

**CROSS-BORDER MERGERS & ACQUISITIONS: THE CASE OF
MERGER CONTROL V. MERGER DEREGULATION**

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Declaration

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Indianapolis, October 1, 2014



Mohammad El-Saied Bedier

Dedication

I owe a huge debt of gratitude to God, for all the countless good things in my life, and no words could be sufficient in return of that. I have to thank my wonderful and great parents, **Prof. Nabila and Mr. Mahmoud**, to whom both I dedicate this work, for their continuous encouragement and support, not only them but I also have to thank all the people that have supported me in finishing this work.

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CROSS-BORDER MERGERS & ACQUISITIONS: THE CASE OF MERGER CONTROL V. MERGER DEREGULATION

Abstract:

During the last century, not only the legal literature but also the literature in many fields along with government efforts on all levels, were all mainly devoted to the debate of trade liberalization in general, and specifically to the case of the expected gains from using international agreements as a tool to remove the trade barriers. Meanwhile, all the parties have paid little attention to profound questions about identifying the impediments that they are facing and the other possible options that might maximize the general welfare, which are the cross-border merger and acquisition transactions.

This dissertation will address that under-researched question, and it will try to identify some of those impediments that are facing the cross-border merger and acquisition transactions. The dissertation will mainly focus on the different premerger control laws that are adopted around the globe, as an impediment that faces the cross-border mergers and acquisitions, and it will try to identify the drawbacks of those laws and most importantly develop and examine reforming proposals.

The underlying result of this dissertation will reveal that the multijurisdictional premerger control laws across the globe have numerous drawbacks that are actual impediments that face mergers and acquisitions in general, and especially the cross-border transactions. In addition to that, the best reformative option is the abolishing of the premerger control laws, or in other words the deregulation of the cross-border merger and acquisition transactions.

The conclusion of this dissertation is that using the law as a useful tool should be reinvented on two dimensions, at one end of the spectrum the law should enable the state possibilities that are required to give a hand and facilitate the entry to markets, by abolishing the premerger control laws i.e. deregulating mergers and acquisitions, and at the other end of the spectrum the law should grant the state the power to monitor and challenge those practices that might cause harm to employees or consumers, before the courts, along with the primary power to challenge anticompetitive behaviors.

Keywords: Corporation History, Antitrust History, Corporate Restructuring, Cross-border M&A, Premerger Control, Behavioral Antitrust, M&A Deregulation.

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List of Abbreviations

ABA	American Bar Association
ARR	Average Rate of Return
CEO	Chief Executive Officer
CFI	European Court of First Instance
CFIUS	The Committee on Foreign Investment in the United States
DCF	Discounted Cash Flow
DIAC	The Draft International Antitrust Code
DOJ	United States Department of Justice
EC	European Commission
ECJ	European Court of Justice
ECOSOC	The Economic and Social Council of the United Nations
ECSC	Treaty establishing the European Coal and Steel Community
EEC	Treaty Establishing the European Economic Community
EPS	Earnings per share
ESOP	Employee Stock Ownership Plan
EU	European Union
ERR	Economic Rate of Return
FBI	The United States Federal Bureau of Investigation
FCPA	Foreign Corruption Practices Act of 1977
FDI	Foreign Direct Investment
FTC	United States Federal Trade Commission
GAAP	Generally Accepted Accounting Principles
GCC	The Cooperation Council for the Arab States of the Gulf
GDP	Gross Domestic Product
HHI	Herfindahl–Hirschman Index
ICN	International Competition Network
ICPAC	International Competition Policy Advisory Committee
IFRS	International Financial Reporting Standards
ILO	International Labour Organization
IOSCO	International Organization of Securities Commissions
IPR	Intellectual Property Rights
IRR	Internal Rate of Return
ITO	International Trade Organization

JV	Joint Venture
LBO	Leveraged Buyout
MBO	Management Buyout
MENA	Middle East & North Africa Region
MRA	Mutual Recognition Agreement
MVM	Market Value Method
NAFTA	North American Free Trade Agreement
OECD	The Organisation for Economic Co-operation and Development
P/E	Price-Earnings Ratio
R&D	Research and Development
RVM	Replacement Value Method
SE	Societas Europaea (European Company)
SEC	United States Securities Exchange Commission
SWF	Sovereign Wealth Fund
TEC	The Treaty Establishing the European Community
TFEU	Treaty on the Functioning of the European Union
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UAE	United Arab of Emirates
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
US	United States of America
VDR	Virtual Data Room
WTO	World Trade Organization

Introduction

Mergers and Acquisitions¹ has gained significant attention during the second half of the 20th century, and while the mergers between corporations that are not mainly based or operating within the very same territory or jurisdiction (hereinafter cross-border mergers) constitutes less than 50% out of the total announced mergers across the globe,² those cross-border mergers are literally considered very significant category of transactions in the world economy, because it constitutes more than 50% of the foreign direct investments (hereinafter FDI).³

As an example to show how huge that kind of cross-border transactions are, on April 12, 2000 the European Commission (hereinafter EC) announced that it would not block the cross-border merger transaction between the British corporation “Vodafone Airtouch” and the German

¹ “Mergers” will be used to indicate mergers, consolidation, and acquisitions, for more accurate definition, types, classifications, *see infra* p.70.

² SALIM MOHAMMED, A STORY OF TWO HALVES, in 2008 INTERNATIONAL MERGERS & ACQUISITIONS: CREATING VALUE IN AN INCREASINGLY COMPLEX CORPORATE ENVIRONMENT at 11,15 (Financier Worldwide Booz & Company ed. 2008); H. Donald Hopkins, *Cross-border Mergers and Acquisitions: Global and Regional Perspectives*, 5 JOURNAL OF INTERNATIONAL MANAGEMENT 207, at 208-209 (1999).

³ J. Peter Neary, *Cross-Border Mergers as Instruments of Comparative Advantage*, 74 THE REVIEW OF ECONOMIC STUDIES 1229, at 1229 (2007).

corporation “Mannesmann,” and the value of the transaction was approximately 180 billion US dollars.⁴ In the same context, it was also reported that the volume of the transaction done in the Middle East region, as the fourth active acquirer in the world, exceeded 106 Billion US dollars in 2007.⁵

Furthermore, during the last decade of the 20th century, an important and regularly active category of players in the field of cross-border mergers appeared. In fact they are not new players but they started to be increasingly key players; those players are the “Sovereign Wealth Fund” (hereinafter SWF), those SWFs are simply state-owned investment funds. In that context, it was reported that in 2007 the total value of the cross-border merger transactions exceeded 48.5 billion US dollars,⁶ and the overall SWF investments across the globe were estimated to be 6.5 trillion US dollars by the end of May 2014, and that increase is expected to continue.⁷

Based on the important nature of mergers transactions, many states tailored special bundles of laws and regulations to control those transactions. Those laws and regulations might be considered, in fact, as a stumbling block that faces the successful and efficient completion of mergers transactions in general and cross-border mergers specifically. The uniqueness of the cross-border mergers is due to the fact that those kind of transactions are not subject only to certain national law, but in fact are subject to different laws in different jurisdictions, and those different laws might be contradicting, or even if are similar they might be interpreted differently.

The core subject of this dissertation will be to clearly identify and address how those laws and regulations are considered as impediments that face mergers in general and cross-border mergers specifically. The discussion will not be limited to those impediments that are imposed by the state or the different regulatory authorities, but it will also include additional layers added by others such as the professional service providers, in which the legal advisors is good example. Moreover, the dissertation will mainly focus on one fundamental impediment; the merger control laws, because merger control is typically one of the most complicated and influential impediments that hinders the cross-border mergers.

⁴ Commission Notice, 2000 O.J. C 141/07.

⁵ MOHAMMED, A Story of Two Halves, *supra* note 2, at 15. 2008.

⁶ SONIA KALSI, SOVEREIGN WEALTH FUNDS, in 2008 INTERNATIONAL MERGERS & ACQUISITIONS: CREATING VALUE IN AN INCREASINGLY COMPLEX CORPORATE ENVIRONMENT at 16, 17 (Financier Worldwide Booz & Company ed. 2008).

⁷ For more details and full profile of all SWF across the globe see <http://www.swfinstitute.org> last visited October 1, 2014.

Despite the fact that a handful of jurisdictions were adopting merger control laws during the development of the merger control history i.e. during the 20th century, it was reported that by 2010 more than 110 jurisdictions adopted a merger control system.⁸ Meanwhile, the dissertation will try to identify some detailed drawbacks of the merger control laws only in three selected jurisdictions, namely the United States of America (hereinafter US), the European Union (hereinafter EU), and Egypt.

It should be noted that the main reasons behind the selection of the three systems specifically is that the US merger control laws were the first adopted merger control system in the world, in addition to that, both of the US and the EU jurisdictions are the most dynamic and active jurisdictions in that field.⁹ Moreover, the extraterritorial jurisdictional dimension of the application of the merger control, which uniquely characterizes both of the US and the EU systems, is a significant reason, and more importantly both of the two systems are heavily imitated in many other jurisdictions around the globe.

Furthermore, the Egyptian system was also selected because Egypt is a leading country in the Middle East and North Africa (hereinafter MENA) region, and the Egyptian system is generally a typical model of the merger control system that is adopted in most of the developing countries. Furthermore, the Egyptian laws are widely copied in almost all of the Arab countries. Moreover, both the US and EU systems are premerger review systems, while the Egyptian system is a post-merger notification system, which are typically the two types or forms of merger control.

Likewise, the Egyptian legal system is considered to be a civil law system and on the other hand the US is a common law system, and it will be more constructive to compare between the US system as a common law model and the Egyptian system as a civil law model. In addition to identifying the drawbacks, the dissertation second core issue will be examining some selected reforming proposals to overcome those drawbacks. This will be done by addressing the question of the possibility of adopting new system that might facilitate mergers generally and cross-border mergers specifically and to enhance the current situation.

⁸ Julie Nicole Clarke, *The International Regulation of Transnational Mergers* (2010) Queensland University of Technology).

⁹ MAHER M. DABBAH, *THE INTERNATIONALISATION OF ANTITRUST POLICY* at 278, 279 (Cambridge University Press. 2003).

Meanwhile, in order to assess the selected reforming proposals, that should be based on a deep understanding of how the merger control laws were developed to be as of now. And for the purposes of gaining a better understanding of the merger control systems, the dissertation will try to answer and address some introductory questions or subtopics. Those subtopics are considered as points of departure, and are namely; what is the history of the corporation as an idea and how was the corporation originated and for what purposes? How was the relation between the corporations and the state started and its developments? What is the history of the mergers? How the trusts lead to the antitrust laws?¹⁰

The answer to those questions require one to discuss some of the benchmarks throughout the history of the corporation, those benchmarks might be considered as a prompt that led to the change, and to the development and proliferation of the corporation idea itself. This will include a brief history of some corporations, namely the East India Company, some named it the mother of the modern corporations, and the South Sea Company as it was the main cause for the biggest financial crisis during the early developments and that obviously lead to a change in the relation between the state and corporations.

Generally speaking, the discussions of those breakthroughs are mainly to address the state role to regulate the corporations and its development in the western jurisdictions during the early ages. In addition to that, the discussions will address the role of feudalism in the relation between the corporations and the state, and how it opened the door for that relation to be developed in the future. The examination will start from the state that grants the monopoly and incorporation rights, followed by the corporation offering the state to make use of these rights as a financing tool to ensure the approval for continuation. Consequently the power of the state was lessen to help the corporation rescue the economy and contribute in the industrial revolution, and then when the corporation gained some power, the state started a new era by reregulating the corporations again, but that did not succeeded and led to two trends respectively, the privatization and then deregulation.

To sum it up, this dissertation will try to address the core issues in addition to the aforementioned points of departure, in a constructive way, and in a chronological order, starting with the history, then the current situation, and the expected future under the reforming proposals

¹⁰ The term “antitrust” is used interchangeably with others terms fox example: antimonopoly, protection against unfair competition and many others, hereinafter the term “antitrust” will be used instead of all other similar terms whenever possible.

at the end. Thus, the dissertation will be mainly divided into three parts or chapters, the first one will be primarily designated for mergers demystification and the historical overview, whereas it will examine the history of: (1) the corporation, (2) mergers, (3) antitrust laws, and (4) the relation between the state and the corporation.

Furthermore, regarding the discussions of mergers demystification, that part will first address the definition and classifications of mergers, in addition to examining some other corporate restructuring options and growth alternatives such as joint ventures, licensing, franchising, etc., and it will also address the typical details of the merger transactions, starting from the preparation before the transaction and until the post-closing stage of the transaction. The discussion of the merger transaction dynamics will be mainly to illustrate how the mergers transactions are complicated by nature, even if the transaction was not controlled by the state or subject to different laws in different jurisdictions.

Moreover, scrutinizing the merger dynamics is crucial because a solid understanding of the merger dynamics is prerequisite to delve into the impediments to the merger process. In that regard, it is undoubtedly true that scrutinizing every single step in the merger dynamics is a prerequisite to understand the remaining steps, in addition to that, scrutinizing the merger dynamics will be undoubtedly a very helpful tool toward understanding how impediments could be removed or at least be should be mitigated.

Subsequently, the second book of the dissertation will be divided into three main parts, the first part is introductory and it will mainly focus on identifying the most popular incentives that drives the parties to enter into merger transactions. The second part will be devoted to examine the mergers efficiencies, on both of the two dimensions or perspectives i.e. the success and failure factors of the transaction from the perspective of the merging parties and from the perspective of its impact on the national and global economy. That discussion is mainly to examine whether the transaction are worthy enough to put efforts in amending or reforming the current laws and regulations.

The third part of the second book will be divided mainly into two subtopics; the first one will identify dozen of impediments that might face the parties of the mergers, as an introduction to the second subtopic. The second subtopic will mainly examine the merger control systems in detail, to show how far those systems are considered impediments that face cross-border

mergers. The examination of the merger control systems will include an overview of the law in aforementioned selected jurisdictions i.e. US, EU, and Egypt.

The third and last book of the dissertation will be mainly devoted to develop and examine seven proposals to reform the current situation of the multijurisdictional merger control systems, which are facing the cross-border mergers. In the introductory part of that book, assessment criteria will be designed and tailored specifically to assess the impact of each of the reforming proposals on the current situation, and that will be followed by a discussion to address each one of the proposals, whereas each will be described first and then tested under the same assessment criteria.

Some of the reform proposals that will be examined in the third chapter are totally new, and others have previously been discussed but are enhanced and accordingly will be more efficient, those include: (1) bilateral cooperation agreements, (2) international merger control rules, (3) supranational premerger control institution, (4) jurisdictional rules, (5) common online filing system, (6) multilevel monitoring system, and (7) mergers deregulation.

Chapter One: Mergers Demystification and Historical Overview

The discussions in this chapter will be divided into two main topics the first topic will be a historical overview, and the second topic will be the merger demystification. In the historical overview four main subtopics will be addressed, the first will be the origins of the idea of corporation, and that will mainly show how the origin of the idea of corporation and its early developments was attributed to ethnic and religious groups; mainly the Greeks, Romans, Muslims, Italians, and even some claimed that Jews had contributed to the development of the corporation in a way or another. The second subtopic will address the corporations as seen by the eye of the early scholars at their time, what were the characteristics and classifications, as it were portrayed by them.

The third subtopic of the historical overview will be devoted to breakthroughs within the corporation history, and it will address the main landmarks that might be considered as prompts that led to the change, the development, and proliferation of the corporation to date. It will address mainly the East India Corporation as it was maintained to be the mother of modern corporations, and also the South Sea Company and the Bubble Act and how they significantly influenced the corporation. Moreover, the proliferation of the trusts will be addressed, in order to

understand how that led to the development of the antitrust laws and to identify the real reason behind the enactment of those laws in certain jurisdictions.

In addition to that, and since this dissertation is mainly concerned about mergers, the history of the mergers will be addressed as a breakthrough in the corporation history, and also the patterns of the mergers transactions through the history to date will be discussed, in order to understand what was the triggering incentives that led to the formation of the merger waves, and also the multinational corporations will be addressed. Finally, the fourth subtopic of the historical overview will address the immemorial relation between the corporations and the states, and it will be scrutinized through the history of the corporation to understand how the state controlled the corporations, by means of laws. In addition to that, to understand how that relation started mainly under feudalism and how it proceeded to date and even how corporations are not just an idle powerless party in that relation.

Delving into the first topic, the historical overview, will undoubtedly led to better understanding of the corporations and how they are the way they are, and why they are the way they are, and that is a very essential step toward understanding how it might be changed for good in the future. Therefore, a better understanding of those issues addressed in that first topic is undoubtedly a prerequisite to delving into the following parts of this dissertation.

Subsequently, the second main topic of this chapter i.e. mergers demystification, will include three subtopics, the first topic is simply mergers definition, and how mergers could be distinguished from other technical terms like acquisition and consolidation. The second subtopic will identify the different types and classifications of mergers, from economic, structural & procedural, and financial perspectives, and it will address also other restructuring forms and trends, and growth options that are used by corporation as an alternative to mergers. Following that, the third subtopic will scrutinize the merger dynamics. It will address each step in that dynamic starting from the preparation step until the closing of the merger transaction, passing through all the other steps such as the due diligence, valuation, structuring the transaction, and financing the transaction. The third subtopic will help in understanding the impediments that will face the merger transaction at the different stages of the transaction.

I. Historical Overview

Indeed history is a good and efficient tool that could inform and guide every researcher about his topic. To be more precise, reverting back and scrutinizing the history of any topic will be beneficial on two dimensions; the first is the formation of the subject itself, and the second is that the development of its main characteristics.¹¹ Moreover, it undoubtedly true that history should be deeply scrutinized to explore all the intrinsic as well as extrinsic factors that might contribute to the creation of one of the modern institutions.¹² Obviously, to better understand corporation it will be very helpful to deep dig into the history until reaching its origins i.e. the seeds not only the roots.

Unfortunately, early historians wrote most of the history of the corporation, and because none of them were legal professionals, many of them did not consider the differences between a corporation as an institution and a merchant who is doing business in his own name. It has been also noted that the resources that might draw a full legal picture of business in the Middle Ages, are not available.¹³ In addition to that, even the medieval sources should not be recognized as reliable, because mainly unqualified “non-historians-soldiers, explorers, missionaries, clerics, and businessmen,” wrote most of it.¹⁴

Though historians used to simplify their work by subjects (i.e. economic, social, and cultural),¹⁵ it is not easy to find a historian who scrutinized history from a legal perspective. It is noteworthy that even law scholars might be excused for their modest efforts, due to the fact that no reliable data concerning the history of the modern organizations were recorded before the end of the 13th century, for instance the records of the King’s Court in the United Kingdom of Great Britain and Northern Ireland (hereinafter UK),¹⁶ started to be uniform and on a permanent basis only after the 12th century.¹⁷

Law scholars did not even started to write about corporations more than four centuries later, some claimed that the first lawyer to write about the law of corporation was William

¹¹ JOHN SMITH & RAYMOND O'BRIEN, *CONFLICT OF LAWS* at 10 (Cavendish 2nd ed. 1999).

¹² FRANCIS FUKUYAMA, *THE ORIGINS OF POLITICAL ORDER* at 1 (Farrar, Straus and Giroux. 2011).

¹³ A. T. CATER, *A HISTORY OF ENGLISH LEGAL INSTITUTIONS* at 259 (Butterworth & Co. 4th ed. 1910).

¹⁴ GENE W. HECK, *CHARLEMAGNE, MUHAMMAD, AND THE ARAB ROOTS OF CAPITALISM* at 1 (W. de Gruyter. 2006).

¹⁵ FERNAND. BRAUDEL, *CIVILIZATION AND CAPITALISM, 15TH-18TH CENTURY: THE PERSPECTIVE OF THE WORLD* at 17 § 3 (Harper & Row. 1981).

¹⁶ A wide range of official names were used to refer to what is now known as the United Kingdom Great Britain and Northern Ireland, especially due to the changes in its territories over the history, therefore UK will be used hereinafter instead of any of these names.

¹⁷ Harold J. Laski, *The Early History of the Corporation in England*, 30 *HARVARD LAW REVIEW* 561, at 562 (1917).

Sheppard¹⁸ and that his first book was published in London in 1659 and his second book on the same subject was published after his death in 1702.¹⁹ Meanwhile, it has also been claimed that the reports of Sir Edward Coke²⁰ were the first legal writings to discuss the law of corporation in detail, specially his writing on the Sutton Hospital Case²¹ that was first published in 1614.²² In his decision on that case, while he was refuting all the arguments that were submitted in the case before him as a Judge, he revealed all the main characteristics of corporations at his time.

Actually, it has been asserted that most of the authors' works during the Middle Ages are used "to describe, not to define."²³ That could be easily identified in the early efforts of the law scholars, while they were trying to contribute to the law of corporations they tended to explain it, not distinguish it. Regrettably but true, that most if not all the early works of history are more interested in describing the development of an idea rather than trying to analyze it.²⁴ Furthermore, the legal scholars' efforts, during the Middle Ages were considered modest to a large extent; they just drew pictures of what they saw without any analysis or critical thinking. For instance, it was common in that period to put a lot of effort into describing the different types of corporations, like Sole and Aggregate Corporations,²⁵ while there are no actual differences between them. They even made an effort to describe the corporate seal as one of the most important characteristics of the corporations, while this "great antiquity" practice of using the seal could be traced back to the Roman Empire.²⁶

Accordingly, and based on the scarce of analytical resources, and due to the nature of this discussion i.e. giving a historical introduction, the discussion here will be more descriptive less

¹⁸ William Sheppard (1595-1674), he worked as a clerk at the upper bench in UK and then as a serjeant-at-law, and later he was directly involved in the corporate issues as he was drafting the charters granted to towns as incorporated corporations.

¹⁹ Amasa M. Eaton, *The First Book in English on the Law of Incorporation*, 12 THE YALE LAW JOURNAL 259, at 259-260 (1903).

²⁰ Sir Edward Coke (1552-1634), he worked as a Lawyer then as Attorney General, and later as a Chief Justice at two courts, and finally as a Statesman. For more about his life and ideas see EDWARD COKE, THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE at XXIV-XXVI (Steve Sheppard ed., Liberty Fund 2003). For a brief overview about his works see *id.* at XXVII-XXIX.

²¹ Sutton Hospital Case (1612) 77 Eng. Rep. 960.

²² COKE, The selected Writings and Speeches of Sir Edward Coke, *supra* note 20, at XXVII. 2003.

²³ Joan C. Williams, *The Invention of the Municipal Corporation: A Case Study In Legal Change*, 34 AMERICAN UNIVERSITY LAW REVIEW 369, at 381 (1985), citing SUSAN REYNOLDS, AN INTRODUCTION TO THE HISTORY OF THE ENGLISH MEDIEVAL TOWNS at 97 (Clarendon Press. 1977).

²⁴ RICHARD HENRY TAWNEY, RELIGION AND THE RISE OF CAPITALISM, A HISTORICAL STUDY at 6 (Penguin books ltd. 1938).

²⁵ For more details about early classifications and different types of corporations see *infra* p.20.

²⁶ Samuel Williston, *History of the Law of Business Corporations before 1800.*, 2 HARVARD LAW REVIEW 105, at 117 (1888).

analytical. The coming discussion will include different claims concerning the origin of the corporation as an idea, and several early efforts to describe the corporation, and its main characteristics and classifications. Moreover, it will try to light the way ahead to spot some significant milestones during the breakthroughs of corporation history, which are mainly the early developments and how the trusts, as a form of business institution, led to the introduction of antitrust laws. The discussion will also include other milestones during the breakthroughs of corporation history, which are the mergers waves, the multinational corporations, and the relation between the corporations and the state.

1. Origin of the Corporation

This discussion will show that there is a great debate between scholars concerning the origin of the idea of corporation, and how each civilization contributed to its development, so it might be more meaningful to call it the debate of origins and developments. While some argued that the idea was born during the Roman Empire and then borrowed and developed by Muslims, others claimed that Muslims created the first modern corporate form, and that the Italians introduced it to the Christian Europe. Alternatively, others argued that the modern corporation was an Italian invention basically invented to satisfy the deep needs of their daily trade practices. In addition to that, some argued that Jews were the fuel of all economies they lived in, and they profoundly contributed to the proliferation of the idea and development of the modern corporation.

All of those claims will be scrutinized in a chronological order, because no single explanation can give the full picture of the origins and development. Though, it is noteworthy here that the following discussion will be limited to the origin and the development of the corporation until the end of Middle Ages at the 16th century, because the following periods will be dissected during the other following discussions of the corporations characteristics, classifications, and breakthroughs. Moreover, the origin of the stock exchange, banks, and other institutions will be out the scope of the discussion.

a) Greek and Roman origins

Numerous authors²⁷ argued that the first seed of the corporation idea was credited to Numa Pompilius²⁸ and all of them are citing only Sir William Blackstone in his famous work the Commentaries on the Law of England,²⁹ although Blackstone himself was citing another ancient Greek historian Plutarchus³⁰ who was fully recognizing the idea of what Numa really created. According to Plutarchus, Numa's idea was to make a separate legal personality for two groups of people, namely Sabines and Romans, and then he developed the idea to make a separate legal personality for subgroups of traders and workers.³¹ Moreover, the idea of tying the corporations to the basic unit of the society i.e. the family was also attributed to the Romans.³² Meanwhile, it was also claimed that such separation or categorization of groups of people into uniting association could be traced and attributed to the Greeks.³³

To the contrary, others alleged that it was reported, even before the Greeks and Romans, that there were some forms of corporations during the period between 2000-1800 B.C., whereas it was maintained that an Assyrians group of investors collected twenty six piece of Gold and they entered into agreement with merchant called Amur Ishtar, who himself paid his share as four pieces of gold, to form an association to be run by Amur himself, that association stood for four years.³⁴

Moreover, it was claimed that the Phoenicians, followed by the Athenians borrowed the ideas of the Assyrians and brought it to the sea in their trading voyages, and thus spread it to

²⁷ Joseph K. Angell, *Treatise on the Law of Private Corporations* Aggregate at 34-35 (Samuel Ames & John Lathrop eds., Little, Brown 7th ed., rev., corr., and enl. / ed. 1861). Douglas Arner, *Development of the American Law of Corporations to 1832*, 55 SOUTHERN METHODIST UNIVERSITY LAW REVIEW 23, at 25-28 (Winter 2002). Leonard W. Hein, *The British Business Company: Its Origins and Its Control*, 15 THE UNIVERSITY OF TORONTO LAW JOURNAL 134, at 135 (1963). Williston, HARVARD LAW REVIEW, *supra* note 26, at 106 (1888). JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA* at 4 (Modern Library. 2003).

²⁸ Numa Pompilius was the legendary second King of Rome, and he was born on the day of Rome's founding (traditionally, 21 April 753 BC).

²⁹ WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS* § 1 (J.B. Lippincott Co. 1893).

³⁰ Lucius Mestrius Plutarchus (was born in AD 46 – and died AD 120), he was a Greek historian, biographer, and essayist.

³¹ BLACKSTONE, *Commentaries on the Laws of England in Four Books*, *supra* note 29, at 468-469. 1893.

³² MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 4. 2003.

³³ Angell, *Treatise on the Law of Private Corporations* Aggregate, *supra* note 27, at 35. 1861. Williston, HARVARD LAW REVIEW, *supra* note 26, at 106 (1888).

³⁴ ALBERT VENN DICEY, *LECTURES ON THE RELATION BETWEEN LAW & PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY* at 245 (Macmillan. 1920).

other civilizations.³⁵ In the same context, it is noteworthy that the contribution of the Athenians became incorporated into the laws of Solon,³⁶ and according to that law it was permissible to form a private corporation more easily than under the Romans rules.³⁷

It was reported that as the Roman Empire expanded, and the trusted Roman tax collectors were not capable enough to collect the taxes over that huge land, therefore a new form of corporations to collect the taxes was invented.³⁸ It was also reported that during this era, the corporations and its principles was less developed or ran through dramatic changes, and by the end of this era the result was limited to a fairly fragile institution and that led some to call it as a “mere group of individuals.”³⁹ On the other hand, it has been claimed that by the end of Romans’ era, there were different forms of corporations like works and trade associations i.e. “guilds,”⁴⁰ and a “merchant empire.”⁴¹

b) Islamic origins

Many authors held that despite the fact that Islam did not contribute to the creation of many commercial and banking instruments, due to the prohibition of usury in Islam, Islam was considered the origin of many corporations’ practices that was then borrowed by the Italians and introduced in Europe. Moreover, others claimed that Muslim scholars have worked effortless to structure and tailor corporate forms and even banking tools to fit into Islamic norms, and these designs and structures were borrowed by Italian and introduced into Christian Europe, where usury was also prohibited, and it helped European to survive the “devastating socioeconomic policies.”⁴²

³⁵ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 3-4. 2003.

³⁶ These laws were attributed to Solon 638 BC – 558 BC, he was an Athenian Statesman and lawmaker.

³⁷ Angell, *Treatise on the Law of Private Corporations Aggregate*, *supra* note 27, at 35. 1861. Arner, *SOUTHERN METHODIST UNIVERSITY LAW REVIEW*, *supra* note 27, at 25 (Winter 2002).

³⁸ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 4. 2003.

³⁹ MICHAEL IVANOVITCH ROSTOVITZEFF, *THE SOCIAL AND ECONOMIC HISTORY OF THE ROMAN EMPIRE* at 160 (Clarendon Press. 1926); and *see generally* ARNOLD HUGH MARTIN JONES, *THE ROMAN ECONOMY: STUDIES IN ANCIENT ECONOMIC AND ADMINISTRATIVE HISTORY* (Rowman and Littlefield. 1974).

⁴⁰ For more about the development of guilds in the Middle Ages *see* Arner, *SOUTHERN METHODIST UNIVERSITY LAW REVIEW*, *supra* note 27, at 26 (Winter 2002).

⁴¹ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 7. 2003.

⁴² HECK, *Charlemagne, Muhammad, and the Arab Roots of Capitalism*, *supra* note 14, at 5-7. 2006.

To be more precise, because Islam banned usury, rich Muslims who have assets but do not want to run trade themselves, cannot lend their money to merchant for interest. It is reported that Muslims created what known later in Italy as *commenda*, which resemble a special purpose vehicle or a corporation, it was used to pool money and then others manage it and trade abroad, and after the trading voyage they share profits and losses.⁴³

It is noteworthy that those early trading voyages were mentioned in the *Holy Quran*, it was mentioned in the *Quraish* chapter that the people of *Quraish*, a group of individuals residing the city of Mecca in the same area that is now known as the Kingdom of Saudi Arabia, are united and their unity was due to their trading voyages, and they took trading voyages twice per year, one to Yemen in the winter and the other in summer to *Bilad Al-Sham* or what was then named the Greater Syria.⁴⁴

Despite the fact that usury was banned in Islam and the fact that it was clear that the *commenda* was literally a form of corporations, others wrongly argued that it was just a type of contract by which rich Muslims would lend merchants money to finance their trading voyages for a large amount of interest in return.⁴⁵ To the contrary, some other scholars argued that the *commenda* was developed by means of the invention of the limited liability concept, whereas the non-practicing or inactive members of the *commenda* were granted a limitation of the liability to their pooled money. For instance, in Italy no individual was liable to the losses of *commenda* after the year of 1408.⁴⁶

On the other hand, it was wrongly claimed that the corporation form that was created by Muslims was suffering from several limitations required for growth and thus was not developed further. These claims were based on the argument that most of the transactions between Muslims were not written, and in addition to that the Islamic inheritance rules lead to the division of the corporate shares to too many successors after the death of the principal. Moreover, they argued

⁴³ John Braithwaite & Peter Drahos, *Globalisation of Corporate Regulation and Corporate Citizenship*, in INTERNATIONAL CORPORATE LAW ANNUAL at 7, (Fiona Macmillan ed. 2003).

⁴⁴ Quraish chapter, the Holy Quran.

⁴⁵ FERNAND. BRAUDEL, CIVILIZATION AND CAPITALISM, 15TH-18TH CENTURY: THE WHEELS OF COMMERCE at 122 § 2 (Harper & Row. 1981).

⁴⁶ COLIN ARTHUR COOKE, et al., CORPORATION, TRUST AND COMPANY: AN ESSAY IN LEGAL HISTORY at 46 (Manchester University Press. 1950).

that that was not the case in Christian Europe, because the principal was allowed to nominate a single beneficiary after his death.⁴⁷

In fact, these claims could be easily refuted, first concerning the unwritten transactions, contrary to the claim; Muslims should write all their transactions done by credit according to the *Holy Quran*. As per the instructions in *verse* No.282 from *Al-Baqarah* chapter, Muslims were instructed not only to do this, but also that *verse* stipulated that sales transactions should be also witnessed by trusted people in addition to the writing requirement, the case is the same even for insignificant or minor transactions.

Moreover, concerning the inheritance rules, during the same early periods of Islam there were Jewish inheritance rules, and those rules were applied to both Jewish and Christians. According to those rules, which are not only similar to a great extent to the Islamic rules of inheritance, but also it allowed more family members to take a share of the dead person estate, for example in Islam neither brothers nor sisters have a share in the estate whenever the dead person has a son or more, while under the Jewish rules, brothers have a share in such case.

To the contrary, others claimed that the Muslim trading practices and forms of corporation were developed and expanded to a very large geographic area, throughout the Mediterranean and to the east in the Indian Ocean and China, and that the Muslim trading community steadily took the whole Byzantine Empire.⁴⁸ It was also reported that thousands of Muslim merchants were traveling to do business and trade in China even before the famous Italian merchant Marco Polo found his way to China in the 14th century.⁴⁹

Moreover, it was even maintained that not only borrowing the corporate structure and ideas from Muslims was a success, but it was also a great success to conclude deals or transactions with them and get gold currency from them or even to get Syrian or Egyptian currency i.e. Dinar, because all these currencies were highly acceptable by merchants in order to purchase silk or salt from Byzantium and to resell them again to Muslims in what was known as “triangular transaction.”⁵⁰

⁴⁷ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 5-6. 2003.

⁴⁸ BRAUDEL, *The wheels of commerce*, *supra* note 45, at 584. 1981; BRAUDEL, *The Perspective of the World*, *supra* note 15, at 108. 1981.

⁴⁹ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 5. 2003.

⁵⁰ BRAUDEL, *The Perspective of the World*, *supra* note 15, at 107. 1981.

c) Italian origins

It was claimed by many scholars that capitalism⁵¹ was a western invention, particularly in the same Italian cities that were trading with Muslims,⁵² thus it could be contended that the seed of capitalism could be traced to Muslims. Moreover, it was reported that the early corporations that were created in 9th century in dynamic cities of Italy, like Venice, Genoa, Amalfi, Gaeta, and Pisa, were structured in the same manner as the Muslims' corporation, these same structure were those that were designed especially for the good of inactive rich people, and even for the same purpose of the single trading voyage.⁵³

By the second half of the 11th century, precisely during the period of 1072-1073 the *commenda* or *colleganza*,⁵⁴ as a form of the trading voyage corporations, started to appear, and then it was developed into two forms; the first was unilateral *colleganza* whereby the inactive investor *socius stands* financed the whole voyage and the party who managed the trade *socius procertans* pay nothing for 25% of the profits, and the second was bilateral *colleganza* where the *socius procertans* shall advance 25% share and then the profit are shared between them equivalently.⁵⁵

Until this stage, it may be claimed that nothing was added to the Muslims' contributions to the corporation development. However, it was reported that by the 12th century a somewhat distinctive form of corporation was developed in Florence, which was the *compagnia*, it was first developed as a family business, and was mainly based on the joint liability of all the family members, and in that regard it is unsurprising to know that the term *compagnia* was a combination of the two Latin words *cum* and *panis*, and their meaning is "breaking bread together."⁵⁶

As it was previously mentioned that getting gold currency from Muslims was a great success, it was also reported that in Florence, as a development in the 13th century, that the

⁵¹ BRAUDEL, *The wheels of commerce*, *supra* note 45, at 237. 1981. This noted that it started to be used at the beginning of the 20th century and was defined as known today as the contrary of socialism.

⁵² HECK, *Charlemagne, Muhammad, and the Arab Roots of Capitalism*, *supra* note 14, at 4. 2006.

⁵³ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 7. 2003.

⁵⁴ The two terms were used differently in the Italian cities.

⁵⁵ BRAUDEL, *The Perspective of the World*, *supra* note 15, at 129-130. 1981.

⁵⁶ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 7-8. 2003.

Italian started to coin their own gold currency, as early as 1250 and in Venice in 1284.⁵⁷ At a later stage, in the 13th century, it has been alleged that Italians have invented two inventions that were profoundly the pillars for the corporation development; the first invention was the double entry bookkeeping that was mainly enabled by using the Arabic numerals instead of the Romans.⁵⁸ It is noteworthy that the Italian Fra Luca Pacioli was the first one to invent and use the double entry bookkeeping.⁵⁹

To better understand how the double entry bookkeeping invention contributed to the development of corporation, it was reported that “Genoese merchant would record money sent to his agent in Bruges as ‘paid’ in his accounts, while the latter put down the amount as ‘received.’ And rather than sending coins, the bigger merchants began to trust each other with letters of exchange—a business that Italian banks would dominate.”⁶⁰ Accordingly, the double entry bookkeeping was directly involved in increasing the trade activities and unquestionably to the development of the corporation as a mean of the trading activities.

Undoubtedly true, Fra Luca Pacioli’s invention directly guided the Italians to what was deemed as their second invention, which is the *persona ficta* i.e. the separation of the corporation legal personality from its owner.⁶¹ In that regard, it was also argued that transferring the national debt into bonds was a later third Italian invention, which might be considered a financial revolutionary tool that helped European countries to succeed.⁶² In addition to that, it was also claimed that there was a fourth Italian invention in the 13th century and it was directly linked to the development of trade and corporations, which is the bill of exchange,⁶³ meanwhile others refuted that claim on the ground that the bill of exchange was originally created by Muslims in the 12th century and was known as *Saftaga*, and it was created among other commercial tools invented during the same period, like the check for instance.⁶⁴

⁵⁷ BRAUDEL, *The Perspective of the World*, *supra* note 15, at 110-112. 1981.

⁵⁸ Braithwaite & Drahos, *Globalisation of Corporate Regulation and Corporate Citizenship*, *supra* note 43, at 5, 8. 2003.

⁵⁹ Dennis W. Carlton & Jeffrey M. Perloff, *Modern Industrial Organization* at 11 (Pearson/Addison Wesley 4th ed. 2005).

⁶⁰ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 8. 2003.

⁶¹ Braithwaite & Drahos, *Globalisation of Corporate Regulation and Corporate Citizenship*, *supra* note 43, at 5. 2003.

⁶² *Id.* at 4.

⁶³ BRAUDEL, *The Perspective of the World*, *supra* note 15, at 112. 1981.

⁶⁴ See generally Mofizur Rahman, *Financial Transactions With Commercial Papers in the Light of Islamic Shariah*, 3 ANNUAL RESEARCH JOURNAL OF THE INTERNATIONAL ISLAMIC UNIVERSITY CHITTAGONG 91(2006).

Another two important forms of corporations were developed in Genoa, in the first half of the 14th century; the first was the *compere* and the second was the *maone*, both forms of corporation were created to run the government tasks, and generally speaking not all scholars agreed on their nature and whether both of these forms could be considered a corporation, the first form was an association that comprised of shares owned and operated by private individuals, and the second form was literally a loan to the government.⁶⁵ While the first form was a corporation to a large extent, the second one might be classified just as a loan agreement between government and private individuals, not as a corporation.

By the end of the 14th century some of the Italian cities like Venice for example, were undoubtedly economically flourishing,⁶⁶ and booming to the extent that it was reported that all European countries were borrowing its corporate forms, structures, and techniques. A very important example was the German's *Magna societas*, whereas it was structured as a merger between three family businesses with a principal office in Ravensburg, which was a small town in Swabia,⁶⁷ and with almost two hundred branches in many other cities like Barcelona, Genoa, Vienna, and Paris.⁶⁸

Undoubtedly true, the flourishing of the corporations in Italy was fueled not only by the rich people that owned shares of the corporations, but also by the organized lending institutions that were raised in the same time; for instance the banks⁶⁹ or what was known at these times as the *banchi*.⁷⁰ It was reported that also Banks expanded through branches and a complicated network throughout many cities located in different countries.⁷¹ The role of banks in financing the development of the corporation will be addressed shortly during the next discussion of the Jewish contributions.

By the beginning of the 16th century there was an urgent need to limit the liability of some of the family members that were not engaged in the practice of management or trade i.e. the inactive party, accordingly a new form of a corporation started to exist, which was the

⁶⁵ BRAUDEL, *The wheels of commerce*, *supra* note 45, at 440. 1981.

⁶⁶ BRAUDEL, *The Perspective of the World*, *supra* note 15, at 119. 1981.

⁶⁷ BRAUDEL, *The wheels of commerce*, *supra* note 45, at 436. 1981.

⁶⁸ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 12. 2003.

⁶⁹ The word *Banchi* was the origin of the word Bank, and it was named after the Italian word *Banco*, which means bench in English, and it was used to indicate the bench that was usually by lenders in Italy to sit or stand behind it.

⁷⁰ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 8. 2003.

⁷¹ *Id.* at 162.

accomandita, and the *accomandita* gradually replaced the aforementioned family *compagnia*.⁷² As an inevitable result of these developments, the sea trading voyages or what some scholars named it as “naval capitalism” significantly expanded during that period.⁷³

d) Jewish contributions

The fact through all the history is that the Jewish merchants’ network was expanding and it reached almost every country on the planet.⁷⁴ For instance, it was reported in the “Cairo Geniza Documents”⁷⁵ that in the 9th century the Jewish network spread from Egypt to Ethiopia in Africa and to India in Asia, using the means and channels that were developed by Muslims.⁷⁶ Additionally, it was reported in the 10th century that very rich Jewish families were involved in various business like trading, banking, and even tax collecting, in many jurisdiction; Egypt, Iran, Iraq, etc.⁷⁷

It is undoubtedly true that any minority throughout history, whether due to nationality or religion background, as in case of the Jews, did unite and form a group for many purposes; to feel more safe, to share the benefits of the group, and to support each other.⁷⁸ Based on that fact, it could be claimed that the members of the minority group might share in some practices and they may spread the practices in the community or the communities where they lived. In that context, scholars admitted that thousands of causes had contributed to the modern structure of

⁷² BRAUDEL, *The wheels of commerce*, *supra* note 45, at 438. 1981. He reported that the first *accomandita* ever recorded was recorded in Florence on May 8, 1532.

⁷³ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 18. 2003.

⁷⁴ BRAUDEL, *The wheels of commerce*, *supra* note 45, at 157. 1981.

⁷⁵ The Cairo Geniza is a collection of some 300,000 Jewish manuscript fragments that were found in the Geniza or storeroom of the Ben Ezra Synagogue in Fustat or Old Cairo, Egypt. These manuscripts outline a 1,000-year continuum (870 CE to 19th century) of Jewish Middle-Eastern and North African history and comprise the largest and most diverse collection of medieval manuscripts in the world. The Genizah texts are written in various languages especially Hebrew, Arabic and Aramaic mainly on vellum and paper, but also on papyrus and cloth. In addition to containing Jewish religious texts such as Biblical, Talmudic and later Rabbinic works (some in the original hands of the authors), the Genizah gives a detailed picture of the economic and cultural life of the North African and Eastern Mediterranean regions, especially during the 10th to 13th centuries. It is now dispersed among a number of libraries, including the libraries of Cambridge University and the University of Manchester. For more details about the “Cairo Geniza documents” see SHELOMO DOV GOITEIN, *A MEDITERRANEAN SOCIETY: THE JEWISH COMMUNITIES OF THE ARAB WORLD AS PORTRAYED IN THE DOCUMENTS OF THE CAIRO GENIZA* (University of California Press. 1999).

⁷⁶ BRAUDEL, *The wheels of commerce*, *supra* note 45, at 157. 1981, citing SHAUL SHAKED ET AL., *A TENTATIVE BIBLIOGRAPHY OF GENIZA DOCUMENTS: PREPARED UNDER THE DIRECTION OF D. H. BANETH AND S. D. GOITEIN* (Mouton & Co., and École Pratique des Hautes Études. 1964).

⁷⁷ Subhi Y. Labib, *Capitalism in Medieval Islam*, 29 *THE JOURNAL OF ECONOMIC HISTORY* 79, at 84 (1969).

⁷⁸ BRAUDEL, *The wheels of commerce*, *supra* note 45, at 165. 1981.

the corporations and the economy, and the examples include the discovery of America and the industrial revolution, and they also affirmed that capitalism would not be as it is if the Jews were not involved and added to the economy.⁷⁹

A breakthrough out of the legal environment, and a cursory overview of the art of the Middle Ages, will reveal the fact that usury was forbidden in most of societies and usurers were tortured and exiled out.⁸⁰ For instance, Dante Alighieri⁸¹ in his poem “*Inferno*”⁸² that was published in 1314, classified the hell into circles and then he mentioned that usurers were sent to be punished into the core of the 7th circle, and people in that circle will be punished by “flaming sand with fiery flakes raining from the sky.”⁸³

In addition to the unity of the Jews due to their minority status, they were almost exiled by many societies during these early times, mainly because they were practicing usury, and that was banned by most of the nations. Being exiled from many societies and relocating from one place to another led to an inevitable result, which was that the Jews contributed and effected the development and the structure of the corporation through the history, as well as the economy in general, not only because of their used usury practices to finance economic activities, but also because they might have borrowed some of the practices from every society they lived in, and then spread them again when they settled in another.

2. Early Characteristics and Classifications of Corporations

Corporation, incorporation, body politic, and body incorporate are all terms that were used interchangeably, by William Sheppard and many other early scholars, while writing about corporations.⁸⁴ They used to describe all of these terms as an assembly that gather many persons in one artificial person.⁸⁵ In fact this is comparable to a large extent to the current brief

⁷⁹ WERNER SOMBART, *THE JEWS AND MODERN CAPITALISM* at 9 (Mortimer Epstein trans., Batoche. 2001).

⁸⁰ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 8. 2003.

⁸¹ Dante Alighieri (1265–1321), he was a key Italian poet of the Middle Ages.

⁸² The word “*Inferno*” means hell in Italian language.

⁸³ Dante Alighieri, *Inferno* at Canto XIV (National Library Company 1909).

⁸⁴ Angell, *Treatise on the Law of Private Corporations Aggregate*, *supra* note 27, at 3. 1861; Eaton, *THE YALE LAW JOURNAL*, *supra* note 19, at 265 (1903).

⁸⁵ Arner, *SOUTHERN METHODIST UNIVERSITY LAW REVIEW*, *supra* note 27, at 42 (Winter 2002). Angell, *Treatise on the Law of Private Corporations Aggregate*, *supra* note 27, at 20. 1861.

description of the modern corporation.⁸⁶ They believed that the artificial person is the perpetual successors of the group of all people, resembling their united soul,⁸⁷ and even Sir Edward Coke concluded that corporation is nothing but a soul.⁸⁸ More than two hundred years later, Chief Justice John Marshall repeated almost the same description by saying that the “corporation is an artificial being, invisible, intangible, and existing only in contemplation of law.”⁸⁹

In the same descriptive context, most of the earlier law scholars repeatedly followed each other and mentioned the same main characteristics of corporations.⁹⁰ Meanwhile, it is noteworthy that while they were repeating each other, they were also describing the corporations’ charters available before them, and that might sometimes have led to contradicting ideas or at least slightly differences or limitations. However these main corporation’s characteristics described by most of them can be summarized as follows: (1) generally the corporation has the right of perpetual succession, but in a range of instances it was granted limited succession period,⁹¹ and sometimes it has to be dissolved by the death of all its partners,⁹² (2) generally the corporation has the right to sue and be sued, but for instance the right to sue foreign corporation was unknown until it was first granted in UK in 1872,⁹³ (3) generally the corporation has the right to purchase and hold lands and all kinds of assets,⁹⁴ likewise some other scholars mentioned that it could not purchase or hold lands,⁹⁵ (4) generally the corporation has the right to have a seal, (5) generally the corporation has the right to issue internal ordinances or by-laws, (6) there is an obligation on the corporation which is that it should allow government officials and others to

⁸⁶ JOSEPH STANCLIFFE DAVIS, *ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS* at 5 (Harvard University Press. 1917).

⁸⁷ Hein, *THE UNIVERSITY OF TORONTO LAW JOURNAL*, *supra* note 27, at 134 (1963).

⁸⁸ Sir Edward Coke Reports Volume 10 the case of Sutton’s Hospital p.33a

⁸⁹ *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

⁹⁰ COKE, *The selected Writings and Speeches of Sir Edward Coke*, *supra* note 20, at 366-367. 2003; BLACKSTONE, *Commentaries on the Laws of England in Four Books*, *supra* note 29, at 475-476. 1893; Williston, *HARVARD LAW REVIEW*, *supra* note 26, at 117 (1888).

⁹¹ That was the norm but some other times it was granted limited succession period for more *see* Hein, *THE UNIVERSITY OF TORONTO LAW JOURNAL*, *supra* note 27, at 139 (1963).

⁹² BLACKSTONE, *Commentaries on the Laws of England in Four Books*, *supra* note 29, at 485. 1893; Arner, *SOUTHERN METHODIST UNIVERSITY LAW REVIEW*, *supra* note 27, at 37 (Winter 2002).

⁹³ SMITH & O’BRIEN, *Conflict of laws*, *supra* note 11, at 184. 1999. Mentioned that in 1872, it was established that a foreign corporation could be sued in England.

⁹⁴ BLACKSTONE, *Commentaries on the Laws of England in Four Books*, *supra* note 29, at 475. 1893.

⁹⁵ Hein, *THE UNIVERSITY OF TORONTO LAW JOURNAL*, *supra* note 27, at 141 (1963). JAMES GRANT, *A PRACTICAL TREATISE ON THE LAW OF CORPORATIONS IN GENERAL: AS WELL AGGREGATE AS SOLE* at 108 (T. & J.W. Johnson. 1854). This mentioned that the corporations cannot hold or purchase land.

investigate it, (7) a corporation is not allowed to form one another corporation,⁹⁶ but some scholars claimed that a corporation could be created by another corporation, and for instance the king is a corporation who has the power to form other corporations,⁹⁷ (8) a corporation could be dissolved by act of parliament, by death of all the partners, by voluntary forfeit to the King, or by the courts as a penalty,⁹⁸ while other scholars argued that this was limited only to parliament.⁹⁹

Scrutinizing or just taking a closer look of what was mentioned in these earlier works, will easily led to the conclusion that they were superficial to a large extent. For instance, as for the right of the corporation to sue and to be sued by third parties, none of these works discussed the concept in detail. To sue a corporation before 1826, a third party would have to sue all the partners in their exact and full name otherwise the suit would be unacceptable, and the right to sue and be sued under its own name or in the name of its representative was granted to some corporations, then it was totally forbidden, then it was granted again for some corporations starting from 1826, and by 1857 most of the corporations was granted that right permanently.¹⁰⁰

In the same context, some scholars mentioned that the corporation was granted its existence by four means: (1) by the common law, (2) by a charter issued by the king, (3) by an act of parliament, and (4) by prescription.¹⁰¹ Meanwhile others claimed that the corporation might be created by a fifth mean, which is corporation made by another corporation,¹⁰² and other scholars even asserted that some forms of corporations created themselves by themselves, for example many towns were created as corporations by themselves.¹⁰³

⁹⁶ WILLIAM SHEPPARD, OF CORPORATIONS, FRATERNITIES, AND GUILDS, OR, A DISCOURSE WHEREIN THE LEARNING OF THE LAW TOUCHING BODIES-POLITIQUE IS UNFOLDED SHEWING THE USE AND NECESSITY OF THAT INVENTION, THE ANTIQUITY, VARIOUS KINDS, ORDER AND GOVERNMENT OF THE SAME; NECESSARY TO BE KNOWN NOT ONLY OF ALL MEMBERS AND DEPENDANTS OF SUCH BODIES; BUT OF ALL PROFESSOURS OF OUR COMMON LAW; WITH FORMS AND PRESIDENTS OF CHARTERS OF CORPORATION at 112 (H. Twyford, T. Dring, and J. Place. 1659).

⁹⁷ GRANT, A practical Treatise on the Law of Corporations in General: As Well Aggregate as Sole, *supra* note 95, at 109-110. 1854.

⁹⁸ BLACKSTONE, Commentaries on the Laws of England in Four Books, *supra* note 29, at 485. 1893; Arner, SOUTHERN METHODIST UNIVERSITY LAW REVIEW, *supra* note 27, at 37-38 (Winter 2002).

⁹⁹ SHEPPARD, Of Corporations, Fraternities, and Guilds, *supra* note 96, at 129. 1659.

¹⁰⁰ Hein, THE UNIVERSITY OF TORONTO LAW JOURNAL, *supra* note 27, at 142-143 (1963).

¹⁰¹ COKE, The selected Writings and Speeches of Sir Edward Coke, *supra* note 20, at 363. 2003. EDWARD ATKINS, THE LAW OF CORPORATIONS CONTAINING THE LAWS AND CUSTOMS OF ALL THE CORPORATIONS AND INFERIOR COURTS OF RECORD IN ENGLAND at 8-9 (Printed for Isaac Cleeve, Iohn Hartley, Francis Coggan, and Thomas Hodgson. 1702).

¹⁰² GRANT, A practical Treatise on the Law of Corporations in General: As Well Aggregate as Sole, *supra* note 95, at 18. 1854.

¹⁰³ Eaton, THE YALE LAW JOURNAL, *supra* note 19, at 266 (1903).

It might be surprising that a political or a community unit like a town was classified at that time as a corporation, but that was the reality in the Middle Ages. In addition to that, most of the scholars at that time devoted a big portion of their writing to identify who might be incorporated or granted the right to be a corporation, for instance William Sheppard cited the following examples; City, Village, Borough, Town, Parish, hospital, traders, free men, existed corporation, among others.¹⁰⁴ The fact that was cited by William Sheppard; which is that a pre-existed corporation might be granted the right to be reincorporated, could be interpreted as that the corporations were allowed to reincorporated or restructured, and that could be considered also as an early sign that corporate restructuring was known and legally permitted.

Concerning the early attempts to classify corporations, they were almost the same classifications, and most of the scholars were just repeating each other. For instance, the early attempts from the scholars to classify corporations, with regard to its subject, they distinguished between sole and aggregate corporations,¹⁰⁵ on the other hand Romans did not recognize sole corporations.¹⁰⁶ Depending on the jurisdiction, corporations were classified into ecclesiastical and lay,¹⁰⁷ and some even classify lay corporations into two categories eleemosynary and civil.¹⁰⁸

Furthermore, with regard to the structure, or the creation of its “Body Politick” as it was called at that time, corporations were classified into elective and representative corporations.¹⁰⁹ Regrettably but true, none of those classifications has an indication or resemble any importance in reality, meanwhile it has been claimed that those classifications were very important at that time,¹¹⁰ however this claim did not mentioned any supporting evidence or even elaborations that might validate it.

¹⁰⁴ SHEPPARD, Of Corporations, Fraternities, and Guilds, *supra* note 96, at 10-12. 1659.

¹⁰⁵ JOSEPH C. FRANCE, PRINCIPLES OF CORPORATION LAW at 11 (M. Curlander. 1914). BLACKSTONE, Commentaries on the Laws of England in Four Books, *supra* note 29, at 469. 1893.

¹⁰⁶ Angell, Treatise on the Law of Private Corporations Aggregate, *supra* note 27, at 20. 1861.

¹⁰⁷ FRANCE, Principles of Corporation Law, *supra* note 105, at 11. 1914; BLACKSTONE, Commentaries on the Laws of England in Four Books, *supra* note 29, at 470-471. 1893; Arner, SOUTHERN METHODIST UNIVERSITY LAW REVIEW, *supra* note 27, at 25,36 (Winter 2002). Emphasizes that Angell and Ames used this classification in their treatise in 1832, and Romans used the very same classification.

¹⁰⁸ Williston, HARVARD LAW REVIEW, *supra* note 26, at 105 (1888); FRANCE, Principles of Corporation Law, *supra* note 105, at 11. 1914. BLACKSTONE, Commentaries on the Laws of England in Four Books, *supra* note 29, at 470-471. 1893.

¹⁰⁹ ATKINS, The Law of Corporations Containing the Laws and Customs of all the Corporations and Inferior Courts of Record in England, *supra* note 101, at 3. 1702.

¹¹⁰ FRANCE, Principles of Corporation Law, *supra* note 105, at 11. 1914.

At a later stage, during the 18th century, the classification of corporations started to be significantly different and it was even based on considerably different criterion. For instance, Adam Smith¹¹¹ classified corporations into regulated, “private *copartners*,” and joint-stock corporations. The regulated corporation, which was also known at that time as “Hamburg Company” was an association that united a group of individuals, and any qualified person could join at anytime during its life, and each member of that corporation was allowed to perform trade activities, according the corporation’s internal rules but everyone has his own liability,¹¹² in short this regulated corporation could be categorized as an equivalent to what was called in Adam Smith time a “Guild.”

It is noteworthy here that some authors argued that the direct linkage between the development of regulated corporation in UK and the “Guilds” in Italy could be easily identified and traced, while the development of the joint-stock corporations in UK could not be traced back to Italy.¹¹³ It was even claimed that by the beginning of the 15th century the word “guildated” was a synonymous to the word “incorporated.”¹¹⁴ Some authors called Adam Smith’s regulated corporations as “*societates*,” and they gave some examples for it such as “the associations for working mines, salt-works, and for collecting taxes” and they also elaborated more by mentioning that this category of corporations was to a great extent resembling a natural person, with regard to its rights, obligations and liabilities.¹¹⁵ In the same context, it was reported that the early examples of that category of regulated corporations was limited to local practices, but by the proliferation of sea voyages in the 16th century, the regulated corporation was granted the right to practice abroad, and it was even claimed that the East India Company was started as a regulated corporation.¹¹⁶

As a development to the regulated corporation idea, it was also reported that joining these abroad trading activities i.e. buying shares of the corporation, was on a voyage-by-voyage basis until 1614, then it became continuous, and by 1692 a dramatic change happened; members to the

¹¹¹ Adam Smith was a Scottish philosopher and economist but *see* Arner, SOUTHERN METHODIST UNIVERSITY LAW REVIEW, *supra* note 27, (Winter 2002). He mentioned that Adam Smith was also trained as a lawyer.

¹¹² ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS at 979-980 (Edwin Cannan ed., University of Chicago Press. 1976).

¹¹³ Hein, THE UNIVERSITY OF TORONTO LAW JOURNAL, *supra* note 27, at 143-144 (1963).

¹¹⁴ Williston, HARVARD LAW REVIEW, *supra* note 26, at 108 (1888).

¹¹⁵ *Id.* at 107.

¹¹⁶ *Id.* at 109-110.

regulated corporation were no longer allowed to practice trade privately.¹¹⁷ By the end of the 17th century, it could be easily identified that the joint-stock corporation was born as a new form of the corporations.

Alternatively, some scholars reported that the joint-stock corporations, as a transferable shares concept, was not recognized by all legal systems at the same time, for instance Sweden recognize the joint-stock corporation more than one hundred years later, in 1848.¹¹⁸ Moreover, joint-stock corporations were not involved in manufacturing to the same extent as trading, but they were involved at least in glass and paper manufacturing as early as 1642, at that time the “Glass Work” joint-stock corporation was formed in Massachusetts, and one earlier example was the paper mill formed in 1706 in Pennsylvania.¹¹⁹

On the other hand, the distinction between “private *copartneries*” and joint-stock corporations, as recognized by Adam Smith, is similar to a great extent to the modern distinction between partnerships and corporations. Undoubtedly true, Adam Smith distinguished between both of them on the basis that in the “private *copartneries*” the partners were not allowed to transfer their shares without a prior consent of all partners, and the liabilities of the partners was not limited to their shares.¹²⁰

As early as the 16th century, other classifications were recognized by the scholars, for instance they recognized that corporations could be classified according to its purposes and how it is connected to the government, in that regard some scholars classified corporations into private, public,¹²¹ semi-public corporations.¹²² In that context, it was also recognized that such distinction in not so productive, because the fact that the end purpose of all corporations, either private “civil” corporation or a public one is good for people.¹²³

An early example of the semi-public corporations was the military corporations, also an interesting example was a corporation named “Take Trustees of the Road and Ferries from Newark to the Road leading from Bergen Point to Paulus Hook” and it was later known as

¹¹⁷ *Id.* at 110.

¹¹⁸ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 47. 2003.

¹¹⁹ DAVIS, *Essays in the Earlier History of American Corporations*, *supra* note 86, at 94. 1917.

¹²⁰ SMITH, *An Inquiry Into the Nature and Causes of the Wealth of Nations*, *supra* note 112, at 989. 1976.

¹²¹ Williston, *HARVARD LAW REVIEW*, *supra* note 26, at 110 (1888).

¹²² FRANCE, *Principles of Corporation Law*, *supra* note 105, at 14. 1914.

¹²³ ATKINS, *The Law of Corporations Containing the Laws and Customs of all the Corporations and Inferior Courts of Record in England*, *supra* note 101, at 2. 1702.

“Jersey City,” this corporation was incorporated in June 20, 1765 to maintain and keep a good state the road between New York and Philadelphia, and in return it enjoyed the right to collect toll and donations for its own private profitability, this corporation was an interesting example because it was reported that the corporation was created by a way of merger between many other corporations.¹²⁴

By time all those early classifications were abandoned, and they were superseded by numerous classifications that were adopted by the different modern legal systems. It could be claimed that by the beginning of the 20th century the classifications became out of control. Though scrutinizing the modern classifications is out of the scope of this dissertation, however the following are just few terms that are designated to some forms of corporations classified according to the relation between the ownership and management; “small private companies, close companies, companies with concentrated ownership of shares, quasi-partnership companies, small and closely-held companies, SMEs, owner managed companies, micro companies, large public companies, quoted companies, companies with fragmented ownership of shares, Berle and Means companies.”¹²⁵

3. Breakthroughs Corporations History

Throughout the history of the corporation there were landmarks, those landmarks might be considered as a prompt that led to the change, and to the development and proliferation of the idea itself. This section will be an overview of some of those landmarks, and it will include a brief history of some corporations namely the East India Company, as some named it the mother of the modern corporations, and the South Sea Company, as it was the main cause for the biggest financial crisis during the early developments. Moreover, the following discussion will address “trusts” and how it is considered as the main cause for the creation of the antitrust laws. Most importantly the discussion will address the history of mergers and scrutinizing the merger waves through the history, and lastly it will include an overview on the development of multinational corporations.

¹²⁴ DAVIS, *Essays in the Earlier History of American Corporations*, *supra* note 86, at 99-103. 1917.

¹²⁵ BEN PETTET, *COMPANY LAW* at 17 (Pearson Longman 2nd ed. 2005).

a) East India Company as the mother of modern corporations

It has been claimed that the joint-stock corporation started to proliferate from the 16th century as a chartered corporation, during a time when the European monarchs started to create several joint-stock corporations.¹²⁶ The following are just a few examples of these chartered joint-stock corporations, which was founded by the European monarchs during the 16th and 17th centuries: “Africa,” “East India,” “Hudson’s Bay,” “Levant,” “Massachusetts,” “Muscovy,” “Virginia,” and “The Company of Distant Parts.”¹²⁷

It was also maintained that those early joint-stock corporations were just a development of the “regulated corporation” that were practicing trade in the Middle Ages,¹²⁸ and scholars further asserted that the two ideas are interrelated but generally speaking both are based on the same earlier idea of guilds, where all the members are allowed to practice trade or a certain profession separately but according to the internal rules.¹²⁹ It was even claimed that the East India Company started as a “regulated corporation,” and to be more precise the shareowners were allowed to trade under the supervision of the management of the corporation until that was prohibited in 1692.¹³⁰

Meanwhile, it is noteworthy that some authors falsely claimed that the development of the idea of the chartered corporation was attributed to two main ideas borrowed from the Middle Ages, namely the idea of trading the corporations’ shares and the idea of limited liability.¹³¹ On the other hand other authors held that limited liability idea were not developed until after the East India Company was even chartered, and it was also reported that one of the main reasons to develop the limited liability was the high risk of the trading sea voyages, and for instance

¹²⁶ JOEL BAKAN, *THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER* at 8 (Free Press. 2004); MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at XVI. 2003.

¹²⁷ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 17. 2003.

¹²⁸ Franklin A. Gevurtz, *Globalization of Corporate Law: The End of History or a Never-Ending Story?*, 86 WASHINGTON LAW REVIEW 475, at 481 (2011).

¹²⁹ Hein, *THE UNIVERSITY OF TORONTO LAW JOURNAL*, *supra* note 27, at 144 (1963).

¹³⁰ Williston, *HARVARD LAW REVIEW*, *supra* note 26, at 109-110 (1888).

¹³¹ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 18. 2003.

between 1599 and 1601, four trading sea voyages were sent to East Indies and two of them were lost.¹³²

In the same context, it was also claimed that even the idea of trading the corporations' shares in the stock exchange was based on the idea that investing in the trading sea voyages had become permanent instead of single voyage as previously shown.¹³³ To the contrary, it was maintained that East India Company started by issuing shares for each trading sea voyage separately, and that continued for the first twelve voyages until it later switched to be the idea of permanent shares.¹³⁴ It was also professed that the idea of holding the corporations' shares for many voyages was borrowed from the Dutch, and even some authors argued that it took almost a century to be imitated by the English East India Company.¹³⁵

The idea of investing in a series of trading sea voyages was first developed after the chartering one of the Dutch's corporations, which had the same name of the English East India Company; the Dutch East India Company "*Vereenigde Oost-Indische Compagnie*," on March 20 1602,¹³⁶ and the idea was further developed to allow the investors to sell and trade their shares in the stock exchange.¹³⁷ It is noteworthy that many other corporations were founded in the same period and had the same name, for instance the French East India Company was founded in 1664, and the West India Company that was founded also in 1664.¹³⁸

It seems that all the ideas developed during that same period were wrongly attributed to the East India Company, despite the fact that many other well-known joint-stock corporations, like the Muscovy Company, was also known by some authors as the Russia Company, which was founded around 1553-1555,¹³⁹ the Mines Royal in 1564,¹⁴⁰ and the Levant Company in 1581,¹⁴¹ all were chartered even before the East India Company, which was founded in 1599 and

¹³² BRAUDEL, *The Perspective of the World*, *supra* note 15, at 262. 1981; For more details about the history of the development of the limited liability idea before and after the East India Company *see* Hein, *THE UNIVERSITY OF TORONTO LAW JOURNAL*, *supra* note 27, at 147-150 (1963).

¹³³ Gevurtz, *WASHINGTON LAW REVIEW*, *supra* note 128, at 482 (2011).

¹³⁴ SMITH, *An Inquiry Into the Nature and Causes of the Wealth of Nations*, *supra* note 112, at 997. 1976.

¹³⁵ BRAUDEL, *The wheels of commerce*, *supra* note 45, at 450. 1981.

¹³⁶ BRAUDEL, *The Perspective of the World*, *supra* note 15, at 213, 216. 1981.

¹³⁷ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 20. 2003.

¹³⁸ BRAUDEL, *The wheels of commerce*, *supra* note 45, at 451. 1981.

¹³⁹ Gevurtz, *WASHINGTON LAW REVIEW*, *supra* note 128, at 481 (2011); BRAUDEL, *The wheels of commerce*, *supra* note 45, at 439, 449. 1981; MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 18. 2003.

¹⁴⁰ BAKAN, *The Corporation: The Pathological Pursuit of Profit and Power*, *supra* note 126, at 8. 2004.

¹⁴¹ BRAUDEL, *The wheels of commerce*, *supra* note 45, at 449. 1981.

chartered in December 31, 1600, and despite that many authors claimed that it is the “mother of our known modern corporations.”¹⁴²

That might not be surprising, after revealing the fact that the East India Company with all of its very long history, not only survived for more than five centuries, but is still alive today between all modern corporations in the 21st century.¹⁴³ It is noteworthy that there are other corporations that were founded almost in the same period and are also still alive, but none of which are famous like the East India Company, one of those corporations is the Hudson’s Bay Corporation founded in May 2, 1670.¹⁴⁴

The East India Company was first chartered for the purpose of practicing trade between UK and Asia under the theme of the trading sea voyages,¹⁴⁵ and that was developed by time to a permanent structure that ends up ruling India with an army of 260,000 troops.¹⁴⁶ Moreover, there were great debates concerning the East India Company, for instance a slavery debate resulted in a boycott of one of its products i.e. sugar, until it started to import sugar from a non-slavery manufacture in Bengal.¹⁴⁷ More importantly, in a political context, granting the East India Company monopoly rights over the trade of tea in 1773 led to huge protests and 342 boxes of tea thrown into the ocean, and that directly led to formation of the Boston Tea party.¹⁴⁸

Moreover, it was claimed that the East India Company heavily contributed to the development of the modern corporation ideas, for instance its structure could be considered a new development to the corporation idea during these early stages of the formation of the corporation idea, whereas it was designed to be managed by two-courts, the first court was a

¹⁴² Nick Robins, *The Corporation that Changed the World: How the East India Company Shaped the Modern Multinational* at 5 (Pluto 2006); Gevurtz, *WASHINGTON LAW REVIEW*, *supra* note 128, at 481 (2011); SMITH, *An Inquiry Into the Nature and Causes of the Wealth of Nations*, *supra* note 112, at 997. 1976.

¹⁴³ For more information about the current activities and news of the East India Company, see its official website: <http://www.theeastindiacompany.com/> last visited October 1, 2014.

¹⁴⁴ DAVIS, *Essays in the Earlier History of American Corporations*, *supra* note 86, at 35. 1917; *The Royal Charter for Incorporating the Hudson’s Bay Company Granted by His Majesty King Charles the Second, in the Twenty-Second Year of his Reign, A.D. 1670* at 24 (Henry Kent Custon & Son 1865); MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 17. 2003; and for more information about the current activities and news of the Hudson’s Bay Corporation, see its official website: <http://www3.hbc.com/> last visited October 1, 2014.

¹⁴⁵ Robins, *The Corporation that Changed the World: How the East India Company Shaped the Modern Multinational*, *supra* note 142, at 5. 2006.

¹⁴⁶ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at XVI. 2003.

¹⁴⁷ *Id.* at 25.

¹⁴⁸ For more details about that fact *see* WESLEY S. GRISWOLD, *THE NIGHT THE REVOLUTION BEGAN.: THE BOSTON TEA PARTY, 1773* at 93-106 (The Stephen Green Press. 1972).

general one and consists of all the share owners, and the second court consists of the managing directors, and in that regard it was reported that the sons of the owners of large shares were always selected to this managing positions.¹⁴⁹

It is noteworthy here that in addition to the well-known purpose of the chartered corporations during that period, mainly trading,¹⁵⁰ another purpose that was considered as “quasi-government” developed by the time to serve certain interests for the king or the public, for instance sponsoring the searching for new sea passages, and canals excavation.¹⁵¹ Moreover, UK and France chartered two corporations; the South Sea Company and the Mississippi Company, in order to rescue them from the huge after-war debts by the end of the 17th century,¹⁵² but as it will be discussed in the next discussion that led to the largest financial disaster in the history.

Meanwhile, some other corporations were chartered in the same period to serve the king’s interest, and surprisingly most of them heavily contributed to the development and prosperity of the American Colonies, such as the Virginia Company and the Massachusetts Bay Company.¹⁵³ It is noteworthy that by time those corporations got its independence in the US, and that was through a series of soft transition steps, and the final step to obtain the independence was taken by a remarkable decision declared by the Supreme Court in the case of *Trustees of Dartmouth College v. Woodward* in 1819.¹⁵⁴

b) South Sea Company and the Bubble Act¹⁵⁵

The South Sea Company was chartered in 1711 as one of the other joint-stock corporations that were founded during that period, and its main purpose was trading and it was granted exclusive rights to trade with the “Spanish America,” and after struggling in its trade activities by 1719, its manager John Blunt changed the purpose to be mainly lending money to

¹⁴⁹ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 23. 2003.

¹⁵⁰ Williston, *HARVARD LAW REVIEW*, *supra* note 26, at 109 (1888).

¹⁵¹ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 40. 2003.

¹⁵² *Id.* at 28.

¹⁵³ DAVIS, *Essays in the Earlier History of American Corporations*, *supra* note 86, at 34. 1917.

¹⁵⁴ *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

¹⁵⁵ Bubble Act 1720 (6 Geo I, c 18)

the British government.¹⁵⁶ During the same period, the typical feature among all the joint-stock corporations that offered their shares to trade was that there were great fluctuations of the prices in the market, and many of those corporations collapsed, and remarkably that trend reached its peak by 1720.¹⁵⁷

In 1720 the British Parliament devoted all its efforts to rescue the South Sea Company from collapsing, to be more precise the Parliament helped the corporation to put a plan for its purpose into effect, and in the same time helped it to flourish by trading of its debt shares.¹⁵⁸ The parliament did this in two steps, the first was on January 21, 1720, whereas it announced that the South Sea Company will handle the British government debt exclusively, and that led to instant outrageous increases in the prices of the shares of the South Sea Company from £128 in January to £187 in February and finally £950 on June 24.¹⁵⁹

Unfortunately, the South Sea Company was about to collapse and the instant outrageous increase of the shares prices formed an actual “Bubble,” as it was named by most of scholars, and that bubble burst by September in the same year, and suddenly the owners of the shares found nothing that resembled their shares value.¹⁶⁰ Other authors named it “[t]he drama of the South Sea Company,” as it was the biggest financial crisis in that early history.¹⁶¹

The second step was the Bubble Act that was enacted by the British Parliament in the same year on June 11, 1720, that act was designed mainly to decrease the number of joint-stock corporations that might compete with the South Sea Company; according to that act the British Parliament prohibited any unchartered joint-stock corporation, thus resulting in that any joint-stock corporation shall be chartered only by act of parliament.¹⁶² That second step succeeded to give a hand to prevent the collapse of the South Sea Company, and the corporation survived the crisis and even the prices of its share returned to £170 again by October in the same year,

¹⁵⁶ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 31. 2003.

¹⁵⁷ PETTET, *Company Law*, *supra* note 125, at 9. 2005.

¹⁵⁸ Arner, *SOUTHERN METHODIST UNIVERSITY LAW REVIEW*, *supra* note 27, at 33 (Winter 2002).

¹⁵⁹ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 31-32. 2003; Arner, *SOUTHERN METHODIST UNIVERSITY LAW REVIEW*, *supra* note 27, at 33 (Winter 2002).

¹⁶⁰ PETTET, *Company Law*, *supra* note 125, at 9. 2005; Arner, *SOUTHERN METHODIST UNIVERSITY LAW REVIEW*, *supra* note 27, at 33 (Winter 2002).

¹⁶¹ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 31. 2003.

¹⁶² Arner, *SOUTHERN METHODIST UNIVERSITY LAW REVIEW*, *supra* note 27, at 33 (Winter 2002); MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 32. 2003.

followed by the British government nationalizing the corporation for its own interest i.e. to avoid paying the government debt.¹⁶³

The inevitable result of the Bubble Act in UK was that investors rerouted their trading practices to be done through old tools such as partnerships, and since the limited liability feature did not arm the old tools, the economy faced a great delay.¹⁶⁴ It was even reported that most of the merchants, during that period, advanced the partnerships agreement to imitate the joint-stock corporations by making the shares of the partnership tradable.¹⁶⁵

The influence of the Bubble Act was not limited to the UK, but it was expanded also to the American Colonies in 1741, and obviously that also delayed the economy for some time.¹⁶⁶ However, the effect in the American Colonies was intolerable, because the economy mainly depends in its existence and proliferation on the early corporation, for instance all of the important American institutions were chartered as a corporation, banks, canals, churches, roads and even universities; the Harvard University was even chartered as a corporation in 1636.¹⁶⁷

Some authors claimed that the American Colonies did not get rid of the Bubble Act until the Declaration of Independence on July 4, 1776,¹⁶⁸ however the Pennsylvania Assembly i.e. the parliament, violated the British prohibition and granted a corporation named the Philadelphia Contributionship,¹⁶⁹ a charter as an American insurance corporation in 1768, prior to the Declaration of Independence. It was also reported that the first American corporation, the Bank of North America, was founded in 1781 in the north of the US after that British prohibition.¹⁷⁰ It is undoubtedly true that the US boomed after getting rid of the Bubble Act, while the UK economy was still suffering from its effect, and it was even reported that 350 corporations were

¹⁶³ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 33. 2003.

¹⁶⁴ Arner, *SOUTHERN METHODIST UNIVERSITY LAW REVIEW*, *supra* note 27, at 33 (Winter 2002).

¹⁶⁵ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 40. 2003.

¹⁶⁶ Arner, *SOUTHERN METHODIST UNIVERSITY LAW REVIEW*, *supra* note 27, at 43 (Winter 2002).

¹⁶⁷ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 43. 2003.

¹⁶⁸ Arner, *SOUTHERN METHODIST UNIVERSITY LAW REVIEW*, *supra* note 27, at 44 (Winter 2002).

¹⁶⁹ The corporation is still alive and for more information about its history and current activity see <http://www.contributionship.com> last visited October 1, 2104.

¹⁷⁰ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 44. 2003.

incorporated in the US only during the period between 1783 and 1801, while no comparable activity was reported in the UK in the same period.¹⁷¹

The Bubble Act was not repealed in the UK until more than a century after its application; in 1825, by that time there was an urgent economic need to allow individuals to do more business in order to rescue the economy.¹⁷² In 1844 the British Parliament enacted a new act to allow individuals to incorporate new joint-stock corporations just as easy as by mere registration.¹⁷³ However, the repeal of the Bubble Act did not offer the expected effect, it was also reported that even after its repeal the situation was unreliable, because the incorporation of the joint-stock corporations was by that time a matter of the common law and the principles of the common law were neither developed nor solid enough to rely on it.¹⁷⁴

Accordingly, the Joint Stock Companies Act was enacted to fully recognize the unchartered joint-stock corporations.¹⁷⁵ It is noteworthy that the British government was very hesitant towards the unchartered corporations in the period after the repeal of the Bubble Act, and it started to recognize joint-stock banks as incorporated corporations by registration in 1826, and then it changed the rules and one was not allowed to incorporate that corporation unless it was by a “letters patent” in 1844, then it was changed again so that it was permissible again to incorporate it just as easy by registration in 1857.¹⁷⁶

c) Trusts and antitrust law

As it will be scrutinized later along with the discussions of the relation between the state and the corporations, it was widely accepted to grant most of the corporations an exclusive right to trade or to practice certain profession during the early ages. However, those exclusive rights led to the development of what was then called an “antisocial” monopoly practices, which was widely justified on the grounds that the monopoly owner always own a scarce goods or services and shall raise the prices to meet the unlimited demand to acquire such goods or services, which

¹⁷¹ Oscar Handlin & Mary F. Handlin, *Origins of the American Business Corporation*, 5 THE JOURNAL OF ECONOMIC HISTORY 1, at 4 (1945).

¹⁷² PETTET, *Company Law*, *supra* note 125, at 9. 2005. Hein, THE UNIVERSITY OF TORONTO LAW JOURNAL, *supra* note 27, at 138-139 (1963).

¹⁷³ PETTET, *Company Law*, *supra* note 125, at 9. 2005.

¹⁷⁴ Hein, THE UNIVERSITY OF TORONTO LAW JOURNAL, *supra* note 27, at 145 (1963).

¹⁷⁵ Joint Stock Companies Act 1844 (7 & 8 Vict. c.110).

¹⁷⁶ Hein, THE UNIVERSITY OF TORONTO LAW JOURNAL, *supra* note 27, at 145-146 (1963).

then appears to be untrue and even *vice versa* i.e. the supply is literally unlimited while the demand is limited.¹⁷⁷

Despite the fact that twenty-one states in the US had their own antitrust laws by 1890,¹⁷⁸ the US Sherman Act of 1890¹⁷⁹ was considered the father of the modern antitrust laws, or in the words of one antitrust scholar the “Magna Carat of free enterprise.”¹⁸⁰ Others also claimed that the Canadian Act that was enacted on May 2, 1889, which was named “An act for the prevention and suppression of combinations formed in restraint of trade,” was the first modern antitrust law.¹⁸¹ Moreover, it was reported that France enacted the *Le Chapelier* act of 1791,¹⁸² to prohibit monopolies and any trade restraining practices,¹⁸³ and even Austria enacted the Austrian Penal Code in 1852 adopting rules in the same direction, while on the other hand it has been reported that these practices were considered lawful and acceptable under other legal systems for instance in UK and Germany.¹⁸⁴

Meanwhile, digging deeper to explore the roots and the earlier seed of the antitrust idea shows that it has more depth than those modern experiences, and it was even held that the idea was developed first by Romans who incorporated the idea into many of their laws, it was then further developed five hundred years later in the Constitution of Emperor Zeno the Ishaurian of 483 AD.¹⁸⁵ Even during the early period of Islam, it was recorded after Prophet Muhammad, peace be upon him, said that whoever intervened in the prices to increase them, should expect the Almighty God to sit him in worst place in hell, in addition to many other instructions that forbid monopolistic behaviors that led to an increase in prices.¹⁸⁶

In the same context, it was also reported that later during the period of the Saxon Kings, it was prohibited and considered a crime to intervene in the direct sale of goods to make a profit

¹⁷⁷ PETER F. DRUCKER, *CONCEPT OF THE CORPORATION* at 216, 219 (New American Library 1983 ed. 1983).

¹⁷⁸ JOHN H. SHENEFIELD & IRWIN M. STELZER, *THE ANTITRUST LAWS: A PRIMER* at 108 (AEI Press 4th ed. 2001).

¹⁷⁹ Sherman Antitrust Act, Ch. 647, 26 Stat. 209, codified at 15 U.S.C. §§ 1-7

¹⁸⁰ Thomas James DiLorenzo, *The Origins of Antitrust: An Interest Group Perspective*, 5 *INTERNATIONAL REVIEW OF LAW AND ECONOMICS* 73, at 74 (1985), citing MARSHALL C. HOWARD, *ANTITRUST AND TRADE REGULATION: SELECTED ISSUES AND CASE STUDIES* at 1 (Prentice-Hall. 1983).

¹⁸¹ ANESTIS S. PAPAPOPOULOS, *THE INTERNATIONAL DIMENSION OF EU COMPETITION LAW AND POLICY* at 9-10 (Cambridge University Press. 2010).

¹⁸² *Le Chapelier Act* of June 14–17 1791.

¹⁸³ Francis Walker, *The Law Concerning Monopolistic Combinations in Continental Europe*, 20 *POLITICAL SCIENCE QUARTERLY* 13, at 27 (1905).

¹⁸⁴ PAPAPOPOULOS, *The International Dimension of EU Competition Law and Policy*, *supra* note 181, at 8-9. 2010.

¹⁸⁵ SANDRA MARCO COLINO, *COMPETITION LAW OF THE EU AND UK* at 2-3 (Oxford University Press. 2011).

¹⁸⁶ For more details about this quote and other quotes from Prophet Muhammad, peace be upon him, *see* NASIRUDDIN AL-KHATTAB, *ENGLISH TRANSLATION OF MUSNAD IMAM AHMAD BIN HANBAL* (Darussalam. 2012).

as a middle man, that crime was mentioned in Domesday Book¹⁸⁷ in 1086, and the monopoly practices was also considered illegal in the Magna Carta in 1215.¹⁸⁸ That early history of antitrust was not just a few instances or laws that were adopted during these early periods, but the common law as a judiciary work is clear evidence that the idea was recognized in some of the early rulings,¹⁸⁹ for example the ruling of the English Courts in the *Dyer's* case in 1414,¹⁹⁰ and in the case of *Darcy v. Allien* in 1599,¹⁹¹ and then in case of *Mitchel v. Reynolds* in 1711.¹⁹² In the same context, it was even claimed that the Sherman Act of 1890 have a “transatlantic origin” and it was codifying of the old common law rules.¹⁹³

As it was said previously, the situation in Germany during the 16th century was similar to UK and the US i.e. the monopoly practices were widely accepted, for instance giant corporations like the Fuggers, Hochstetters, and Welsers were controlling mercury, silver, and copper during the 16th century and no other corporation could even plan to enter into market of such industries.¹⁹⁴ However, by the end of the 16th century, namely during the period of the King James VI and I, the situation started to take a new direction in the UK, both the parliament and the judiciary considered granting royal monopoly rights as unconstitutional, and that was also expanded to the US.¹⁹⁵ On the other hand the situation remained the same i.e. monopoly practices are accepted in Germany for many centuries and even after the beginning of the 20th century.¹⁹⁶

Additionally, it should be noted that the mentioned change in the UK and the US does not mean that monopoly was prohibited, it was merely unconstitutional to grant corporations such rights by the state, and it was to the contrary of that; these monopoly practices were considered the main cause that led to the growth of some American corporations domestically, and even gaining a controlling position in the foreign markets, and by the end of the 19th century many of

¹⁸⁷ For more details about the Domesday Book see <http://www.domesdaybook.co.uk/> last visited October 1, 2104.

¹⁸⁸ COLINO, Competition Law of the EU and UK, *supra* note 185, at 3. 2011.

¹⁸⁹ DABBAH, The Internationalisation of Antitrust Policy, *supra* note 9, at 32. 2003. PAPADOPOULOS, The International Dimension of EU Competition Law and Policy, *supra* note 181, at 7-9. 2010.

¹⁹⁰ The *Dyer's* case, (1414) 2 Hen. V, fol. 5, pl. 26.

¹⁹¹ *Edward Darcy Esquire v Thomas Allin of London Haberdasher* (1599) 74 ER 1131, (1602) 77 Eng Rep 1260 and (1599) Noy 173.

¹⁹² *Mitchel v. Reynolds* (1711), 1 P. Wms., 181, 24 Eng. Rep., 347.

¹⁹³ DABBAH, The Internationalisation of Antitrust Policy, *supra* note 9, at 32. 2003.

¹⁹⁴ BRAUDEL, The wheels of commerce, *supra* note 45, at 418. 1981.

¹⁹⁵ SHENEFIELD & STELZER, The Antitrust Laws: A Primer, *supra* note 178, at 8-9. 2001.

¹⁹⁶ MICKLETHWAIT & WOOLDRIDGE, The Company: A Short History of a Revolutionary Idea, *supra* note 27, at 90-91. 2003.

what was called “trusts” were formed.¹⁹⁷ Unsurprisingly, what mainly triggered the debate in the US concerning the prohibition of monopoly practices or even the abuse of the granted monopoly powers was the growth and expansion of these trusts.¹⁹⁸

An overview on the history of the Standard Oil Corporation may give a clearer picture of how these trusts appeared and grew in the US and then developed into the main trigger of the mentioned debate, and even then led to what was named antitrust laws.¹⁹⁹ The story begins in 1852, when John Davison Rockefeller and his friend Maurice Clark started to “pool” some of their savings and to use it in “commission business,” and by 1862 they partnered with Samuel Andrews to start new promising business, an oil refinery, henceforth their business grew and they started a second refinery and then they opened branches in different states, then Rockefeller invested into many refinery businesses, and by June 1870 he merged all his businesses that were worth more than one million US dollars, under the umbrella of the Standard Oil Corporation.²⁰⁰

A dramatic change happened in 1871, when Rockefeller met a businessman who had a magic tool that was offered for sale, that magic tool was a corporation chartered under the name of the “South Improvement Company,” and the owner of that charter was granted the ability to do any business of any nature in whatever place he might decide, there is no need to mention that Rockefeller took the opportunity and bought the charter, but he was not alone, he arranged for a new form of institutions or associations, on January 2, 1872 he and many other businessmen in the refinery business pooled and divided the 2,000 shares of that corporation between themselves, and formed an association or that new business structure that was then known as a “trust” to take over the oil industry.²⁰¹ That oil trust or to be more precise the trust idea was copied by many other businessmen, in many other industries in the US, during the same period, most notably the industries of the sugar refinery, tobacco, railroads, and steel among others.²⁰²

¹⁹⁷ SHENEFIELD & STELZER, *The Antitrust Laws: A Primer*, *supra* note 178, at 9. 2001.

¹⁹⁸ Andreas Koutsoudakis, *Antitrust More than a Century After Sherman: Why Protecting Competitors Promotes Competition More than Economically Efficient Mergers*, 34 DAYTON LAW REVIEW 223, at 230 (2009); RUDOLPH J. R. PERTIZ, *COMPETITION POLICY IN AMERICA, 1888-1992 HISTORY, RHETORIC, LAW* at 9 (Oxford University Press. 1996).

¹⁹⁹ For full history about the Standard Oil Corporation, *see* IDA M. TARBELL, *THE HISTORY OF THE STANDARD OIL COMPANY* § 1 (Mc Clure, Phillips & Co. 2nd Impression ed. 1904). It is noteworthy that the author vividly mentioned that she was a daughter of one of the many oil producers who was heavily harmed by the oil trusts.

²⁰⁰ *Id.* at 42-44.

²⁰¹ *Id.* at 56-57.

²⁰² PAPADOPOULOS, *The International Dimension of EU Competition Law and Policy*, *supra* note 181, at 10. 2010; PERTIZ, *Competition Policy in America, 1888-1992 History, Rhetoric, Law*, *supra* note 198, at 13. 1996; and *see generally* DiLorenzo, *INTERNATINAL REVIEW OF LAW AND ECONOMICS*, *supra* note 180, (1985).

Controlling an industry was not a new trend that was sufficient to develop the antitrust idea, it just triggered the debate in that concern, and thus the debate led to the development of the antitrust laws in the US, the following will be an overview on the history of such debate. It is noteworthy here that while the history may reveal some of the legislative intent or goals, the discussion of such goals will come later during the discussion of the merger control as an impediment.²⁰³

It should be noted that the debate lasted for almost two years, starting from January 21, 1888 until the enactment of the Sherman Act in 1890.²⁰⁴ To be more precise, it started by the Representative of New York State; Henry Bacon, when he requested the inspection of the trusts, and unsurprisingly the Senator of the State of Ohio, which was the state that chartered the Standard Oil Corporation; Senator John Sherman presented an antitrust bill by the mid of August 1888, and that bill was even named after him i.e. the “Sherman Act.”²⁰⁵

One might think that Senator Sherman presented that bill because of the fact that the trusts was controlling the markets during that period, and that control led to public anger due to high prices, or due to the shortage of supply, or even the bad quality of goods or services, but surprisingly by scrutinizing the congressional records and analyzing some of the speeches of the Senators on that debate extremely unexpected results were revealed. Senator George Franklin Edmunds said: “Although for the time being the sugar trust has perhaps reduced the price of

²⁰³ Enormous number of literature could be cited for more information and details about the history and the circumstances that led to the enactment of the Sherman Act, for example: PERTIZ, *Competition Policy in America, 1888-1992 History, Rhetoric, Law*, *supra* note 198, at 9. 1996. Cited over than 50 reference; most importantly HANS BIRGER THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* (Johns Hopkins Press. 1955); William L. Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 *THE UNIVERSITY OF CHICAGO LAW REVIEW* 221(1956); Richard Hofstadter, *What Happened to the Antitrust Movement?*, in *THE PARANOID STYLE IN AMERICAN POLITICS, AND OTHER ESSAYS* (1965); Rudolph J. R. Pertiz, *Rule of Reason in Antitrust Law: Property Logic in Restraint of Competition*, 40 *HASTINGS LAW JOURNAL* 285(1989); David Millon, *The Sherman Act and the Balance of Power*, 61 *SOUTHERN CALIFORNIA LAW REVIEW* 1219(1988); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 *HASTINGS LAW JOURNAL* 65(1982); John J. Flynn, *Rethinking Sherman Act Section 1 Analysis: Three Proposals For Reducing The Chaos*, 49 *ANTITRUST LAW JOURNAL* 1593(1980); Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 *CORNELL LAW REVIEW* 1140 (1981). And COLINO, *Competition Law of the EU and UK*, *supra* note 185, at 3. 2011, citing HANS BIRGER THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* (P.A. Norstedt; John[s] Hopkins Press. 1954); see also RICHARD ORME WILBERFORCE, *THE LAW OF RESTRICTIVE TRADE PRATICES AND MONOPOLIES* (Sweet & Maxwell 2nd ed. 1975).

²⁰⁴ PERTIZ, *Competition Policy in America, 1888-1992 History, Rhetoric, Law*, *supra* note 198, at 13. 1996.

²⁰⁵ *Id.* at 9.

sugar, and the oil trust certainly has reduced the price of oil immensely, that does not alter the wrong of the principle of any trust.”²⁰⁶

It is noteworthy here that a deep analysis to the available data, showed that the trusts actually added to the output of the economy, during the period from 1880 to 1900, and there was an actual growth of output, and that was not limited to certain trust but literally for all the trusts, for example the oil, salt, steel, and sugar, as it appears in the following graph.²⁰⁷

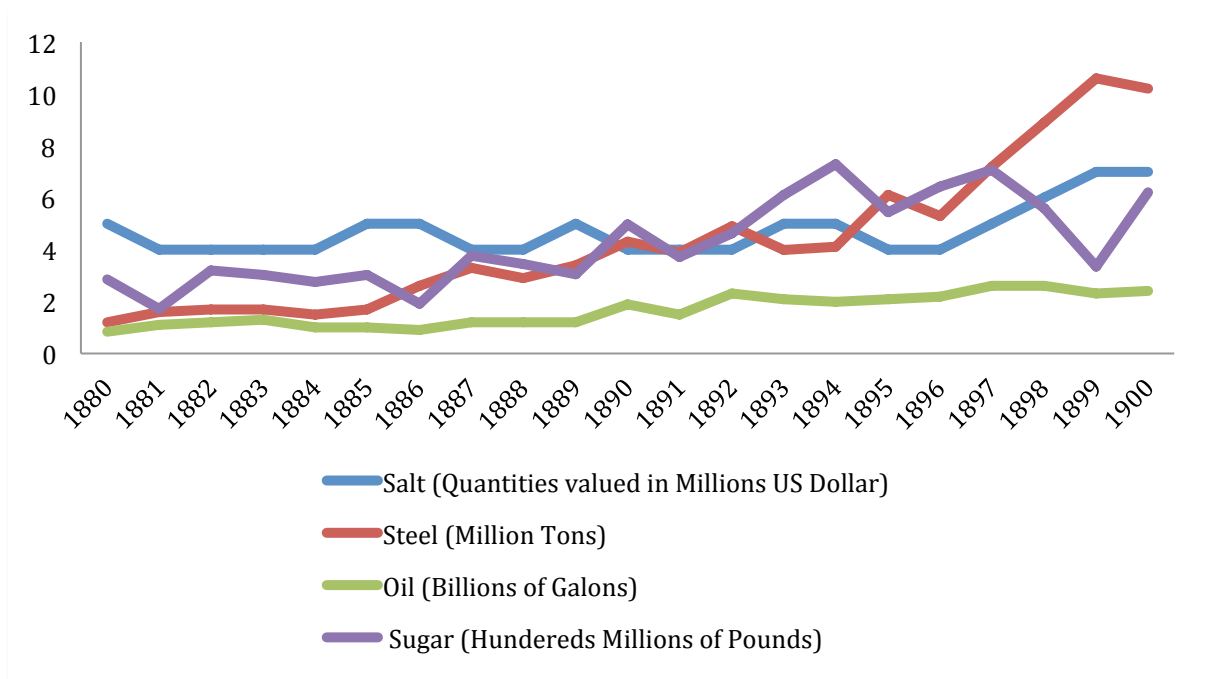


Figure 1: Output of certain industries during the period 1880-1900²⁰⁸

Moreover, that opinion was not just a single opinion, it was the opinion of most of House at that time, and for example one of the most important statements was the statement by Senator William Ernest Mason, whereas he clearly said that:

trusts have made products cheaper, have reduced prices; but if the price of oil, for instance, were reduced to one cent a barrel, it would not right the wrong done to the people of this country by the ‘trusts’ which have destroyed legitimate competition and driven honest men from legitimate business enterprises.²⁰⁹

²⁰⁶ Congressional Record, 51st Congress, 1st Session, House, 20 June (1890) P.2558

²⁰⁷ DiLorenzo, INTERNATIONAL REVIEW OF LAW AND ECONOMICS, *supra* note 180, at 77-78 (1985).

²⁰⁸ Data retrieved from *Id.* at 78-79, citing US Bureau of the Census, Statistical Abstract of the U.S., various years (Washington DC: Government Printing Office); US Bureau of the Census, Historical Statistics of the U.S.

²⁰⁹ Congressional Record, 51st Congress, 1st Session, House, 20 June (1890) P.4100.

It is clear that they were arguing about the protection of small businesses from the trusts, a giant powerful business that might swallow them easily, but unfortunately the prices were not important which means that the antitrust was at the cost of consumers, in that context it has been claimed that the purpose was to save the “less efficient ‘honest men’ [from being driven] out of business”²¹⁰.

To elaborate more on that point; while the Senators revealed vividly that the oil and sugar trusts kept the trend of the prices going down, some authors argued that there was also another cause, which was the drop of the railroad prices.²¹¹ Actually, it could be easily recognized that both of these causes i.e. the trusts and the drop of the railroad prices were interrelated, because the trusts were using the railroads as a means of transportation and they managed to get rebates for their large transactions,²¹² and that led to the drop of the railroads prices and *vice versa*; the drop of the transportation prices led to the fall in the prices of goods.

Accordingly, the overall trend of the prices were going down for the good of consumers, but at the same time other groups of people were unhappy by these results, those groups were mainly the small businesses owners and the farmers, and they simply could not manage to get the same transportation prices for their small transactions and thus they struggled to compete with the prices offered by the trusts or generally speaking with the price trend during that period, and those groups joined the debate to the pro antitrust camp,²¹³ if not considered as the actual triggering factor of the antitrust debate.

However, the first bill that was presented by the Senator Sherman was very confusing, actually its language was indicating that the goal was nothing other than to protect consumers as follows: “That all arrangements, contracts, agreements, trusts, or combinations ... made with a view, or which tend to prevent full and free competition ... or which tend to advance the cost to the consumer ... are hereby declared to be against public policy, unlawful, and void.”²¹⁴ Here it

²¹⁰ DiLorenzo, *INTERNATIONAL REVIEW OF LAW AND ECONOMICS*, *supra* note 180, at 87 (1985); Koutsoudakis, *DAYTON LAW REVIEW*, *supra* note 198, at 245 (2009).

²¹¹ DOUGLASS NORTH, *GROWTH AND WELFARE IN THE AMERICAN PAST: A NEW ECONOMIC HISTORY* at 139 (Prentice Hall. 1966).

²¹² DiLorenzo, *INTERNATIONAL REVIEW OF LAW AND ECONOMICS*, *supra* note 180, at 75-76 (1985).

²¹³ Sanford D. Gordon, *Attitudes towards Trusts prior to the Sherman Act*, 30 *SOUTHERN ECONOMIC JOURNAL* 156, at 158 (1963).

²¹⁴ H.R. Misc. Doc. No. 124, 50th Cong., 1st Sess., 19 CONG. REC. 719 (1888) (in substitution of H.R. REP. No. 67, introduced by Representative William Mason (R.II.)). The resolution directed the House Judiciary Committee to investigate certain charges about trusts’ high prices to consumers. REPORT OF THE HOUSE COMMITTEE ON MANUFACTURES, H.R. REP. No. 3112, 50th Cong., 1st Sess. (July 30, 1888); S. 3440 and S. 3445, 50th

was clearly declared that the debate was taking into consideration mainly the protection of the consumer, side by side with the goal “full and free” competition as a mean to protect the consumer but not as an end in itself.

When the debate over that bill started on January 23, 1889,²¹⁵ Senator Sherman himself declared the same meaning; he actually denied that the purpose of his bill was to cripple combinations of capital and labor, the formation of partnerships or of corporations, but only to prevent and control the combinations made with a view to prevent competition, or for the restraint of trade, or to increase the profits of the producer at the cost of the consumer. It is the unlawful combination . . . not the useful combination.²¹⁶

It is also clear that Senator Sherman was trying to defend the language of his bill by any means; some of his reasoning does not even make sense; he said that his bill seeks to make the “unlawful combination” unlawful. Meanwhile, it seems that most of the voices in the house were standing for purposes other than that was declared by Senator Sherman; the bill was referred to another committee and it was returned after six days with different language saying nothing about the “cost to the consumer” or even the “full and free competition,” the bill passed with the new language dealing with “restraint of trade,” and in fact by a majority of fifty two to one.²¹⁷

The enactment of the Sherman Act did not put the debate to an end. Instead the debate expanded to the courts and it was more confusing when enforced, it was also claimed that the continuous debate was anticipated and that it distracted the public’s attention from the introduction of a new trade restraint tool, which was a new tariff bill sponsored by the Senator Sherman himself.²¹⁸ There was too much evidence supporting that claim, for instance the first time the Sherman Act was used against the oil trusts present in the Standard Oil Corporation was more than fifteen years after the law was enacted in 1906.²¹⁹

Actually, it was not the first time to initiate a lawsuit against the oil trusts represented by the Standard Oil Corporation; in 1889 David Watson the Attorney General of the State of Ohio,

Cong., 1st Sess., 19 CONG. REC. 7512 (1888); S. 3445, 50th CONG. REC. 1120 (1889) (as amended). EARL W. KINTNER, *THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES* at 53 § 1 (Chelsea House Publishers. 1978).

²¹⁵ PERTIZ, *Competition Policy in America, 1888-1992 History, Rhetoric, Law*, *supra* note 198, at 13. 1996.

²¹⁶ Cong Rec S.1, 51st Cong 1st Sess. (March 18, 1890) P.2457.

²¹⁷ PERTIZ, *Competition Policy in America, 1888-1992 History, Rhetoric, Law*, *supra* note 198, at 13-14. 1996.

²¹⁸ DiLorenzo, *INTERNATIONAL REVIEW OF LAW AND ECONOMICS*, *supra* note 180, at 87 (1985).

²¹⁹ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 73. 2003.

accidentally read the agreement of the trust of the Standard Oil Corporation, and he realized that it violated the Ohio Charter by controlling other corporations out of the State of Ohio, and the Supreme Court of Ohio decided to the side of the state, but it did not declare the charter as void, and the trust continued under a new name the “liquidating trustees.”²²⁰ Accordingly Rockefeller moved the corporation to the more liberal State of New Jersey, and that actually led to the expansion of his business even more freely.

By 1899 the trust was the owner and controlled another forty corporations,²²¹ and it was even reported that the expansion was a result of the increase of its capital from seventy million to more than one hundred million US dollars.²²² The second lawsuit against the trust, which was the first under the Sherman Act, was a knockdown of the trust; in 1911 the Supreme Court ordered the divestiture of some of the assets of the twenty two billion US dollars trust, and the result was giant oil corporations, namely Amoco, Chevron, Exxon, and Mobil.²²³

Finally it should be noted that the movement in the west side of the Atlantic never stopped and many amendments were introduced to the Sherman Act, and these amendments will be discussed later along with the discussions of the merger control.²²⁴ Furthermore, that movement was met with a deep silence on the other side of the Atlantic i.e. the European countries did not take their actual first steps toward modern antitrust regulations until it was incorporated in the Treaty establishing the European Coal and Steel Community (hereinafter ECSC) in April 18, 1951.²²⁵

However, it was claimed that the first step was in March 25, 1957, indeed when the Treaty Establishing the European Economic Community (hereinafter EEC) was signed.²²⁶ From that time and on the antitrust was considered “a fundamental provision which is essential for the

²²⁰ IDA M. TARBELL, THE HISTORY OF THE STANDARD OIL COMPANY at 150,153 § 2 (Mc Clure, Phillips & Co. 2nd Impression ed. 1904).

²²¹ MICKLETHWAIT & WOOLDRIDGE, The Company: A Short History of a Revolutionary Idea, *supra* note 27, at 68. 2003.

²²² TARBELL, The History of the Standard Oil Company, *supra* note 220, at 153. 1904.

²²³ MICKLETHWAIT & WOOLDRIDGE, The Company: A Short History of a Revolutionary Idea, *supra* note 27, at 73. 2003.

²²⁴ *See infra* p.186.

²²⁵ COLINO, Competition Law of the EU and UK, *supra* note 185, at 5. 2011.

²²⁶ PAPADOPOULOS, The International Dimension of EU Competition Law and Policy, *supra* note 181, at 14. 2010; EEC was renamed after the treaty of Maastricht of 1992 to “The Treaty Establishing the European Community” (hereinafter TEC), and it was renamed again after the treaty of Lisbon of 2007 to “Treaty on Functioning the European Union” (hereinafter TFEU).

accomplishment of the tasks entrusted to the [EU] and, in particular, for the functioning of the internal market.”²²⁷

d) Merger waves

Mergers as an idea was not clearly known during the Middle Ages, even the idea of that the corporation can own or create another one, was disputable as previously shown in discussions concerning the early characteristics of corporations. Whereas some claimed that corporations was not allowed to do so,²²⁸ while others maintained it was permissible,²²⁹ and even some mentioned examples to support that last claim, for instance the King at these periods was a corporation himself and he was allowed to own and create another corporations, and in the same context many American Colonies were corporations and they created corporations.²³⁰

Accordingly, and since the merger was forbidden, the resources discussing its history during these early stages were very scarce; therefore few early merger examples were reported. For instance, the first report of a merger akin was that of the Dutch East India Company (Vereenigde Oost-Indische Compagnie), which was formed on March 20, 1602, this was a merger between previous corporations.²³¹ It was also reported that the Queen and two corporations entered into some sort of agreements named “indenture tripartite” in order to unite in 1702, and then that turned into a completely merged corporation by an Act of the British parliament in 1708, and the outcome i.e. the new corporation was named “The United Company of Merchants trading to the East Indies,” and that was the case until the second half of the 19th century.²³²

Starting from the second half of the 19th century, mergers started to be a reality of economic life, and it was claimed that the trusts that were formed at that time could be considered typical mergers, and that was obvious in the case of the oil trust of the Standard Oil Corporation, one more example was the tobacco trust; in 1890 James Buchanan Duke, who owned a tobacco corporation, had it merge with four other corporations to form the American

²²⁷ *Eco Swiss China Time Ltd v Benetton International NV* case C-126/97 [2000] 5 CMLR 816, para. 36

²²⁸ SHEPPARD, *Of Corporations, Fraternities, and Guilds*, *supra* note 96, at 112. 1659.

²²⁹ GRANT, *A practical Treatise on the Law of Corporations in General: As Well Aggregate as Sole*, *supra* note 95, at 9-10. 1854.

²³⁰ Eaton, *THE YALE LAW JOURNAL*, *supra* note 19, at 370-371 (1903).

²³¹ BRAUDEL, *The Perspective of the World*, *supra* note 15, at 213. 1981.

²³² SMITH, *An Inquiry Into the Nature and Causes of the Wealth of Nations*, *supra* note 112, at 999. 1976.

Tobacco Company, and the same trend also appears in many other industries like cotton and steel.²³³

In Germany, during the same period, the recession was a great driving force to unite, but rather than enter into mergers they preferred a softer tool to unite, and most of the corporations entered into “cartels,” and it was even reported that 4 cartels were formed by 1875 and that number increased to 385 by 1905.²³⁴ Preferring that form of uniting rather than merging may be attributed to the fact that it has been previously noted that these cartels resembles trade restraint practices which were permitted and even widely accepted in Germany during that same period.

Examining the literature concerning the history of mergers, which is very scarce, reveals that the only comprehensive data recorded was limited to US transactions, thus the following discussion of the merger waves in history will be limited to the US merger history. Furthermore, it reveals also that the available resources have many limitations; for instance some are limited to specific industries like mining industry, while others are limited to transaction with certain values, and even other limitation factors such as specific periods.

Meanwhile, most of the literature that was written about the merger history was mainly dependent on the same resources, and again that was due the scarcity of the recorded data concerning the early mergers. These resources are mainly: (1) the works done at National Bureau of Economic Research, most notably done by Ralph Nelson,²³⁵ (2) the publications of the US Federal Trade Commission (hereinafter FTC), (3) the periodical named Mergers and Acquisitions, (4) the annual reports of W. T. Grimm & Co.²³⁶

It is noteworthy that most of the literature regarding the merger history agreed on the fact that mergers throughout the history were always characterized by taking the form of waves or movements and some named it “episodic.”²³⁷ The wave begins at certain time and then booms until it reached its peak and then slows down again, usually because of a recession,²³⁸ or

²³³ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 65-68. 2003.

²³⁴ ALFRED CHANDLER & TAKASHI D. HIKINO, *SCALE AND SCOPE: THE DYNAMICS OF INDUSTRIAL CAPITALISM* at 423 (Belknap Press. 1990).

²³⁵ RALPH L. NELSON, *MERGER MOVEMENTS IN AMERICAN INDUSTRY, 1895-1956* at VII-VIII (Princeton University Press. 1959).

²³⁶ For more details about these resources and any industry, time, and transaction value limitation therein, *see* ALAN J. AUERBACH, *MERGERS AND ACQUISITIONS* at 26-29 (University of Chicago Press Paperback ed. 1988).

²³⁷ NELSON, *Merger Movements in American Industry, 1895-1956*, *supra* note 235, at 4. 1959.

²³⁸ PATRICK A. GAUGHAN, *MERGERS, ACQUISITIONS, AND CORPORATE RESTRUCTURINGS* at 50-51 (Wiley 3rd ed. 2002).

financial crisis.²³⁹ The reason behind the fact that mergers were episodic or in the form of waves will be identified in the coming discussion, as each of those waves has its own circumstances.

In addition to that, the literature broadly agrees on the periods that constitute merger waves, and obviously on the number of those waves, which are six from the end of the 19th century to date, as it will be shown in this discussion. It should be noted here that the coming discussion will mainly focus on the first four waves. The last two waves are literally contemporary waves and they share the same the general trends and characteristics, and will be discussed later.

However, most of the literature disagrees concerning the exact time on which the first wave started; some contended that it started in 1893, while others claimed it started in 1895, and others maintained it started in 1897, and even others claimed it started in 1898.²⁴⁰ In fact, the starting date of the first wave was not the only a disagreement, but literally the dates of the starting and the ending of all the waves are debatable, and that might be due to the lack of data; as it was previously noted or it might be due to different data analysis or interpretation.

Nevertheless, the differences are not crucial and it will not lead to wrong results, at least in the context of this dissertation, especially because all the claimed dates are fluctuating within a small range, as illustrated in the following figure. But it should be noted that it has been argued by an author that there was a merger wave during the period from 1946 until 1956, and he even maintained that it was the third wave,²⁴¹ meanwhile no one held the same, and therefore that wave will be set aside and not be included in the timeline and the coming discussions.

²³⁹ DONALD M. DEPAMPHILIS, *MERGERS AND ACQUISITIONS BASICS ALL YOU NEED TO KNOW* at 24-25 (Academic Press. 2011).

²⁴⁰ J. FRED WESTON & SAMUEL C. WEAVER, *MERGERS AND ACQUISITIONS*, at 7 (McGraw-Hill. 2001); BRETT COLE, *M&A TITANS: THE PIONEERS WHO SHAPED WALL STREET'S MERGERS AND ACQUISITIONS INDUSTRY* at 2 (John Wiley & Sons. 2008); NELSON, *Merger Movements in American Industry, 1895-1956*, *supra* note 235, at 4. 1959. GAUGHAN, *Mergers, Acquisitions, and Corporate Restructurings*, *supra* note 238, at 23, 27. 2002; DEPAMPHILIS, *Mergers and Acquisitions Basics All You Need to Know*, *supra* note 239, at 24. 2011.

²⁴¹ NELSON, *Merger Movements in American Industry, 1895-1956*, *supra* note 235, at 5-6. 1959.

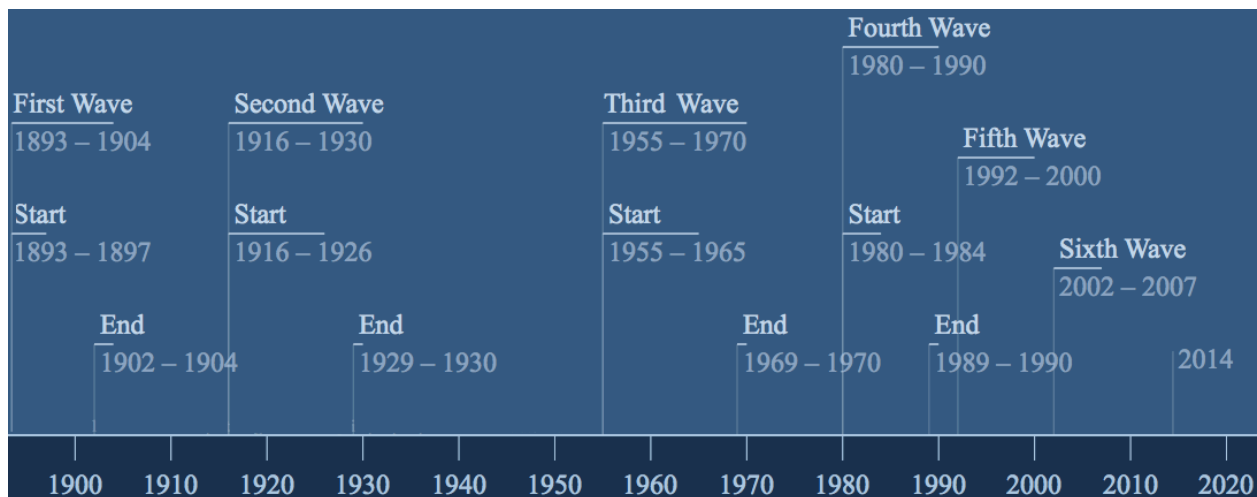


Figure 2: Timeline of mergers waves²⁴²

The first merger wave (1893 – 1904) is argued to be the foundation of industrial development in the US.²⁴³ The main industries that participated in that merger wave were manufacturing, mining,²⁴⁴ and oil industries. Ralph Nelson clearly identifies most of the manufacturing industries as (1) bituminous coal production, (2) chemical production, (3) fabricated metal production, (4) food processing, (5) oil production, (6) machinery production, (7) primary metal products, and (8) transportation equipment.²⁴⁵

It was also reported that in 1901 J. P. Morgan succeeded in creating the first American one billion US dollars corporation by means of merger of 785 corporations, which was the U.S. Steel Corporation.²⁴⁶ Moreover, it was also reported that during that first wave 1,800 corporations were merged to form only 137 corporations, and it has been claimed that this wave was mainly fueled by a complete transportation network i.e. railroad.²⁴⁷ Others held that the lax

²⁴² Data was retrieved from WESTON & WEAVER, *Mergers and Acquisitions*, *supra* note 240, at 7-8. 2001; DAVIS, *Essays in the Earlier History of American Corporations*, *supra* note 86, at 2. 1917; GAUGHAN, *Mergers, Acquisitions, and Corporate Restructurings*, *supra* note 238, at 23, 28, 30, 32, 44, 50, 51. 2002; COLE, *M&A Titans: The Pioneers Who Shaped Wall Street's Mergers and Acquisitions Industry*, *supra* note 240, at 2. 2008; DEPAMPHILIS, *Mergers and Acquisitions Basics All You Need to Know*, *supra* note 239, at 24, 25, 27, 29. 2011; OLIVER BLACK, *CONCEPTUAL FOUNDATIONS OF ANTITRUST* at 23-24 (Cambridge University Press. 2005); NELSON, *Merger Movements in American Industry, 1895-1956*, *supra* note 235, at 5. 1959; Larry D. Qiu & Wen Zhou, *Merger Waves: A Model of Endogenous Mergers*, 38 THE RAND JOURNAL OF ECONOMICS 214, at 214 (2007).

²⁴³ GAUGHAN, *Mergers, Acquisitions, and Corporate Restructurings*, *supra* note 238, at 23. 2002; Qiu & Zhou, *THE RAND JOURNAL OF ECONOMICS*, *supra* note 242, at 214 (2007).

²⁴⁴ COLE, *M&A Titans: The Pioneers Who Shaped Wall Street's Mergers and Acquisitions Industry*, *supra* note 240, at 2. 2008.

²⁴⁵ GAUGHAN, *Mergers, Acquisitions, and Corporate Restructurings*, *supra* note 238, at 23. 2002.

²⁴⁶ DEPAMPHILIS, *Mergers and Acquisitions Basics All You Need to Know*, *supra* note 239, at 24. 2011.

²⁴⁷ WESTON & WEAVER, *Mergers and Acquisitions*, *supra* note 240, at 7. 2001.

enforcement of the Sherman Act catalyzed business owners to enter into more horizontal mergers i.e. mergers between corporations operating at the same level of certain industry.²⁴⁸

On the other hand, scrutinizing the data during that same period, as shown in the coming figure below, reveals that the number of the vertical mergers i.e. mergers between corporations operating at different levels of the certain industry,²⁴⁹ was very high if compared to the horizontal mergers during the same period. Therefore, the lax nature of the antitrust enforcement cannot be considered as the main driving force of that first merger wave.

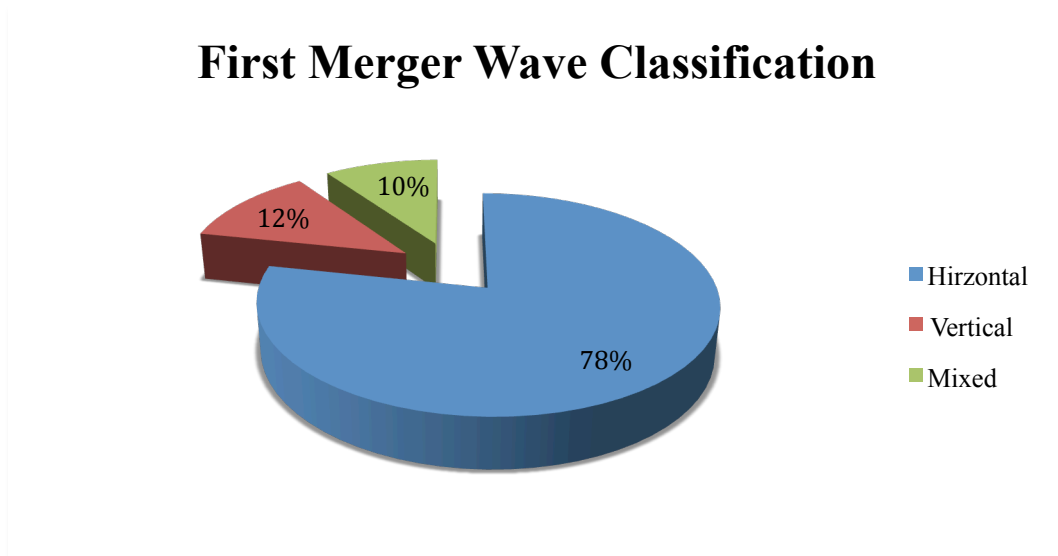


Figure 3: First merger wave classification²⁵⁰

It was claimed that the main cause fueled the first merger wave was the “race to the bottom” between the American states to attract corporations to relocate their investments, as it was previously noted; Rockefeller moved Standard Oil to New Jersey, and many others did the same due to the enactment of the “General Corporation Act,”²⁵¹ which allowed unlimited corporation size and mergers. It was even asserted that Delaware won the race by enacting an even more friendly corporation act in 1899.²⁵²

The second merger wave (1916 – 1930) was characterized by a significant increase in the number of vertical mergers, and generally speaking this means that the manufacturers were try to

²⁴⁸ DEPAMPHILIS, Mergers and Acquisitions Basics All You Need to Know, *supra* note 239, at 24. 2011.

²⁴⁹ *Id.* at 14.

²⁵⁰ Data retrieved from NEIL FLIGSTEIN, THE TRANSFORMATION OF CORPORATE CONTROL at 72 (Harvard University Press. 1990).

²⁵¹ New Jersey General Corporation Act of 1896.

²⁵² MICKLETHWAIT & WOOLDRIDGE, The Company: A Short History of a Revolutionary Idea, *supra* note 27, at 68, 69. 2003. Delaware General Corporation Law of 1899 (21 Del. Laws-273)

control or at least integrate the means of distribution.²⁵³ For instance, Ford Corporation²⁵⁴ owned steel factories, railroad, and car manufacturing lines.²⁵⁵ Meanwhile, it was claimed that this wave was a horizontal merger wave, but that claim was not based on any facts or data other than the fact Samuel Insult created a utility corporation that was operating in thirty nine US states.²⁵⁶

Generally speaking, this second wave was mainly fueled by three factors, the first one was the post World War I booming economy,²⁵⁷ and the second one was the development of the communication means specially the radio as a marketing tool,²⁵⁸ and the third one was the advancement of the transportation means.²⁵⁹ George Stigler²⁶⁰ claimed that the trend during this second wave turned from merge to monopoly to merge to oligopoly, which means that the market is dominated by a number of corporations, not only one.²⁶¹

The third merger wave (1955 – 1970), this wave was first characterized by a trend, described as the conglomerate transactions; the appeal of the traditional vertical and horizontal mergers faded away, and corporations from different unrelated industries started to go through mergers.²⁶² It was also characterized by making use of the tools of mathematics in the financial markets, for the purposes of gaining outstanding profits, which was then known as “financial engineering.” For instance most of the corporations during that wave were driven to go through mergers of any kind, as soon as a new tool or principle of gaining profits was revealed, for example most of the mergers during that wave were driven by the profits gained under the model

²⁵³ WESTON & WEAVER, *Mergers and Acquisitions*, *supra* note 240, at 8. 2001.

²⁵⁴ Ford is US automobiles manufacturing corporation that was founded in 1903, for more information about Ford and its history visit its official website at <http://corporate.ford.com/our-company?gnav=footer-aboutford> last visited on October 1, 2014.

²⁵⁵ COLE, *M&A Titans: The Pioneers Who Shaped Wall Street's Mergers and Acquisitions Industry*, *supra* note 240, at 2. 2008.

²⁵⁶ DEPAMPHILIS, *Mergers and Acquisitions Basics All You Need to Know*, *supra* note 239, at 25. 2011.

²⁵⁷ GAUGHAN, *Mergers, Acquisitions, and Corporate Restructurings*, *supra* note 238, at 28. 2002; DEPAMPHILIS, *Mergers and Acquisitions Basics All You Need to Know*, *supra* note 239, at 25. 2011.

²⁵⁸ WESTON & WEAVER, *Mergers and Acquisitions*, *supra* note 240, at 8. 2001.

²⁵⁹ GAUGHAN, *Mergers, Acquisitions, and Corporate Restructurings*, *supra* note 238, at 30. 2002.

²⁶⁰ George Stigler (January 17, 1911 – December 1, 1991) was an economist and he received the Nobel Memorial Prize in Economic Sciences in 1982, and he was also a Professor of economics at the Chicago University, and is considered as one of the leaders of the Chicago School of Economics.

²⁶¹ Gaughan, *Mergers, Acquisitions, and Corporate Restructurings*, *supra* note 238, at 28. 2002; BLACK, *Conceptual Foundations of Antitrust*, *supra* note 242, at 24. 2005, citing George J. Stigler, *Monopoly and Oligopoly by Merger*, 40 THE AMERICAN ECONOMIC REVIEW 23(1950).

²⁶² WESTON & WEAVER, *Mergers and Acquisitions*, *supra* note 240, at 8. 2001; BLACK, *Conceptual Foundations of Antitrust*, *supra* note 242, at 24. 2005.

of the Price-Earnings Ratio (hereinafter P/E),²⁶³ which will be discussed later along with the other mergers incentives.

Accordingly, it was claimed that banks unlike the first two waves did not finance this wave, whereas businesses heavily relied on the financial engineering tools as a new financing option.²⁶⁴ It was also reported that the strict enforcement of antitrust during that period, and the enactment of the Clayton Act of 1914 and its amendments,²⁶⁵ as a reinforcement of the Sherman Act, were directly affecting the merger activity since the second wave.²⁶⁶ Strictly speaking that could not be considered as the fuel of that wave, but it could be easily be considered as to shaping the conglomerate as a means to avoid the antitrust violation. It was also reported that this wave reached its peak in 1969 with 6,107 mergers reported only in that year as shown in the next figure, and it was also reported that by the end of this wave 15 of the top 200 corporations of the US fortune 500 were conglomerate.²⁶⁷

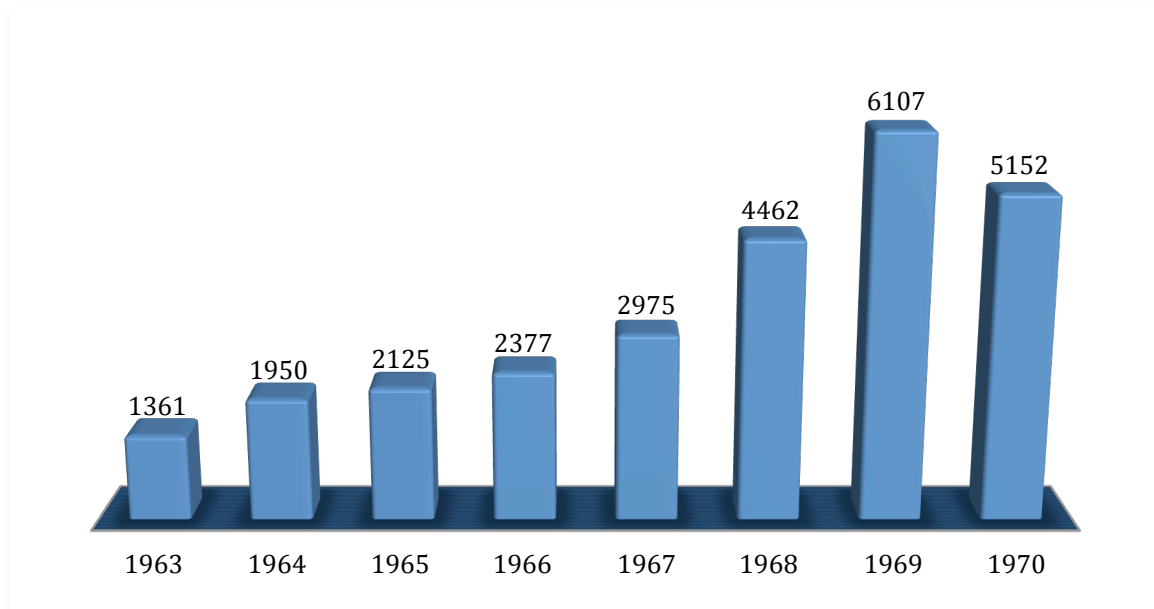


Figure 4: Number of reported mergers during the period 1963-1970²⁶⁸

²⁶³ DEPAMPHILIS, Mergers and Acquisitions Basics All You Need to Know, *supra* note 239, at 25. 2011; GAUGHAN, Mergers, Acquisitions, and Corporate Restructurings, *supra* note 238, at 35-36. 2002.

²⁶⁴ GAUGHAN, Mergers, Acquisitions, and Corporate Restructurings, *supra* note 238, at 31. 2002.

²⁶⁵ 15 U.S.C. §§ 12-27

²⁶⁶ GAUGHAN, Mergers, Acquisitions, and Corporate Restructurings, *supra* note 238, at 29. 2002.

²⁶⁷ MICKLETHWAIT & WOOLDRIDGE, The Company: A Short History of a Revolutionary Idea, *supra* note 27, at 121. 2003.

²⁶⁸ The data were retrieved from GAUGHAN, Mergers, Acquisitions, and Corporate Restructurings, *supra* note 238, at 33. 2002.

The fourth merger wave (1980 – 1990) was characterized by the unfriendly or hostile takeover (hereinafter takeover), which briefly means entering into a merger transaction without the consent of one party or more.²⁶⁹ The advanced financial engineering trend, during this period, played a greater role in that regard, especially by making use of the new financing tools like junk bonds,²⁷⁰ and leveraged buyouts²⁷¹ (hereinafter LBO).²⁷² On the other hand it was also claimed that these very financing tools i.e. the junk bonds was double sword, it financed most of the LBO during this wave, and when it collapsed by the end of the period, it put the wave to an end.²⁷³

Analyzing the data, specifically the numbers of the transactions and the value of the merger transaction that were conducted during the third wave and comparing them with the numbers and the value of the mergers of the fourth wave in the US, reveals a very surprising result which is despite the fact that the number of mergers conducted in the fourth wave were very low if compared to the number of mergers conducted in the third wave, the value of the transactions in the fourth wave were very high compared to the value of the transactions in the third wave, as figure illustrates.

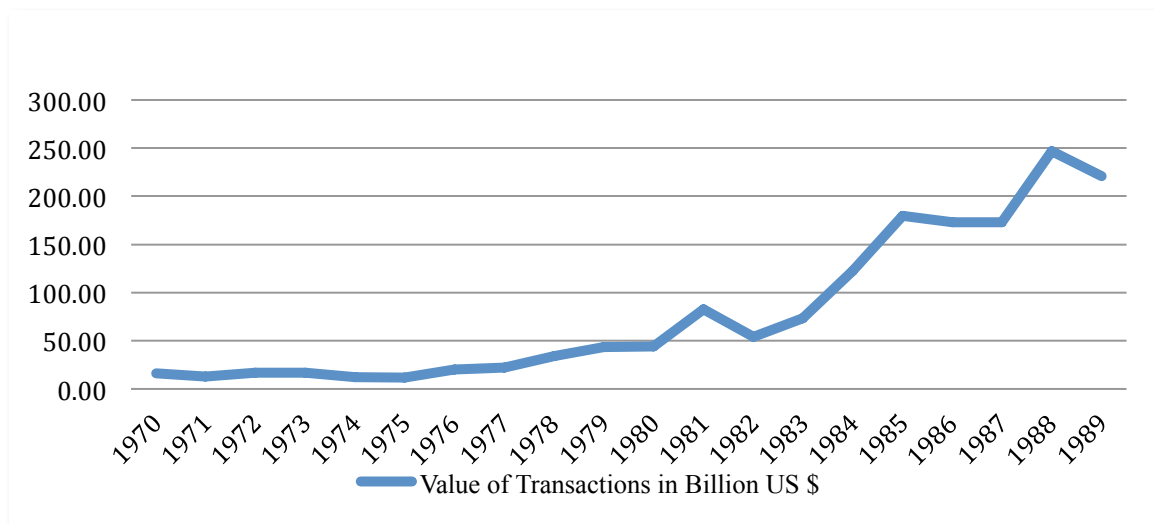


Figure 5: Value of transactions during the period 1970-1989²⁷⁴

²⁶⁹ COLE, M&A Titans: The Pioneers Who Shaped Wall Street's Mergers and Acquisitions Industry, *supra* note 240, at 2. 2008; DEPAMPHILIS, Mergers and Acquisitions Basics All You Need to Know, *supra* note 239, at 25. 2011.

²⁷⁰ Junk bonds are high default risk bonds, but offer very high-yields.

²⁷¹ For more details about LBO *see infra* p.78.

²⁷² WESTON & WEAVER, Mergers and Acquisitions, *supra* note 240, at 8. 2001.

²⁷³ GAUGHAN, Mergers, Acquisitions, and Corporate Restructurings, *supra* note 238, at 50-51. 2002.

²⁷⁴ Data retrieved form Lokey Houlihan, Howard & & Zukin, Mergerstat Transaction Roster 1998 (Houlihan, Lokey, Howard & Zukin 1998).

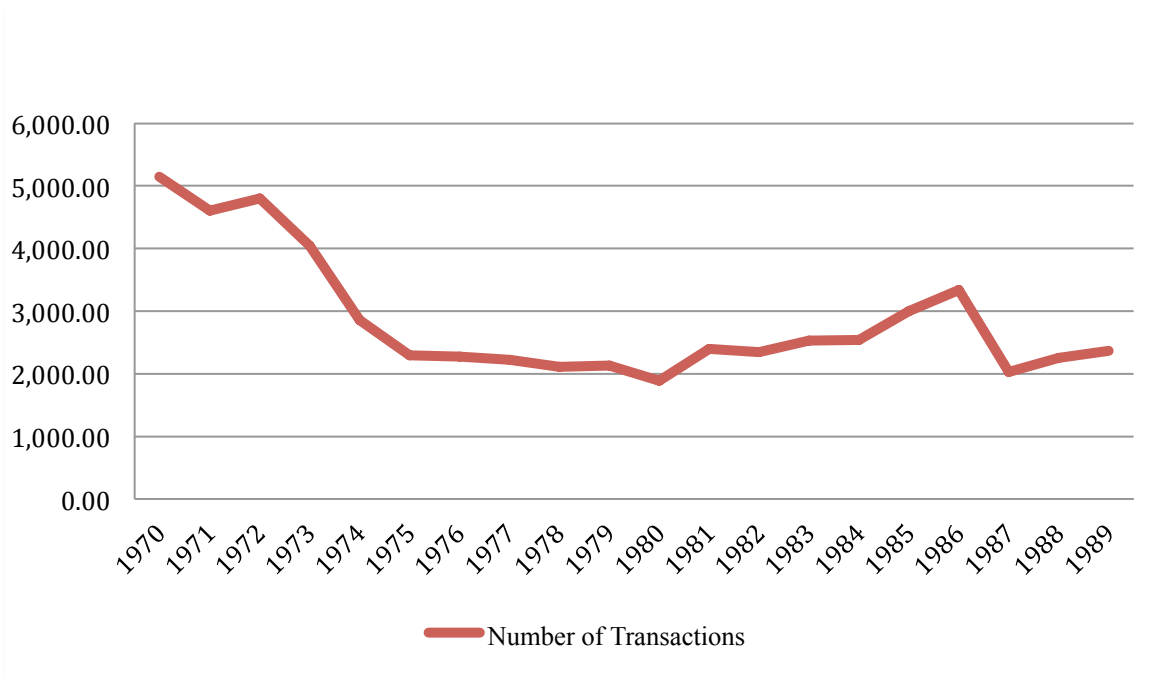


Figure 6: Number of transactions during the period 1970-1989²⁷⁵

The fifth merger wave (1992 – 2000) was characterized by the essence of scaling and going global as a main goal, and that was very appealing, and even that period was known as “the age of the Strategic Mega-Merger,”²⁷⁶ but very significant percentage of merger activities was limited to only five or six industries.²⁷⁷ Moreover, it was reported that the mergers activities during this wave set new records, regarding the transaction values and even the number of transactions.²⁷⁸ In the same context, it was also reported that during this merger wave, the merger benefits was undoubtedly expected, and the mergers in addition to some similar forms of transactions created approximately 20% of the American fortune 1,000 corporations.²⁷⁹

Meanwhile, and because the fact that the mergers were scaling and going on all over the world, other countries relatively experienced the same merger wave, and it could be easily claimed that starting from the fifth wave mergers were expanding and crossing borders, and that became a fact not just a hope. Despite the fact that the data below revealed that other countries

²⁷⁵ Data retrieved from *Id.*

²⁷⁶ COLE, *M&A Titans: The Pioneers Who Shaped Wall Street's Mergers and Acquisitions Industry*, *supra* note 240, at 2. 2008; DEPAMPHILIS, *Mergers and Acquisitions Basics All You Need to Know*, *supra* note 239, at 27. 2011; GAUGHAN, *Mergers, Acquisitions, and Corporate Restructurings*, *supra* note 238, at 51. 2002.

²⁷⁷ WESTON & WEAVER, *Mergers and Acquisitions*, *supra* note 240, at 8. 2001.

²⁷⁸ DEPAMPHILIS, *Mergers and Acquisitions Basics All You Need to Know*, *supra* note 239, at 27. 2011.

²⁷⁹ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 145-146. 2003.

were not experiencing the same merger wave in the same magnitude like the US, that might confirm in the same time that the mergers turned out of the American box and spread across the globe. It was also reported in a report by the United Nations Conference on Trade and Development (hereinafter UNCTAD) that during this wave, the number of mergers grew by 42% per year.²⁸⁰

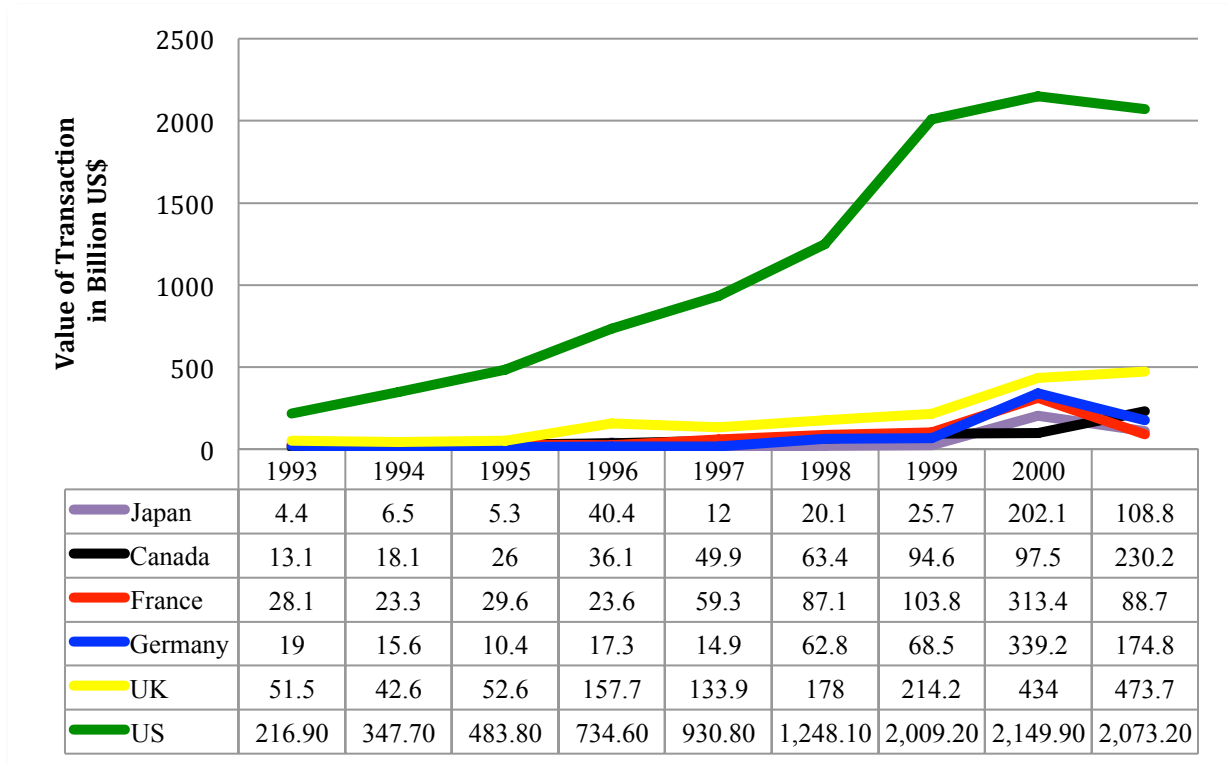


Table 1: Data table of the fifth merger wave in certain jurisdictions²⁸¹

The sixth merger wave (2002 – 2007) started with the “rebirth” of the LBO, the heavy use of financial engineering tools in general, and very complicated debt transactions, and it ended by the world financial crisis in 2007.²⁸² The globalization spirit, and the maturity of the previous mega mergers corporations and the increase of their appetite to go global also characterized this wave; moreover the mergers transactions started to be more complicated similar to the trends, and there are also new players.²⁸³ Generally speaking, it is not easy to

²⁸⁰ UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, CROSS-BORDER MERGERS AND ACQUISITIONS AND DEVELOPMENT at XIX (United Nations. 2000).

²⁸¹ Data was retrieved from GAUGHAN, Mergers, Acquisitions, and Corporate Restructurings, *supra* note 238, at 54. 2002., citing Thomson Financial Securities Data.

²⁸² DEPAMPHILIS, Mergers and Acquisitions Basics All You Need to Know, *supra* note 239, at 27. 2011.

²⁸³ See generally 2008 *International Mergers & Acquisitions: Creating Value in an Increasingly Complex Corporate Environment*, 2008, available at Financier Worldwide.

scrutinize and understand the complex trends and the characteristics of mergers starting from this wave henceforth, that requires painstaking and dedicated efforts, but all the coming discussions will be an eye opening of what is going on, starting from this relatively recent period.

e) Multinational corporations

The German idealism, philosopher Hegel,²⁸⁴ asserted that the state is and will always be the centerpiece in any society, while both of Adolf Hitler²⁸⁵ and Vladimir Lenin²⁸⁶ argued that it will be the political party, while others maintained it will be the other institutions like the church.²⁸⁷ None of those claims seems to be materializing, and neither what Samuel Madden, a famous Irish satirist in the 17th century, ironically expected as described in one of his novels, that two titan corporations would rule the world in the 20th century.²⁸⁸

It is undoubtedly true, that the development of the modern form of corporation was not accidental,²⁸⁹ but the corporation idea was steadily developing throughout centuries not decades, as it was shown during the previous discussions. In that context, it could be easily claimed that the proliferation of the latest breakthrough of the corporation history, which is the multinational corporations, was an inevitable result of the merger waves; this breakthrough is worth studying.

During the third merger wave, the EU countries woke-up to a nightmare; most of the giant American corporations like IBM, Heinz, Kellogg, Ford and P&G invaded the EU markets, and many American corporations practiced hostile takeovers toward European corporations.²⁹⁰ It was also reported even before that i.e. from the end of World War I or the beginning of the second merger wave and before the third merger wave, that the financing institutions contributed

²⁸⁴ Georg Wilhelm Friedrich Hegel (August 27, 1770 – November 14, 1831) was a German philosopher, and a major figure in German Idealism. His historicist and idealist account of reality revolutionized European philosophy and was an important precursor to Continental philosophy and Marxism.

²⁸⁵ Adolf Hitler (April 20, 1889 – April 30, 1945) was an Austrian-born German politician and the leader of the Nazi Party and the National Socialist German Workers Party. He was chancellor of Germany from 1933 to 1945.

²⁸⁶ Vladimir Lenin (April 22, 1870 – January 21, 1924) was a Russian communist, politician and political theorist.

²⁸⁷ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at XIV-XV. 2003.

²⁸⁸ Samuel Madden (1687-1765), was an Irish author, and for more details about what he expected for the 20th century during his time *see generally* Samuel Madden, *Memoirs of the Twentieth Century*, (1733).

²⁸⁹ Williston, *HARVARD LAW REVIEW*, *supra* note 26, at 113 (1888).

²⁹⁰ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 171. 2003.

to finance the corporations to go global, for instance that period witnessed the expansion of the utility sector especially electricity by the help of multinational corporations.²⁹¹

It was also reported that by the sixth merger wave the estimated number of multinational corporations across the globe were 65,000 corporations, and the expansion was not limited to giant corporations, because small corporations were also given the opportunity to finance their deals and to mimic giant corporations.²⁹² It is not clear if the inevitable result of the proliferation of multinational corporations was a driving force for the convergence of the different systems of corporate laws across the globe, or the convergence of the corporate laws was the fuel that drove the corporations to go global. It was even maintained that since the origin of the corporation, the corporate law was founded and designed to be a global tool.²⁹³

All that was the main cause that corporations in general and especially multinational corporations shared the same characteristics across the globe; the people either at their “home or abroad” never loved them, however to the contrary, they are also considered as the “force for good ... [and] they have given up sinning quite so egregiously.”²⁹⁴ In addition to that, it was even claimed that the convergence of the corporate laws across the globe was characterized by taking the same form of the merger waves; it was also episodic and constitutes “cyclic” movements or waves.²⁹⁵

Finally, it is noteworthy that it was argued that there was a corporate raid, for example JPMorgan Chase & Co. is the result of merger transactions between more than one thousand of its predecessor, which were conducted over almost the last century.²⁹⁶ Moreover, by the end of the fifth merger wave the hundred biggest economies in the world were all corporations.²⁹⁷ Generally speaking, the corporation turned out now to be the largest and most powerful

²⁹¹ William J. Hausman, et al., *Global Electrification: Multinational Enterprise and International Finance in the History of Light and Power, 1880s-1914*, 58 REVUE ÉCONOMIQUE 175, at 176, 186-187 (2007).

²⁹² MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 173-174. 2003.

²⁹³ Gevurtz, WASHINGTON LAW REVIEW, *supra* note 128, at 479-480 (2011).

²⁹⁴ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 176-178. 2003.

²⁹⁵ Gevurtz, WASHINGTON LAW REVIEW, *supra* note 128, at 485-486 (2011).

²⁹⁶ J. P. Morgan Chase, *The History of JPMorgan Chase & Co: 200 Years of Leadership in Banking at 1* (JPMorgan Chase & Co ed., JPMorgan Chase & Co. 2008).

²⁹⁷ BRAITHWAITE & DRAHOS, *Globalisation of Corporate Regulation and Corporate Citizenship*, *supra* note 43, at 4. 2003.

institution throughout the history.²⁹⁸ Meanwhile, the government or the state across the globe was not standing idly toward that corporate raid, but there was always some sort of control or at least relation between these two powerful institutions, and the story of this relation will be discussed in detail in that coming discussion.

4. Relation between State and Corporations

Throughout history different forms or models of the state were developed, for instance in the early history i.e. the Middle Ages, the ruler whether a King, Queen, or even the church, was the owner of everything.²⁹⁹ Scrutinizing the different models from the perspective of the relation between the state and the corporation reveals that throughout history there was always some sort of relation between both of them. At one end of the spectrum that relation was that the state was fully controlling the corporation either by granting the creation of corporation itself, licensing its practices, or by overseeing corporation as a regulator, and to the other end of the spectrum where the state was giving a hand to help the corporation surviving by means of subsidies and some other helpful tools.

If it is true that the corporation has always been the focus of attention or in other words the key player in the economy, and these relation spectrums could be shortened in a quotation by Ronald Regan³⁰⁰ as he said: “Government’s view of the economy could be summed up in a few short phrases: If it moves, tax it. If it keeps moving, regulate it. And if it stops moving, subsidize it.”³⁰¹ On the other hand, the corporation role changed throughout the history, and accordingly the following discussion will be an overview of the stages of the different roles throughout history, and how the relation with the state was developed.

²⁹⁸ KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES* at 4 (University of Chicago Press. 2006).

²⁹⁹ BRAUDEL, *The wheels of commerce*, *supra* note 45, at 519. 1981.

³⁰⁰ Ronald Wilson Reagan (February 6, 1911 – June 5, 2004) was an American actor and politician, and the 40th President of the United States.

³⁰¹ PRESIDENT REAGAN RONALD UNITED STATES OFFICE OF THE FEDERAL REGISTER UNITED STATES, *PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, RONALD REAGAN: 1981-1988-89* at 1109 (U.S. G.P.O. 1982).

a) Early history and feudalism

Despite the fact that the information concerning the early history of feudalism³⁰² as a form of relation between the state and corporations are sometimes contradicting and in other instances unclear. The following discussion will continue to reveal the effect of feudalism on the development of corporation as an idea. At first glance one might think that feudalism has no effect or even not related to the development of corporation, but analyzing the history of feudalism reveals that the relation started as land ownership issues then it turned into the ruler granting the right to create the corporation.

The history might be scrutinized even before feudalism, whereas the first reported relation between one form of the state, which was represented by the temple, and the landowners, was just after the Sumerians had developed the concept of land ownership around 3000 B.C., and by entering into agreements, the temple was granted the right to be involved, and it was claimed that the temple practiced a form of control or supervision over all the issues concerning the land ownership.³⁰³

Then during the Middle Ages, an important breakthrough in that relation happened; it was the development of the feudalism, an idea by the Norman Conquests,³⁰⁴ where there was a ranked system of land ownership and control of society, it started with the lord or noble who was at the highest rank and it ended with the *fief* at the lowest rank.³⁰⁵ In that context it was held that feudalism paved the way for the development of capitalism, while others asserted that it was the rights and the privileges granted to certain lords or nobles that drove the development of the capitalism, in other words the nobles and lords found feudalism “a favourable climate in which ... [they could] ‘institutionalize their own position.’”³⁰⁶

To elaborate more on how they institutionalized their positions, the nobles were granted rights to collect feudalism fees or taxes on behalf of the ruler, and by time they figured out that these tasks should be performed under some sort of institution in order to stand for a long time, and consequently they recognized that the idea of creating a corporation would help them

³⁰² Definitions of feudalism are contradicting and inconsistent, for more details about that *see generally* Elizabeth A. R. Brown, *The Tyranny of a Construct: Feudalism and Historians of Medieval Europe*, 79 THE AMERICAN HISTORICAL REVIEW 1062, at 1063-1088 (1974).

³⁰³ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 3-4. 2003.

³⁰⁴ CATER, *A History of English Legal Institutions*, *supra* note 13, at 16. 1910.

³⁰⁵ Brown, THE AMERICAN HISTORICAL REVIEW, *supra* note 302, at 1071 (1974).

³⁰⁶ BRAUDEL, *The wheels of commerce*, *supra* note 45, at 594. 1981.

protecting these personal interests. It was reported that the oldest corporation of that purpose was the Aberdeen Harbour was created in 1136,³⁰⁷ and the City of London Corporation was another example that was also created in the 12th century, and interestingly both of these two corporations are alive today.³⁰⁸

Then the idea of seeking that institutional framework became widespread and proliferated by time, and it was even reported that any group of people that planned to avoid the feudalism system struggled to be granted a corporation right, for instance by that time many “groups” were granted the right of to be a corporation, for example the boroughs, guilds, universities.³⁰⁹ Moreover, literally most of the towns in the UK were granted the right to be corporations at that period.³¹⁰

Meanwhile, the widespread use of corporations was not serving the ruler interests, because as it was previously shown that one of the old corporations’ characteristics was the right of perpetual succession, which means that whenever a group of people are granted such corporation rights they will avoid the feudalism system forever, and accordingly Edward I enacted what was known as the Statute of Mortmain in 1279, in order to control the amount of land to be owned by corporations. It should be noted that despite the fact that the Statute of Mortmain could be clearly considered as a form of state control over corporations, it did not stop the widespread of the idea of corporation.³¹¹

³⁰⁷ For more information about the current activities and news of the Aberdeen Harbour corporation, see its official website: <http://www.aberdeen-harbour.co.uk> last visited October 1, 2014

³⁰⁸ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 12. 2003. For more information about the current activities and news of the City of London Corporation, see its official website: <http://www.cityoflondon.gov.uk> last visited October 1, 2014

³⁰⁹ STEWART KYD, *A TREATISE ON THE LAW OF CORPORATIONS* at 63 (Printed for J. Butterworth. 1793-1794). Stewart Kyd published that definitive treatise on the law of corporate boroughs in two volumes in 1793-94.

³¹⁰ Williams, *AMERICAN UNIVERSITY LAW REVIEW*, at 377 (1985).

³¹¹ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 13. 2003.

b) Granting charters and monopolies³¹²

Most of the corporations that were created under the feudal system were granted certain exclusive rights or monopoly, in order to perform its tasks, that monopoly was actually granting those corporations a privilege to accumulate profits, for instance it was reported that some of those corporation made profits rates of more than 150%.³¹³ However, the corporations granted to those monopolies were not limited to the feudal corporation, because it was also granted to other individuals in order to practice trade, and the first private corporation to be chartered was Stora Enso of Sweden,³¹⁴ which was chartered in 1347,³¹⁵ and as previously mentioned that the first joint-stock corporation was the Muscovy Company, which was founded in 1553-55.³¹⁶

As previously been shown, Sir William Coke and others claimed that the corporation, during the early ages, were created by one of the following instruments; (1) by common law, (2) by charter issued by the king, (3) by an act of parliament, (4) by prescription.³¹⁷ Meanwhile, it is noteworthy that for a corporation to be created by prescription i.e. long time standing or by common law it should not practice trade, examples of those corporations; the Brought, the Church, the Parish, etc., and even in those cases it was held that those corporations hold an unstated “assent of the King.”³¹⁸

In that context it should be noted that granting the right of incorporation by the ruler or by the parliament was almost the same, and most of the early scholars even failed to differentiate between them, furthermore it was asserted that granting the right to incorporation by the ruler was more appreciated in the society, because it was considered that the parliament was just an

³¹² For an early definition of the term monopoly by Sir Edward Coke, *see* EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES at 181 (Printed by M. Flesher, for W. Lee, and D. Pakeman. 1644). It was defined as: “an Institution, or allowance by the King, by His Grant, Commission, or otherwise, to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working or using of anything, whereby any person or persons, bodies politic or corporate are sought to be restrained of any freedom, or liberty that they had before or hindered in their lawful trade.”

³¹³ BRAUDEL, The wheels of commerce, *supra* note 45, at 343. 1981.

³¹⁴ For more information about the current activities and news of the Stora Enso corporation, see its official website: <http://www.storaenso.com> last visited October 1, 2014

³¹⁵ MICKLETHWAIT & WOOLDRIDGE, The Company: A Short History of a Revolutionary Idea, *supra* note 27, at 12. 2003.

³¹⁶ Gevurtz, WASHINGTON LAW REVIEW, *supra* note 128, at 481 (2011); BRAUDEL, The wheels of commerce, *supra* note 45, at 439, 449. 1981; MICKLETHWAIT & WOOLDRIDGE, The Company: A Short History of a Revolutionary Idea, *supra* note 27, at 18. 2003.

³¹⁷ COKE, The selected Writings and Speeches of Sir Edward Coke, *supra* note 20, at 363. 2003. ATKINS, The Law of Corporations Containing the Laws and Customs of all the Corporations and Inferior Courts of Record in England, *supra* note 101, at 8-9. 1702. SHEPPARD, Of Corporations, Fraternities, and Guilds, *supra* note 96, at 6-8. 1659.

³¹⁸ DAVIS, Essays in the Earlier History of American Corporations, *supra* note 86, at 6. 1917.

agent of the ruler, so it was more prized to be granted the right from the principal.³¹⁹ In that regard it is noteworthy that if the corporation was created by an act of the parliament it was known as a “statutory company.”³²⁰

Meanwhile, it was reported that the instrument issued by the ruler to grant a monopoly for a group or corporation was named a “charter,” while it was named as a “letter of patent” if it was granted to an individual.³²¹ In fact some might claim that such distinction is not important, however it is important, because the fact that granting a monopoly for an individual will be for his own good and is not accepted and vice versa.³²² That fact was early realized by Francis Bacon in his speech before the parliament in November 20, 1601 as he said: “If her Majesty... make patent or a monopoly into any of her servants, that we must go and cry out against; but if she grant it to a number of burgesses, or a corporation, that must stand, and that, forsooth, is no monopoly.”³²³

Moreover, it was claimed that most of the successful trading corporations were created at first as monopolies,³²⁴ and without the monopoly rights most of those corporations would not realize any profits at all.³²⁵ Likewise, other individual merchants whom were not granted any letter of patent and also most of the public, were all suffering from these monopolies, and that led to a great debate among the people everywhere and most importantly in the UK Parliament, especially because of the increase in the prices and poor quality of the goods offered by the monopoly corporations during that period, and the debate ended by the enactment of the Statute of Monopolies³²⁶ in 1623, which prohibited certain types of monopolies.³²⁷

The right to grant the other types of monopolies, which were permitted under the Statute of Monopolies, was an abused by the King at that time, to the extent that it was reported that the terms “incorporated” and “monopoly” were synonyms in the UK, and that actually led to reserve

³¹⁹ Eaton, THE YALE LAW JOURNAL, *supra* note 19, at 282 (1903).

³²⁰ PETTET, Company Law, *supra* note 125, at 18. 2005.

³²¹ Laski, HARVARD LAW REVIEW, *supra* note 17, at 584 (1917). DAVIS, Essays in the Earlier History of American Corporations, *supra* note 86, at 6. 1917.

³²² For more details about the history of monopoly during the period of 1780-1860 see MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 at 109-139 (Harvard University Press. 1977).

³²³ GEORGE WALTER PROTHERO, SELECT STATUTES AND OTHER CONSTITUTIONAL DOCUMENTS ILLUSTRATIVE OF THE REIGNS OF ELIZABETH AND JAMES I at 111 (Clarendon Press 3d ed. ed. 1906).

³²⁴ BRAUDEL, The wheels of commerce, *supra* note 45, at 443. 1981.

³²⁵ SMITH, An Inquiry Into the Nature and Causes of the Wealth of Nations, *supra* note 112, at 1008. 1976.

³²⁶ Statute of Monopolies 1623, Chapter 3 21 Ja 1

³²⁷ COLINO, Competition Law of the EU and UK, *supra* note 185, at 4-5. 2011.

the right to grant monopolies only to the parliament, in 1688.³²⁸ However, the Statute of Monopolies was revoked by 1844 when the state realized that the monopoly was not the problem and that the problem was the abuse of the monopoly powers, consequently that is the principle adopted nowadays in the UK, under the Competition Act of 1998 and the Enterprise Act of 2002.³²⁹

It was also reported that all the previously mentioned development of granting the incorporation by a ruler charter or by act of parliament, was also taking effect in the American Colonies until its independence was declared.³³⁰ After the independence, the development of the creation of corporation was slightly different in the US than the UK, for instance it was reported that according to a Federal Circuit Court decision in 1771, the creation of corporation by prescription was more accurately described in the US and was also limited only to “religious, charitable, or literary purposes.”³³¹

Granting the charter was not limited only to the ruler and the parliament in UK territories, but it was also reported that the parliament in the American Colonies practiced that right as early as 1652, for example the Massachusetts General Court granted the people of Boston the right to form corporations, in order to support themselves with utilities such as water.³³² In the same context, too many corporations were chartered by the parliament in the US after independence, most notably for the purpose of developing railroads, which was known as the “railroad mania,”³³³ and by the end of the 18th century most of the US states were involved in granting corporation charters for all purposes.³³⁴ It is noteworthy here that the *Economist* started in its first issue by designating a small portion of the stock market column, and then it turned to be a nine page section designated only for the railroad stock market in 1845.³³⁵

Finally the previous discussion shows that both the ruler and the parliament were only controlling the right to incorporate or granting monopolies, as both of the terms were almost

³²⁸ Hein, THE UNIVERSITY OF TORONTO LAW JOURNAL, *supra* note 27, at 137 (1963).

³²⁹ COLINO, Competition Law of the EU and UK, *supra* note 185, at 5. 2011.

³³⁰ DAVIS, Essays in the Earlier History of American Corporations, *supra* note 86, at 7. 1917.

³³¹ Samuel Hazard, *The Opinion of the Circuit Court of the United States, in and for the Eastern District of Pennsylvania, on the Will of Sarah Zane, a member of the Society of Friends*, in HAZARD'S REGISTER OF PENNSYLVANIA at 308-309, (Samuel Hazard ed. 1834).

³³² DAVIS, Essays in the Earlier History of American Corporations, *supra* note 86, at 89. 1917.

³³³ BRAITHWAITE & DRAHOS, Globalisation of Corporate Regulation and Corporate Citizenship, *supra* note 43, at 10. 2003.

³³⁴ HORWITZ, The Transformation of American Law, 1780-1860, *supra* note 322, at 109. 1977.

³³⁵ MICKLETHWAIT & WOOLDRIDGE, The Company: A Short History of a Revolutionary Idea, *supra* note 27, at 48-49. 2003.

synonyms, but also both of them were trying to take a bigger role in that regard, and in the same time the public and non incorporated groups were suffering from difficulties under the monopolies. That relation between the state, represented by the ruler and the parliament, and the corporation did not stop at that end, whereas the state decided not only to control the corporation, but also to make use of it, as it will be scrutinized in the coming discussion.

c) Corporation as a financing institution

Surprisingly, it was reported during the end of the 17th century and the beginning of the 18th century, that the state was going “hand in hand” with corporations, and nothing was forbidden by that time in the commercial community, and the state even “turn[ed] a blind eye” if something went wrong.³³⁶ Meanwhile, that might be foreseeable if someone was well informed about what the state was planning to do, the state introduced such flexibility and cooperation but that was not for free, something should be given back in return, and that will be revealed in this discussion.

The idea of converting the state’s debt into tradable or transferable bonds was first invented in Naples in the 17th century, by Neapolitan Lorenzo Ponti in 1653,³³⁷ the state usually used the debt to help in accomplishing all the tasks that require financial resources, for instance it was used sometimes to finance war,³³⁸ other times to finance “quasi-government” purposes for example, the exploration of sea passage voyages. Meanwhile, despite the fact that the idea of securitization was a Neapolitan invention, the ruler in the UK decided to heavily make use of it, and that led to the result that the UK appeared to be a more successful country than the other European countries during that period, for instance more successful than France.³³⁹

In order to consider the idea of securitization of the national debt as a landmark in the relation between the state and corporation, that requires one more step, the step of converting the debt into corporate shares, and that step was actually invented in the same time in both the UK

³³⁶ BRAUDEL, *The Perspective of the World*, *supra* note 15, at 206. 1981.

³³⁷ BRAITHWAITE & DRAHOS, *Globalisation of Corporate Regulation and Corporate Citizenship*, *supra* note 43, at 25. 2003.

³³⁸ BRAUDEL, *The wheels of commerce*, *supra* note 45, at 519. 1981.

³³⁹ BRAITHWAITE & DRAHOS, *Globalisation of Corporate Regulation and Corporate Citizenship*, *supra* note 43, at 4. 2003.

and France. In France, that step was motivated by John Law,³⁴⁰ whereas after he invented the paper money he converted the debt bonds of the French government into a joint-stock corporation in 1729, that corporation was the Mississippi Company and it handled the French government debt that was so huge over time, especially after the war during the period from 1689 to 1714.³⁴¹

In the UK, the position was almost the same, as previously shown the parliament announced on January 21, 1720, that the South Sea Company would handle the British government debt exclusively.³⁴² Moreover, as it was previously shown, handling the debt of the state caused one of the biggest financial crises in the history and that it was even named “[t]he drama of the South Sea Company.”³⁴³ Similarly, the Mississippi Company also turned out to be a bubble that busted suddenly in the face of the investors who found no assets.³⁴⁴ Meanwhile, it was claimed that the “drama of the South Sea Company” did not reach the same peak of the Mississippi Company crisis.

Unfortunately, that stage of the relation between the state and the corporation was unsuccessful and it ended with an unhappy crises, and as it was previously mentioned the Bubble Act was introduced by the British Parliament to survive the crisis and in fact it did; by prohibiting the uncharted corporations and limiting the power of incorporating incorporation only to the parliament, but that was at the expense of the economy and development of the corporation idea. In fact, those led to the next stage of the relation, which in the repeal of the Bubble Act and allow individuals to incorporate corporations just as easy by registration as it will be shown in the coming discussion.

d) Incorporation by registration

After the period of the mentioned financial crises, the economy of most of the European countries was struggling, and that led the state to start some initiatives to restore the economy,

³⁴⁰ John Law (April 21, 1671- March 21, 1729), a Scottish economist and gambler, invented paper money and was responsible of the Mississippi Company crisis in France in 1720.

³⁴¹ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 28-29. 2003.

³⁴² *Id.* at 31-32.

³⁴³ Arner, *SOUTHERN METHODIST UNIVERSITY LAW REVIEW*, *supra* note 27, at 33 (Winter 2002); PETTET, *Company Law*, *supra* note 125, at 9. 2005.

³⁴⁴ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 30-31. 2003.

and those initiatives mostly focused on removing all the internal customs, duties, and tolls, and that initiatives began in Spain as early as 1717 and its end was in France by 1790.³⁴⁵ But it could be easily recognized that all the initiatives were modest, at least in its scope, and it did not deliver what was expected, and that led to the following radical changes in the relation between the state and the corporation in order to restore the economy.

As it was previously mentioned, during the discussion of the South Sea Company and the Bubble Act,³⁴⁶ the British Parliament repealed the Bubble Act and enacted a new act that permit the creation of a new joint-stock corporation as easily as by registration. However, that was not applicable to corporations for all purposes, for instance joint-stock corporation for the purposes of practicing banking were not allowed to incorporate by registration, and that could be attributed to the fear from future crises that could have similar effect of the crisis resulted from the use of the South Sea Company as a financing institution.

Starting from 1844, it was allowed for any individual to incorporate a joint-stock corporation by registration.³⁴⁷ In that context, it was claimed that incorporating a new corporation just by registration “truly arrived” by that time, and a new dimension was opened in the relation between the state and the corporation by adopting that liberalized approaches.³⁴⁸ In fact that liberalized approach started by allowing the incorporation by registration but it did not stop at that end, many other acts followed the same approach for a long period of time, for instance it was reported that by 1856, the limited liability principle was permitted by law, and that led to the proliferation of the incorporation and the economy in general.³⁴⁹

It is noteworthy that that liberalized approach was expanded to include industries other than the trade, it mainly expanded to include banking; whereas banks was granted the right to be incorporated as a limited liability corporation in UK by the 2nd half of the 19th century, and that liberalized approach was also borrowed by many other countries in Europe and across the globe.³⁵⁰ Meanwhile, that liberalized approach was followed by another trend that was not in the same line, thus the state started to plan for opening a new dimension in its relation with

³⁴⁵ BRAUDEL, *The Perspective of the World*, *supra* note 15, at 290. 1981.

³⁴⁶ *See supra* p.30.

³⁴⁷ PETTET, *Company Law*, *supra* note 125, at 9. 2005.

³⁴⁸ Braithwaite & Drahos, *Globalisation of Corporate Regulation and Corporate Citizenship*, *supra* note 43, at 10. 2003.

³⁴⁹ PETTET, *Company Law*, *supra* note 125, at 9-10, 23-24. 2005.

³⁵⁰ Braithwaite & Drahos, *Globalisation of Corporate Regulation and Corporate Citizenship*, *supra* note 43, at 10. 2003.

corporations, which was introducing more rigorous procedures in order to regain the control over the corporations and make use of them.³⁵¹

e) Protectionism

By the end of the 19th century, it could be easily identified that many countries around the world, specially the US, fully realized the fact that they should step-in and intervene in order to protect and support their own economies against any failure. In order to accomplish that, the state should play two different roles; the first was the adoption of stricter policies toward its own domestic corporations and the second was to protect its own domestic corporations against foreign corporations. In fact, supporting the domestic corporations in order to grow was a prerequisite to benefit from them, but in the mean time they should remain under control, and that will be clearly shown in this discussion.

For instance in the US, as it was previously discussed, antitrust measures were introduced by the end of the 19th century, in order to impose some sort of control over domestic corporations. On the other hand, it was also reported that the trend during that period in many countries like France and Germany was to impose trade barrier measures against the foreign corporations,³⁵² both fiscal barriers like tariffs and antidumping measures, and non-fiscal barriers like requiring special standards and licensing requirement, and all these barriers were considered a golden key that would support the economy.

While on the other hand a more liberalized environment in the UK was flying the free-trade flag during the same periods, encouraged more foreign corporation to invest and even incorporate in the UK, and that was not an exceptional characteristic about the UK, it is undoubtedly true that that is the result in any other liberalized economy.³⁵³ In that context, it was reported that American corporations invaded the European markets during the period from the late 19th century to the beginning of the 20th century and that led the Austrian officials to send

³⁵¹ Hein, THE UNIVERSITY OF TORONTO LAW JOURNAL, *supra* note 27, at 151 (1963).

³⁵² MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 164. 2003.

³⁵³ MAHER M. DABBAH, *COMPETITION LAW AND POLICY IN THE MIDDLE EAST* at 5 (Cambridge University Press. 2007).

letters to their counterparts in the other European countries asking them to unite against to what was named the “American invaders,” in 1897.³⁵⁴

What put that trend or form of relation between the state and the corporation to an end, after almost fifty years, was the introduction of the General Agreement on Tariffs and Trade (hereinafter GATT),³⁵⁵ while it was just a temporary agreement to put into action the proposed system of tariff reductions, it turned out to be the “framework for international coordination of trade policies.”³⁵⁶ One of the main reasons behind that movement for the GATT was that by the end of the First World War most of the countries across the globe were playing the role of supporting their domestic corporation, as they were adopting protectionist measures, and even the UK surrendered to that idea in 1932.³⁵⁷

In the same context, almost all countries circumvented the GATT and all the other movement that counterattacked their tendencies to control corporation by several actions. One of these actions was designing exceptions for additional protectionism measures, such as the antidumping system.³⁵⁸ It was even reported that the state tried to introduce “industry-specific” regulations by the second half of the 20th century, and it was trying to drive all the corporate goals to the economic and social welfare ends.³⁵⁹

For instance, President Roosevelt³⁶⁰ himself said that: “[Corporations] are indispensable instruments of our modern civilization; but I believe that they should be so supervised and so regulated that they shall act for the interests of the community as a whole.”³⁶¹ The state goal was a good one to defend but how to reach it that was another part, and it could be claimed that it was not yet well planned, accordingly that form of the relation almost failed and led to the adoption

³⁵⁴ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 164. 2003.

³⁵⁵ General Agreement on Tariffs and Trade, Oct. 30, 1947.

³⁵⁶ J. M. FINGER, *THE ORIGINS AND EVOLUTION OF ANTIDUMPING REGULATION* at 24 (Country Economics Dept., World Bank. 1991).

³⁵⁷ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 170. 2003.

³⁵⁸ For more comprehensive details about antidumping laws *see generally* GREG MASTEL, *ANTIDUMPING LAWS AND THE U.S. ECONOMY* (M.E. Sharpe. 1998); Finger, J. M. (1993). J. M. FINGER & NELLIE T. ARTIS, *ANTIDUMPING: HOW IT WORKS AND WHO GETS HURT* (University of Michigan Press. 1993).

³⁵⁹ Robert B. Horwitz, *Understanding Deregulation*, 15 *THEORY AND SOCIETY* 139, at 142-143 (1986).

³⁶⁰ Theodore Roosevelt (October 27, 1858 – January 6, 1919) was the 26th President of the United States, and he was also an American author, historian, and politician.

³⁶¹ Quoted in MICKLETHWAIT & WOOLDRIDGE, *The Company: : A Short History of a Revolutionary Idea*, *supra* note 27, 182. 2003.

again of some of the old liberalized approach but possibly with a more liberalized essence, as it will be shown in the coming discussion.

f) Privatization and industry deregulation

During the second half of the 20th century most of the economies were not promising across the globe due to high inflation rates, recession, and high unemployment rates.³⁶² All these negative features of the economy were the main reasons behind pushing the state to adopt more liberalized-approach measures toward the economy in general and the corporations specifically; one of these measures was the “corporatization” which was changing the structure and the environment in the corporations owned by the government to resemble the private management schemes.³⁶³

Those measure were followed by more serious steps, one of those steps was started by the British Prime Minister Margaret Thatcher³⁶⁴ in 1982, it was the privatization trend or mania i.e. all the governments all over the globe started to sell the government owned corporation to private parties, and the British government privatized the North Sea oil and gas corporation and then it continued and privatized the British Airways, Electricity, Gas, Steel, Telecom, Water and within ten years two third of the state owned corporation were sold.³⁶⁵

Meanwhile it was also reported that not all industries had gone through the said privatization scheme, but the state reserved some industries to itself,³⁶⁶ for example it is not permissible in Egypt until now to own or to operate a power plant by a privately held corporation.³⁶⁷ But generally speaking, by 1992 the privatization mania was spreading everywhere across the European countries, and all the state owned giant corporation like Deutsche Telekom, ENI, Elf, Renault, and Volkswagen were either entirely or somewhat gone through the privatization scheme, the same was also the trend in Southeast Asia and Latin

³⁶² BAKAN, *The Corporation: The Pathological Pursuit of Profit and Power*, *supra* note 126, at 21. 2004.

³⁶³ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 126. 2003.

³⁶⁴ Margaret Hilda Thatcher (October 13, 1925 – April 8, 2013) was the leader of the conservative party in the UK from 1975 to 1990 and she was also the Prime Minister of the UK from 1979 to 1990.

³⁶⁵ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 126. 2003.

³⁶⁶ STANLEY FOSTER REED, et al., *THE ART OF M&A* at 103 (McGraw-Hill 4th ed. 2007).

³⁶⁷ For more details *see infra* p.170.

America, and it was also reported that Russian President Boris Yeltsin³⁶⁸ started a huge privatization plan through the same pattern i.e. “corporatization.”³⁶⁹

Someone may claim that the privatization has nothing to do with the relation between the state and the private corporations. Meanwhile, it was stated that there was a direct proportionate relation between the privatization as a trend and introducing regulatory measures over the corporations, and that was reported across the globe and in many industries for example the telecommunication industry and the power industry.³⁷⁰ In addition to that, it was even claimed that the privatization mania was one of the main factors that forced the state to take more radical moves in the future, which was the “deregulation.”³⁷¹

During the same period i.e. 1980s-1990s, the position in the US was totally different, due to the different structure of the corporate environment, the US was already taking the next step i.e. industry deregulation, and to be more precise the US President Jimmy Carter started by deregulating the airline industry and that was followed by the railroads and trucks and then the telecommunication, and ironically though, even after the deregulation started, the state bureaucratic representatives in the US and across the EU were ready to hold up that liberal approach by finding some roles for themselves in the new form of relation between the state and corporations.³⁷²

The deregulation liberal approach was expanded in the US to an unprecedented extent during the term of President George W. Bush,³⁷³ who was the first American president to hold the degree of a Master of Business Administration. He was planning to deregulate the power industry, but unfortunately by the end of 2001 a stream of accounting scandals started by collapsing of a giant power corporation “Enron” in just a few weeks and that was also followed by the collapse of a telecommunication giant corporation “WorldCom,” and also most of the

³⁶⁸ Boris Nikolayevich Yeltsin (February 1, 1931 – April 23, 2007), was a Russian politician and the first President of the Russian Federation from 1991 to 1999

³⁶⁹ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 127. 2003.

³⁷⁰ David Levi-Faur, *The Global Diffusion of Regulatory Capitalism*, 598 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 12, at 18 (2005).

³⁷¹ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 125. 2003.

³⁷² *Id.* at 128.

³⁷³ George Walker Bush (born July 6, 1946), is an American businessman and politician (Republican), and he was the 43rd President of the United States from 2001 to 2009.

related accounting firms like “Arthur Andersen” collapsed.³⁷⁴ Actually delving into the details of these accounting scandals is beyond the limits of this dissertation,³⁷⁵ but it should be noted that the inevitable results of these scandals was that the state started to intervene again, and some laws and regulations like the Sarbanes Oxley Act³⁷⁶ was introduced to regain power over the corporations.³⁷⁷

Undoubtedly true, the industry deregulation trend was running in parallel with other state control measures taken toward corporations. For instance, several controlling measures were introduced like the Sarbanes Oxley Act and many other protectionism measures like controlling the foreign investments in the US by the Foreign Investment and National Security Act,³⁷⁸ which will be discussed later in detail during the discussions of the impediments to the cross-border merger.³⁷⁹

In the same line, it was maintained that the deregulation was offset by the political efforts exerted towards the old goal of driving all the corporate goals to the economic and social welfare ends.³⁸⁰ Most importantly, it was claimed that the deregulation was just a deregulation of the markets, while the relation between the state and corporations started a new route of overregulation that was even more complicated than before.³⁸¹ Thus scrutinizing all the details of those current complicated and overregulation trends is unmanageable and beyond the scope of this dissertation, and it will be limited to scrutinize only the regulations of the merger industry, and to be more precise the rules that controls merges.

g) Corporation counterattacking state

It is undoubtedly true that corporation throughout the history was not that innocent powerless or idle party in that relation i.e. the relation with the state. The corporation threatened

³⁷⁴ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 153. 2003.

³⁷⁵ For more information about the Enron scandal see the documentary *Enron: The Smartest Guys in the Room* (Magnolia Pictures, 2005).

³⁷⁶ Sarbanes Oxley Act of 2002 (Pub.L. 107–204, 116 Stat. 745, enacted July 30, 2002)

³⁷⁷ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 151. 2003.

³⁷⁸ Foreign Investment and National Security Act of 2007 (Pub.L. 110–49, 121 Stat. 246, enacted July 26, 2007)

³⁷⁹ *See infra* p.186.

³⁸⁰ Horwitz, *THEORY AND SOCIETY*, *supra* note 359, at 142-143 (1986); MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 149-150. 2003.

³⁸¹ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 190. 2003.

to counterattack the state whenever it had to do so, mainly in the situation where the state was using its powers to over-control the development or the expansion of the corporation. It is noteworthy that the corporation threats were not a new phenomenon; it was as old as introducing the state measures to control corporations. This discussion will include three straightforward examples of a clear threat to the economy of state by corporations.

The first example is based on what was previously discussed concerning minorities throughout the history, whether due to nationality or religion, they did unite and form a group to feel more safe, to share the benefits among the group, and to support each other, these groups did not hesitate to threaten the state and to draw their investments, even just for personal reasons not related to the state over-control. For instance, it was reported that in 1723 the Russian government refusal of an Indian widow's request to be burned along with her dead husband led to a real threat from all Indians to take their investments and leave Moscow, therefore the Russian government bowed at the end, and it should be noted that that very incident was not the only one, the same incident was reported again in 1767.³⁸²

The second example was reported in the 1920s, when the American General Motors Corporation acquired the British Vauxhall Corporation and the German Opel Corporation, and the transaction was mainly structured to bypass the tariff imposed during that period, and it was reported that its Chief Executive Officer (hereinafter CEO) Alfred Pritchard Sloan announced it clearly when he said that: "[w]e had to work out a special form of organization that would be suitable overseas."³⁸³ That example clearly demonstrates that whenever the state show up with a new policy tool such as tariff, corporations would immigrate to a friendlier environment.

The third example was simply a dream of CEO of Dow Chemical Corporation in 1970, he revealed this saying: "I have long dreamed of buying an island owned by no nation and of establishing the world head quarters of the Dow company on the truly neutral ground of such an island, beholden to no nation or society."³⁸⁴ The dream of the Dow Chemical Corporation was similar to some extent to the second example, but it was more far reaching one, he dreamed to own the environment instead of just live in a friendly one.

³⁸² BRAUDEL, *The wheels of commerce*, *supra* note 45, at 153, 165. 1981.

³⁸³ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 170. 2003.

³⁸⁴ LESLIE SKLAIR, *THE TRANSNATIONAL CAPITALIST CLASS* at 12 (Blackwell. 2001).

The fourth example is the telecommunication corporations in Cuba; in that example the corporations were actually controlling the state and its decision.³⁸⁵ Those examples are not the full list, and it could be easily claimed that a lot of examples already appeared and will continue to appear every now and then. Those examples were mainly due to the fact that the state approach toward corporations is not always in the same manner all over the globe, and whenever one state overuse its power to control, the corporation threatens to leave that state, by making use of opportunities offered by another state that underuse its powers.

However, others argued that despite the fact that the approach of almost all the states were and will be more complicated by time, and that it is not always in one direction. The approaches are always fluctuating between the two extremes deregulation and overregulation; it was and will last as trends or “cyclic” patterns. An example is when the state sometimes uses the antitrust laws as a tool to control a corporation that already operate in a deregulated industry,³⁸⁶ and that is supporting the very claim that state was deregulating the markets or industries not deregulating the corporation itself.

Finally, it was so clear from the previous discussions that the corporations used the state to develop itself at first, but that turned out through the history to become an opportunity for the state to attack back by control and make use of the corporations, and during the history the state did not follow a single approach, it rather followed many, while struggling to manage its goals.³⁸⁷ Some of these approaches were welcomed and sometimes initiated by the corporation itself, while others were counterattacked. To sum it up, the relation between the state and corporations is a battle of interests that will never come to an end, and sometimes they cease the fire in order to take time to be prepared and re-attack, or even due to the convergence of their interests. That was perfectly summarized as that the corporation was born under a “franchise” from the society represented by the state, and the corporation will always need to keep that “franchise,” but the state will never give it up unconditionally.³⁸⁸

³⁸⁵ For more details on how the telecommunication corporations controlled Cuba *see generally* T. J. ENGLISH, et al., HAVANA NOCTURNE HOW THE MOB OWNED CUBA-- AND THEN LOST IT TO THE REVOLUTION (Playaway Digital Audio: [Manufactured and distributed by] Findaway World, LLC. 2009).

³⁸⁶ Gevurtz, WASHINGTON LAW REVIEW, *supra* note 128, at 487-489 (2011).

³⁸⁷ BRAUDEL, The wheels of commerce, *supra* note 45, at 515. 1981.

³⁸⁸ MICKLETHWAIT & WOOLDRIDGE, The Company: A Short History of a Revolutionary Idea, *supra* note 27, at 182. 2003.

II. Mergers Demystification

The following discussions will first include a technical definition of mergers as a term, and then it will include a classification of the different types of mergers, and a distinction between mergers and some other alternatives. Secondly it will include an overview of the merger dynamics; how the transaction starts with preparation and screening and moves through various steps, and how these step ends with closing the transaction, and that will also include an overview of some of the post-closing issues, as follows.

1. Mergers Definition

Although the corporation started as an embryo of the state and developed throughout the history to help it hosting the society, and there were always various breakthroughs during this very long journey, the scaling through mergers, and even more through mergers between competitors, was one of these exceptional breakthroughs.³⁸⁹ Moreover, mergers were to a great extent popular and old, the mergers waves were previously discussed, and that was relatively sufficient to have the same solid definition in most legal systems across the globe. Meanwhile, as it was previously noted that the mergers term is used in these discussions to indicate mergers, consolidations, and acquisitions, it should be noted that there is a distinction between all these terms as follows.³⁹⁰

Acquisitions were defined as the process of purchasing all or part of the shares of a corporation (hereinafter target) by another corporation (hereinafter acquirer), and by that process the target will continue to exist as well as the acquirer, but all assets and liabilities of the target that resemble the purchased shares will be owned by the acquirer. On the other hand, the merger was simply defined as the process of the combination between two or more corporations to become only one corporation, one of these corporations will survive but all the others will cease to exist. Meanwhile, consolidation is almost like the merger but in consolidation all the corporations ceased to exist, and all are combined under the formation of one new corporation.³⁹¹ The following diagram will simply illustrate the differences well to avoid any confusion.

³⁸⁹ Stigler, THE AMERICAN ECONOMIC REVIEW, *supra* note 261, at 23 (1950).

³⁹⁰ It should be noted here again that for the rest of the discussion, whenever possible and appropriate, the term “merger” will be used to indicate all these terms.

³⁹¹ MILLEDGE A. HART ANDREW J. SHERMAN, MERGERS & ACQUISITIONS FROM A TO Z at 11 (Milledge A. Hart ed., AMACOM 2nd ed. 2006); REED, et al., The Art of M&A, *supra* note 366, at 4. 2007; RICHARD A. ROBERTS &



Figure 7: Acquisition



Figure 8: Merger



Figure 9: Consolidation

However, the everyday transactions are not as simple and straightforward as these definitions or the diagram may indicate, and actually different terms are given where the combination of these processes that might be used in one transaction. To illustrate, acquirer A may purchase target B in a process known as “subsidiary merger” by which both will survive but B will be a subsidiary of A, and if then B merged again with A and cease to exist the process is known as “reverse subsidiary merger,” while in other cases different terms are also used to distinguish between the friendly transactions done by the will of all parties from unfriendly transactions, “takeover” and “hostile takeover,”³⁹² and even more terms are used for other complicated transactions, as it will be scrutinized in detail in the coming discussions.

BARRY S. MANN, *BUSINESS LAW AND THE REGULATION OF BUSINESS* at 774-775 (South-Western Cengage Learning 10th ed. 2011); DEPAMPHILIS, *Mergers and Acquisitions Basics All You Need to Know*, *supra* note 239, at 13-14. 2011.

³⁹² GAUGHAN, *Mergers, Acquisitions, and Corporate Restructurings*, *supra* note 238, at 7. 2002.

The most complicated transactions are the cross-border mergers, and while it constitutes less than 50% out of the total announced mergers across the globe,³⁹³ it is literally considered a very significant category of transactions in the world economy, because it constitutes more than 50% of the FDI.³⁹⁴ To illustrate more about how huge that kind of transactions are, and of a great value to the world economy, on April 12, 2000 the European Commission (hereinafter EC) announced that it will not block the cross-border merger transaction between the British corporation “Vodafone Airtouch” and the German corporation “Mannesmann,” and the value of the transaction was approximately 180 billion US dollars.³⁹⁵ In that context, it was also reported that the volume of the transaction done the Middle East region, as the fourth active acquirer in the world, exceeded 106 Billion US dollars in 2007.³⁹⁶

Meanwhile, it is noteworthy that due to the fact that corporations nowadays become multinational, with operations in many countries, added to the fact that is there issues related to defining the corporate nationality, sometimes it is not an easy task to distinguish between cross-border mergers and “semi-domestic” merger transactions. Moreover, there is no clear definition to what should be a pure domestic transaction and what is not. For instance, it was reported that the merger transaction between the American corporation “Wal-Mart” and the Puerto Rican corporation “Supermercados Amigo” was considered “semi-domestic” transaction because Puerto Rico is a “partially autonomous US commonwealth.”³⁹⁷

Finally, it should be noted that during the last decade of the 20th century there was an important regularly active category of players in the field of cross-border mergers, in fact they are not new players but they started to be steadily key players; those are the “Sovereign Wealth Fund” (hereinafter SWF), those SWFs are simply state-owned investment funds. In that context, it was reported that in 2007 the total value of the cross-border merger transactions exceeded 48.5

³⁹³ Mohammed, A Story of Two Halves, *supra* note 2, at 11,15. 2008; Hopkins, JOURNAL OF INTERNATIONAL MANAGEMENT, *supra* note 2, at 208-209 (1999).

³⁹⁴ Neary, THE REVIEW OF ECONOMIC STUDIES, *supra* note 3, at 1229 (2007).

³⁹⁵ Commission Notice, 2000 O.J. C 141/07.

³⁹⁶ Mohammed, A Story of Two Halves, *supra* note 2, at 15. 2008.

³⁹⁷ Daniel A. Crane, *Anti-Competitive Behavior and International Law: Substance, Procedure, and Institutions in the International Harmonization of Competition Policy*, 10 CHICAGO JOURNAL OF INTERNATIONAL LAW 143, at 149 (2009); Eleanor M. Fox, *An Anti-Monopoly Law for China: Scaling the Walls of Governments Restraints*, 75 ANTITRUST LAW JOURNAL 173, at 183-184 (2008).

billion US dollars,³⁹⁸ and the overall SWF investments across the globe were estimated by 6.5 Trillion US dollars by the end of May 2014, and that increase is expected to continue.³⁹⁹

2. *Mergers Types and Classifications*

The following discussion will show that mergers' types and classifications are vast, and that it mainly depends on the perspective. First the discussion will include a classification of mergers from an economic perspective; according to this classification mergers will be categorized as horizontal, vertical, and conglomerate mergers. Meanwhile, the second part of the discussion will include a classification from a structural and procedural perspective, whereas mergers could be classified into direct, triangular, reverse, and many other types that have more complicated structures.

A third classification will be from a financial perspective, the discussion will show how mergers are classified according to the financial schemes that are used to finance the transaction, and that depends on whether it was through debt or equity. According to that classification the merger transaction could be done through many debt structures, such as LBO, Management Buyout (hereinafter MBO), or Employee Stock Ownership Plan (hereinafter ESOP). Moreover, the merger transaction could be also done in cash, stocks or assets exchange, and also through a mixture between any of these financing tools.

In the same context, it should be noted that mergers are generally considered as a corporate restructuring transaction, whether for the purpose of growth or for any other purposes, and it could be also be distinguished from other restructuring transactions, by the fact mergers are classified as an operational restructuring process and not as a financial restructuring process. Meanwhile, there are some other trends and forms of corporate operational restructuring transactions like spin-off, carve-out, roll-up, etc.,⁴⁰⁰ thus the fourth part of the following discussion will address some of these trends and forms of transactions. The following discussion will end up by addressing some other transactions, which are usually used by corporations for the purpose of growth, as an alternative to mergers.

³⁹⁸ KALSI, *Sovereign Wealth Funds*, *supra* note 6, at 16-17. 2008.

³⁹⁹ For more details and full profile of all SWF across the globe see <http://www.swfinstitute.org> last visited October 1, 2014.

⁴⁰⁰ DEPAMPHILIS, *Mergers and Acquisitions Basics All You Need to Know*, *supra* note 239, at 17. 2011.

As it was previously mentioned, mergers could also be classified according to the nature of the approval of the transaction by the target's management and shareholders, to what is called friendly and hostile takeovers. Meanwhile, as it was previously mentioned in the introduction, that the hostile takeovers transactions are governed by specific rules that are not applied to the friendly mergers, and the discussions in this dissertation it limited to the friendly mergers, the following discussions will not include such category of classification. In the same context, and for the same reason, the following discussion will not include the classification of mergers from a tax perspective i.e. to a taxable and non-taxable merger.

a) Economic classifications

From an economic perspective, scholars usually divide mergers into three categories; horizontal, vertical, conglomerate mergers.⁴⁰¹ As it was previously mentioned during the discussion of the merger waves,⁴⁰² a horizontal merger is simply a merger between two or more corporations that are all operating at the same level in the same or related industries. For instance, the merger between two corporations that are operating at the level of manufacturer in the computer industry, like for example the merger that was concluded between Hewlett Packard and Compaq.⁴⁰³

Another example in the oil and gas industry was the merger that was concluded between two giant corporations Exxon and Mobil and between Chevron and Texaco. Moreover, as an example from what is known as the fast-moving consumer goods industry, the merger between Procter & Gamble and Gillette was also classified as a horizontal merger.⁴⁰⁴ An example from the industry of the technology and social media networking is the merger between Facebook and

⁴⁰¹ STEPHEN A. ROSS, et al., *CORPORATE FINANCE* at 818 (McGraw-Hill 6th ed. 2002); Koutsoudakis, *DAYTON LAW REVIEW*, *supra* note 198, at 227-228 (2009); DEPAMPHILIS, *Mergers and Acquisitions Basics All You Need to Know*, *supra* note 239, at 14. 2011; WESTON & WEAVER, *Mergers and Acquisitions*, *supra* note 240, at 12. 2001.

⁴⁰² *See supra* p.42.

⁴⁰³ Marco Becht, et al., *Chapter 12 Corporate Law and Governance*, in *HANDBOOK OF LAW AND ECONOMICS* at 852, (A. M. Polinsky & S. Shavell eds., 2007).

⁴⁰⁴ DEPAMPHILIS, *Mergers and Acquisitions Basics All You Need to Know*, *supra* note 239, at 14. 2011.

Instagram is a horizontal merger example,⁴⁰⁵ and even more recent, the merger between Facebook and WhatsApp.⁴⁰⁶

It should be noted that the horizontal mergers are classified into two subcategories as market-extension merger and product-extension merger; the merger would be classified as a market-extension when the merging corporations are operating in the same industry but in different markets i.e. not in the same geographic area, and in that type of mergers the corporation will get the opportunity to access all these different markets. While the horizontal merger is known as a product-extension horizontal merger if the merging corporations are operating in related industries, whereas the merging corporations will get the opportunity to share resources and operations and sometime bundling.⁴⁰⁷

On the other hand the vertical mergers, as was also previously mentioned during the discussions of the merger waves,⁴⁰⁸ could be simply defined as a merger between two or more corporations that some or all of them are not operating at the same level in the same or related industries. A good example is the merger between two corporations, one of which is operating at the manufacturing level and the other is operating at the distribution level. The merger transaction between “Time Warner” and the media production corporation “Turner,” is an example of the merger transaction concluded between the giant broadcasting and cables operator corporation.⁴⁰⁹

In addition to that, the vertical mergers are also classified into two subcategories as forward vertical mergers and backward vertical mergers; the transaction will be considered as forward transaction if the acquirer purchased a target that is operating in a level before the level that the acquirer is operating and vice versa. To elaborate more, an example of the forward vertical merger, the merger between Boise Cascade as an acquirer and OfficeMax as a target, whereas the acquirer is a wood products supplier and the target was a distributor of some of these

⁴⁰⁵ Tomio Geron, Facebook Officially Closes Instagram Deal, Forbes magazine, September 6, 2012 <http://www.forbes.com/sites/tomiogeron/2012/09/06/facebook-officially-closes-instagram-deal> last visited May, 31,2014.

⁴⁰⁶ Tim Bradshaw, As it happened: Facebook’s \$19bn WhatsApp deal, Financial Times magazine, February 19, 2014, <http://blogs.ft.com/tech-blog/liveblogs/fb-whatsapp-liveblog> last visited May 31, 2014

⁴⁰⁷ João D. Cicarini Jr., Valuation for M&A Purposes: An Analysis of its Importance to Present a Fair Value of a Company and its Implications for the M&A and Post-integration Process (2009) Aalborg University).

⁴⁰⁸ See *supra* p.42.

⁴⁰⁹ Mergers and Competition in the Telecommunications Industry Hearing before the Committee on the Judiciary, United States Senate, One Hundred Fourth Congress, Second Session September 11, 1996 at 84-85 (U.S. G.P.O. 1997).

products.⁴¹⁰ An example of a backward vertical merger is the merger between Walt Disney as an acquirer and Pixar as a target whereas the studio entertainment segment of Walt Disney Company distributed animated and featured movies and Pixar is a creator of such movies.⁴¹¹

Meanwhile, the conglomerate merger is simply the merger between two or more corporations that are some or all of them are operating in different or unrelated industries, in other words it is neither a horizontal nor a vertical merger.⁴¹² This would be a merger between two corporation, one of which is operating in any level in certain industry and the other is operating in same or other level in another unrelated industry, for example the merger that was concluded between “Phillip Morris” which is operating in the production level in the tobacco industry and “Kraft General Foods” which is operating also in the production level but in the grocery manufacturing and processing industry.⁴¹³

b) Structural and procedural classifications

A merger could be also classified according to the structure and procedures taken to go through the transaction, in that regard there are many classifications. Basically mergers could be classified according to how the transaction was done i.e. whether it was directly between the merging corporations or indirectly through a subsidiary owned by any of them. In that context the mergers could be classified into two categories; direct and triangular mergers, in the direct merger the transaction is simply concluded between the merging corporations, whereas in a triangular merger a subsidiary owned by one of the merging corporation will go through the transactions instead of its parent corporation.⁴¹⁴

There are so many advantages in the triangular merger transaction; (1) the transaction should be approved by subsidiary shareholders i.e. the acquiring parent corporation not the shareholders of the acquiring parent corporation itself, and that might circumvent any

⁴¹⁰ DEPAMPHILIS, *Mergers and Acquisitions Basics All You Need to Know*, *supra* note 239, at 15. 2011.

⁴¹¹ Jérôme Barthélemy, *The Disney–Pixar relationship dynamics: Lessons for outsourcing vs. vertical integration*, 40 ORGANIZATIONAL DYNAMICS 43(2011).

⁴¹² Koutsoudakis, DAYTON LAW REVIEW, *supra* note 198, at 228 (2009); WESTON & WEAVER, *Mergers and Acquisitions*, *supra* note 240, at 12. 2001; Cicarini Jr., *Valuation for M&A Purposes: An Analysis of its Importance to Present a Fair Value of a Company and its Implications for the M&A and Post-integration Process*, *supra* note 407, at 18. 2009.

⁴¹³ Dennis C. Mueller, *Efficiency Versus Market Power Through Mergers*, in THE INTERNATIONAL HANDBOOK OF COMPETITION at 65, (Manfred Neumann & Jürgen Weigand eds., 2004).

⁴¹⁴ EDWIN L. MILLER, *MERGERS AND ACQUISITIONS: A STEP-BY-STEP LEGAL AND PRACTICAL GUIDE* at 84 (Wiley. 2008).

requirement imposed in that regard, (2) the acquirer parent corporation will not be liable for the target liabilities and the liability will be limited only to the subsidiary, (3) the registration fees of the target assets might be avoided in some legal systems as well as taxes.⁴¹⁵

In the same context, it is noteworthy that there are two subcategories of the triangular mergers; if the target is merged into the subsidiary it will be known as a forward triangular merger, and if the subsidiary is merged into the target the transaction will be known as reverse triangular merger.⁴¹⁶ It should be noted that in the triangular reverse mergers there are some additional advantages, for example the target might hold a non-assignable agreement and any other regulatory licenses, unless otherwise clearly required by law.⁴¹⁷

Mergers could be also classified according to the structure of the merging corporations after the transaction into two categories, statutory mergers and subsidiary mergers. If the acquirer swallows the target in the transaction and all of its liabilities and assets, and the target ceased to exist, the transaction will be classified as a statutory merger. On the other hand if the target survives after the transaction as a subsidiary of the acquirer the transaction will be classified as subsidiary merger.⁴¹⁸

Mergers could be also classified according to the procedures or the steps taken to finalize the transaction into two categories, according to whether the transaction to be finalized in just one step or in a series of steps.⁴¹⁹ In that context, the typical first category is the classic merger transaction in which the transaction is finalized in one step. A second category in which the transaction is done in two steps; the first step is acquiring a significant or controlling share of the target and that is almost done through a tender offer, and the second step in merging the whole target into the acquirer or merging the acquirer itself into the target which is known as “reverse merger,” and that second step is almost done through a transaction known as a “squeeze out” because in that transaction the minority shareholders will be forced to go through the merger.⁴²⁰

It is noteworthy in that context that the private corporations i.e. corporation that does not have its shares as tradable in the stock exchange, may use the “reverse merger” transactions to

⁴¹⁵ WESTON & WEAVER, *Mergers and Acquisitions*, *supra* note 240, at 15-16. 2001.

⁴¹⁶ MILLER, *Mergers and Acquisitions: A Step-by-Step Legal and Practical Guide*, *supra* note 414, at 84. 2008.

⁴¹⁷ WESTON & WEAVER, *Mergers and Acquisitions*, *supra* note 240, at 17-18. 2001.

⁴¹⁸ DEPAMPHILIS, *Mergers and Acquisitions Basics All You Need to Know*, *supra* note 239, at 13-14. 2011.

⁴¹⁹ ANDREW J. SHERMAN, *Mergers & Acquisitions from A to Z*, *supra* note 391, at 117. 2006; REED, et al., *The Art of M&A*, *supra* note 366, at 270-271. 2007.

⁴²⁰ For more details about the “squeeze out” transaction *see* MILLER, *Mergers and Acquisitions: A Step-by-Step Legal and Practical Guide*, *supra* note 414, at 100. 2008.

circumvent the stock market regulations or requirement for the purpose of going public i.e. listed in the stock exchange and its shares become tradable.⁴²¹ In other words a private corporation may acquire publicly traded corporations as a “shell corporation” and then the acquirer merges into this shell and becomes a publicly tradable corporation by the end of the transaction without satisfying any listing requirements.

c) Financial classifications

As it was previously mentioned, the merger transaction could be financed either through a debt or equity or even by a mixture of both, and if the transaction will be mainly financed through debt the merger will be known as an LBO.⁴²² In a typical LBO transaction the acquirer is almost a shell corporation with modest borrowing abilities and arrangements for financing a large percentage or even all the transaction through debt and both of the target’s assets and the expected returns or profits will serve as collateral for that debt.⁴²³

If the management of the target was the shareholders of the acquirer shell corporation, the transaction is known as MBO.⁴²⁴ It should be noted here that most of the MBO transactions are used as defensive tactic against hostile takeovers or what is known as “poison pills.”⁴²⁵ Moreover, both LBO and MBO are frequently used to restructure a public corporation to turn it into a private one i.e. shares will be no more tradable in the stock exchange,⁴²⁶ while in other cases if the transaction is reversed i.e. to go public it will be known as “Reverse LBO.”⁴²⁷ Unfortunately, bad management practices may lead management team to be engaged in buying

⁴²¹ GAUGHAN, *Mergers, Acquisitions, and Corporate Restructurings*, *supra* note 238, at 17. 2002; Cicarini Jr., *Valuation for M&A Purposes: An Analysis of its Importance to Present a Fair Value of a Company and its Implications for the M&A and Post-integration Process*, *supra* note 407, at 19. 2009.

⁴²² DEPAMPHILIS, *Mergers and Acquisitions Basics All You Need to Know*, *supra* note 239, at 15-16. 2011.

⁴²³ MILLER, *Mergers and Acquisitions: A Step-by-Step Legal and Practical Guide*, *supra* note 414, at 295. 2008.

⁴²⁴ ANDREW J. SHERMAN, *Mergers & Acquisitions from A to Z*, *supra* note 391, at 123. 2006; WESTON & WEAVER, *Mergers and Acquisitions*, *supra* note 240, at 183. 2001; GAUGHAN, *Mergers, Acquisitions, and Corporate Restructurings*, *supra* note 238, at 11. 2002.

⁴²⁵ ROSS, et al., *Corporate Finance*, *supra* note 401, at 841. 2002; For more details about defensive tools against hostile takeover i.e. poison pills *see* ROBERT WINTER, et al., *STATE TAKEOVER STATUTES AND POISON PILLS* (Prentice Hall Law and Business. 1988).

⁴²⁶ Gaughan, *Mergers, Acquisitions, and Corporate Restructurings*, *supra* note 238, at 11. 2002; DEPAMPHILIS, *Mergers and Acquisitions Basics All You Need to Know*, *supra* note 239, at 15-16. 2011.

⁴²⁷ GAUGHAN, *Mergers, Acquisitions, and Corporate Restructurings*, *supra* note 238, at 315. 2002.

undervalued shares through a MBO transaction, and then resell the shares back again through a Reverse LBO transaction, for an overvalued or even fair value only to gain personal profits.⁴²⁸

There is another version of the LBO transactions, which is the ESOP, where the employees' pension plan funds are used mainly to acquire the shares of their employer through the use of a shell corporation, that version of the LBO i.e. ESOP is generally used as defensive tactic against hostile takeovers.⁴²⁹ Furthermore, ESOP has some other benefits, for instance it has been reported that ESOP has been widespread in the US since 1920s, and that was mainly for its tax benefits.⁴³⁰

However, ESOP has also some other disadvantages; these are at least phony benefits that are not usually realized to the expected level, for instance it was maintained that the corporation will realize extra gains or profits because the employees themselves will do extra efforts to serve their own interests, but in fact it was reported that no such differences were found between ESOP and other LBO or mergers transactions in that regard.⁴³¹ Moreover, the proper financial analysis to the actual costs of the ESOP transactions proved that one of its disadvantages is that it is considered as an equity dilution and that will inevitable led to loss of control over the corporate shares.⁴³²

It is undoubtedly true that all these classifications from the financial perspective have important implications on the transaction and how it might be taxable or not.⁴³³ Therefore, merger transactions could be also classified into three main categories; taxable transactions, partial tax-free transactions, and tax-free transactions,⁴³⁴ and that will be further scrutinized during the discussions of structuring the transaction in the merger dynamics.⁴³⁵ Meanwhile, it is noteworthy that the tax-free merger transaction is not absolutely free, and to be more precise it could be considered a deferred taxable transaction, because the shareholders will defer the tax

⁴²⁸ Leslie Wayne, *Reverse LBOs Bring Riches*, NEW YORK TIMES, April 23, 1987. 1987.

⁴²⁹ WESTON & WEAVER, *Mergers and Acquisitions*, *supra* note 240, at 191-193. 2001.

⁴³⁰ GAUGHAN, *Mergers, Acquisitions, and Corporate Restructurings*, *supra* note 238, at 370. 2002. And for more details about the tax benefits in the US *see Id.* at 379-380.

⁴³¹ U.S. General Accounting Office, *Employment Stock Ownership Effects: Little Evidence of Effects on Corporate Performance*, Report to the Committee on Finance, U.S. Senate (U.S. G.P.O. 1987).

⁴³² GAUGHAN, *Mergers, Acquisitions, and Corporate Restructurings*, *supra* note 238, at 381-382. 2002.

⁴³³ For more details about the general idea of taxes and their effect on merger transactions *see* Joseph P. Driscoll, *Taxable Acquisitions and Their Effect on Seller and Purchaser* at 81-103 (The Bobbs-Merrill Company - Indianapolis 1956).

⁴³⁴ ANDREW J. SHERMAN, *Mergers & Acquisitions from A to Z*, *supra* note 391, at 113. 2006.

⁴³⁵ *See infra* p.103.

until entering into a later taxable transaction, but in the merger industry that is known as a tax-free merger transaction.⁴³⁶

In the same context, as it was previously mentioned that the merger transaction could be financed through one or more of these four financing schemes, accordingly the merger transactions could be also classified into additional four categories; the first is an only cash transactions, the second is an only stock transactions which is known as stock for stock transactions, the third is what is known as stock for asset transactions, and finally the fourth could be a mixture between any of these schemes. In that regard, and according to the US tax regime, it should be noted that two of these mergers are considered tax-free transactions: (1) stock-for-stock mergers, (2) stock-for-assets mergers.⁴³⁷

In that tax context, it is should be distinguished that there are some merger structures that were specially tailored to avoid taxation in the cross-border merger transactions, these are as follows: (1) “Dividend Access Share Structure”: in that structure the transaction will involve linking the value of the shares of the merging corporation without actual exchanging of the shares between the parties, (2) “Exchangeable Share Structure”: in that structure the transaction is the same as the dividend access share structure but the target will issue exchangeable shares to be exchanged on demand, and (3) “Equalization Structure”: in that structure the transaction will be also the same as the dividend access share structure but the merging corporations will jointly control the merging corporations.⁴³⁸

Finally, the merger transaction could be classified to two categories according to the percentage of the shares acquired by the acquirer, whereas the acquirer may acquire only a controlling share of the target, and in that case the acquirer will be known as a holding corporation. On the other hand the acquirer may acquire all the shares of the target, and in that case the target will be known as a wholly owned subsidiary. It should be noted that to call an acquirer a holding corporation that depends mainly on the percentage of acquired shares, and usually certain threshold is required under the various legal systems.⁴³⁹

⁴³⁶ REED, et al., *The Art of M&A*, *supra* note 366, at 321. 2007; Sharon Stern Gerstman, et al., *International Tax Law*, 43 *INTERNATIONAL LAWYER* 759, at 769 (2009).

⁴³⁷ ANDREW J. SHERMAN, *Mergers & Acquisitions from A to Z*, *supra* note 391, at 109, 115. 2006; REED, et al., *The Art of M&A*, *supra* note 366, at 322. 2007.

⁴³⁸ For more details about this structures *see* Richard Godden, et al., *Cross Border Deals: Myth and Reality*, *PLI'S ANNUAL INSTITUTE ON SECURITIES REGULATION IN EUROPE* 1121, at 1002-1017 (2001).

⁴³⁹ For more details about the advantages and disadvantages of the holding corporation structure *see* GAUGHAN, *Mergers, Acquisitions, and Corporate Restructurings*, *supra* note 238, at 18-19. 2002.

d) Other restructuring trends and forms

There are various trends and forms of restructuring transactions that are closely connected to mergers, these are mainly: spin-offs, carve-outs, roll-ups, and tracking stocks. This discussion will address each of these trends or forms of transactions in turn. Generally speaking spin-offs and carve-outs are classified as divestiture transactions, and a divestiture transaction is simply a transaction by which a corporation decided whether to split a part or a whole of one of its owned subsidiaries, or a business unit, and sometime only certain assets.⁴⁴⁰

In fact corporation might decide to go through divestiture due to either the poor performance of that subsidiary or business unit, or simply as a step to accomplish a new plan or strategy to be more focused on certain type of operations, or even sometimes to serve other downsizing purposes.⁴⁴¹ However, in specific circumstances corporation may be obligated to go through involuntary divestiture transaction, as it will be scrutinized later in detail in the discussions of the merger control.

The carve-out transaction is a typical divestiture transaction whereas the divested unit will be offered for sale to third party i.e. another corporation or even to public in the stock exchange.⁴⁴² On the other hand spin-off, also a typical divestiture transaction, differs from the carve-out, because the divested unit will remain owned by the shareholders of the corporation and will not be offered to a third party, and that unit will take the form of a new corporation that operates independently away from the parent corporation.⁴⁴³

One more difference between both these forms is that the spin-off is always a free transaction, while carve-out might be taxable in some taxation systems.⁴⁴⁴ In that context, it was reported that because of that exemption from taxation of spin-off transactions, some corporations deceptively use the spin-off form of transactions to evade taxes by hiding profits in the new unit

⁴⁴⁰ ANDREW J. SHERMAN, *Mergers & Acquisitions from A to Z*, *supra* note 391, at 122-123. 2006.

⁴⁴¹ Gaughan, *Mergers, Acquisitions, and Corporate Restructurings*, *supra* note 238, at 11. 2002; WESTON & WEAVER, *Mergers and Acquisitions*, *supra* note 240, at 179. 2001.

⁴⁴² GAUGHAN, *Mergers, Acquisitions, and Corporate Restructurings*, *supra* note 238, at 12. 2002; WESTON & WEAVER, *Mergers and Acquisitions*, *supra* note 240, at 180. 2001; DEPAMPHILIS, *Mergers and Acquisitions Basics All You Need to Know*, *supra* note 239, at 15-16. 2011.

⁴⁴³ For more details about spin-off generally *see* Alexandra R. Lajoux and H. Peter Nesvold, *The Art of M&A Structuring: Techniques for Mitigating Financial, Tax, and Legal Risk* (New York: McGraw-Hill, 2004).

⁴⁴⁴ REED, et al., *The Art of M&A*, *supra* note 366, at 337. 2007.

or even use it the other way to hide losses into it, and that trend was reported to be widespread throughout the US during the 1990s.⁴⁴⁵

On the other hand the roll-up transaction is a kind of strategy adopted by an acquirer, who is always a holding corporation, through that strategy the acquirer will acquire as many targets operating in a certain industry or a geographic region, and that could be done through a horizontal, vertical, or even conglomerate transactions, and that trend was also widespread in the US in the 1990s.⁴⁴⁶ Meanwhile, the tracking stocks are those types of stocks or shares that are issued and acquired by an acquirer who is interested in specific type of operation within a certain corporation and not in all its business, or even in a specific high growth division of the corporation.⁴⁴⁷

e) Distinction between mergers and other growth alternatives

Generally speaking, corporations might make use of its own resources to grow internally i.e. to maximize the shareholder value as an ultimate measure of the corporation success,⁴⁴⁸ and that could be accomplished by: opening a new sales channels, hiring more sales staff, developing new products, etc., and it might opt out for external growth options like mergers or some other merger alternatives. Those alternatives are mainly the joint venture (hereinafter JV), strategic alliance, franchising, licensing, exclusive agreements, and minority investments.⁴⁴⁹

Due to the close connections between all those external growth alternatives, this discussion will be an overview of each of those alternatives to draw a clear distinction between all of them, each in turn. The discussion will start with the growth alternative that gives the most controlling power; which is the minority investments, and passing then by the less to the lesser less, followed by JV then franchising, and then licensing and exclusive agreements, until the least controlling power giving growth alternative, which is the strategic alliance option.

The minority investments option is the closest growth alternative to merger,⁴⁵⁰ because a corporation or an investor wants to maximize the shareholder value through the acquisition of

⁴⁴⁵ ANDREW J. SHERMAN, *Mergers & Acquisitions from A to Z*, *supra* note 391, at 122-123. 2006.

⁴⁴⁶ *Id.* at 124.

⁴⁴⁷ WESTON & WEAVER, *Mergers and Acquisitions*, *supra* note 240, at 181. 2001.

⁴⁴⁸ DEPAMPHILIS, *Mergers and Acquisitions Basics All You Need to Know*, *supra* note 239, at 18. 2011.

⁴⁴⁹ ANDREW J. SHERMAN, *Mergers & Acquisitions from A to Z*, *supra* note 391, at 10. 2006; WESTON & WEAVER, *Mergers and Acquisitions*, *supra* note 240, at 122-123. 2001.

⁴⁵⁰ DEPAMPHILIS, *Mergers and Acquisitions Basics All You Need to Know*, *supra* note 239, at 18. 2011.

minority controlling share, in other words acquiring less than 51% of the target's voting shares.⁴⁵¹ That growth alternative has many advantages, for instance, the transaction might be easily done without any consent or prerequisite approvals, and in addition to that the acquirer will be passive and will not bear any management obligations, however the acquired share might have a significant voting power that could exercise control over the target.⁴⁵² It should be noted here that SWF are the most active players in that field, for instance it was reported that Qatar Investment Authority which is running the State of Qatar's SWF is typically opting to that growth alternative.⁴⁵³

On the other hand, in a typical JV two or more corporations enter into agreement to form a new independent legal entity, whether a corporation or just a partnership, and usually JVs are limited most of the times to a certain joint task or goal to be achieved, and in some other times it is even limited to a certain short or long periods.⁴⁵⁴ Moreover, that new independent legal entity resulted from the JV might be directly managed or at least controlled by all the parties of the JV agreements, and it was reported that the parties of the JV agreement might be competitors but they share a common goal that serve their interests.⁴⁵⁵

In a JV, parties pool their resources to reach the planned common goal or task, and in that context many successful examples of JVs could be listed, most notably in the car manufacturer industry in the US and Japan. A prime example is the JV between two giant cars corporations, Chrysler Motors and Mitsubishi Motors, to manufacture cars in a new manufacture facility in Bloomington, Illinois.⁴⁵⁶ On February 20, 2001 two giant Fast-Moving Consumer Goods Industry corporations namely Coca-Cola and P&G, entered into a JV agreement to develop a new 4.2 billion US dollars corporation for juices and snacks, which is undoubtedly considered as another successful JV example.⁴⁵⁷

It should be mentioned here that in addition to the usual benefits of reaching common goals, corporation might enter into a JV agreement for many other purposes; for instance, some

⁴⁵¹ ROSS, et al., *Corporate Finance*, *supra* note 401, at 817-818. 2002.

⁴⁵² DEPAMPHILIS, *Mergers and Acquisitions Basics All You Need to Know*, *supra* note 239, at 19. 2011.

⁴⁵³ *See generally* Dinesh Nair, Qatar Builds up Xstrata Stake Ahead of Glencore Deal (Thomson Reuters 2012)., Jesse Riseborough, et al., Qatar Holds Out on Glencore as Davis Heads for Exit (Bloomberg News 2012).

⁴⁵⁴ DEPAMPHILIS, *Mergers and Acquisitions Basics All You Need to Know*, *supra* note 239, at 18-19. 2011; ANDREW J. SHERMAN, *Mergers & Acquisitions from A to Z*, *supra* note 391, at 256. 2006.

⁴⁵⁵ SHENEFIELD & STELZER, *The Antitrust Laws: A Primer*, *supra* note 178, at 54. 2001.

⁴⁵⁶ GAUGHAN, *Mergers, Acquisitions, and Corporate Restructurings*, *supra* note 238, at 19-20. 2002.

⁴⁵⁷ WESTON & WEAVER, *Mergers and Acquisitions*, *supra* note 240, at 124. 2001.

corporations enter in JV in order to circumvent the barriers that might be facing some of the parties as a foreign investments.⁴⁵⁸ For instance, foreign corporations enter into JV with local corporations to circumvent the laws that control foreign investments and activities in certain industries within the US,⁴⁵⁹ and in the G.C.C. region, and most significantly in China. Despite the fact that it was reported that the JV as an option of growth started to lose favor a few years ago due to its problems, which are in fact similar to those facing merger transactions,⁴⁶⁰ it might be beneficial to discuss the Chinese experience in some details.

China is in fact the most important example here because; firstly it is the leading receiver of FDIs among all the developing countries i.e. inbound FDIs, and secondly because in the meantime China is the leading user of the FDIs as an acquirer of foreign corporations i.e. outbound FDIs,⁴⁶¹ and thirdly the Chinese SWF is ranked as fourth with concern to the volume of its outbound FDI activities.⁴⁶² In that context, and as an explanation of the inbound FDIs, there is empirical evidence that revealed that the corporations generally preferred the JV as a mode of FDI or entry to the more restrictive closed markets, such as China.⁴⁶³

On the other hand, that could not be generalized, because that is not always the case, whereas the corporation in most cases is obligated to use the JV option as a mode of entry, in order to circumvent the restrictive practices of banning the acquisition of a national corporation in certain industries or the requirement of national partner with a specified percentage to enter into certain industries. That concept will be discussed in more details during the discussions of the impediments that faces the cross-border mergers.⁴⁶⁴

Further, concerning the explanation of the booming outbound FDIs from China, it was claimed that the outbound FDIs from China are significantly increasing due the fact that the Chinese corporation acquired experiences from entering into cross-border JVs with foreign

⁴⁵⁸ *Id.*

⁴⁵⁹ For more details about laws limiting foreign investments and activates in certain industries in the US *see* REED, et al., *The Art of M&A*, *supra* note 366, at 907-911. 2007.

⁴⁶⁰ IAN COLEMAN, EMERGING MARKETS AND M&A ACTIVITY in 2008 INTERNATIONAL MERGERS & ACQUISITIONS: CREATING VALUE IN AN INCREASINGLY COMPLEX CORPORATE ENVIRONMENT at 51 (Financier Worldwide Booz & Company ed. 2008).

⁴⁶¹ Mattia Colonnelli de Gasperis, et al., *International M&A and Joint Ventures*, 43 INTERNATIONAL LAWYER 367, at 389, 403 (2009).

⁴⁶² For full profile of the Chinese SWF *see* <http://www.swfinstitute.org/swfs/china-investment-corporation> last visited October 1, 2014.

⁴⁶³ Yung-Heng Lee, et al., *An Empirical Study of Wholly-Owned Subsidiaries and Joint Ventures for Entry into China Markets*, 3 GLOBAL JOURNAL OF BUSINESS RESEARCH 9, at 16 (2009).

⁴⁶⁴ *See infra* p.166.

corporations.⁴⁶⁵ Accordingly, it could be argued that facilitating the path for the FDIs to use JV as a mode of entry will not only benefit the economy domestically in the hosting country, but it will also benefit the national corporations in outbound FDIs in other countries.

It is significant that China in order to fully utilize that JV option adopted a JV law on July 1, 1979, which was then amended on April 4, 1990 and was then amended for the second time March 15, 2001. It was reported that since the adoption of that law the inbound FDIs proliferated exponentially by means of JVs.⁴⁶⁶ Meanwhile, it was reported that the actual number of operating JVs in China decreasing from the registered JVs,⁴⁶⁷ and just taking the registered JVs number into consideration might led to a false indication in that concern.

At the same time, it could be claimed that that proliferation in the JVs transaction in China seem not only limited to the proliferation of JVs as an idea. China is generally witnessing a booming economy, even during global financial crises periods. For instance it was reported that while the US and many other western economies in the world witnessed almost a 30% decrease in the merger activities, during the financial crisis of 2008, China witnessed an increase by 1% at least in the merger activities.⁴⁶⁸

In addition to those efforts to attract the FDI generally, and to use the JV specially as a mode of market entry, China issued a specialized catalogue to guide the investors planning to use FDI in China in 1995, and that catalogue is updated periodically and the most recent version is the 2011 version.⁴⁶⁹ It was claimed that the catalogue mainly categorizes the industries into three main categories; the first category is the category of the encouraged industries, and the second is the category of the restricted industries, and the third category is the other industries that does not included in any of the first two categories, and that is a permitted industries category.⁴⁷⁰

⁴⁶⁵ Karl P. Sauvart, et al., *Foreign Direct Investment by Emerging Market Multinational Enterprises, the Impact of the Financial Crisis and Recession and Challenges Ahead* (OECD Investment Divison 2009).

⁴⁶⁶ Paul W. Beamish & Hui Y. Wang, *Investing in China via Joint Ventures*, 29 *MANAGEMENT INTERNATIONAL REVIEW* 57, at 57 (1989).

⁴⁶⁷ *Id.* at 62.

⁴⁶⁸ Gasperis, et al., *INTERNATINAL LAWYER*, *supra* note 461, at 388-389 (2009).

⁴⁶⁹ The English version of the catalogue is available on the official website of the Chinese government at http://www.gov.cn/flfg/2011-12/29/content_2033089.htm last visited October 1, 2014.

⁴⁷⁰ STEPHEN CHAN, *RULES AND ISSUES SURROUNDING M&A WITH CHINESE COMPANIES* in 2008 *INTERNATIONAL MERGERS & ACQUISITIONS: CREATING VALUE IN AN INCREASINGLY COMPLEX CORPORATE ENVIRONMENT* at 341 (Financier Worldwide Booz & Company ed. 2008).

That claim is not completely accurate, because the general rule in China is that if something is not restricted it does not mean that it is permitted,⁴⁷¹ and that is generally the trend in the developing countries not only in China. In addition to that the authorities in China do not apply only the law but also apply the directives as spelled out by the government authorities as compulsory rules for implementing the general rules that are stipulated by law; those directives are known as the “Red-Title Documents.”⁴⁷²

The most important remark on that investment catalogue is that many of the FDI opportunities that are spelled out in it are reserved just for the JVs route, such as the business of cultivating the traditional Chinese medicines, exploitation and utilization of coal-bed gas; petroleum; and natural gas, and most notably the manufacturing material of high technology semiconductors. The Chinese efforts are also extended to encourage the JVs and the FDI in general through other actions taken by the government officials. To illustrate, it was reported that the current Chinese Primer developed a policy to attract the professional human resources to be an added value to the economy in general, and that will undoubtedly be considered an added value to the FDI environment in China.⁴⁷³

Meanwhile, there was also empirical findings that indicate that some corporations did not prefer the cross-border JV as a growth alternative in China due to many reasons: (1) the fear that the JV will not sufficiently protect IPR owned by them,⁴⁷⁴ (2) the discrimination against JVs that are owned by foreign corporations specially with concern to the government procurements,⁴⁷⁵ (3) the lack of coordination between the different regulators in China,⁴⁷⁶ (4) the JV option will not provide the full sole control that might be offered by other growth alternatives, and accordingly it that might fully serve the interest of the shareholders of the investing corporation, (5) the lack of harmonized standards with the global economy and that include not only production standards but also management schemes ... etc., (6) the short term orientation or mindset of the Chinese partner of the JVs, (7) the foreign partners in the JV in China are always expecting to suffer from

⁴⁷¹ FEI GUOPING, HOW TO SPEED UP M&A DEALS IN CHINA in 2008 INTERNATIONAL MERGERS & ACQUISITIONS: CREATING VALUE IN AN INCREASINGLY COMPLEX CORPORATE ENVIRONMENT at 333 (Financier Worldwide Booz & Company ed. 2008).

⁴⁷² *Id.*

⁴⁷³ International Economic Research Division, *Global Investment and Trade Report*, JAPANESE EXTERNAL TRADE ORGANIZATION 1, at 10 (2014).

⁴⁷⁴ Lee, et al., GLOBAL JOURNAL OF BUSINESS RESEARCH, *supra* note 463, at 19 (2009).

⁴⁷⁵ Ken Davies, *China Investment Policy: An Update*, 2013 OECD WORKING PAPERS ON INTERNATIONAL INVESTMENT 1, at 3 (2013); Guoping, How to Speed up M&A Deals in China, *supra* note 471, at 333. 2008.

⁴⁷⁶ Davies, OECD WORKING PAPERS ON INTERNATIONAL INVESTMENT, *supra* note 475, at 31 (2013).

foreign exchange difficulties,⁴⁷⁷ and profit remittance problems, and (8) the JV option might lead to taxation complexities similar to those caused by the mergers.⁴⁷⁸

Likewise, it was also claimed that the JV as a growth option has anticompetitive effects on the markets, as well as the mergers, and in that context it should be noted that the empirical findings of the researches done in that regard revealed that pure domestic JVs has more positive effects on the economy than the cross-border JVs, and even that pure domestic horizontal JVs has less negative effects on the economy than the cross-border JVs, and that the strong belief that the JVs are pro-competitive is not an accurate hypothesis.⁴⁷⁹

Accordingly, it could be declared that the Chinese experience in using the JV as a mode of entry for FDI is the closest growth option to mergers, and while it could be used to overcome some of the impediments that face cross-border mergers, it will be discussed later in detail. The JV is not a cost free transaction as it might be imagined, because planning for a successful JV will consume nearly all similar resources,⁴⁸⁰ but as it was mentioned it is a preferred option in many closed developing economies and used for the purposes of circumventing the FDI limitations that are imposed in those jurisdictions,⁴⁸¹ and in return the investing corporation will reap the full benefits of the growth opportunity but with some limitations specially with concern to the full control over the JVs.

By the same token, the JV as a mode of entry is also regulated under the same rules that control the mergers in almost all the jurisdictions in the world.⁴⁸² In the same context, it was suggested that the foreign corporation will always show a tendency to fully acquire the JV i.e. buyout the local corporation shares, if the JV appeared to be successful.⁴⁸³ That means that the corporation, if not obligated under a restricting closed market regime, in order to fully utilize the

⁴⁷⁷ Beamish & Wang, *MANAGEMENT INTERNATIONAL REVIEW*, *supra* note 466, at 62 (1989).

⁴⁷⁸ ANDREW J. SHERMAN, *Mergers & Acquisitions from A to Z*, *supra* note 391, at 259. 2006.

⁴⁷⁹ Tony W Tong & Jeffrey J Reuer, *Competitive Consequences of Interfirm Collaboration: How Joint Ventures Shape Industry Profitability*, 41 *JOURNAL OF INTERNATIONAL BUSINESS STUDIES* 1056, at 1069 (2010).

⁴⁸⁰ CHRISTOPH REIMNITZ, *EXPLORING THE POTENTIAL OF JOINT VENTURES TO CREATE VALUE AS OPPOSED TO OUTRIGHT M&A* in 2008 *INTERNATIONAL MERGERS & ACQUISITIONS: CREATING VALUE IN AN INCREASINGLY COMPLEX CORPORATE ENVIRONMENT* at 115 (Financier Worldwide Booz & Company ed. 2008).

⁴⁸¹ WESTON & WEAVER, *Mergers and Acquisitions*, *supra* note 240, at 124. 2001.

⁴⁸² For more practical details about the transactions that should be notified or controlled under the merger control system in 60 different jurisdictions see James Musgrove & Eva Bonacker, 2014/2015 *Pre-merger Notification Manual: A practical Guide to Understanding Merger Regimes in Multiple Jurisdictions* (TerraLex 2014).

⁴⁸³ Coleman, *Emerging Markets and M&A Activity*, *supra* note 460, at 51. 2008.

growth possibility it should turn the JV into an actual merger, wholly owned and fully controlled by the corporation.

An example of a giant corporation that refused to enter into JV with a local partner in China, is the American insurance corporation “AIG,” whereas it was even reported that that corporation lobbied with the US government to oppose the China accession to the WTO until it waived the requirement of entering into JV with a local partner in order to enter into the insurance industry in China, and at the end AIG was granted the right to continue its operations in China without entering into JV with a local partner.⁴⁸⁴

Corporations might enter into JV agreement for the purpose of reducing the risks, or even eliminating the unplanned risk that might appear when entering into a new business alone, and that could be simple by dividing risk among all the parties of the JV.⁴⁸⁵ It should be also noted here that the horizontal JV transactions are used heavily as a merger alternative,⁴⁸⁶ and that is obviously to circumvent impediments that might face the typical horizontal merger transaction.

On the other hand, franchising is a totally different growth alternative, whereas the concerned parties enter into a franchising agreement under which a party “the franchisor” grants another party “the franchisee” the right to manufacture or sell the products or services or even just use the name and the business model of the franchisor, and under that agreement they also share some of their resources in return for sharing profits.⁴⁸⁷ That form of a growth alternative i.e. franchising is widespread in the fast-food industry,⁴⁸⁸ and also the hotel industry. Franchising is almost at no cost to the franchisor but will designate some of its resources to the success of the franchise.⁴⁸⁹

Licensing is also another and almost free growth alternative,⁴⁹⁰ here the concerned parties enter into licensing agreement under which the owner of intellectual property rights (hereinafter IPR) i.e. “the licensor” grants another party “the licensee” the right to use or exploit the IPR

⁴⁸⁴ David L. Levy & Aseem Prakash, *Bargains Old and New: Multinational Corporations in Global Governance*, 5 BUSINESS AND POLITICS 131, at 135 (2003).

⁴⁸⁵ ANDREW J. SHERMAN, *Mergers & Acquisitions from A to Z*, *supra* note 391, at 256. 2006; WESTON & WEAVER, *Mergers and Acquisitions*, *supra* note 240, at 123. 2001.

⁴⁸⁶ ANDREW J. SHERMAN, *Mergers & Acquisitions from A to Z*, *supra* note 391, at 259. 2006.

⁴⁸⁷ WESTON & WEAVER, *Mergers and Acquisitions*, *supra* note 240, at 129. 2001; DEPAMPHILIS, *Mergers and Acquisitions Basics All You Need to Know*, *supra* note 239, at 19. 2011; ANDREW J. SHERMAN, *Mergers & Acquisitions from A to Z*, *supra* note 391, at 261. 2006.

⁴⁸⁸ DEPAMPHILIS, *Mergers and Acquisitions Basics All You Need to Know*, *supra* note 239, at 19. 2011.

⁴⁸⁹ ANDREW J. SHERMAN, *Mergers & Acquisitions from A to Z*, *supra* note 391, at 262. 2006; DEPAMPHILIS, *Mergers and Acquisitions Basics All You Need to Know*, *supra* note 239, at 19. 2011.

⁴⁹⁰ DEPAMPHILIS, *Mergers and Acquisitions Basics All You Need to Know*, *supra* note 239, at 19. 2011.

rights without the transfer of the ownership, in the exchange of some royalties which is almost less than the profits expected.⁴⁹¹ In that context, it should be noted that licensing is a widespread growth alternative in the pharmaceutical and technological industries.⁴⁹² Licensing is also of great advantage to the licensee because the licensee will be granted the access to the developed IPR without investing or using resources in its developing.⁴⁹³

Likewise, distributorships and dealerships, which are mainly classified as exclusive agreements growth alternatives, are to a great extent parallel to the franchising and licensing, whereas the owner of the rights of marketing of certain product or service enter into agreement to grant an independent party “the dealer” or “the distributor” the right to exclusively market that product or service.⁴⁹⁴ These exclusive agreements most of the times grant the owner access to new market beyond his reach.⁴⁹⁵

Furthermore, those exclusive agreements are almost giving marketing rights that are limited to certain markets or certain geographic area, or even limited to certain category of consumers, and it might be also limited for certain time or a period.⁴⁹⁶ It is noteworthy that under the exclusive agreements model the owner will exercise less power over the dealer or the distributor than in the franchising or licensing models, but those exclusive agreements are classified as franchising agreement in some legal systems, and that might lead to very complicated problems unless otherwise clearly mentioned that there are minimal control power granted to the owner.⁴⁹⁷

Lastly, the strategic alliance alternative is to a great extent a flexible form of JV,⁴⁹⁸ whereas in a strategic alliance there are some significant differences; first: ranging from minimal to no formal or written agreement is required, and that mainly saves financial resources and increase the flexibility;⁴⁹⁹ second: the parties will use their own legal entities and no new

⁴⁹¹ ANDREW J. SHERMAN, *Mergers & Acquisitions from A to Z*, *supra* note 391, at 256, 272. 2006.

⁴⁹² For more details about examples in the pharmaceutical industry *see* WESTON & WEAVER, *Mergers and Acquisitions*, *supra* note 240, at 128-129. 2001.

⁴⁹³ DEPAMPHILIS, *Mergers and Acquisitions Basics All You Need to Know*, *supra* note 239, at 19. 2011.

⁴⁹⁴ ANDREW J. SHERMAN, *Mergers & Acquisitions from A to Z*, *supra* note 391, at 279. 2006.

⁴⁹⁵ WESTON & WEAVER, *Mergers and Acquisitions*, *supra* note 240, at 128. 2001.

⁴⁹⁶ ANDREW J. SHERMAN, *Mergers & Acquisitions from A to Z*, *supra* note 391, at 279-280. 2006.

⁴⁹⁷ For more details about these problems under the US legal system *see* REED, et al., *The Art of M&A*, *supra* note 366, at 563. 2007.

⁴⁹⁸ GAUGHAN, *Mergers, Acquisitions, and Corporate Restructurings*, *supra* note 238, at 21. 2002.

⁴⁹⁹ WESTON & WEAVER, *Mergers and Acquisitions*, *supra* note 240, at 125. 2001; DEPAMPHILIS, *Mergers and Acquisitions Basics All You Need to Know*, *supra* note 239, at 19. 2011.

independent legal entity will be developed;⁵⁰⁰ third: is characterized by the uncertainty and ambiguity of the terms and the relation between the parties depends mainly on the trustworthiness between them;⁵⁰¹ fourth: parties of the strategic alliance coordinate but each take decisions more independently;⁵⁰² fifth: no capital contributions are required;⁵⁰³ sixth: strategic alliances are always temporary or even limited by time.⁵⁰⁴

Finally, it is significant that some corporations use mergers and all those growth alternatives at different stages during its history, and even may use some or all of them combined together at the same time. Scrutinizing the history of a corporation like the Mail Boxes ETC will reveal that it used franchising as growth option in the early 1980s and in then in 1990 the United Parcel Corporation acquired a minority but significant percentage of its shares (15%) and then Mail Boxes ETC entered into JV with USA Technologies to jointly market one of its products (MBE Express), and then U.S. Office Products acquired Mail Boxes ETC through a 267 million US dollars transaction, and then it entered into strategic alliance with iShip.com.⁵⁰⁵

3. Mergers Dynamics

As it was previously mentioned, this dissertation is limited to the friendly mergers and it will not address the hostile takeover, because the hostile takeover is characterized by different rules, and that is mainly because in the hostile takeover transactions the acquirer is an opportunity taker, which obviously means that the transaction is most probably unplanned and therefore it will be difficult, if not impossible, to predict its procedures, structure, and dynamics.

Scrutinizing the merger dynamics is crucial because a solid understanding of the merger dynamics is a prerequisite to delve into the impediments to the merger process. In that regard, it was claimed that scrutinizing every single step in the merger dynamics is a prerequisite to understand the remaining steps, and that both the acquirer and the target should “drink at the ever-renewing spring of M&A knowledge [and to] drink deep, they must recognize first that

⁵⁰⁰ GAUGHAN, Mergers, Acquisitions, and Corporate Restructurings, *supra* note 238, at 21. 2002.

⁵⁰¹ James Sawler, *Horizontal Alliances and the Merger Paradox*, 26 *MANAGERIAL AND DECISION ECONOMICS* 243, at 247 (2005); WESTON & WEAVER, Mergers and Acquisitions, *supra* note 240, at 126. 2001.

⁵⁰² Sawler, *MANAGERIAL AND DECISION ECONOMICS*, *supra* note 501, at 243-244 (2005).

⁵⁰³ ANDREW J. SHERMAN, Mergers & Acquisitions from A to Z, *supra* note 391, at 258. 2006.

⁵⁰⁴ Sawler, *MANAGERIAL AND DECISION ECONOMICS*, *supra* note 501, at 247 (2005).

⁵⁰⁵ WESTON & WEAVER, Mergers and Acquisitions, *supra* note 240, at 130. 2001.

there is something called an acquisition process, with many crucial stages....⁵⁰⁶ In addition to that, scrutinizing the merger dynamics is undoubtedly a very helpful tool toward understanding how impediments could be removed or be managed at least.

This discussion will be devoted to the dynamics of the mergers, and it will address first how the target may prepare itself for a future merger and screen for a prospective acquirer. Next it will examine the preliminary agreement that might be entered into by parties as a second step. The third step it will also address the comprehensive appraisal of the target i.e. due diligence⁵⁰⁷ and valuation. This will be followed by the fourth step that will review how the transaction could be structured and financed. Finally, the discussion will address the closing of the transaction as the fifth step.

a) Preparation and screening

Whatever the incentives are for entering into a merger, whenever a target decided to go into a merger, or even a prospective acquirer approaches it, it will be of a great benefit to go first through preparations.⁵⁰⁸ Preparing the target for a merger could easily be shortened in what is known as “getting the house in order.”⁵⁰⁹ In order to successfully accomplish that step the target should first start by assembling its preparation team, and typically that team will include its own in-house accounting, financial, legal, and corporate affairs team, if any, and in addition to that it may also seek other external professionals’ services like investment bankers, tax advisors, estate planners, etc.⁵¹⁰

The main task for the preparation team will be simply to get the house in order, and that might include finalizing all pending financial, accounting, legal, tax, and estate issues, making all documents and records clear and available, and also make a preliminary evaluation of the target among a long list of preparation tasks.⁵¹¹ That team should mainly perform its mission with a

⁵⁰⁶ REED, et al., *The Art of M&A*, *supra* note 366, at 2. 2007.

⁵⁰⁷ The term “due diligence” was originally used by section 11 in The Securities Act of 1933 (codified at 48 Stat. 74, 15 U.S.C. § 77a et seq.) as a defense against liabilities on account of false registration statement, with regard the publicly traded corporations in the stock exchange.

⁵⁰⁸ MILLER, *Mergers and Acquisitions: A Step-by-Step Legal and Practical Guide*, *supra* note 414, at 23. 2008.

⁵⁰⁹ ANDREW J. SHERMAN, *Mergers & Acquisitions from A to Z*, *supra* note 391, at 21. 2006.

⁵¹⁰ RICHARD LIEBERMAN, *PREPARING A COMPANY FOR SALE TO MAXIMISE VALUE* in 2008 *INTERNATIONAL MERGERS & ACQUISITIONS: CREATING VALUE IN AN INCREASINGLY COMPLEX CORPORATE ENVIRONMENT* at 69 (Financier Worldwide Booz & Company ed. 2008).

⁵¹¹ ANDREW J. SHERMAN, *Mergers & Acquisitions from A to Z*, *supra* note 391, at 21. 2006.

single goal in mind, which is to maximize the value of the target and to make it more appealing to potential acquirers, and in that regard it was claimed that unprepared or even “poorly” prepared target will be less appealing to prospective acquirers or at least will delay closing the transaction in a proper timing.⁵¹²

Searching for a prospective “dancing partner” in the merger transaction, whether it is acquirer or target, which is known as the screening process, is an important part of the preparation step or at least directly interrelated to it.⁵¹³ In the screening process the corporation by itself or by the help of an intermediary, which is typically an investment banker or just a broker,⁵¹⁴ will draw an exhaustive list of the most qualified acquirers or targets.⁵¹⁵ Almost all of those corporations that are included into the list should fit into the merger planning or strategy,⁵¹⁶ but obviously not all of them will have the same willingness to enter into the proposed merger, therefore the list should be narrowed after approaching them, in order to identify the prospective acquirer or target.

After the parties of the proposed merger transaction found common ground and demonstrate their interest towards the transaction, they will usually develop a plan and timetable in order to proceed to the next step of the merger process. Towards the closing of the transaction, they may as well enter into a preliminary agreement or something similar to that effect, which will govern all the subsequent steps,⁵¹⁷ as it will be discussed in the following discussion.

b) Preliminary agreement

By reaching this step the parties are more serious about entering into the proposed merger, and that accordingly requires developing an action plan, and entering into preliminary agreement that includes the terms and conditions that would govern all the remaining steps until closing the transaction, or even some post-closing issues, and also how the process might be terminated. That kind of preliminary agreement is recognized under various legal systems and is

⁵¹² LIEBERMAN, Preparing a Company for Sale to Maximise Value, *supra* note 510, at 68. 2008.

⁵¹³ ANDREW J. SHERMAN, Mergers & Acquisitions from A to Z, *supra* note 391, at 22. 2006.

⁵¹⁴ It was reported that the fees of the investment bankers are lower than the brokers MILLER, Mergers and Acquisitions: A Step-by-Step Legal and Practical Guide, *supra* note 414, at 26. 2008.

⁵¹⁵ ANDREW J. SHERMAN, Mergers & Acquisitions from A to Z, *supra* note 391, at 29. 2006.

⁵¹⁶ REED, et al., The Art of M&A, *supra* note 366, at 31. 2007.

⁵¹⁷ ANDREW J. SHERMAN, Mergers & Acquisitions from A to Z, *supra* note 391, at 49. 2006.

usually titled as “Letter of Intent,” “Term Sheet,” “Heads of Agreements,” or simply as “Preliminary Agreement.”⁵¹⁸

Meanwhile, entering into that kind of agreement is not a worldwide practice, and it was proclaimed that it is impractical in some cases and even problematic in other cases especially if one of the parties of the proposed merger is a publicly traded corporation. For instance, under securities regulations in the US, entering into such agreement might be considered a premature merger announcement for the purpose of influencing the prices of the shares in the stock exchange.⁵¹⁹ Accordingly, these agreements should be carefully drafted, and parties sometimes draft it and agree to its terms but just do not sign it, and they even adopt “no-comment” policy as a response to any inquiries concerning the proposed merger transaction.⁵²⁰

However, it should be noted that the preliminary agreement usually governs all the issues concerning the remaining steps of the merger process, and that might be different from case to case. Meanwhile in most of the cases it will address the main general terms and conditions, among which are the following issues: (1) granting access to books and records, (2) protecting confidential information, (3) publicity and announcements concerning the transaction, (4) merger process expenses, (5) the brokers fees, (6) the expected effect of the transaction on the employees, (7) conditions to closing the transaction, (8) operations during the merger process, (9) key terms to be incorporated in the closing agreement, and (10) deadlines and timetable.⁵²¹

Generally speaking, the parties are always concerned with allocating the risk of the transaction between them, which could be accomplished through the terms incorporated in the preliminary agreement, and it was even reported that the parties might enter into insurance agreement specially designed for mergers transactions.⁵²² In addition to those general terms, the preliminary agreement may contain some other crucial provisions concerning the following

⁵¹⁸ ROBERT COYNE & KEVIN EVANS, NON-BINDING PRELIMINARY AGREEMENTS: USE ‘GOOD FAITH’ WITH CAUTION in 2008 INTERNATIONAL MERGERS & ACQUISITIONS: CREATING VALUE IN AN INCREASINGLY COMPLEX CORPORATE ENVIRONMENT at 74 (Financier Worldwide Booz & Company ed. 2008).

⁵¹⁹ MILLER, Mergers and Acquisitions: A Step-by-Step Legal and Practical Guide, *supra* note 414, at 43. 2008.

⁵²⁰ Thomas Lee Hazen, *Rumor Control and Disclosure of Merger Negotiations: Full Disclosure or "No Comment" -- The Only Safe Harbors*, 46 MARYLAND LAW REVIEW 954, at 961 (1987).

⁵²¹ ANDREW J. SHERMAN, Mergers & Acquisitions from A to Z, *supra* note 391, at 52, 56-58. 2006.

⁵²² WALT LEMANSKI, RISK ALLOCATION – DRIVING FORCE BEHIND THE M&A PROCESS in 2008 INTERNATIONAL MERGERS & ACQUISITIONS: CREATING VALUE IN AN INCREASINGLY COMPLEX CORPORATE ENVIRONMENT at 106 (Financier Worldwide Booz & Company ed. 2008).

issues: (1) conducting negotiations in good faith, (2) locking-up the transaction, (3) termination and break-up the process, each of those additional provisions will be discussed in turn as follows.

Concerning the “good faith” provision, some preliminary agreements include such provision that require the parties to negotiate in good faith, but that kind of provisions are not similarly recognized in all the countries around the world; at one end of the spectrum that provision has no legal impact in the UK, while in Australia it has some impact if it is clearly mentioned that the agreement itself is binding, while at the other end of the spectrum the provision is binding even if it was expressly mentioned in the preliminary agreement that it is not a binding agreement in most of the US jurisdictions.⁵²³ Accordingly, in a cross-border merger transaction using that provision might have different interpretations and that might end with a dispute before courts.

In the same context, it was claimed that the “good faith” provision in the preliminary agreement might contradict with the directors’ obligations (good faith, fiduciary duty of care, and loyalty) in the US legal system.⁵²⁴ To elaborate more, the obligation to negotiate the merger transaction in “good faith” might led to missing some other opportunities with third party, and those opportunities might better serve the shareholders’ interests, and this is highly problematic because there is no clear standard that defines the directors’ obligations.⁵²⁵ As a clearer, precise, and more effective alternative to the “good faith” provision, the parties may clearly state and define their obligations with regard to the negotiation process and the consequences in the case of the breach instead of these generalized vague obligations.⁵²⁶

The parties, mainly the acquirer, may wish to save their interest in the transaction and not to waste resources by finding that the transaction ends up intended for a third party, accordingly they might incorporate a lock-up provision in the preliminary agreement, or what is known as “non-solicitation” or “no-shop/no talk” provisions, and under those lock-up provisions the target is banned from entering into negotiations or even talks concerning other proposals with third parties, at least for a certain period.⁵²⁷

⁵²³ For more details about the impact of the “Good Faith” provision in UK, Australia, and US *see generally* COYNE & EVANS, Non-binding Preliminary Agreements: Use ‘Good Faith’ with Caution, *supra* note 518, at 74-76. 2008.

⁵²⁴ REED, et al., The Art of M&A, *supra* note 366, at 790. 2007.

⁵²⁵ Jessica Toonkel, Skepticism Rises Around SEC Fiduciary Rule (Thomson Reuters 2012).

⁵²⁶ COYNE & EVANS, Non-binding Preliminary Agreements: Use ‘Good Faith’ with Caution, *supra* note 518, at 77. 2008.

⁵²⁷ John Mackie, Deal Protection in a Tough Market No Talks and Go Shops (Thomson Reuters 2011).

One more time, that kind of provisions is also highly problematic in some jurisdictions, especially in the US, because it might also contradict with the directors' obligations (good faith, fiduciary duty of care, and loyalty).⁵²⁸ As a clearer alternative, it could be argued that kind of lock-up provisions would be better replaced by a termination provision i.e. setting consequences in case that the target terminate the process for any reason.

Concerning the termination and the break-up provisions that might be incorporated in the preliminary agreement, the parties may agree to set certain fees to be paid in case the acquirer did not close the transaction, or the target terminates the process as a result of a third party offer, those kinds of provisions are known as "reverse termination fees," "break-up fees," or simply as "termination fees" provisions,⁵²⁹ and those provisions are of a great importance and have great implications in almost all the cases.

To better understand the importance and the implications of such termination provisions, consider the fact that the percentages of termination fees have reached up to 19.40% of the estimated purchase price of the target in some transactions during 2011.⁵³⁰ Furthermore, it was also reported that in 2011 AT&T paid a 3 billion US dollars as reverse break fees to Deutsche Telekom AG, because it did not close the transaction, regardless of the fact that the transaction was blocked by the authorities in the US i.e. the US Department of Justice (hereinafter DOJ), despite the fact AT&T was not responsible for its failure.⁵³¹

Meanwhile, it was reported that kind of termination provisions are not recognized similarly in all jurisdictions in the same manner, such as high fees percentages are not acceptable in some jurisdictions, and for instance, it is only acceptable by the courts to set a termination fees within the range of 2-3% of the estimated purchase price of the transaction, in some jurisdictions of the US.⁵³²

⁵²⁸ MILLER, *Mergers and Acquisitions: A Step-by-Step Legal and Practical Guide*, *supra* note 414, at 28. 2008; for more details about one of the most famous case law that increased the uncertainty in the lock-up provision practice especially in the publicly traded corporations *see* Delaware Chancery Court decision on Omnicare, Inc. v. NCS Healthcare, Inc., 818 A. 2d 914 - Del: Supreme Court 2003

⁵²⁹ MARC C. D'ANNUNZIO & WAYNE N. BRADLEY, *DRAFTING AND NEGOTIATING PURCHASE AGREEMENTS TO ANTICIPATE CHALLENGES* in 2008 *INTERNATIONAL MERGERS & ACQUISITIONS: CREATING VALUE IN AN INCREASINGLY COMPLEX CORPORATE ENVIRONMENT* at 102 (Financier Worldwide Booz & Company ed. 2008).

⁵³⁰ Alex Lee, *Reverse Termination Fees Escalation in an Uncertain Environment* (Thomson Reuters 2011).

⁵³¹ Alex Lee, *A Global Review of Merger and Acquisition Activity* (Thomson Reuters 2011).

⁵³² D'ANNUNZIO & BRADLEY, *Drafting and Negotiating Purchase Agreements to Anticipate Challenges*, *supra* note 529, at 102. 2008.

In the same context, it should be noted that some of the termination provisions in the preliminary agreements are not just a straight forward provisions i.e. not just setting certain percentage of the estimated purchase price as a break-up fees. Termination provisions could be designed and drafted in a tiered structure, which means the percentage is not fixed but fluctuated according to certain scenarios, for example, in the transaction between Medco Health Solutions and Express Scripts the termination fees was ranging from 650 million US dollars to 950 million US dollars.⁵³³ Meanwhile, the tiered structure of the termination provision will inevitably increase the risks and uncertainties during the merger process.

Finally, it was also reported that those termination provisions are not only widely accepted between parties, but also some acquirers might prefer to pay a high termination or break-up fees instead of entering into an over-valued transaction,⁵³⁴ and it is noteworthy here that the target valuation and determining whether it is over-valued or not will be identified in the next step in the merger process i.e. the step of due diligence and valuation, as it will be addressed in the next discussion.

c) Due diligence and valuation

In the due diligence and valuation step the parties will put the transaction into a “reality test” to deeply examine the records and documents, in order to decide whether the transaction is of a real value as it appears or not.⁵³⁵ In other words, the parties will examine the results accomplished by the preparation team, during the preparation and screening step, in order to make sure that the proposed or expected value is realistic and is not just a synthesized value by a professional team, and it is undoubtedly true that the results of that examination i.e. the due diligence will inevitably effect the final decision as whether to enter into the transaction or not.⁵³⁶

The due diligence mainly involves the examination and the analysis of all the records and documents of the target from legal, financial, and accounting perspectives. Moreover, from all those perspectives, the due diligence main tasks include; the assessment of the current situation

⁵³³ Lee, Reverse Termination Fees Escalation in an Uncertain Environment, *supra* note 530, 2011.

⁵³⁴ DEREK STOLDT, DEAL CERTAINTY AND RECENT DISLOCATIONS IN THE CREDIT AND M&A MARKETS in 2008 INTERNATIONAL MERGERS & ACQUISITIONS: CREATING VALUE IN AN INCREASINGLY COMPLEX CORPORATE ENVIRONMENT at 99 (Financier Worldwide Booz & Company ed. 2008).

⁵³⁵ ANDREW J. SHERMAN, Mergers & Acquisitions from A to Z, *supra* note 391, at 63. 2006.

⁵³⁶ REED, et al., The Art of M&A, *supra* note 366, at 381-382. 2007.

of the target, valuating the expected benefits from the transaction, identify potential risks and any impediments that might face closing the transaction, gathering all information that will be used in the next steps, for example, the information that will be possibly used to structure and finance the transaction.⁵³⁷

The documents to be checked by the acquirer's representing team during the due diligence might be classified into hundreds of categories,⁵³⁸ and it is not easy if not impossible to draw up an exhaustive list of the documents, but as guidance, some authors tried to classify those documents under key categories. Under the corporate affairs category there is a huge list that starts with all documents related to corporate registrations, by-laws and any amendments thereof, board and shareholder meetings' minutes, and all corporate affairs related management reports. Under the financial issues category there is also an enormous list that exceeds the corporate affairs category, as it includes but not limited to all the financial information starting from the taxation documents, auditing reports, books, all documents related to debt and financing issues, financial statements, balance sheets, and all the management reports related to finance.⁵³⁹

Moreover, under the employment category there is also a massive list that might include for example; all employment agreements, consulting and management agreements, all benefits' plans specially those for the top-tier management team, unions or collective agreements, all documents proving compliance to regulatory issues such as those rules issued by the U.S. Equal Employment Opportunity Commission and those required under the Occupational Safety and Health Act,⁵⁴⁰ those adopted by the administration at the United States Department of Labor, and all the employment policies that are adopted internally.⁵⁴¹

Furthermore, under the assets category there is another gigantic list, no less than the list under the previous categories, and that might include for example documents related to real estate registrations and taxes, insurance plans, all agreements related to real estate transactions such as rent; purchase; and mortgages, and all documents related to IPR.⁵⁴² In that regard, it should be noted that assets registration especially lands are highly problematic under most of legal systems, and that the real estate registration issues resembles a great percentage of the legal

⁵³⁷ ANDREW J. SHERMAN, *Mergers & Acquisitions from A to Z*, *supra* note 391, at 64. 2006.

⁵³⁸ For more details about a general list of documents to be examined during the due diligence *see generally* MILLER, *Mergers and Acquisitions: A Step-by-Step Legal and Practical Guide*, *supra* note 414, at 51-56, 60-63. 2008.

⁵³⁹ ANDREW J. SHERMAN, *Mergers & Acquisitions from A to Z*, *supra* note 391, at 69-71. 2006.

⁵⁴⁰ Occupational Safety and Health Act of 1970, U.S.C. § 651 et seq.

⁵⁴¹ ANDREW J. SHERMAN, *Mergers & Acquisitions from A to Z*, *supra* note 391, at 71-72. 2006.

⁵⁴² *Id.* at 72-73.

issues that might be discovered during the due diligence, and it was even reported that targets operating in agriculture industry have always been acquired at an underestimated value due to that very reason.⁵⁴³

Ironically, it is not even easy to draw up the list of categories of the lists itself, for instance many other categories could be listed, for example all documents related to domestic and overseas operations, documents related to filing and licensing from industry-specific regulatory authorities and all compliance reports thereof, documents related to all the business agreements whether already performed or still pending, documents related to any disputes discovered during what is known as the “litigation analysis.”⁵⁴⁴

It could be easily claimed that those huge lists of documents are not only highly problematic because it is not easy to accurately draw up an exhaustive list for them, but also because the examination of such documents might lead to disclosing confidential information to the acquirer, disturbance of the daily operations by conducting on-site visits, and finally consuming the parties’ resources. However, regarding the confidentiality of the information that might be disclosed during the due diligence step, it was previously noted in the discussions of the preliminary agreement step, that in most of the cases the parties enter into a special confidentiality agreement or incorporate confidentiality clause in the preliminary agreement in order to properly protect their interests at that stage and during the whole process.⁵⁴⁵

In the same context, and as a solution to some of the mentioned problems, the idea of Virtual Data Room (hereinafter VDR) emerged, by which a VDR service provider will manage to upload a soft copy of all the documents to online servers, and the target gives the potential acquirer access to those servers.⁵⁴⁶ To demonstrate how these VDRs are useful, it should be noted that; the parties would incur no traveling or lodging expenses,⁵⁴⁷ access to certain information might be restricted and limited only to certain top-tier management team, documents

⁵⁴³ BOGDAN BOROVIK & EKATERINA KATERINCHUK, SECTOR-SPECIFIC M&A IN UKRAINE in 2008 INTERNATIONAL MERGERS & ACQUISITIONS: CREATING VALUE IN AN INCREASINGLY COMPLEX CORPORATE ENVIRONMENT at 291 (Financier Worldwide Booz & Company ed. 2008).

⁵⁴⁴ For more details about litigation analysis in due diligence *see generally* REED, et al., *The Art of M&A*, *supra* note 366, at 397-399. 2007.

⁵⁴⁵ MILLER, *Mergers and Acquisitions: A Step-by-Step Legal and Practical Guide*, *supra* note 414, at 26. 2008; REED, et al., *The Art of M&A*, *supra* note 366, at 383. 2007.

⁵⁴⁶ MILLER, *Mergers and Acquisitions: A Step-by-Step Legal and Practical Guide*, *supra* note 414, at 27. 2008.

⁵⁴⁷ ANGUS BRADLEY, SELL-SIDE ONLINE DATAROOMS in 2008 INTERNATIONAL MERGERS & ACQUISITIONS: CREATING VALUE IN AN INCREASINGLY COMPLEX CORPORATE ENVIRONMENT at 137 (Financier Worldwide Booz & Company ed. 2008).

will be available at anytime regardless of different working hours or conflicting time zones, avoiding the affect and negative impact on the target's employees or what is known as “water-cooler rumor mills” that might develop during the on-site visits, granting access to several potential acquirers at the same time, and even indexing and searching are easier than the traditional on-site visits.⁵⁴⁸

In addition to the mentioned problems, it should be also noted that due diligence in cross-border mergers is highly complicated because the documents should be examined according to different jurisdictions, each might have its own legal, regulatory, financial, accounting rules that are not only different but sometimes contradicting, for instance there are conflicting issues between the rules of preparing the financial statements in many countries as it will be discussed while discussing the cross-border mergers impediments in detail. It also could be claimed that due diligence is a highly complicated task that should be accomplished by specialized professionals otherwise that might lead to fatal problems that put the transaction to an end or even lead to more serious problems.⁵⁴⁹

In the cross-border context, there are different trends in using external professionals to conduct or assist in carry out the due diligence, for instance in some jurisdictions in the EU the target may finalize due diligence reports through an independent third party before engaging into serious steps with any potential acquirer, and it should be also noted that not only the different trends and contradicting or conflicting rules are problematic, but also every different jurisdiction has its own “hot-buttons” i.e. issues that are resembling a high priority to that jurisdiction, for instance it was reported that environment related issues are “hot-buttons” in the US meanwhile the employees' pension plans are “hot-buttons” in the UK.⁵⁵⁰

Based on the just mentioned “hot-buttons” issue, it was claimed that the domestic acquirer might be more aware of the target status than any other foreigner acquirer, and that might ease finalizing the due diligence step with more accurate results,⁵⁵¹ and obviously that is

⁵⁴⁸ ANDREW J. SHERMAN, *Mergers & Acquisitions from A to Z*, *supra* note 391, at 79. 2006; DARREN REDMAYNE & SAURIN MEHTA, DOMESTIC VERSUS FOREIGN ACQUIRERS: MANAGING AN INTERNATIONAL SALE PROCESS in 2008 INTERNATIONAL MERGERS & ACQUISITIONS: CREATING VALUE IN AN INCREASINGLY COMPLEX CORPORATE ENVIRONMENT at 83 (Financier Worldwide Booz & Company ed. 2008).

⁵⁴⁹ For more details about common mistakes happened in due diligence *see generally* ANDREW J. SHERMAN, *Mergers & Acquisitions from A to Z*, *supra* note 391, at 56-58. 2006.

⁵⁵⁰ REDMAYNE & MEHTA, *Domestic Versus Foreign Acquirers: Managing an International Sale Process*, *supra* note 548, at 83. 2008.

⁵⁵¹ *Id.* at 81.

also true for the publicly traded corporations, because it would be easier to get access to most of its records and financial statements due to the disclosure obligation imposed by the rules adopted in the stock exchange in most of the jurisdictions, and that is even before the due diligence and without entering into a preliminary agreement.

It is noteworthy that the due diligence will not stop throughout all the other remaining steps during the merger dynamics, or even by closing the transaction, it might be slowed down but it should not be stopped, for instance carrying out a due diligence after the closing is highly important to ease the management tasks and to check the validity of any representations that were made before the closing. In that context, the parties often incorporate a “bring-down” clause into the merger agreement, which imposes an obligation and warranties on the target to keep the financial and legal status unchanged until the closing of the transaction.⁵⁵²

As it was previously mentioned the main goal of the due diligence is to determine the realistic value of the target, therefore the valuation is extremely interrelated to the due diligence and both of them could be considered as the second step in the merger dynamics. However, successful due diligence is a prerequisite to start a valuation process on a solid ground and equipped with the realistic information about the target, and undoubtedly that will also help in expecting its future. It should be noted that the valuation process might be conducted by using one of the following valuation methods.

The first method is the most common valuation method, which is the Discounted Cash Flow (hereinafter DCF) method. The DCF method is based mainly on the principal of time value of money, which means that the current value of certain amount of money is not the same in the future, and according to the DCF method of valuation the target is valued as follows; first all the expected future cash flows are estimated, and then that estimated amount is discounted at certain rate in order to determine the current value of these cash flows as if it was earned presently, not in the coming future.⁵⁵³

The second method of evaluation is the Relative Valuation method, according to that method determining the value of the target depends mainly on the market value of comparable corporations, and comparable within that method means that both corporations i.e. the target and base corporation are almost of the same size, operating in the same industry, and having same

⁵⁵² REED, et al., *The Art of M&A*, *supra* note 366, at 410-411. 2007.

⁵⁵³ ANDREW J. SHERMAN, *Mergers & Acquisitions from A to Z*, *supra* note 391, at 137-139. 2006; REED, et al., *The Art of M&A*, *supra* note 366, at 89, 108-109. 2007.

financial status.⁵⁵⁴ The third method is the Replacement Value Method (hereinafter RVM), according to the RVM the target is valued by determining the cost of building it from scratch, and in that method not only the cost of the tangible assets are considered but all other “soft assets” like for instance the cost of hiring the current employees are also considered.⁵⁵⁵

The fourth method is Average Rate of Return (hereinafter ARR); within that method the target is simply valued by dividing the average of the expected accounting profits by the average expected investments.⁵⁵⁶ The fifth method is the Payback method, in which analyzes the decision as whether to proceed for a merger according to certain proposed value based on the payback period, and that period is the period after which the capital investments are recovered back to the acquirer, and it should be noted that in the payback method any returns beyond the payback period will be disregarded.⁵⁵⁷

The sixth method of valuation is the Internal Rate of Return (hereinafter IRR) and it is sometimes referred to as Economic Rate of Return (ERR), that method is also based on the principal of time value of money like the DCF, however according to the IRR or ERR the target is valued by estimating the expected future returns not the cash flows, and then that estimated amount is discounted at certain rate in order to determine the current value of these returns as if it was earned currently, not in the coming future.⁵⁵⁸

The seventh method of valuation is the Market Value Method (hereinafter MVM), the MVM is mainly used in acquiring publicly traded corporations, whereas it depends mainly on the value of the of comparable corporations, and comparable here in that method means that both corporations i.e. the target and base corporation have the same P/E.⁵⁵⁹ The eighth method of valuation is the Comparable Net Worth to MVM, as its name appears it is similar to MVM but actually with some accounting adjustments for the purposes of a more accurate valuation even by using less amount of information, and it was designed mainly to protect minority shareholders in squeeze-out transactions.⁵⁶⁰

Despite the fact that the assessment of those valuation methods is beyond the scope of this dissertation, it is undoubtedly true that a deep understanding of all those valuation methods

⁵⁵⁴ MILLER, *Mergers and Acquisitions: A Step-by-Step Legal and Practical Guide*, *supra* note 414, at 32-33. 2008.

⁵⁵⁵ REED, et al., *The Art of M&A*, *supra* note 366, at 87, 104-105. 2007.

⁵⁵⁶ *Id.* at 87-88, 105.

⁵⁵⁷ *Id.* at 88, 105-106.

⁵⁵⁸ *Id.* at 88-89 106.

⁵⁵⁹ *Id.* at 89, 106-107.

⁵⁶⁰ *Id.* at 89, 107-108.

will reveal that the valuation is “not a precise science [and] is based upon both objective facts and subjective beliefs and assumptions about the future performance of the [target].”⁵⁶¹ It was even claimed that all the known valuation methods are impractical and are “highly subjective,” and the final valuation depends mainly on negotiations and the supply and demand forces i.e. the acquirer is willing to pay certain amount for the target and the target is willing to go through merger in return for a certain amount also the estimated valuations are usually a rough range that fits in between those wills.⁵⁶²

Generally speaking, parties always enter into negotiations and even make adjustments to the valuation until the closing date in order to mitigate any fluctuations in the market prices, foreign exchange rates, and other possible factors that might affect the initial valuation.⁵⁶³ In the same context, it is noteworthy that the value is wrongfully used as synonym for the price, meanwhile they could be easily distinguished; whereas the “[v]alue is the intrinsic worth of an asset, while price is what a buyer has actually paid for it. Value essentially exists only in the minds of people, while price reflects real-world market behavior.”⁵⁶⁴

Moreover, in order to circumvent or at least to cutback any gaps that might be between the valuation of the target and what the acquirer is expecting about the performance of the target in the future, is known as “earn-out” provision. Under the earn-out provision the purchase price will be linked to the future performance such as sales or total revenues, etc., and that provision is also held to be an incentive for the target to maintain or improve its performance that may increase the purchase price in addition to mitigating the gap between the valuation and the acquirer expectations.⁵⁶⁵

Finally, it should be noted that the due diligence and the valuation step are almost continuous until the closing of the transaction, and it is also primarily governed by the terms and conditions of any preliminary agreement thereof, like all the other steps throughout the merger process. However, if the parties are interested in proceeding to the next step in the merger

⁵⁶¹ ANDREW J. SHERMAN, *Mergers & Acquisitions from A to Z*, *supra* note 391, at 28. 2006.

⁵⁶² MILLER, *Mergers and Acquisitions: A Step-by-Step Legal and Practical Guide*, *supra* note 414, at 35. 2008.

⁵⁶³ D'ANNUNZIO & BRADLEY, *Drafting and Negotiating Purchase Agreements to Anticipate Challenges*, *supra* note 529, at 103. 2008; MILLER, *Mergers and Acquisitions: A Step-by-Step Legal and Practical Guide*, *supra* note 414, at 50. 2008.

⁵⁶⁴ REED, et al., *The Art of M&A*, *supra* note 366, at 79. 2007.

⁵⁶⁵ MURRAY LANDIS & GREGG MCCONNELL, *EFFECTIVE EARN-OUT PROVISIONS IN SALE & PURCHASE AGREEMENTS* in *2008 INTERNATIONAL MERGERS & ACQUISITIONS: CREATING VALUE IN AN INCREASINGLY COMPLEX CORPORATE ENVIRONMENT* at 104-105 (Financier Worldwide Booz & Company ed. 2008).

process, which is deciding which merger structure will best serve their interests and how the transaction will be financed, which will be addressed in the next discussion.

d) Structuring and financing the transaction

As it was previously addressed during the discussion of the mergers types and classifications, the merger transaction could be executed or structured in enormous structures, and mergers could be also classified according to how the transaction was financed.⁵⁶⁶ Furthermore, it should be noted here that structuring and financing the transaction are directly interrelated to each other, whereas the structure will be executed by means of the financial tools, meanwhile financing the transaction depends mainly on how it will be structured.

Actually, both structuring and financing the transaction will mainly depend on the information that was gathered during the due diligence as it was also previously mentioned, and the more the due diligence was successfully accomplished the more the decisions that will be taken to choose the structure and the right financing tool will fit into the interests of all the parties. Generally speaking, the parties may decide to structure and finance the transaction to resemble any of the structures that was previously mentioned during the discussions of the mergers types and classifications.⁵⁶⁷

For instance the parties may decide to structure their transaction as one of the following structures: (1) direct merger, (2) triangular merger, (3) reverse triangular merger, (4) statutory mergers, and (5) subsidiary mergers, or even one of the nontraditional structure like: (1) dividend access share, (2) exchangeable share, and the (3) equalization structure, or any other structure of the previously discussed structures. Moreover, they may decide to finance the transaction either through debt or equity, and they might use any of the previously discussed financing options, for example: (1) leveraged buyouts (ESOP, MBO), (2) cash for stock, (3) stock for stock, (4) stock for asset, etc., or even the parties may also decide to finance the deal through a combination of any of the financing tools.

What should primarily drive the parties decisions for certain structure or financing tool deals with how that structure and financing option will serve their interests on a case by case basis, but generally their main concerns in that regard could easily be identified as follows: (1)

⁵⁶⁶ See *supra* p.73.

⁵⁶⁷ See *supra* p.73.

taxes (instant or deferrable tax), (2) availability of the financial resources, (3) limiting the liability of the acquirer through a triangular structure, (4) how the target will operate after merger, independently or it will be wholly swallowed by the acquirer, (5) whether the target's agreements and licenses are assignable or not, (6) the complexity of the structure and how it may take time to be executed, and (7) the legality of the proposed structure in the jurisdictions where it will be registered and where the operations will be performed.

As an example of how the transaction might be structured, take the following example, the ESOP fund at corporation "A" and some of the shareholders of corporation "C" agreeing to jointly acquire "A," and to keep "X" (operation unit in "A") operating independently, and to sell "Y" (operations unit in "C"), while the rest of "C" is to operate as a part of "A," the structure may be as follows: the partners will incorporate a new corporation named "B," and then "B" enter into debt agreements with various lending sources, following that "B" will acquire controlling share of "C," then "B" acquire the rest of shares of "C" in a squeeze-out transaction, then "C" will swallow "B" in a reverse triangular merger transaction, next "C" divest "Y" through a carve-out transaction to a third party, followed by "C" entering into debt agreements with various lending sources to acquire "A" in an LBO transaction, resulting in "A" divesting "X" in a spin-off transaction, and at the end "A" swallowing "C" in a reverse triangular merger.

e) Closing the transaction

Closing the transaction is the final step in the merger dynamics, and that crucial step will successfully finalize all the efforts done throughout the entire process of the merger transaction, and will put it into a working reality. Closing the transaction could be simply defined as "the event through which the parties to [the merger] transaction consummate that transaction by the execution and delivery of documentation, and, if applicable, the transfer of funds ...", and accordingly it encompasses two categories of closing issues, the first one is the corporate issues and the second category is the financial issues.⁵⁶⁸

The closing of the transaction, as a step in the row of steps in the merger dynamics, begins after all the preliminary negotiations and the due diligence and valuation is successfully done, and the transaction was structured and the parties decided how it would be financed. The

⁵⁶⁸ REED, et al., *The Art of M&A*, *supra* note 366, at 613. 2007.

closing step starts by drafting and negotiating a definitive agreement, to determine all the key terms and conditions of the transaction such as, the representations and warranties, indemnification, payments terms and conditions, closing conditions, post-closing rights and obligations, and how the transaction will be executed and defining the remedies for any breach thereof.⁵⁶⁹

The tasks to be accomplished during the closing step are basically enormous, and could be categorized into three phases: (1) pre-closing, (2) closing, and (3) post-closing phases.⁵⁷⁰ In that context, drafting and negotiating the mentioned definitive agreement is a task in the pre-closing phase, meanwhile signing the definitive agreement is not recommended during that phase because it will be risky to do so, since there are still some closing conditions to be satisfied before signing the definitive agreement.⁵⁷¹ It was reported that in most of the cases the parties sign the definitive agreement and closed the transaction simultaneously during the closing phase.⁵⁷²

In addition to drafting and negotiating the definitive agreement during the pre-closing phase, the parties should do all preparations to satisfy any closing requirements and conditions as per the agreements, laws, and regulations in all the concerning jurisdictions. For instance, filing and obtaining all the required shareholders approvals, any required regulatory approvals such as antitrust clearance by the merger control authorities, approval by the stock exchange authorities in case that one or more of the parties is a publicly traded corporation, in addition to any industry-specific premerger approvals, and also any foreign investment or national security approvals.⁵⁷³

It should be noted that not only the volume of the transaction and how it will be structured will determine the time it might take to close it, but the time will overwhelmingly depend on the tasks to be accomplished during the pre-closing phase, due to the fact most of those tasks are in one way or another depending on actions to be done by third parties or even the waiver of their rights, such as the antitrust authorities in a situation which a premerger approval is required, and third parties in a situation that the assignment of the agreements with the target is precondition.

⁵⁶⁹ ANDREW J. SHERMAN, *Mergers & Acquisitions from A to Z*, *supra* note 391, at 174. 2006.

⁵⁷⁰ REED, et al., *The Art of M&A*, *supra* note 366, at 618. 2007.

⁵⁷¹ MILLER, *Mergers and Acquisitions: A Step-by-Step Legal and Practical Guide*, *supra* note 414, at 29. 2008.

⁵⁷² REED, et al., *The Art of M&A*, *supra* note 366, at 614. 2007.

⁵⁷³ MILLER, *Mergers and Acquisitions: A Step-by-Step Legal and Practical Guide*, *supra* note 414, at 29, 77. 2008.

To overcome any lengthy time periods that the pre-closing phase might take, any negative effects it might cause to the operations of the both the target and the acquirer, or on the prices in the stock exchange, and any changes to the governing rules and regulations in circumstances that a new law is adopted, the parties may sign the definitive agreement and arrange for an escrow account to be designated specially as a guarantee for the tasks that are not accomplished until the signing date, while on the other hand signing the agreement is sometimes a prerequisite condition by the regulatory authorities and the financing partners.⁵⁷⁴

The closing phase is usually short, ranging from few hours to few days, during which the parties shall satisfy the final task checklist, that list may generally include: (1) making a final review of the documents, (2) date any undated documents, (3) sign all the documents that requires such signature and were not yet signed, (4) checking whether all the closing condition were satisfied or waived, (5) making payments, and finally (6) deliver documents.⁵⁷⁵ Obviously, starting from the moment of the signing the definitive agreement the relation between the parties and any closing or post-closing issues will be governed by the definitive agreement not the preliminary one.

The last and final phase is the post-closing phase, during which each party will receive any remaining documentation that it is entitled to receive it, but was not yet delivered during the closing phase, as it happens in some cases the delivery of some the documents during the closing phase is not possible.⁵⁷⁶ In fact, during that post-closing phase, the parties have to implement what is known as the post-merger plan that was designed to overcome any challenges that the parties might face in the implementation, and they even sometimes have to mutually monitor the post-merger operations as in the case of earn-out transactions.⁵⁷⁷

It is noteworthy that the post-merger plan might take a long time starting from three months to more than six months,⁵⁷⁸ because in most instances it is an integration process between two or more different corporations in many aspects, such as operations, policies, financial and accounting perspective, etc. In summary, that integration will mainly depend on the volume and the complexity of the structure of the transaction itself, and on many other factors like cultural

⁵⁷⁴ REED, et al., *The Art of M&A*, *supra* note 366, at 614-615. 2007.

⁵⁷⁵ *Id.* at 622-623.

⁵⁷⁶ *Id.* at 629.

⁵⁷⁷ ANDREW J. SHERMAN, *Mergers & Acquisitions from A to Z*, *supra* note 391, at 21-22. 2006.

⁵⁷⁸ REED, et al., *The Art of M&A*, *supra* note 366, at 649. 2007.

differences between the corporations of the merger transaction, whereas the cultural differences are considered the main problem that might face the implementation of the post-merger plan.

While the cultural differences do not lead directly to merger failure it might cause a negative impact on the implementation of the post-merger plan, or at least slow down the ideal integration level to fully realize the expected efficiencies from the merger. Consequently, it was reported that most of the well-known mergers suffered from the cultural differences, for example the mergers between Sony Corporation and Columbia Pictures, AT&T and NCR, Daimler-Benz and Chrysler, Citicorp and Travelers Group, AOL and Time Warner, and Hewlett Packard and Compaq Computer. To demonstrate how crucial the issue of cultural differences is, consider the case of the Hewlett Packard and Compaq Computer merger transaction, whereas tremendous efforts, more than two years' worth of time, were made to identify these cultural differences to overcome, during which more than hundred and forty focusing group were conducted in more than twenty countries.⁵⁷⁹

III. Conclusion

By the end of this chapter, many conclusions could be identified, the first was that the origins of the idea of corporation and its development could be attributed to all the humans throughout history, some ethnic groups think about it, maybe others imagined its future, some just spread it or even developed it, but the most important fact was that it was mainly originated and developed for the good of them i.e. humans. The second conclusion is that the early scholars did not contribute to its development as much as it was expected, and they just tried to describe what they experienced in their time, and they even did not give the full picture to their successors, but that could be attributed to the limited resources at their time.

Moreover, the third conclusion is that the East India Company is an example of how that very same early corporations from the 17th century is surprisingly still alive to date, and the fact is also that it is not the only one, there are others. However, others like the South Sea Company was not just an example of the early corporations, but they significantly changed the history of the corporations and its relation with the state, whereas it was used as a financing tool, in

⁵⁷⁹ *Id.* at 661-662, citing J. Robert Carleton & Claude S. Lineberry, *Achieving Post-Merger Success: A Stakeholder's Guide to Cultural Due Diligence, Assessment, and Integration*, (2004). And it is noteworthy that Carleton's firm, Vector Group Inc., conducted the focus groups and interviews as consultants to HP.

addition to that it proved that the corporation could to led to the collapse of the economy whenever it was not used for the good of people.

The fourth and actually a very important conclusion is that surprisingly the US antitrust laws were not enacted for the purpose of protecting the consumers, nor to put the harmful trusts of the American economy to an end, these laws were actually enacted to support some jumpy farmers and some other small inefficient corporations, while also to distract the public attention to introduce a new tariff bill, and on top of that the trusts were doing good for the economy or at least it was not engaged in anticompetitive behavior.

The fifth conclusion is the very surprising role of feudalism in the relation between the corporations and the state, and it literally opened the door for that relation to be developed in the future. Altogether that development could easily be portrayed as starting from the state granting the monopoly and incorporation rights, and then the corporation offering the state to make use of it as a financing tool to ensure the approval for continuation, followed the power of the state being lessen to help the corporation rescue the economy and contribute in the industrial revolution. Next when the corporation gained some power, as represented in the trusts, the state started an new era by reregulating the corporations again, but that time under a new scheme and more professional fashioned style, again that did not succeeded and led to two trends respectively, the privatization and then deregulation.

The sixth conclusion is the creation of the state's role to regulate the corporations and its development in the western jurisdictions; this could easily be identified in the form of the regulatory role of the state during the last century by mean of legislations, while the tool are nonexistent in the most of the eastern jurisdictions, especially the Arab countries. That could be attributed to the fact that from the Islamic perspective that was prevailing in the Arab countries, at least during the early periods, is that the state should not intervene or introduce legislations to control the market unless it should do so to rescue the market from total collapse,⁵⁸⁰ for instance there is nothing reported about any requirement or procedure to incorporate a new corporation.

Furthermore, the seventh conclusion is that mergers are not the only restructuring options for the corporations, from a legal perspective, and there are other alternatives, but the merger is always expected to be more powerful tool that might led to better results, but that is not in all the cases and the parties may opt for other options. The eighth conclusion is that mergers are very

⁵⁸⁰ DABBAH, Competition Law and Policy in the Middle East, *supra* note 353, at 24. 2007.

highly complicated transactions that should be carried out by professionals, and that most of them are based mainly on highly subjective estimations, and it consume huge resources, and that actually raised very perplexing questions, which are mainly; is it worth to enter into such kind of transactions? Does it really work in reality? Those questions and many other important questions will be addressed in the next part.

Chapter Two: Mergers Incentives, Efficiencies, and Impediments

This chapter is considered the core of the dissertation not because it will try to answer the questions of what are the impediments that face mergers, but as a starter and for a clear knowledgeable answer, the incentives that drives the merging parties to engage in such kind of transactions. In other words this chapter will identify what are the expected gains, and then the question of whether the mergers are efficient and will the parties recognize what was expected. Moreover, the coming discussion will try to portray a full picture of the efficiencies of mergers, if any.

This chapter will try to answer each of the above-mentioned questions in turn, therefore it will first address the question of what are the incentives that drives the merging parties, or to be more precise its management, to take the decision to enter into a merger transaction. Because identifying those incentives should be used as standards to evaluate the merger transaction, whereas to assess the idea and determine how it is effective the expected gains should be defined

first. In that context, the discussion will try to identify those incentives and understand how the merging parties might use them in order to realize the expected gains.

The discussion will address the conventional incentive such as, the operational and financial synergies, technological alignment, tax benefits, and even the mismanagement biases like the hubris and winner curse. It will also address the incentives that are mainly related to the cross-border mergers, like for instance the exchange rate, and the market incentives offered in foreign jurisdictions, among others. Then the discussion will try to answer the second question of how efficient are the mergers, and it will try to identify the success and failure factors of the merger transactions.

While answering that second question of the merger efficiency the discussion will try to draw a full picture of the impact of the mergers on the different players in the society, not only the merging parties but all the other members, for example the employees. In addition to that, due to the nature of the question the discussion will not be limited to the argumentative discussions, but will also discuss the empirical findings to figure out the reality of the impact of mergers on the total welfare. In the same line, but from a cross-border mergers perspective, the discussion will try to go further and answer marginal but important question of what is the impact of cross-border mergers on the globalization, and a more profound question of how far is the world now from a globalized world, and is it expected from cross-border mergers to deepen the fears from globalization and even are these myths real.

Then the discussion will be concrete enough to answer the third question, which is the core thesis of this dissertation i.e. what are the impediments that are facing the mergers in general and specially the cross-border mergers, and how they affect the merger transactions. Additionally, the discussion will address the issue of how those impediments could be classified, and does it really matter to classify them into categories. The discussion will identify and address a dozen of those impediments, which are not limited to those impediments imposed by the state or the different regulatory authorities, but it will also include those impediments imposed by others, for instance the professional services providers such as the legal advisors and the role of the law schools in that regard.

The discussion will then attempt to gain a deeper understanding of one additional impediment that faces the mergers, in order to answer the fourth question, which is how the multijurisdictional merger control systems around the globe are hindering the merger

transactions. In order to answer such question the discussion will first start by an overview of three different merger control systems, which are namely the merger systems in the US, the EU, and Egypt. Following that, the discussion will identify some of the drawbacks of adopting such different merger control systems around the globe on both the pure domestic mergers in general and the cross-border mergers specifically.

The discussion of the drawbacks that will be identified will be limited to only ten, and the discussion will show how each of them are expected to influence the merger transaction, and how that will range from just making it more difficult to realize the expected gains from the transaction, or even not realizing any gains at all, to the extent of total failure of the transactions and suffering from losses or sometimes bankruptcy. By the end of that discussion the problems or the impediment that might face the cross-border mergers should be clearly identified, and the research could be advanced to the next step, which will be the design of some reforming proposals.

I. Mergers Incentives

As it was shown, the merger transaction is not an unplanned process, it is also undoubtedly true that deciding to enter into a merger transaction is not a spontaneous decision, but actually a number of incentives motivate the decision maker and drive them to be involved in such complicated transaction. Those incentives were identified by many scholars and merger industry professionals, and the incentives list is extremely varied, at one end of the spectrum it was limited to only one incentive, for example it has been claimed by Warren Buffet⁵⁸¹ that the main and only incentive to enter into a merger transaction is “to move investment out of cash and into assets,” while at the other end of the spectrum other scholars claimed that the common list of incentives includes ten or more incentives.⁵⁸²

In that context, the list of common merger incentives could be simply identified by the following 11 incentives: (1) operational synergies, (2) financial synergies, (3) undervalued assets, (4) managerial pride (Hubris), (5) agency problems (mismanagement), (6) technological

⁵⁸¹ Warren Edward Buffet (August 30, 1930) is an American businessman and is the 2nd in the richest people list, in the U.S., according to the Forbes Magazine, and for more details about his profile visit the Forbes magazine website at <http://www.forbes.com/profile/warren-buffett> last visited October 1, 2014.

⁵⁸² REED, et al., *The Art of M&A*, *supra* note 366, at 646, 647. 2007; ANDREW J. SHERMAN, *Mergers & Acquisitions from A to Z*, *supra* note 391, at 13-17. 2006.

alignment, (7) exchange rates, (8) strategic planning, (9) market policies (regulation and deregulation), (10) market power, (11) tax efficiencies.⁵⁸³ All those incentives will be addressed in this coming discussion, but it should be noted that some of those incentives are directly related to one or more of the other incentives, accordingly the discussion will occasionally address some of those incentives under the same title, as follows.

1. Synergies

Synergies are always classified as the main incentive that drives the decision maker to go through a merger transaction, and in addition to that it is always expected to realize synergies even if it is not the incentives that drive the parties.⁵⁸⁴ Synergies in the merger industry are defined as a “increase in competitiveness and resulting cash flows beyond what the [merging parties] are expected to accomplish independently,”⁵⁸⁵ and it could be explained more simply as the value created or added to the value of the parties by means of the merger transaction.

To elaborate more, consider that simple example; the value of corporation A is VA, and the value of corporation B is VB, the value of both corporations together before the merger is VA+VB, while the value of both corporations together after merger transaction is expected to be VAB, which is greater than VA+VB, because it equals VA+VB+ Synergies.⁵⁸⁶ In other words, expecting that one plus one will be more than two after the merger transaction will drive the decision maker to enter into that transaction.⁵⁸⁷

As it was shown previously, the merger is considered a restructuring tool, and generally speaking the corporate restructuring process can be divided into two main categories; the first category is restructuring for operational purposes (operational restructuring), and the second category is restructuring for financial purposes (financial restructuring). Accordingly, the main incentives to merger transaction as a restructuring tool can be also classified into two main categories; the first category is incentives related to the expected operational synergies, and the

⁵⁸³ DEPAMPHILIS, *Mergers and Acquisitions Basics All You Need to Know*, *supra* note 239, at 3. 2011.

⁵⁸⁴ Steffen Huck & Kai A. Konrad, *Merger Profitability and Trade Policy*, 106 THE SCANDINAVIAN JOURNAL OF ECONOMICS 107, at 107 (2004).

⁵⁸⁵ MARK L. SIROWER, *THE SYNERGY TRAP: HOW COMPANIES LOSE THE ACQUISITION GAME* at 6 (Free Press. 1997).

⁵⁸⁶ ROSS, et al., *Corporate Finance*, *supra* note 401, at 823. 2002.

⁵⁸⁷ REED, et al., *The Art of M&A*, *supra* note 366, at 27. 2007.

second category is the incentives related to the expected financial synergies.⁵⁸⁸ Both of these incentive categories will be addressed in that discussion each in turn, as follows.

a) Operational synergies

As it was previously mentioned, operational synergies is expected in most if not all merger transactions, meanwhile there are two subcategories of operational synergies to be expected out of the merger transactions. The first category is the operational synergies that could be realized on the vertical level, for instance the reduction of the sales and marketing costs of production inputs in case of merger between supplier and manufacturer, or of the final product in case of a merger between that manufacturer and the final product distributor.⁵⁸⁹

The second category is the operational synergies that could be realized on the horizontal level, for instance the reduction of significant percentage of expenses by sharing or using some of the common resources between the merged corporations. For example reducing the fixed costs⁵⁹⁰ by sharing some of the resources such as facilities or even employees, or reducing variable costs by sharing the inventory costs of spare parts or any other resources that could be shared on the same horizontal level.⁵⁹¹

On both the horizontal and vertical levels the parties of the merger will realize synergies due to the average costs⁵⁹² reduction, and that reduction could be explained under various explanations for instance, as a result of applying better management practices,⁵⁹³ and even easier compliance requirements.⁵⁹⁴ Meanwhile, there are two main theories in that regard, the first one is the economies of scope, according to which the synergies would be realized in the case that the average cost is less when the parties of the merger operates together. For example in the case of using the output or the products manufactured by one party as an input for another party of the

⁵⁸⁸ DEPAMPHILIS, *Mergers and Acquisitions Basics All You Need to Know*, *supra* note 239, at 4, 13. 2011.

⁵⁸⁹ REED, et al., *The Art of M&A*, *supra* note 366, at 19. 2007.

⁵⁹⁰ Fixed costs is also known as overheads and are distinguished from variable costs as expenses to be incurred by the corporation independent of any change in the operations, either increase or decrease, for example facility's rent and the management team pay.

⁵⁹¹ REED, et al., *The Art of M&A*, *supra* note 366, at 27. 2007.

⁵⁹² Average cost equals the total costs of certain products or services divided by the number of such products or services.

⁵⁹³ DEPAMPHILIS, *Mergers and Acquisitions Basics All You Need to Know*, *supra* note 239, at 4. 2011.

⁵⁹⁴ Horst Lukanec, et al., *Corporate Restructuring -- the European Cross-Border Merger Directive with a Special Focus on Employment Issues*, 19 *EMPLOYMENT & INDUSTRIAL RELATIONS LAW* 13, at 13 (2009).

merger or even sharing some of the resources on the horizontal level as been previously mentioned.⁵⁹⁵

On the other hand, the second theory is the economies of scale,⁵⁹⁶ under which the synergies would be realized in the case that the cost of operations for the parties of the merger is less when the scale of operations is increased, in other words the merger may induce the parties to increase the scale of their output and that might led to the reduction of average costs by spreading the fixed costs on more output.⁵⁹⁷ However, it should be mentioned, that this is not always the case because at certain levels of production or output the average cost will be increased if the output is increased, in other words if the marginal cost is more than the average cost, the merger will not realize synergies due to diseconomies of scale.⁵⁹⁸

It should be noted here that realizing synergies in a merger under the theory of the economies of scale or even the economies of scope does not mean that the merging parties should operate in same facilities or use the same stores, etc. but they might share their resources while operating in different plants or facilities, to illustrate, the merging corporations may use the same sales, marketing, management, and financial teams while the production will remain in their own separated facilities or plants in different locations.⁵⁹⁹

In the same context, George Stigler claimed that the theory of economies of scale is missing effective tools to determine the optimum scale of output, and thus he developed the technique known as “survivor method” in order to determine it accurately.⁶⁰⁰ The following example could be used to show in a simple way the main idea of the economies of scale; it was reported that the libraries in Indiana have a u-shape average cost curve, whereas for one small library with a circulation of 2,000 per year the average cost per circulation is 3.63 US dollars, and if some small and medium size libraries entered into a merger to reach a library with a circulation of 350,000 per year its average cost per circulation will be only 2.13 US dollars,

⁵⁹⁵ BLACK, *Conceptual Foundations of Antitrust*, *supra* note 242, at 44. 2005.

⁵⁹⁶ For more discussion and details about the theory of economies of scale *see* George J. Stigler, *The Economies of Scale*, 1 *JOURNAL OF LAW AND ECONOMICS* 54 (1958).

⁵⁹⁷ MILLER, *Mergers and Acquisitions: A Step-by-Step Legal and Practical Guide*, *supra* note 414, at 11. 2008; DEPAMPHILIS, *Mergers and Acquisitions Basics All You Need to Know*, *supra* note 239, at 4. 2011; Hopkins, *JOURNAL OF INTERNATIONAL MANAGEMENT*, *supra* note 2, at 215 (1999).

⁵⁹⁸ BLACK, *Conceptual Foundations of Antitrust*, *supra* note 242, at 35, 39. 2005.

⁵⁹⁹ *Id.* at 46.

⁶⁰⁰ Stigler, *JOURNAL OF LAW AND ECONOMICS*, *supra* note 596, at 54 (1958).

meanwhile the average cost of a library with a circulation of more than 350,000 per year will be at an average cost per circulation of more than 2.13 US dollars.⁶⁰¹

It is noteworthy that in order to realize the operational synergies in a horizontal merger transaction, economists claimed that there are preconditions, the main precondition is that the output of the merging parties should have different marginal costs,⁶⁰² while in the case that the outputs have similar marginal cost it was stated that the mergers will not be profitable and accordingly the operational synergies will not be the incentive to drive such a merger transaction.⁶⁰³

It is undoubtedly true that the merger might be induced not only by reducing the average costs of operations, but also by the other operational synergies that might be realized from reducing liabilities of the transactions, at least between the parties of the merger themselves, or even otherwise with third parties.⁶⁰⁴ Actually, operational synergies could also be realized by just improving the risk profile of any of the parties to the merger⁶⁰⁵ or even by enhancing the borrowing capabilities, to demonstrate a party of the merger may benefit from having access to certain output of the other parties and using it as a source of input during shortage periods in the market which will unquestionably support operations to better perform its obligations and to manage risk and liabilities.

Finally, it should be mentioned that despite the fact that synergies are considered as the “magic force” that led to positive efficiencies, either as a revenue increase or even as cost cutting mechanism, some of the synergies coincided with a negative impact in general on economy. For instance, sharing common resources such as the management teams will lead to a fixed cost reduction by saving salaries, but in the same time that will lead to an unemployment negative effect on the economy i.e. job cuts will inevitably lead to an increase in the unemployment rates and even sometimes lead to losses for the merging corporations because most of the employees will get compensation packages upon leaving.⁶⁰⁶

⁶⁰¹ BLACK, *Conceptual Foundations of Antitrust*, *supra* note 242, at 41. 2005.

⁶⁰² Marginal cost is the change in the total costs when one more unit of outputs is produced.

⁶⁰³ Qiu & Zhou, *THE RAND JOURNAL OF ECONOMICS*, *supra* note 242, at 215 (2007).

⁶⁰⁴ MADS ANDENAS & WOOLDRIDGE FRANK, *EUROPEAN COMPARATIVE COMPANY LAW* at 491 (Cambridge University Press. 2009).

⁶⁰⁵ MILLER, *Mergers and Acquisitions: A Step-by-Step Legal and Practical Guide*, *supra* note 414, at 12. 2008.

⁶⁰⁶ Cicarini Jr., *Valuation for M&A Purposes: An Analysis of its Importance to Present a Fair Value of a Company and its Implications for the M&A and Post-integration Process*, *supra* note 407, at 16. 2009.

b) Financial synergies

The financial synergies are the second category of the synergies that might induce the parties to enter into merger, whereas the financial synergies simply refer to the synergies expected out the merger transaction by reducing the cost of capital.⁶⁰⁷ In that regard it was claimed that the cost of capital might be reduced in many merger cases, one of the clearest case is where one or more of the merging parties have excess cash flow and entered into the merger with one or more of the other merging parties that do not have enough internally generated financial resources to finance its operations, in other words the cost of financing the operations through debt will be reduced.⁶⁰⁸

It could be argued that no synergies are realized in that situation and the corporation with excess cash flow would otherwise reduce its own cost of capital instead of the other merging party, meanwhile that is clearly untrue because the average reduction in cost of capital of the merging parties will be more than the reduction of the cost of capital only of the corporation with the excess cash flow. The reason behind that is actually the increase in the value of the merging parties reflected from the other merger operational synergies, for example the enhanced risk profile and borrowing capabilities. In addition to that, it could be maintained that the financial synergies could be realized even without any operational synergies through what is known as financial engineering.⁶⁰⁹

In that context, explaining the P/E model,⁶¹⁰ which is a financial engineering tool, will be a good example to show how merging parties would realize financial synergies through mergers and how it could be a robust incentive for the parties to enter into the merger transaction. Assume in a P/E game model, corporation “A” with an outstanding 1000 share and each share is worth 11 US dollars and its total earnings is 1000 US dollars, which means that its earnings per share (hereinafter EPS) is 1 US dollar and its P/E equal 11; while corporation “B” with an outstanding 1000 share and each share is worth 5 US dollars and its total earnings is also 1000

⁶⁰⁷ The cost of the capital is the minimum returns that are required to induce the future acquirer or the lender to finance the acquisition of corporations' stocks either through debt or equity.

⁶⁰⁸ DEPAMPHILIS, *Mergers and Acquisitions Basics All You Need to Know*, *supra* note 239, at 5. 2011.

⁶⁰⁹ MILLER, *Mergers and Acquisitions: A Step-by-Step Legal and Practical Guide*, *supra* note 414, at 9. 2008.

⁶¹⁰ P/E equals the market price of the stocks of certain corporation divided by its earnings to the shareholder, on a per stock basis, and for more details about the P/E model *see* GAUGHAN, *Mergers, Acquisitions, and Corporate Restructurings*, *supra* note 238, at 35-36. 2002; WESTON & WEAVER, *Mergers and Acquisitions*, *supra* note 240, at 88-89. 2001.

US dollars, and that means that its EPS is also 1 US dollar but its P/E equals 5, thus the total value of both A and B equals 15,000 US dollars.

In the event that A acquired B through a stock-for-stock merger transaction, A would offer 1 share (worth 11 US dollars) for 2 shares of B (worth 10 US dollars + 1 US dollar as a premium⁶¹¹), and that means that A will offer 500 of its shares for the 1000 shares of B, and the merger will result in holding an outstanding amount of 1500 shares in total. Accordingly, the average EPS will be approximately 1.33 US dollars (the total earnings 2000 US dollars ÷ total number of shares 1500), and since the empirical results proved that the stock exchange will usually keep the old P/E of the acquirer not of the target,⁶¹² which was in that situation 11, whereas the final result will be that the average market price of each share approximately 14.6 US dollars and the total value of the corporations approximately 21,900 US dollars instead of just 15,000 US dollars, before the merger i.e. 6,900 US dollars could be realized as a financial synergies out the thin air.

It was even reported that the financial synergies that might be realized from the P/E game model was the only incentive in unprecedented number of merger transactions,⁶¹³ and that was clearly evidenced during the period (1955 – 1970) i.e. the third merger wave in the US.⁶¹⁴ As it was previously mentioned in the discussion of merger waves, that the third merger wave was mainly forced by the magic force of the financial synergies that were realized by means of a financial engineering tool and especially by using the P/E game model.⁶¹⁵

2. Misvaluation

It has been previously mentioned during the discussion of the corporate valuation methods as a step in merger dynamics, which was strongly asserted that all the known valuation methods are highly subjective, and obviously do not always reflect the actual value of the corporation. In fact, the misvaluation results could be recognized on both sides of the spectrum i.e. it could be an overvaluation on one side or even an undervaluation on the other end of the

⁶¹¹ The difference between the estimated real value of a company and the actual price paid to obtain it. Acquisition premium represents the increased cost of buying a target company during a merger and acquisition.

⁶¹² MILLER, *Mergers and Acquisitions: A Step-by-Step Legal and Practical Guide*, *supra* note 414, at 11. 2008; GAUGHAN, *Mergers, Acquisitions, and Corporate Restructurings*, *supra* note 238, at 35-36. 2002.

⁶¹³ MILLER, *Mergers and Acquisitions: A Step-by-Step Legal and Practical Guide*, *supra* note 414, at 10-11. 2008.

⁶¹⁴ GAUGHAN, *Mergers, Acquisitions, and Corporate Restructurings*, *supra* note 238, at 35. 2002.

⁶¹⁵ *See supra* p.42.

spectrum, and in both situations that inaccurate value may be an incentive to enter into merger transaction as it will be explained in that discussion.

It could be easily claimed that misvaluation as an incentive to enter into merger transaction might be recognized in many cases: (1) in case that a corporation shares are undervalued thus acquiring these shares will be a good opportunity for other corporations, (2) in case that a corporation shares are overvalued then that might be a good opportunity for the corporation itself to acquire other corporations by using its own shares to finance the transaction, (3) in event that both situations happened at the same time i.e. the acquirer shares are overvalued and the target shares are undervalued, that will be the typical case in which the misvaluation will play a great role in inducing the acquirer to enter into the merger transaction in order to realize expected financial synergies.⁶¹⁶

It was also claimed that the misvaluation is not only one of the main incentives that drives the acquirer to enter into merger transaction but it might lead to the formation of a merger wave, and in that context it was also stated that the economic environment may be the reason behind the misvaluation, for instance the increased inflation and interest rates inevitably lead to a decrease in shares prices less than the value of the assets that are listed in the balance sheets i.e. the book value of the corporation.⁶¹⁷ Moreover, it was maintained that the undervalued prices of the shares at a certain stock exchange in a certain country might induce the acquirer from other countries, where the prices of the shares are overvalued or even accurately valued to enter into cross-border mergers.⁶¹⁸

In that context, it is noteworthy that in order to verify that the valuation was not accurate and to determine whether there is an undervaluation or an overvaluation, James Tobin⁶¹⁹ developed what is known as Q-Ratio; the Q-Ratio is simply the ratio between the market price of a corporation's shares to the cost of the replacement of its assets, and he also simply claimed that when the Q-Ratio is less than 1 the corporation is undervalued while on the other hand if the Q-Ratio is more than 1 the corporation is overvalued.⁶²⁰ According to the Q-Ratio theory,

⁶¹⁶ Huck & Konrad, *THE SCANDINAVIAN JOURNAL OF ECONOMICS*, *supra* note 584, at 107 (2004).

⁶¹⁷ DEPAMPHILIS, *Mergers and Acquisitions Basics All You Need to Know*, *supra* note 239, at 9-10. 2011.

⁶¹⁸ Hopkins, *Journal of International Management*, *supra* note 2, at 215 (1999).

⁶¹⁹ James Tobin (March 5, 1918 – March 11, 2002) was an economist, and he received the Nobel Memorial Prize in Economics Sciences in 1981, and he served as a Professor at Yale University, and on the Council of Economic Advisors and the Board of Governors of the Federal Reserve System.

⁶²⁰ DEPAMPHILIS, *Mergers and Acquisitions Basics All You Need to Know*, *supra* note 239, at 9-10. 2011.

corporations with a Q-Ratio less 1 are always expected to be targets, while on the other hand corporations with a Q-Ratio more than 1 are expected to be acquirer.

3. Managerial Purposes

Management related purposes might be a strong incentive that induces the decision maker to enter into merger transaction. In that regard, it was reported that the most important of these management related incentives is the personal incentives that drives the managers or the decision makers to enter into the merger transaction, and that is known as “Hubris” and “Winner’s Curse” incentives,⁶²¹ meanwhile there are other management related incentives like the improvement of the mismanagement practices and borrowing better corporate governance systems.⁶²² That discussion will address both of these two categories of incentives, each in turn, as follows.

a) Hubris and winner’s curse

It has been reported that the results of analyzing the decision of the managers in several merger transactions revealed that most of the managers are highly biased like most of humans, and thus their decision are usually not just based on rational incentives, but are sometimes attributed to personal motives like hubris.⁶²³ In that regard, it was claimed that those biases could be categorized into three kinds of biases: (1) optimistic biases, (2) desirability biases, and (3) illusion of control biases.⁶²⁴ It was also held that those management biases always end up with overpaying problems, in order to acquire the target for personal purposes the manager or the decision maker might experience shame after winning the transaction along with losses or even failure, thus those incentives are known as “hubris” and “winner’s curse.”⁶²⁵

According to the optimistic biases, the managers might believe that their performance will offset any overpaying, because they believe that their own valuation of the target and the transaction as a whole is very accurate, and the same for the expected future synergies, either

⁶²¹ Hopkins, JOURNAL OF INTERNATIONAL MANAGEMENT, *supra* note 2, at 216 (1999).

⁶²² See generally David R. Kuipers, et al., *The Legal Environment and Corporate Valuation: Evidence from Cross-Border Takeovers*, 18 INTERNATIONAL REVIEW OF ECONOMICS & FINANCE 552 (2009).

⁶²³ DEPAMPHILIS, *Mergers and Acquisitions Basics All You Need to Know*, *supra* note 239, at 9. 2011.

⁶²⁴ For more details about these biases see generally Avishalom Tor, *The Fable of Entry: Bounded Rationality, Market Discipline, and Legal Policy*, 101 MICHIGAN LAW REVIEW 482, at 503-514 (2002)., and for more details about hubris see generally Richard Roll, *The Hubris Hypothesis of Corporate Takeovers*, 59 THE JOURNAL OF BUSINESS 197(1986).

⁶²⁵ DEPAMPHILIS, *Mergers and Acquisitions Basics All You Need to Know*, *supra* note 239, at 9. 2011.

operational or financial. While on the other hand the desirability biases refers to that the managers believe that certain events will happen in the future to put their expectation into effect, and finally the illusion of control refers to the fact that the managers believe that they will control all future events and disregard all risk and other factors that might put their expectations into question.⁶²⁶

In most of the cases where those kinds of incentives drive the managers to enter into a merger transaction, and that is typically in a hostile takeover transactions, or whenever the transaction is done through a tender offer. The manager of the acquirer will win the contest because of the willingness to overpay, but the winner might experience winner's curse because the decision might led to severe liabilities due to the fiduciary duty i.e. the manager's decision will put himself into trouble because he was not taking into account the shareholder's interest,⁶²⁷ and it should be noted that these fiduciary duty issues are highly problematic and it is out of the scope of this dissertation. Meanwhile, in some other jurisdictions, for example Sweden, the directors and officers are protected from such liabilities under an insurance policy tailored especially to cover their liabilities in such circumstances.⁶²⁸

b) Mismanagement

Mismanagement could be realized in several management practices, but mainly in the case where the managers are focusing on their personal interests by improving the lifestyle, fake reputation, and job security, rather than the shareholders' interests, which is definitely maximizing the share value, and that inevitably leads to the decrease of the price of the shares or even its value. Meanwhile, it was reported that in most cases the mismanagement practices push the situation toward the merger solution, in either way i.e. either as a target because the low price of the shares will be an incentive to the acquirers, or as an acquirer because managers will try to raise the price of the shares by acquiring a target with a low P/E, for example.⁶²⁹

⁶²⁶ Tor, MICHIGAN LAW REVIEW, *supra* note 624, at 503-514 (2002).

⁶²⁷ DEPAMPHILIS, Mergers and Acquisitions Basics All You Need to Know, *supra* note 239, at 9. 2011.

⁶²⁸ The directors and officers insurance is governed by the Swedish Insurance Contracts Act (Försäkringsavtalslag (SFS 2005:104)); SUSANNA NORELID & CHRISTER A. HOLM, DIRECTORS AND OFFICERS DUTIES ACCORDING TO SWEDISH LAW in 2008 INTERNATIONAL MERGERS & ACQUISITIONS: CREATING VALUE IN AN INCREASINGLY COMPLEX CORPORATE ENVIRONMENT at 259-260 (Financier Worldwide Booz & Company ed. 2008).

⁶²⁹ DEPAMPHILIS, Mergers and Acquisitions Basics All You Need to Know, *supra* note 239, at 10-11. 2011.

In that context, Avi Eden, the Vice-Chair of a corporation based in the US, claimed that mismanagement is the main incentive to acquire a target, and by acquiring a mismanaged corporation his corporation could improve the management of the target and thus realize synergies to maximize the value of the shareholders, and he also added that his corporation will not acquire a target that is well performing or one in which its management could not be improved if acquired.⁶³⁰ On the other hand, the mismanagement could be corrected by acquiring a better-managed corporation in order to borrow its good management practices after replacing the mismanagement team with that better one.⁶³¹

In the same context, it was asserted that the most successful merger transaction driven by the mismanagement incentive is the merger where the acquirer is a large corporation with good management practices and system to follow, and the target is a small corporation that is typically a startup and is led by an entrepreneur with low to no management skills but with an innovative good or service.⁶³² Moreover, good management or better corporate governance practices might be as an incentive for the mismanaged corporation in order to offset their losses and maximize the value of the shareholders.

Ironically, that is not always the case, mismanagement might even be misused, whereas the management team might decide to enter into a merger transaction in order to benefit from the mismanagement opportunities i.e. to avoid their obligations and liabilities towards the shareholders under the rules in their jurisdiction, in other words by entering into a merger transaction with a corporation in a jurisdiction where the rules are more tolerant or even friendly to mismanagement practices. This can be seen in some jurisdictions where the shareholders rights are highly protected under laws and regulation while in other jurisdictions the managers are secured against any liabilities toward the shareholders, for example under the insurance policies in Sweden, as it was just mentioned, decision makers may acquire a target in one of those permissible jurisdictions.⁶³³

⁶³⁰ Hopkins, JOURNAL OF INTERNATIONAL MANAGEMENT, *supra* note 2, at 219 (1999).

⁶³¹ MILLER, Mergers and Acquisitions: A Step-by-Step Legal and Practical Guide, *supra* note 414, at 11-12. 2008.

⁶³² GAUGHAN, Mergers, Acquisitions, and Corporate Restructurings, *supra* note 238, at 151. 2002.

⁶³³ See generally Kuipers, et al., INTERNATIONAL REVIEW OF ECONOMICS & FINANCE, *supra* note 622, (2009).

4. *Technological Alignment*

Generally speaking, owning technological advancements are one of the most important tools for a corporation to compete efficiently with other corporations in the same industry, especially when there are huge technological gap between various jurisdictions.⁶³⁴ Owning such technological advancement might be done in many ways, starting from developing it internally by the research and development (hereinafter R&D) internal unit, licensing, franchise, or any other growth alternatives to mergers as has previously been discussed. Meanwhile, it is not easy to develop such technological advancements internally through R&D, and using other growth alternatives might have disadvantages or at least do not grant the acquirer the same benefits or rights of the owner that are gained through the merger transaction.

Accordingly, the alignment with the technological advancements could be one of the merger incentives, and the 73 billion US dollars merger transaction between GlaxoWellcome and SmithKline Beecham in 1999 to form GlaxoSmithKline⁶³⁵ is very good example to prove that the gains from mergers especially in the technological advancements field could be the main incentive for corporation to enter into merger transaction, and here the merger result was the merging of the two corporations R&D budgets, which is highly important in the pharmaceutical industry and inevitably led to realized expected gains.⁶³⁶

It is undoubtedly true that the alignment with the technological advancement as an incentive for a merger transaction is not limited to certain industries like the pharmaceutical industry, meanwhile it is clear in some industries that the technological advancement is crucial not only to the growth of the corporation but is also considered as a surviving precondition, that could also clearly be identified in the telecommunications industry and all the other technology based industries, for instance the consumer electronics industry, internet based services, the internet providing services, etc.⁶³⁷

It is noteworthy that on the cross-border mergers level, there is a special model for the technological advancement as an incentive for parties to enter into merger transaction; whereas

⁶³⁴ Jeff Madura & Geraldo M. Vasconcellos, *Cross-Border Mergers and Acquisitions: A Capital Budgeting Approach and Empirical Evidence*, Faculty Working Paper No.1440 BEBR, at 6-7 (1988).

⁶³⁵ GlaxoSmithKline is one of the largest pharmaceutical corporation and for more information about its history since 1715 visit its official website <http://www.gsk.com/about-us/our-history.html> last visited May 31, 2014

⁶³⁶ GAUGHAN, *Mergers, Acquisitions, and Corporate Restructurings*, *supra* note 238, at 151. 2002.

⁶³⁷ DEPAMPHILIS, *Mergers and Acquisitions Basics All You Need to Know*, *supra* note 239, at 7-8. 2011.

some countries have a comparative advantage⁶³⁸ in technology while others have a comparative advantage in labor costs, thus the model predicts that the gaps in both the technology and the labor costs, are incentives for corporations in both countries to enter mergers. Furthermore, the merger will be considered a tool for more specialization and realizing the synergies of mergers along with the other benefits of specialization, and that model is strongly supported by empirical evidences.⁶³⁹

In addition to that, it was claimed that entering into a merger in order to acquire the technological advancements may serve different purposes other than just the growth or efficiencies, for instance it was held that corporation may enter into merger in order to own technological advancements for defensive purposes, for example eBay⁶⁴⁰ acquired Skype⁶⁴¹ in 2006 for the purpose to keep the technological advancements out of the hand of its competitor, which turned out to be wrong and eBay even resell Skype in 2009 and admitted its failure to realize the expected benefits.⁶⁴²

5. *Exchange Rates*

While the exchange rate is simply the rate at which one currency is exchanged for another, and that obviously will not induce a merger transaction that are concluded in the same jurisdiction or at least where all parties of the transaction are using the same currency, it was claimed that the exchange rate plays a strong role in inducing cross-border merger transactions.⁶⁴³ To better understand how the exchange rate might be considered as a cross-border merger incentive the following example is always given; whenever the value of a certain currency in jurisdiction A is relatively less than the foreign currency in jurisdiction B, the corporations at country A will be an expected target to acquirers from B and vice versa.

⁶³⁸ Comparative advantage refers to the ability of a producer or country to produce certain products or service at a lower marginal cost than anyone else, and even if a certain producer or country has an absolute advantage in producing all products and services that country will gain benefits from limiting its production i.e. specialization, for more details about the theory *see generally* SMITH, An Inquiry Into the Nature and Causes of the Wealth of Nations, *supra* note 112, 1976.

⁶³⁹ Neary, THE REVIEW OF ECONOMIC STUDIES, *supra* note 3, at 1246-1247 (2007).

⁶⁴⁰ eBay is mainly an Internet based corporation in the business of consumer-to-consumer business, for more information about eBay visit its official website http://www.ebayinc.com/who_we_are/one_company last visited May 31, 2014.

⁶⁴¹ Skype is an Internet telephony and messaging services provider corporation, for more information about Skype visit its official website <http://www.skype.com/en/about> last visited May 31, 2014.

⁶⁴² DEPAMPHILIS, Mergers and Acquisitions Basics All You Need to Know, *supra* note 239, at 9. 2011.

⁶⁴³ WESTON & WEAVER, Mergers and Acquisitions, *supra* note 240, at 86. 2001.

Moreover, it was claimed that there was clear evidence in the US, that whenever the exchange rate of the US dollar is high relative to other foreign currencies, it is expected to see increasing activities and this may be a trend for US corporations to acquire foreign corporation from the jurisdictions where the exchange is low relatively to the US dollar, and during the periods where the US dollar is experiencing exchange rate difficulties, the US corporations will be a good opportunity for acquirers from the other countries with a better exchange rate relatively to the US dollar.⁶⁴⁴

Unfortunately, these claims are not accurate because the mere differences between currencies value i.e. the exchange rate, is not the indicator of the purchase power of the currency,⁶⁴⁵ which is actually the factor that might be considered as an incentive to enter into cross-border merger. To elaborate more, whenever a corporation that holds a currency with strong purchasing power acquires a target, and the transaction is concluded in a weaker currency, in that case the acquirer corporation would expect to gain synergies from that transaction.

In that context, it could be claimed that even the purchase power of currency has no clear-cut effect on the cross-border merger, because the gains that might be expected from the cross-border merger due to the differences in the purchasing power of the parties, may be offset by remitting the earnings of the target to the home country of the acquirer as the purchasing power of the earning currency will also be weak. To be more precise, the net wealth of the parties to the cross-border merger may be affected by the fluctuation of the purchasing power of their different currencies, and that should be of important consideration for them and may induce them to enter into the transaction.⁶⁴⁶

6. Strategic and Market Incentives

It is undoubtedly true that entering into a merger transaction is considered as a strategy itself toward the growth of the corporation; meanwhile some other strategic plans might induce the corporation to enter into a merger transaction, for instance a merger might help the corporation to capitalize on its main operations or even diversify, increase its market power,

⁶⁴⁴ Madura & Vasconcellos, BEBR, *supra* note 634, at 3-4, 24 (1988).

⁶⁴⁵ Purchase power of certain currency is known as the real exchange rate and it equals the ratio of the number of units. Certain currency is required to buy a certain product or service from a foreign country after exchanging that currency with the other foreign currency, to the number of units of the that currency that would be required to buy same product or service from the home country.

⁶⁴⁶ See generally Kuipers, et al., INTERNATIONAL REVIEW OF ECONOMICS & FINANCE, *supra* note 622, (2009).

provide the corporation with additional resources, and finally benefit from belonging to a successful parent corporation or group of corporations which is known as “parenting advantage.”⁶⁴⁷

Furthermore, the diversifications of operations generally reduce risk and increase the borrowing capabilities of corporations.⁶⁴⁸ In that context, it was claimed that the strategy of expanding the operations to new products or markets with more expected returns is a good example to show how diversifications is risk reducing,⁶⁴⁹ and it was also maintained that diversifications on an international level across more than one economy might be more beneficial.⁶⁵⁰ Accordingly, a corporate strategy to diversify operations by adding a new production line, in another country to minimize the risk profile, is good illustration to show how the diversification of operations might be an incentive for a corporation to enter into a cross-border merger transaction.⁶⁵¹

One more clearer example to demonstrate how the corporate strategy might be an incentive for a corporation to enter into a cross-border merger transaction, is the case of a corporation operating in the consumer electronic industry and has a skilled marketing and sales teams, but it did not own patents of new products to satisfy consumers, in addition there is a recession in the market in its home country due to the high costs of production. That corporation may develop a strategic plan to decrease the costs of production and own new products, thus its strategic plan might encompass entering into a merger transaction with a corporation that already owns patents of new products, and into a cross-border merger transaction with a corporation that could produce these products at lower costs of production.

In the same context, it was also claimed that corporation might develop certain competition strategy, and that strategy could be achieved through dominant position i.e. gaining enough market power to control the supply certain products or services, and that entering into one or even a series of merger transactions might be the best decision that could serve such monopolistic purposes, and accordingly the corporate competition strategy that might be an

⁶⁴⁷ Hopkins, JOURNAL OF INTERNATIONAL MANAGEMENT, *supra* note 2, at 212 (1999).

⁶⁴⁸ ROSS, et al., Corporate Finance, *supra* note 401, at 834-835. 2002.

⁶⁴⁹ DEPAMPHILIS, Mergers and Acquisitions Basics All You Need to Know, *supra* note 239, at 6. 2011.

⁶⁵⁰ Madura & Vasconcellos, BEBR, *supra* note 634, at 5-6 (1988).

⁶⁵¹ MILLER, Mergers and Acquisitions: A Step-by-Step Legal and Practical Guide, *supra* note 414, at 11. 2008.

incentive for the corporation to enter into a merger transaction.⁶⁵² Such an incentive might raise an antitrust question,⁶⁵³ which will be addressed later during the discussions of the merger control.⁶⁵⁴

In addition to that, it was propertied that not only the corporate strategies that are developed to gain market power are an incentive to enter into merger transaction, but also the market itself might be an incentive. The market itself as an incentive for mergers could clearly be realized in most of the cross-border merger transactions, whereas the differences between markets in different jurisdictions will give the merging parties the opportunity to realize the expected synergies, and therefore is considered as an incentive for the corporation to enter into mergers. To further illustrate this, a more lenient market policies or even deregulated markets in certain jurisdiction might induce corporation from another jurisdiction to enter into a cross-border merger, in order to benefit from such polices instead of starting from the “ground zero” in that market or even using the other growth alternatives to enter such markets.⁶⁵⁵

Meanwhile, it should be noted that it was claimed that the market itself as a factor might significantly induce and boost cross-border merger activities generally, or even in specific economy or industry, but it should not be considered as an incentive that drive specific merger transaction, and many examples were given in that regard to identify such market factors; for instance the accelerated technological advancements, the reduced communication and transportation expenses, the improvements in the quality of research and development, and both industry regulation and deregulation.⁶⁵⁶ In fact that claim is clearly incorrect, because if a certain factor will boost mergers generally, that certain factor might obviously induce certain transaction and therefore will be considered as an incentive for such transaction.

7. *Tax Efficiencies*

As it has been previously mentioned during the discussion of structuring the merger transaction, taxes might significantly influence the structure of the transaction, as it might be

⁶⁵² DEPAMPHILIS, *Mergers and Acquisitions Basics All You Need to Know*, *supra* note 239, at 12. 2011; Huck & Konrad, *THE SCANDINAVIAN JOURNAL OF ECONOMICS*, *supra* note 584, at 108 (2004).

⁶⁵³ Madura & Vasconcellos, *BEBR*, *supra* note 634, at 6 (1988).

⁶⁵⁴ *See infra* p.186.

⁶⁵⁵ Hopkins, *JOURNAL OF INTERNATIONAL MANAGEMENT*, *supra* note 2, at 214-217 (1999).

⁶⁵⁶ WESTON & WEAVER, *Mergers and Acquisitions*, *supra* note 240, at 3-4. 2001; ANDREW J. SHERMAN, *Mergers & Acquisitions from A to Z*, *supra* note 391, at 40. 2006.

taxable or what is known as tax-free transaction.⁶⁵⁷ Taxes once again have a vital role in merger transactions because it is also considered an incentive that might drive corporations to enter into merger transaction.⁶⁵⁸ For instance, it was claimed that a corporation might gain benefits from entering into merger with another corporation in many cases due to the expected tax efficiencies, for example, it might be expected to benefit from; offsetting the loss by carrying forward the combined taxable income, from using the unused investment tax credits, offsetting depreciation expenses that might be changed due to a change in the book value of the assets after the revaluation is done during the merger transaction, among other tax efficiencies.⁶⁵⁹

Meanwhile, in the same context, it was argued that in only a few cases, the expectation of realizing tax benefits might be considered as the incentive that induced the parties to enter into to the merger transaction.⁶⁶⁰ It was even reported empirically, that just announcing the expected tax benefits from the proposed transaction during the merger process, in the cases of offsetting the loss and carrying forward and using the unused tax credits, will inevitably affect the returns of the parties of the transaction significantly, during the process of the merger itself.⁶⁶¹

One more time, tax efficiencies as an incentive for mergers could clearly be shown in most of the cross-border merger transactions, whereas the differences between the taxing regimes in different jurisdictions will give the merging parties the opportunity to realize the expected synergies and therefore is considered as an incentive for the corporation to enter into mergers, for instance lower tax rates, more lenient taxing policies, or even tax-free jurisdictions, which are known as tax heavens, might induce corporations from another jurisdictions to enter into cross-border mergers in order to realize gains from such benefits under the foreign taxing regime instead of being attacked under the national taxing regime or even as a step in the plan to relocate to such jurisdiction.

In that context, it should be noted that those tax efficiencies could be realized away from any tax evasion practices such as splitting profits within non-arm's length⁶⁶² corporations and

⁶⁵⁷ See *supra* p.103.

⁶⁵⁸ Huck & Konrad, *THE SCANDINAVIAN JOURNAL OF ECONOMICS*, *supra* note 584, at 107 (2004).

⁶⁵⁹ DEPAMPHILIS, *Mergers and Acquisitions Basics All You Need to Know*, *supra* note 239, at 11. 2011.

⁶⁶⁰ Ronald Gilson, et al., *Taxation and the Dynamics of Corporate Control: The Uncertain Case for Tax Motivated Acquisitions*, in *KNIGHTS, RAIDERS AND TARGETS* at 273-299, (John Coffee, et al. eds., 1988).

⁶⁶¹ GAUGHAN, *Mergers, Acquisitions, and Corporate Restructurings*, *supra* note 238, at 154. 2002, citing Carla Hayn, *Tax attributes as determinants of shareholder gains in corporate acquisitions*, 23 *JOURNAL OF FINANCIAL ECONOMICS* 121, at 121-153 (1989).

⁶⁶² Non-arm's length refers to two or more legal entities that are related to each other i.e. somehow one control the other.

transfer pricing techniques,⁶⁶³ which might be controlled under bilateral treaties that are specially held between different jurisdictions to prevent such practices and domestic national regulation respectively.⁶⁶⁴ Moreover, returns might be taxable even if it were realized abroad according to the US taxing regime as well as many other “worldwide taxation” regimes,⁶⁶⁵ which means that entering into a merger with a corporation in a tax heaven might not be that attractive. Accordingly, it was claimed that whenever tax consequences after the conclusion of the transaction are significant the tax efficiencies might be the main incentive for the transaction; in other cases it might be considered as a secondary incentive or even a non-issue.⁶⁶⁶

II. Mergers Efficiencies

As it was previously mentioned, the parties of the merger transaction are almost taking their decision to enter into such transaction based on the expected gains, and it does not really matter what they are looking for, and even if it appears that they may have different focuses, it mainly comes down to one main goal which is growth, either to maximize the value for shareholders or even for personal purposes i.e. hubris. Actually, all the discussion concerning merger incentives was in fact addressed from a premerger point of view, but now the question that should be addressed is whether mergers are efficient, in other words do all mergers succeed, or do they all fail, or do some succeed and others fail.

Other important questions are: what are the factors that lead to the success or even the failure of the mergers, who will gain the fruits in the case of success, the acquirer, the target, the employees, the consumer, or the whole society, and who might suffer losses out of the merger

⁶⁶³ Transfer pricing technique means setting the price of certain products or services between two or more non-arm’s length corporations in order to allocate profits and losses, for more details about Transfer Pricing *see generally* WOLFGANG SCHÖN & KAI ANDREAS KONRAD, FUNDAMENTALS OF INTERNATIONAL TRANSFER PRICING IN LAW AND ECONOMICS (Kai Andreas Konrad & Wolfgang Schön eds., Springer. 2012). For more details about Transfer Pricing in Practice *see Id.* at 159-256., for details about the approach of the Organisation for Economic Co-operation and Development (hereinafter OECD) to Transfer Pricing *see Id.* at 71-158.

⁶⁶⁴ Most of the national taxing regimes regulates Transfer Pricing, for more information about the OECD countries’ transfer pricing profile *see* <http://www.oecd.org/ctp/transfer-pricing/transferpricingcountryprofiles.htm>, moreover the Egyptian income tax law No.91 of 2005 regulates the Transfer Pricing practices, and for more about the Egyptian system *see* Egypt Tax Guide 2012 at 4 (PKF International Limited April 2012)., meanwhile it is noteworthy that it is not easy to identify the effectiveness of the transfer pricing regulations as been indicated in ASSAF RAZIN & JOEL SLEMROD, TAXATION IN THE GLOBAL ECONOMY at 150-151 (University of Chicago Press Paperback 1992 ed. 1990).

⁶⁶⁵ For example Philippine also have a worldwide taxation regime, Taxation of Cross-Border Mergers and Acquisitions: Philippines at 8 (Maria Georgina J. Soberano ed., KPMG International 2012); RAZIN & SLEMROD, Taxation in the Global Economy, *supra* note 664, at 2. 1990.

⁶⁶⁶ ANDREW J. SHERMAN, Mergers & Acquisitions from A to Z, *supra* note 391, at 113-114. 2006.

success or failure. More importantly, one more question should be addressed in the same context, is there a clear-cut answer for any of these questions, and whether there are empirical findings that might support the answers to such question. The answers to all these questions will be for the purpose of answering the most vital question, is it really worth entering into a merger transaction or is it just a theoretical idea or myth. In the coming discussion, all these questions will be addressed in some details, as follows.

1. Mergers Efficiencies in Theory and Empirical Findings

There is a great debate concerning the mergers efficiencies,⁶⁶⁷ some scholars claim that mergers always fail, while others to the contrary claim that mergers always succeed, in the same context other claims that there are some factors for success and others for failure, and the success or failure depends on the conditions of each case, because it is undoubtedly true that not all mergers are the same and each transaction has its own conditions. Surprisingly, these contradicting claims are not only in theory but were also reported in empirical researches, as it will be shown in that discussion.

Theoretically, it was maintained that mergers efficiencies could be generally categorized, into three main scenarios according to the incentives that induced the decision maker to enter into the transaction: (1) in the first scenario, the transaction is driven by incentives related to synergies and value creation, and it is expected in theory in that scenario that all the parties of the transaction will realize gains i.e. the value of the acquirer and the target will be increased, and accordingly the total value will be increased, (2) in the second scenario, the transaction is driven by incentives related to managerial purposes and misevaluation, and it is expected in theory in that scenario that the target will realize gains while the acquirer might suffer losses, and accordingly the losses might offset the gains, (3) in the third scenario, the transaction is driven by incentives related to mistakes such as these incentives might raise agency problems issues, and it is expected in theory in that scenario that the target might realize gains while these gains will not

⁶⁶⁷ For more details about Efficiency gains from mergers from an economists point of view see Lars-Hendrik Roller, et al., *Efficiency Gains from Mergers*, in EUROPEAN MERGER CONTROL: DO WE NEED AN EFFICIENCY DEFENCE? (Fabienne Ilzkovitz & Roderick Meiklejohn eds., 2006).

compensate the losses suffered by the acquirer, and accordingly the total value of the parties will be decreased.⁶⁶⁸

As it was previously shown, most of the merger transactions are expecting to realize gains, at least in theory, for all the parties to the transaction. Meanwhile, it has been held that some of the mergers patterns are not efficient, at least for the acquirer.⁶⁶⁹ Additionally, from a practical point of view it was claimed that most of the mergers are efficient even for the acquirer.⁶⁷⁰ Indeed the history of the mergers waves, which was previously discussed during the discussions of the corporation history,⁶⁷¹ might support the practical claims and put the other claims into a perplexing question, because it does not make sense that most of mergers are inefficient, while merger transactions are booming and setting records in both the number and the value of the transactions, and in almost all of the industries during the past century at least until now.⁶⁷²

Despite the fact that there are great difficulties in accurately measuring most of the gains from the merger transactions,⁶⁷³ it could be argued that by using the empirical research the debate between the contradicting efficiency claims will come to an end, for instance by monitoring the prices of the shares of the merging parties it might be easier to identify any gains or losses to the parties. In that context, there are unprecedented volume of empirical evidences, derived from what is known as “event studies,” reported that in almost all merger transactions the target realized short run gains in the prices of its shares, and it was also reported that these gains might be on the long run in many cases.⁶⁷⁴

Moreover, it was also reported that the gains that are realized by target in the form of the increased prices of its shares, are mainly due to the premium and usually starts from the date of

⁶⁶⁸ WESTON & WEAVER, *Mergers and Acquisitions*, *supra* note 240, at 83-84. 2001.

⁶⁶⁹ *Id.*

⁶⁷⁰ James A. Fanto, *Quasi-Rationality in Action: A Study of Psychological Factors in Merger Decision-Making*, 62 OHIO STATE LAW JOURNAL 1333, at 1334 (2001).

⁶⁷¹ *See supra* p.42.

⁶⁷² Anju Seth, et al., *Value Creation and Destruction in Cross-Border Acquisitions: An Empirical Analysis of Foreign Acquisitions of U.S. Firms*, 23 STRATEGIC MANAGEMENT JOURNAL 921, at 921 (2002); Kenneth J. Hamner, *The Globalization of Law: International Merger Control and Competition Law in the United States, the European Union, Latin America and China*, 11 THE JOURNAL OF TRANSNATIONAL LAW & POLICY 385, at 386-387 (2002).

⁶⁷³ ROSS, et al., *Corporate Finance*, *supra* note 401, at 845. 2002.

⁶⁷⁴ Mueller, *Efficiency Versus Market Power Through Mergers*, *supra* note 413, at 69-70. 2004; BLACK, *Conceptual Foundations of Antitrust*, *supra* note 242, at 26. 2005; ROSS, et al., *Corporate Finance*, *supra* note 401, at 841, 844. 2002.

the announcement of the transaction and reaches its peak on the closing date.⁶⁷⁵ Accordingly, that obviously means that these argued gains might not be classified as merger gains, because it is mainly realized during the premerger period and it could be realized even if the parties fails to conclude the transaction at the designated date. In that context, it was claimed that these price fluctuations are just a product of “reshuffling of ownership that produces short-run ... gains,”⁶⁷⁶ and it was even reported that the parties of the unsuccessful merger i.e. not closed, usually suffers from decrease in the price of its shares.⁶⁷⁷

In addition to that, it was even claimed that the increase of the prices of the shares of the target might be a mere result of management tactics usually used to raise the premium or to prevent certain acquirer from closing the transaction, such tactics are known as the poison pills, which are mainly used as a defense in a hostile takeover transaction, on the other hand it was reported that the acquirer would realize gains to the price of its shares if succeeded in acquiring the target in such a hostile takeover, more than the gains that might be realized if succeeded to acquire a target through a friendly merger transaction.⁶⁷⁸

While it was just mentioned that there is a great difficulty in accurately measure most of the gains from merger transactions, that does not mean that there are no indicative empirical findings to measure such gains. For instance, some scholars directly examined and analyzed the accounting data to identify any gains to the value of the merging parties, instead of just watching the price of their shares, and that data revealed that actual increase in value, if any, is less than what is reflected in the price of the shares, while on the other hand some researchers using almost the same techniques of retrieving the findings directly from the accounting data, reported that the parties realized significant gains i.e. value creation, most importantly due to the change to better management or even through saving by “eliminate[ing] redundancies and overlapping positions.”⁶⁷⁹

In that context, it was reported that whenever the acquirer is from a jurisdiction that is more concerned with shareholders rights and the target jurisdiction does not have the same concerns, that will usually drive the merger transaction to create value and realize significant

⁶⁷⁵ BLACK, *Conceptual Foundations of Antitrust*, *supra* note 242, at 26. 2005; Mueller, *Efficiency Versus Market Power Through Mergers*, *supra* note 413, at 71. 2004.

⁶⁷⁶ BLACK, *Conceptual Foundations of Antitrust*, *supra* note 242, at 25. 2005.

⁶⁷⁷ ROSS, et al., *Corporate Finance*, *supra* note 401, at 841. 2002.

⁶⁷⁸ BLACK, *Conceptual Foundations of Antitrust*, *supra* note 242, at 25. 2005.

⁶⁷⁹ DEPAMPHILIS, *Mergers and Acquisitions Basics All You Need to Know*, *supra* note 239, at 216. 2011; BLACK, *Conceptual Foundations of Antitrust*, *supra* note 242, at 27. 2005.

gains, while on the other hand in the cases where the acquirer is from a jurisdiction that is more concerned with markets than the jurisdiction of the target, that will not drive the merger to create value as much as in the situation where the acquirer is from the shareholder rights oriented jurisdiction.⁶⁸⁰

Furthermore, it is even reported that the empirical findings in most of cases revealed no evidence for costs reductions after mergers,⁶⁸¹ and even claimed that mergers destroy value more than create value to its parties.⁶⁸² However, it was stated that these empirical findings i.e. those studies that reported that there are no evidence for value creation, are virtually not accurate especially with concern to cross-border mergers, whereas most of those studies do not take the transaction incentives into consideration, whereas the merger incentives might not lead to immediate value creation or even that some mergers were driven by personal incentives like hubris and are not expected to realize gains on the corporate level at anytime.⁶⁸³ On the other hand, it was reported to the contrary of these findings that most of mergers create value for the parties and reduce costs.⁶⁸⁴

It should be noted here that there is a great debate concerning the empirical findings of the cross-border mergers, and whether it proves that it is efficient, and if so, is it more efficient to enter into such kind of transaction than entering into a pure domestic transaction. In that context, it was reported that the empirical findings revealed that the gains realized from the cross-border mergers are significantly higher than those might be realized from the pure domestic transactions, but these gains are not attributed to certain factors but attributed to general differences between jurisdictions like the differences in the taxation regimes and exchange rates.⁶⁸⁵

Meanwhile, on the other hand, it was also expressed that the empirical findings revealed that the gains realized from the domestic mergers are actually differ from those that might be

⁶⁸⁰ Seth, et al., STRATEGIC MANAGEMENT JOURNAL, *supra* note 672, at 938 (2002); Steen Thomsen & Torben Pedersen, *Ownership Structure and Economic Performance in the Largest European Companies*, 21 *see id.* at 689, at 702-703 (2000).

⁶⁸¹ ROSS, et al., *Corporate Finance*, *supra* note 401, at 845. 2002.

⁶⁸² Fanto, OHIO STATE LAW JOURNAL, *supra* note 670, at 1334-1335 (2001).

⁶⁸³ Seth, et al., STRATEGIC MANAGEMENT JOURNAL, *supra* note 672, at 937-938 (2002).

⁶⁸⁴ BLACK, *Conceptual Foundations of Antitrust*, *supra* note 242, at 28. 2005.

⁶⁸⁵ Robert S. Harris & David Ravenscraft, *The Role of Acquisitions in Foreign Direct Investment: Evidence from the U.S. Stock Market*, 46 THE JOURNAL OF FINANCE 825, at 842-843 (1991); S. Scholes Myron & Mark A. Wolfson, *The Effects of Changes in Tax Laws on Corporate Reorganization Activity*, 63 THE JOURNAL OF BUSINESS S141, at S141-S164 (1990).

realized from the cross-border merger transactions, but which gains are more beneficial for the merging parties will mainly depend on both the trade and merger policies adopted in the national and the foreign jurisdictions, and there are a lot of permutations and combinations in that regard that will end up with different results, for instance, more gains would be realized in pure domestic than in cross-border mergers if closed market policies were adopted on the national level and vice versa, and it was also reported that pure domestic mergers will benefit the national economy and will harm the foreign economy.⁶⁸⁶

It should be mentioned that all these empirical findings are the result of observation and analysis of massive amounts of data, which is almost the same in empirical studies in any other field. However, the findings concerning the mergers' efficiency are generally contradicting, and that is mainly due to number of variables: (1) each empirical research observes and analyzes different set of data concerning specific number of mergers, during specific period, financed by specific financial tools, mostly in specific jurisdictions, and in specific industries, (2) there are inherent limitations due to confidentiality issues, whereas the access to data might not be granted easily, (3) most of the researches was based on the idea that merger decision was a rational decision and does not take into consideration the different incentives of each transaction. Accordingly, the discussion was aiming to show how researches are contradicting in their findings without analyzing the numbers or arguing about its validity, as this is out of the scope of this discussion.

Moreover, it should be also noted that those empirical findings depends mainly on how the researcher define failure and that significantly varies from one to another, some might attribute them to the accomplishment of the incentives, others only to certain financial goals, etc. For instance, in order to show how many factors are influencing the rationality of the merger decision, and that empirical researches should take incentives into consideration, some empirical researches reported that many psychological factors influences the decision of entering into a merger transaction, and that these factors affect the performance of the corporation after closing the merger transaction.⁶⁸⁷ Those psychological factors along with other factors will lead to the success or failure, and that issue will be addressed in the following discussion.

⁶⁸⁶ Huck & Konrad, *THE SCANDINAVIAN JOURNAL OF ECONOMICS*, *supra* note 584, at 108-110, 121 (2004).

⁶⁸⁷ Fanto, *OHIO STATE LAW JOURNAL*, *supra* note 670, at 1358-1374 (2001); *Id.*

2. *Factors for Success and Failure*

First, it should be noted that since the internal factors are mainly the factors that might affect the success or failure i.e. to meet the expectation of the parties after closing the transactions, this discussion will be limited only to these internal factors, while on the other hand the external factors will be addressed later in the discussion of the impediments of merger. That is mainly because, as it was previously mentioned, this section is concerned in the first place with merger efficiency and to answer the question of is it really worth it to enter into a merger transaction or is it just a myth or theoretical idea. The answer might help in answering the next question in cases where mergers are really worth it; what are the external factors that might impede it success.

Examining the literature to determine the factors that led to the success or the failure of the merger transactions, revealed that there is no single factor that could be identified as the success or magic key, or as the doorway to failure, meanwhile there are a long list of factors that might be considered as factors for success, and another list of factors that might be considered as failure factors. Despite the fact that many of these factors could be listed in both lists, the failure list is not as long as the success factors list, as it will be shown in this discussion, as follows.

The success factors list is a very long,⁶⁸⁸ however, these factors could be categorized into five main categories, each one is comprised of many factors. The first category is the cross-border related factors, and that category includes the following factors: (1) add new distribution channels i.e. entering new markets, (2) improve existing distribution channels by circumventing trade barriers at the home country of the target and other countries to which that home country has special access such as in the case of common markets, (3) advantageous operational inputs i.e. better quality or cheaper production inputs, less expensive workforces or more trained employees, more advanced output tools, (4) regulatory advantages i.e. more lenient policies or deregulated industries, less tax rates, more political stability, better investment incentives, transparency and accountability, and easier licensing requirement or waiver conditions, and (5) exchange rates differences.

The second category of success factors is the technology related factors, which includes the following factors: (1) acquire new IPR, (2) obtain new technology, (3) get new R&D

⁶⁸⁸ For a more detailed list of the success factors *see generally* WESTON & WEAVER, *Mergers and Acquisitions*, *supra* note 240, at 85-86. 2001; Neary, *THE REVIEW OF ECONOMIC STUDIES*, *supra* note 3, at 1230 (2007).

potentials, (4) fully exploit already owned technology, (5) fully exploit already owned IPR, (6) entering technology related industries, and (7) upgrade existing technological advancement. The third category is the management related factors, and it includes the following factors: (1) integration of several teams on all levels for instance the management, marketing, operational, sales teams, etc., (2) adopting new management strategies, (3) adopting better management practices, (4) adopting better corporate governance practices, and (5) adopting better corporate culture.

The fourth category of success factors is the market related factors, which includes the following factors: (1) increase market share, (2) economy of scope advantages, (3) diversification advantages,⁶⁸⁹ (4) market power, and (5) fewer competitors. The fifth category of success factors is the financial related factors that include the following: (1) cost reductions due to economies of scale, (2) enhanced financial portfolio, (3) enhanced risk profile, (4) access to new financing resources, (5) enhanced borrowing capabilities, and (6) fully utilization of all resources.

On the other hand, the list of failure factors includes three main factors, in addition to some success factors that might be considered as failure factors if not used properly and in the right direction and time, for example focusing on the integration between teams might lead to poor performance and then lead to failure.⁶⁹⁰ The first failure factor is overpaying i.e. paying a very high premium that no synergies might possibly offset,⁶⁹¹ or at least could not easily be restored over long terms.⁶⁹² The second factor is a failed, costly, or slow pace of the integration process i.e. integration between the different management policies, teams, operations, accounting systems, corporate culture, etc.⁶⁹³ The third factor is the mismanagement errors, which might occur due to practices that are mainly intended to satisfy personal purposes, such as mergers that are driven by hubris,⁶⁹⁴ or some other psychological factors.

⁶⁸⁹ BLACK, *Conceptual Foundations of Antitrust*, *supra* note 242, at 27. 2005. He claimed that some empirical findings reported that the more diversified operations are after closing the merger the less the gains would be realized by the acquirer.

⁶⁹⁰ Fanto, *OHIO STATE LAW JOURNAL*, *supra* note 670, at 1335 (2001).

⁶⁹¹ Hopkins, *JOURNAL OF INTERNATIONAL MANAGEMENT*, *supra* note 2, at 213 (1999).

⁶⁹² For example a premium of more than 50% was proposed by the US corporation United Parcel Services (UPS) to acquire the Dutch corporation TNT-express in a 6.85 billion US dollars transaction, and UPS planned to spend 1.3 billion euros for integration purposes, for more details about that proposed transaction *see* Anthony Deutsch, et al., *UPS to Buy TNT for 5.2 Billion Euros* (Anna Willard ed., Thomson Reuters 2012).

⁶⁹³ DEPAMPHILIS, *Mergers and Acquisitions Basics All You Need to Know*, *supra* note 239, at 43. 2011.

⁶⁹⁴ Mueller, *Efficiency Versus Market Power Through Mergers*, *supra* note 413, at 69. 2004.

In that context, some empirical findings reported that there are some psychological factors that influences the decision of entering into the merger transaction, and that the factors affect the performance of the corporation even after closing the transaction.⁶⁹⁵ Those psychological factors are mainly: (1) myopia: under such factor, thoughtless emotions would mainly drive the decision maker, (2) status-quo: under that bias, the fear to lose the current market power or position drives the decisions, (3) extremeness aversion: under such factor the decision maker opts for average strategies and results and keeps away from extremes even if it could lead to gains or avoid losses, (4) over optimism: under such factor, decisions are based on unrealistic expectation even if contradicting with solid norms and empirical statistics, and (5) anchoring heuristic: under that bias, decisions are based on an arbitrary selected “anchor” i.e. values that readily available, and the decision maker holds tight to that “anchor” despite the fact that it is contradicting with rational reasoning.⁶⁹⁶

Finally, it should be noted that those lists of success and failure factors are not an exhaustive list of factors that might led to the failure or the success of merger transactions, and as previously mentioned that each transaction has its own unique conditions and factors, which if properly used and fully utilized will led to success and vice versa. Furthermore, addressing those factors and the empirical findings of mergers efficiency indeed did not give a solid answer or draw a full picture about mergers, as to whether it is efficient and worthwhile, and what are the impacts on the other parties in society, all these issues will be addressed in the following discussion.

3. *The Full Domestic Picture and Drawbacks*

The full picture of the merger efficiencies is not only the gains and losses to the parties of the transaction, but in the full picture other stakeholders or third parties should be considered in measuring the merger efficiencies, because the merging corporations are not living in a vacuum, they are many other parties and stakeholders that are living in society, and they might be affected by those merger transactions, even if they are not engaged as a party to the transaction or not

⁶⁹⁵ For an early summary of the psychological factors in literature see Bernard S. Black, *Bidder Overpayment in Takeovers*, 41 STANFORD LAW REVIEW 597 (1989).

⁶⁹⁶ Fanto, OHIO STATE LAW JOURNAL, *supra* note 670, at 1358-1374 (2001).

even as an antitrust authority, to be more precise there are consumers, competitors, new investors, employees, and other stakeholders might be affected generally by the economy.

In one of his speeches, namely his speech before the conference of the “Merger Regulation in the EU after 20 years,”⁶⁹⁷ Joaquín Almunia, who was the Vice President of the EC and the Commissioner responsible for Competition Policy Competition in the EU, until November 2014, after listing some of the gains that are expected from mergers, he said that: “[t]he full picture is more complicated, because mergers can also harm consumers and the economy when, for example, they allow firms to have too much market power. Instead of locking in efficiencies, some mergers can lock out competition; and for a very long time.”⁶⁹⁸

Despite the fact that the words of Joaquín Almunia should be examined and verified, it summarizes not the full picture of the merger efficiencies but in fact one of the hottest debate in that industry, and indeed reflects on the concerns and the opinion of not only the government officials and antitrust authorities, but also most of scholars, that debate is namely the gained market power effects out of the merger transactions. In that mentioned picture, four parties could be identified as follows: the merging corporations, their competitors, the consumer, and the society in general i.e. the economy.

However, the full picture still not complete, there is a missing fifth party, which is the employee. One might claim that this party was not intentionally missed in the picture, and what happened is that party was not on the agenda of that conference, but in fact that was not the case because that is not the first incidence not to consider the employee in the picture, and it was even reported that many government officials in many jurisdictions clearly mentioned that the employees issues in the merger industries are “not considered” at all.⁶⁹⁹

The full picture also explicitly suggests that despite any efficiencies or gains that might be realized by the parties of the transactions, it is also expected that the other parties will experience drawbacks. Those drawbacks can be categorized into two main categories; the first category is the negative effects that might result from the market power gained through the merger or in other words the anticompetitive and monopolistic practices, and the second category is the negative effects that might be experienced by the employees.

⁶⁹⁷ The conference was organized by the International Bar Association and EC, and was held on 9–11 March 2011 in Brussels.

⁶⁹⁸ Joaquín Almunia, *EU Merger Control has Come of Age at 2* (IBA Antitrust Committee and the European Commission ed., 2011).

⁶⁹⁹ *Efficiency Gains from Mergers: Report of EC Contract II/98/003*. (2001).

Concerning the anticompetitive practices, it was claimed that the competitors of the merging parties may suffer from market power gained by the surviving corporation after the merger, whereas it might gain enough power to drive all of them or at least some of them out of the market.⁷⁰⁰ In the same context, but with regard to the monopolistic practices, it was maintained that the consumer would be mainly affected by the increasing of the prices due to the limitation on output, in the situations where the merging parties entered into monopolistic practices to maximize their profits.⁷⁰¹

To elaborate more in that concern i.e. on how limiting the output will harm the society, consider the following elaborations according to the following figure; in the case that corporations in the market are competing with one another, corporations will compete until they reach the equilibrium situation where they produce certain quantity of output (Q), which is determined by the market forces at the point where the supply or the marginal cost (MC) intersects with the demand curve (D), accordingly the corporations will offer that output at a price (P) equal to the marginal cost (MC) of that quantity of output (Q), and in that situation there will be a consumer surplus.⁷⁰²

While on the other hand, if there is no actual competition between the corporations in the market, the concerned corporation or corporations will try to limit their production to certain quantity (Q₁) according to its willpower, and that will be at the point where the marginal cost (MC) intersects with the marginal revenue (MR), and accordingly the corporation will offer the unit of that quantity of output at a higher price (P₁), and accordingly the consumer will pay higher price and the corporation will decrease its output, these losses are generally known as the dead-weight loss or welfare loss.⁷⁰³

⁷⁰⁰ Mueller, Efficiency Versus Market Power Through Mergers, *supra* note 413, at 66-67. 2004.

⁷⁰¹ Hamner, THE JOURNAL OF TRANSNATIONAL LAW & POLICY, *supra* note 672, at 388 (2002); BLACK, Conceptual Foundations of Antitrust, *supra* note 242, at 25. 2005.

⁷⁰² Consumer surplus occurs when the consumer is willing to pay more than market price to in the return for certain products or services.

⁷⁰³ GAUGHAN, Mergers, Acquisitions, and Corporate Restructurings, *supra* note 238, at 138-139. 2002.

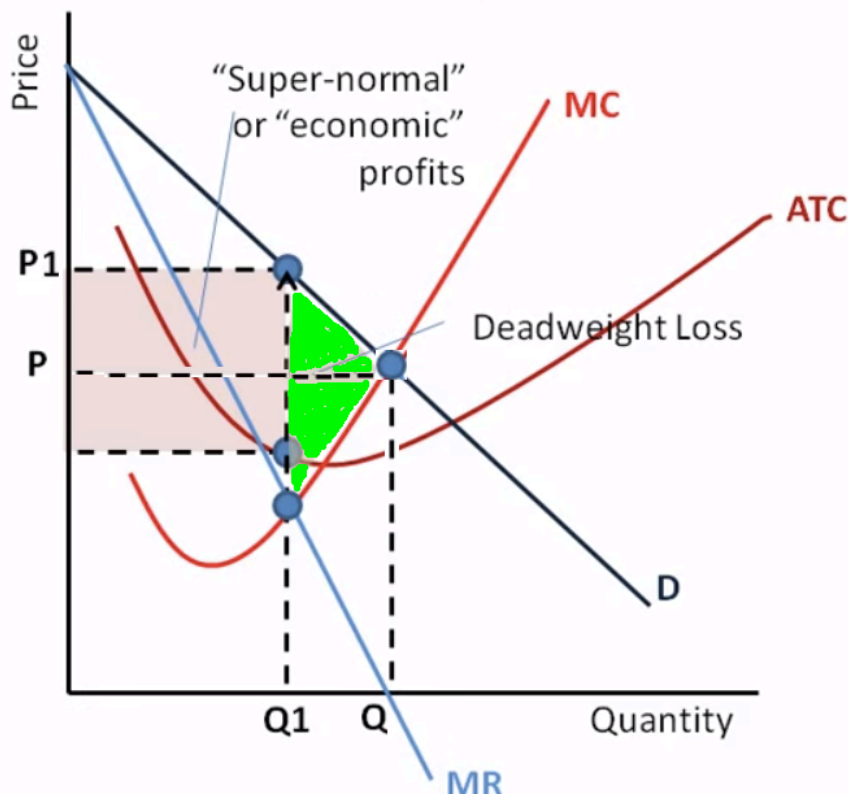


Figure 10: The conventional economic justification of antitrust rules

In that regard, it could be claimed that the main goal of mergers is contradicting with that assumption, because the merging corporation will mainly be interested in expansion and reaching the gains or the expected synergies from the economies of scale i.e. efficiency.⁷⁰⁴ Meanwhile, and based on that fact, the antitrust authorities are interested in investigation whether the merger will lead to certain effects in the market, not only the simple model of the sole player in the market who could determine the output for the market. Those effects are mainly classified into three categories: (1) unilateral or un-coordinated effects, (2) coordinated effects, (3) conglomerate effects.⁷⁰⁵ These effects will be addressed later in detail during the discussion of the foundational errors as a drawback of the merger control systems.⁷⁰⁶

It was also claimed that the antitrust laws could be also justified in addition to the loss suffered by the consumer due to the output limitation by the corporation, there will also be

⁷⁰⁴ BLACK, *Conceptual Foundations of Antitrust*, *supra* note 242, at 18-20. 2005.

⁷⁰⁵ Jonathan Green & Gianandrea Staffiero, *Economics of Merger Control*, THE HANDBOOK OF COMPETITION ECONOMICS 8, at 8 (2007).

⁷⁰⁶ *See infra* p.235.

indirect losses that will be suffered by the consumer as result of the false messages sent to corporations in other industries that certain output is worth more than its actual price.⁷⁰⁷

In that context it was held that according to the Chicago School of Economics,⁷⁰⁸ the consumer welfare model, which is in fact aiming to offset the consumer losses that might be realized due the limitation of the output by the corporation “productive inefficiency,” which was enabled to do that by means of the power gained under merger and restore the position where the consumer will realize consumer surplus “allocative efficiency,” means that the antitrust laws are mainly concerned with the efficiency issues.⁷⁰⁹ In fact that was not the only school with an economic justification of antitrust laws, but there were other schools like for instance the Harvard School, the Post-Chicago School and many others.⁷¹⁰

It was argued that realizing profits does not indicate that the merger is economically efficient or not,⁷¹¹ because economic efficiency is mainly concerned with decreasing “the level of wastage of society’s resources” i.e. allocative efficiency.⁷¹² On the other hand merger advocates are arguing that mergers would led to productive efficiency, and in that regard it should be noted that the productive efficiency of the merger is the least debated category of merger efficiencies, but in the same context it is considered as one of the main incentives that drives most of the merger transactions during the last decade.⁷¹³

The claim of merger productive efficiency is usually based on another claim, which is that the gains that might be realized out of the merger are unattainable under other growth

⁷⁰⁷ COLINO, *Competition Law of the EU and UK*, *supra* note 185, at 9. 2011.

⁷⁰⁸ For more details about the ideas and thoughts of the Chicago School as presented by one of its leaders *see* generally Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 925 (1979).

⁷⁰⁹ W. Adam Hunt, *Business Implications of Divergences in Multi- Jurisdictional Merger Review by International Competition Enforcement Agencies*, 28 NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS 147, at 150-151 (2007).

⁷¹⁰ For more details about the difference between the main schools of thought i.e. Chicago and Harvard Schools *see* generally; William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUMBIA BUSINESS LAW REVIEW 1(2007); Max Huffman, *Marrying Neo-Chicago With Behavioral Antitrust*, 78 ANTITRUST LAW JOURNAL 105, at 111-115 (2012); VIVEK GHOSAL & JOHN STENNEK, *THE POLITICAL ECONOMY OF ANTITRUST* at 27, 32-34, 37-38, 44 (B. Baltagi, et al. eds., ELSEVIER. 2007); Posner, UNIVERSITY OF PENNSYLVANIA LAW REVIEW, *supra* note 708, (1979).

⁷¹¹ Stanley M. Besen, et al., *An Economic Analysis of the AT&T-T-Mobile USA Wireless Merger*, 9 JOURNAL OF COMPETITION LAW & ECONOMICS 23, at 38 (2013).

⁷¹² JULIE CLARKE, *INTERNATIONAL MERGER POLICY: APPLYING DOMESTIC LAW TO INTERNATIONAL MARKETS* at 21 (Edward Elgar. 2014).

⁷¹³ Neil Finkelstein & Michael Piaskoski, *Do Merger Efficiencies Receive “Superior” Treatment in Canada? Some Legal, Policy and Practical Observations Arising from the Canadian Superior Propane Case*, 27 WORLD COMPETITION 259, at 272 (2004).

alternatives.⁷¹⁴ In the same context, it was reported in many jurisdictions that proving that the gains are not reasonably achievable under other growth alternatives but the merger is considered a perquisite, in different jurisdictions, to accept the claims of the merger efficiency.⁷¹⁵

Moreover, it has been contended that every efficiency that is realized after the merger is a merger-specific efficiency, while others maintained that any efficiency attributed to the merger is attainable under other growth alternatives and that no efficiency is a merger-specific efficiency, however both of these extreme opposing positions are mere theoretical, and in fact each merger transaction has its own outcome.⁷¹⁶ From a practical point of view,⁷¹⁷ the claim of merger-specific efficiencies depends mainly on the market concentration and how it is expanding, and it was even claimed that merging parties “in a rapidly expanding market will have difficulty successfully asserting efficiency defenses ... since the same result may be achieved fairly promptly through internal expansion.”⁷¹⁸

Furthermore, it was maintained that there are different types of efficiencies that are expected from mergers, and despite the fact that some of these efficiencies are considered “real cost-savings” and others are considered “pecuniary cost-savings,” all of these efficiencies could be categorized under the same category of cost-savings or cost reductions efficiencies.⁷¹⁹ A good example of efficiencies that could be categorized under pecuniary cost-savings is the tax efficiencies and the efficiencies expected from exchange rates, which were previously discussed during the discussions of merger incentives.⁷²⁰ On the other hand, the productive efficiencies that could be categorized under the “real cost-savings” category are namely: (1) rationalization of output, (2) economies of scale and scope, (3) technological advancements, (4) purchasing economies, (5) reduce managerial slack.⁷²¹

⁷¹⁴ CLARKE, International merger policy: applying domestic law to international markets, *supra* note 712, at 21, 2014.

⁷¹⁵ For instance the FTC requires that efficiencies expected under the merger should not be achievable by other alternatives, for instance *see Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer Licenses and Applications, Memorandum Opinion and Order*, 19 FCC Red 21522, at 201, (2004).

⁷¹⁶ Joseph Farrell & Carl Shapiro, *Scale Economies and Synergies in Horizontal Merger Analysis*, 68 ANTITRUST LAW JOURNAL, at 691, 692 (2001).

⁷¹⁷ For more details about the merger efficiency claims in practice in Canada, EU, France, Germany, Sweden, U.K., and U.S. *see* Roller, et al., Efficiency Gains from Mergers, *supra* note 667, at 58-92, 2006.

⁷¹⁸ Robert Pitofsky, *Efficiencies in Defense of Mergers: Two Years After*, 7 GEORGE MASON LAW REVIEW 485, at 488 (1999).

⁷¹⁹ Roller, et al., Efficiency Gains from Mergers, *supra* note 667, at 15, 2006.

⁷²⁰ *See supra* p. 124, 127.

⁷²¹ Roller, et al., Efficiency Gains from Mergers at, *supra* note 667, 14-24, 2006.

To elaborate more, the rationalization of output means that merging parties are expecting cost-savings due to the optimal utilization of production by means of shifting the production to the party with the least marginal cost of production.⁷²² As for the economies of scope, the efficiencies would be realized, as it was previously mentioned, based on the fact that the average cost will be less when the parties are operating together rather than shifting the production from one to the other. Meanwhile, in the case of the economies of scale, in addition to the gains realized from the short-run economies of scale, the main gains would be realized from the fact that merging parties usually invest in the long-run economies of scale.⁷²³

Furthermore, the rationalization of output as an expected productive efficiency under mergers could be done through the utilization of different types of resources, these types of resources are namely: (1) tangible physical fixed assets like machineries and buildings, (2) natural resources like the raw materials, (3) intangible assets like patents and know-how, and (4) human resources.⁷²⁴

The efficiencies realized under the technological advancements come in many flavors, such as the reduction of the production costs, the increasing the quality of the products at the same cost, and the diffusion of the know-how.⁷²⁵ Concerning the gains from the purchasing economies, it is expected that the merging parties gain more collective bargaining power towards their suppliers.⁷²⁶ In many cases, it is also expected that the merger would reduce the managerial slack result out of borrowing good management practices from one party to overcome the internal management inefficiencies that is known as “x-inefficiencies.”⁷²⁷

As an obvious inevitable result of realizing any of the mentioned efficiencies, as a result of the merger, at least one of the merging parties will experience decrease in the average total cost, and thus a downward shift in the long-run supply curve. Accordingly, it is expected that if

⁷²² Dennis van Harmelen, *Efficiency Effects: The Effects of a Horizontal Merger on Cost-Efficiency* (2012) Erasmus University Rotterdam); Roller, et al., *Efficiency Gains from Mergers*, *supra* note 667, at 16, 2006.

⁷²³ Roller, et al., *Efficiency Gains from Mergers*, *supra* note 667, at 16-18, 2006.

⁷²⁴ Gregory J. Werden, *An Economic Perspective on the Analysis of Merger Efficiencies*, 11 ANTITRUST 12, at 12 (Summer 1997).

⁷²⁵ Roller, et al., *Efficiency Gains from Mergers*, *supra* note 667, at 18-20, 2006; Harmelen, *Efficiency Effects: The Effects of a Horizontal Merger on Cost-Efficiency*, *supra* note 722, at 13-16, 2012.

⁷²⁶ Roller, et al., *Efficiency Gains from Mergers*, *supra* note 667, at 20, 21, 2006; Harmelen, *Efficiency Effects: The Effects of a Horizontal Merger on Cost-Efficiency*, *supra* note 722, at 16-18, 2012.

⁷²⁷ Roller, et al., *Efficiency Gains from Mergers*, *supra* note 667, at 20, 21, 2006; Harmelen, *Efficiency Effects: The Effects of a Horizontal Merger on Cost-Efficiency*, *supra* note 722, at 18, 19, 2012.

the parties were not operating at the minimum efficient scale⁷²⁸ before the merger, as a result of the productive efficiency realized under the merger transaction they will reach the minimum efficient scale.

In that context, it was claimed that in some market situations, like for instance where the market is growing by means of technological advancements, the expected productive efficiencies from merger or to be more precise from the rationalization of production, could also be achievable through the normal internal growth of parties, as result of the market competition, even if they are not engaged in a merger transaction, and that would also led to reaching the minimum efficient scale.⁷²⁹ However it was argued that even if the efficiencies are achievable without a merger, the realization of such efficiencies i.e. reaching the MES might be achieved faster through mergers.⁷³⁰

In the same line, it was argued that in the case where the merger is just accelerating the achievement of efficiencies, only the value of the reduced delay is considered a merger-specific efficiency.⁷³¹ In addition to that, it was reported that some merging parties' efficiency claims are contradicting with their precompetitive claims. To elaborate more, the merging parties claim that new entrants will not experience barriers to entry as the result of the merger because those entrants are adequately efficient even if they are small. Meanwhile the merging parties claim that the merger would also increase their own efficiency, and that ironically means that they claim a humped-shape average cost curve instead of the conventional u-shape average cost curve.⁷³²

Furthermore, the merger-specific productive efficiency could be also categorized into variable cost reductions and fixed cost reductions,⁷³³ and it is noteworthy here that it was reported that the variable cost reduction claims are more tolerable by the regulatory authorities in many jurisdictions such as Canada, US, and EU, and that is mainly based on the claim that the variable cost reductions will be realized by consumers in the form of price reduction, and even in a shorter term than the fixed cost reductions.⁷³⁴

⁷²⁸ The minimum efficient scale is the scale of production at which the production is at the lowest point on the average cost curve and on that scale the average cost of producing one additional item is equal to the marginal cost.

⁷²⁹ Farrell & Shapiro, *ANTITRUST LAW JOURNAL*, *supra* note 716, at 688, 689 (2001).

⁷³⁰ Besen, et al., *JOURNAL OF COMPETITION LAW & ECONOMICS*, *supra* note 711, at 38 (2013); Farrell & Shapiro, *ANTITRUST LAW JOURNAL*, *supra* note 716, at 697 (2001).

⁷³¹ U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, n.13 at 30, (August 19, 2010).

⁷³² Farrell & Shapiro, *ANTITRUST LAW JOURNAL*, *supra* note 716, n.7 at 688 (2001).

⁷³³ *See supra* note 590.

⁷³⁴ Finkelstein & Piaskoski, *WORLD COMPETITION*, *supra* note 713, at 266 (2004).

In that context, it should be noted that in some jurisdictions, the gains from a merger transaction should “pass-on” to the consumer at the end, and that could be either in the form of price reduction or other benefits such as an enhanced quality of a good at the same price, and that is an additional precondition to consider the claim of the “merger-specific efficiency.”⁷³⁵ It is noteworthy that this “pass-on” precondition is widely accepted by many scholars, not only by regulatory authorities.⁷³⁶ Furthermore, the delay in “passing-on” the realized gains to the consumer might lead to the result that the regulatory authorities will give the efficiency claim “less weight because they are less proximate and more difficult to predict.”⁷³⁷

Moreover, it was argued that the “pass-on” requirement should be interpreted as whether the efficiencies passed-on to the consumer would offset the increase in the market power of the parties in addition to the plain meaning of the price reduction.⁷³⁸ And that is the case even if there will be a price increase in the short run.⁷³⁹ However, it could be obviously claimed that such a “pass-on” requirement might be considered as a precondition to prove that the merger is efficient only in the case in which consumer welfare is the end goal, while on the other hand if the goal is the total welfare, that “pass-on” condition would not be a precondition to consider the claim of merger-specific efficiency.

To sum it up, the economic analysis of the merger efficiency is a matter of the adopted welfare standard, or the weight given to allocative inefficiency versus the productive efficiency. In the same context, it was argued that the courts should not adopt just a black and white linguistic legal analysis of the merger, but it should also consider the economic analysis of the merger efficiencies.⁷⁴⁰ In that context, Judge Robert Bork⁷⁴¹ even claimed that the US courts over more than eighty years did not develop a comprehensive idea about the objective of the

⁷³⁵ The “pass-on” requirement was explained for the first time by the FTC decision, *American Medical International, Inc.* 104 F.T.C. 1, 213-20 (1984).

⁷³⁶ Paul L. Yde & Michael G. Vita, *Merger Efficiencies: Reconsidering the "Passing-on" Requirement*, 64 ANTITRUST LAW JOURNAL, at 735 (1996).

⁷³⁷ U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, n.15 at 31, (August 19, 2010).

⁷³⁸ Yde & Vita, ANTITRUST LAW JOURNAL, *supra* note 736, at 736 (1996).

⁷³⁹ Joseph Kattan, *Efficiencies and Merger Analysis*, 62 *see id.* at 513, at 527 (1994).

⁷⁴⁰ Andrew J. Roman, et al., *Legal Principles Versus Economic Principles: The Battle Over Efficiencies In Canadian Merger Review*, 44 CANADIAN BUSINESS LAW JOURNAL 173, at 188, 189 (2006).

⁷⁴¹ Judge Robert Bork (March 1, 1927 – December 19, 2012) was one of the prominent legal scholars, law professors, Attorney Generals, and Judges, and he was an active scholar of antitrust law.

antitrust policy in the US.⁷⁴² In addition to that there are numerous prominent scholars challenging those economic justifications of antitrust, and they argue for the repeal of antitrust, which will be addressed later in detail during the discussions of the different policies and enforcements as a drawbacks of the merger control systems.⁷⁴³

Meanwhile, labeling the scholars as supporting or criticizing this or that economic justification of the antitrust rules or how it is enforced, is not the objective of this dissertation, but in fact identifying or pointing out the differences might be for the purpose of revealing that the merger control policies are different and even in situations where they are similar or typical, the enforcement itself is different, and that fact will inevitably lead to the result that merger control is an impediment that faces the cross-border mergers, as it will be discusses in more details during the discussion of the exclusion of the behavioral antitrust findings as drawback of the merger control systems.⁷⁴⁴

It is undoubtedly true that the consumer surplus, the productive efficiencies and the deadweight loss should be taken into consideration, but not as the final goal of the antitrust laws by itself, but as “byproduct” of the competition dynamics in a free market.⁷⁴⁵ In addition to that, it was reported that not all mergers will have anticompetitive effects, but in fact some mergers might have a pro-competitive effects, whereas the merging parties may be induced to enter into the merger transaction in order to restore the inefficient performance of one or more of the parties and get them back on track with the competition and other efficient players in the industry,⁷⁴⁶ and that claim was supported by the US courts in the case of *Brown Shoe Co., Inc. v. United States*.⁷⁴⁷ It should be noted here that those claims, concerning the anticompetitive and

⁷⁴² ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* at 50-51 (Basic Books. 1978); in the same line of criticizing antitrust and merger control *see generally* DOMINICK T. ARMENTANO, *ANTITRUST: THE CASE FOR REPEAL* (Mises 2nd ed. 1999); YALE BITTLINGMAYER GEORGE BROZEN, *CONCENTRATION, MERGERS, AND PUBLIC POLICY* (Macmillan Pub. Co.; Collier Macmillan Publishers. 1982); Jr. Fred L. Smith, *Why Not Abolish Antitrust?*, *REGULATION: AEI JOURNAL ON GOVERNMENT AND SOCIETY* 23 (1983); Frank H. Easterbrook, *The Limits of Antitrust*, 63 *TEXAS LAW REVIEW* 1, at 1-40 (1984); Fred S. McChesney, *Law's Honour Lost: The Plight of Antitrust*, *THE ANTITRUST BULLETIN* 359, at 359-382 (1986); FRED S. MCCHESENEY & WILLIAM F. SHUGHART II, *THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC-CHOICE PERSPECTIVE* (University of Chicago Press. 1995); and WILLIAM F. SHUGHART, *THE ORGANIZATION OF INDUSTRY* (Dame 2nd ed. 1997).

⁷⁴³ *See infra* p.216.

⁷⁴⁴ *See infra* p.225.

⁷⁴⁵ Maurice E. Stucke, *Should Competition Policy Promote Happiness?*, 81 *FORDHAM LAW REVIEW* 2575, at 2645 (2013).

⁷⁴⁶ Koutsoudakis, *DAYTON LAW REVIEW*, *supra* note 198, at 230-231 (2009).

⁷⁴⁷ *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294 (1962) Page 370 U. S. 346

monopolistic practices, are in the main core of this dissertation and will be addressed later in detail during the discussions of the merger control as an impediment.⁷⁴⁸

On the other hand, concerning the employment issues, it was reported in most of the cases, as an inevitable result of the merger, that the number of employees were reduced,⁷⁴⁹ and that is obviously realized especially in the situation where the transaction was induced by the operational synergies incentives such as the economies of scale, whereas the parties might share common resources. One of those resources is the human resource, and that might happen on all levels and especially on the management level, for example, in most of the cases the surviving corporation will be managed by only one CEO. In that context, it was claimed the gains of mergers are mere “illusory ... unjustified transfer of wealth from those dependent on the acquired firm (for example, employees) to its shareholders, or valuation errors by the stock market.”⁷⁵⁰

Unfortunately, every factor in the full picture that might led to losses for certain party, might be twisted and used as gains at least for other parties, thus in general the gains might offset the said losses, and vice versa. For instance, concerning the unemployment losses specially in the case of economies of scale the transaction will lead to the reduction in costs of production, and will also increase the production efficiencies, and that will inevitably lead to an increase in both the profits and consumer surplus, accordingly it could be claimed that the aggregate or total welfare will be generally increased, and that will offset the unemployment losses.⁷⁵¹

In the same context, more examples could be identified, for instance; concerning the losses to the competitors of the merging parties, it was reported that as the prices of the shares of the merging parties increased the prices of the share of their competitors would also increase in most cases, unless the surviving corporation significantly increased its production efficiencies over the competitors, meanwhile it was claimed that no clear cut evidence or empirical data, other than the prices of the stock exchange, which might support both of those claims.⁷⁵²

Finally, it was strongly argued that there is no clear cut comprehensive evidence to understand and theorize what is happening in the full picture, or to assert there are certain gains or drawbacks, but there is always a possibility for positives and negatives. Meanwhile, and

⁷⁴⁸ See *infra* p.186.

⁷⁴⁹ Röller, et al., Efficiency Gains from Mergers: Report of EC Contract II/98/003 at 57. 2001.

⁷⁵⁰ BLACK, Conceptual Foundations of Antitrust, *supra* note 242, at 28. 2005.

⁷⁵¹ Neary, THE REVIEW OF ECONOMIC STUDIES, *supra* note 3, at 1244 (2007).

⁷⁵² BLACK, Conceptual Foundations of Antitrust, *supra* note 242, at 27-28. 2005.

according to the Pareto principle, 80% of the effects are from by 20% of the causes and vice versa,⁷⁵³ therefore if some drawbacks have been expected, according to the rule even if the chance of gains are small, those gains might exceed and offset or suppress most of the losses.⁷⁵⁴ In that regard, it was claimed that it is worth it to continue further studies until an understanding on solid findings or evidences can help in developing rules,⁷⁵⁵ bearing in mind that full picture should be taken within the background of a global economy i.e. to the international level, and that will be the main issue of the following discussion.

4. *Mergers and the Semi-globalized World*

This discussion will mainly address the impact of cross-border mergers on the global economy, and to be more precise on the growth of the global economy. In that context, it should be noted that the increased number of researches and the overuse of the word globalization led to some sort of confusions and vagueness about the idea itself.⁷⁵⁶ Meanwhile, it was claimed that globalization is considered as an ideology, and further argued that it “masks more than it reveals of what is happening in the world ...”, meanwhile, globalization is defined as the process whereas “a set of unequal exchanges in which a certain art[i]fact, condition, entity or local identity extends its influence beyond its local or national borders and, in so doing, develops an ability to designate as local another rival art[i]fact, condition, entity or identity.”⁷⁵⁷

Despite that fact that globalization as an idea could be traced back to the first half of the 20th century, and that it was implicitly mentioned as early as 1883, when Robert Louis Stevenson claimed that there are no foreign lands, and it is just the persons who could be considered as a foreigner,⁷⁵⁸ scholars did not give it a great attention until late 1970s,⁷⁵⁹ since then scholars increasingly directed their efforts in that regard, and for instance approximately 500 books were

⁷⁵³ The Pareto principle was named after the Italian economist Vilfredo Pareto, because it was derived from his findings that 20% of the Italian people owns 80% of the Italian lands, for more about the Pareto principle, *see generally* RICHARD KOCH, *THE 80/20 PRINCIPLE: THE SECRET OF ACHIEVING MORE WITH LESS* (Doubleday. 2008).

⁷⁵⁴ Clarke, *The International Regulation of Transnational Mergers*, *supra* note 8, at 25. 2010.

⁷⁵⁵ FABIENNE, et al., *European Merger Control: Do We Need an Efficiency Defence?*, *supra* note 667, at 241. 2006; Röller, et al., *Efficiency Gains from Mergers: Report of EC Contract II/98/003*, *supra* note 749, at 55. 2001; BLACK, *Conceptual Foundations of Antitrust*, *supra* note 242, at 28. 2005.

⁷⁵⁶ Gerald K. Helleiner, *Markets, Politics, and Globalization: Can the Global Economy Be Civilized?*, 7 *GLOBAL GOVERNANCE* 243, at 2 (2001).

⁷⁵⁷ Boaventura de Sousa Santos, *Globalizations*, 23 *THEORY, CULTURE & SOCIETY* 393, at 395-396 (2006).

⁷⁵⁸ ROBERT LOUIS STEVENSON, *THE SILVERADO SQUATTERS* at 96 (Chatto and Windus. 1883).

⁷⁵⁹ For the origins and meaning of the word globalization *see generally* R. Walker Gordon & Mark A. Fox, *Globalization: An Analytical Framework*, 3 *INDIANA JOURNAL OF GLOBAL LEGAL STUDIES* 375(1996).

published on that subject during the 1990s, and then the rate of publishing increased significantly to more than the double every one year and a half.⁷⁶⁰

However, that increased attention does not mean that all the scholars are supporting the idea nor that they are all refusing it, but generally speaking most of them have fears against it. In that context, it was asserted that the increased number of studies and the overuse of the word globalization led to some sort of confusions and vagueness about the idea itself.⁷⁶¹ Some even warned about that uncontrolled phenomenon i.e. globalization, for instance it was mentioned in the introduction of this dissertation, that even the Secretary General of the UN Mr. Kofi Annan realized that it was maintained by others that: “arguing against globalization is like arguing against the laws of gravity.”⁷⁶²

To show how vague globalization is and that it is overuse consider that it was stated that multinational corporations are dominating the global economy by the means of globalization,⁷⁶³ while to the contrary others claimed that both national corporations and multinational corporations will not have a place in the market if they do not “go global,”⁷⁶⁴ or at least all corporations shall prepare themselves for that reality.⁷⁶⁵ On the other hand, others claimed that anti-globalization circles are in fact exaggerating, whereas multinational corporations are less powerful than it was claimed, and the reason behind that is that they confusingly shuffle between the actual value of the multinational corporations and the volume of their sales.⁷⁶⁶

Ironically, many anti-globalization movements have arisen during the recent decades, and they actually would not have the opportunity to accomplish their communications around the world, arrange their campaigns, protests in Seattle and elsewhere,⁷⁶⁷ publish their thoughts online, and even to appear before people, in the absence of the means offered by or resulted from

⁷⁶⁰ PANKAJ GHEMAWAT, *REDEFINING GLOBAL STRATEGY: CROSSING BORDERS IN A WORLD WHERE DIFFERENCES STILL MATTER* at 10 (Harvard Business School Press. 2007).

⁷⁶¹ Helleiner, *GLOBAL GOVERNANCE*, *supra* note 756, at 2 (2001).

⁷⁶² Andrew R. Klein, *Foreign Plaintiffs, Forum Non Conveniens, and Consistency*, *SELECTED WORKS* 1, at 2 (2007); Kofi Annan, Speech (Opening 53rd UN annual DPI/NGO conference ed., 2000).

⁷⁶³ RODRÌGUEZ GARAVITO & CÈSAR A. SANTOS BOAVENTURA DE SOUSA, *LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY* at 92-93 (Cambridge University Press. 2005).

⁷⁶⁴ Theodore Levitt, *The Globalization of Markets*, *THE MCKINSEY QUARTERLY* 1, at 19 (1984), citing Christopher Lorenz, *The Overselling of World Brands*, *FINANCIAL TIMES*, July 19, 1984. 1984.

⁷⁶⁵ Levitt, *THE MCKINSEY QUARTERLY*, *supra* note 764, at 20 (1984).

⁷⁶⁶ MICKLETHWAIT & WOOLDRIDGE, *The Company: A Short History of a Revolutionary Idea*, *supra* note 27, at 176. 2003.

⁷⁶⁷ Daniel W. Drezner, *Globalization and Policy Convergence*, 3 *INTERNATIONAL STUDIES REVIEW* 53, at 53 (2001).

the globalization.⁷⁶⁸ In that context, and despite the fact that discussing whether globalization in itself is a good or bad thing is highly debatable,⁷⁶⁹ which is indeed out of the scope of this dissertation, it was argued that even if globalization is a real threat it could turn out to be a great opportunity, especially for blocks like the EU.⁷⁷⁰ Moreover, Francis Fukuyama argued in his book (*The End of History and the Last Man*), that while there are some societies that are resisting the globalization culture, “there is hardly a society in the world that does not embrace the goal itself.”⁷⁷¹

Now the discussion should be directed to identify the impact of mergers on the global economy and to see how they are both related or connected. First, it should be noted that the coming discussion will be limited to the cross-border mergers, because its connections and impact on the global economy is more clear than the pure domestic mergers. In that context, it is undoubtedly true that both the technological means and the globalization process are the main determinants of the growth of the global economy, and in the same time the outcome of the cross-border merger transactions which are the “global corporations” are in fact the main determinant of both the technological means and the globalization process.⁷⁷²

In addition to those factors that determine the growth of the global economy, it is also contended that political power is also one of the main determinants, and that factor is expected to drive the world toward more globalization progress in both of its forms i.e. in the form of the convergence of national rules or in the form of eliminating the state regulations.⁷⁷³ Meanwhile, it could also be claimed that globalization forces are driving the political power towards the convergence of rules and the elimination of the state regulations.

In fact, both of those claims might be true, but it mainly depends on how strong the political power is itself, whereas in the case of the developing countries, it is undoubtedly true that globalization is driving their policy maker to align with the system, and vice versa. In that context, it should be noted that it was empirically reported in one of the International Monetary

⁷⁶⁸ Godden, et al., *PLI'S ANNUAL INSTITUTE ON SECURITIES REGULATION IN EUROPE*, *supra* note 438, at 1121 (2001).

⁷⁶⁹ DABBAH, *The Internationalisation of Antitrust Policy*, *supra* note 9, at 12. 2003; Globalization and its impact were greatly debated during the Globalization of the Legal Profession Symposium, held at the Indiana University School of Law, on April 6, 2006.

⁷⁷⁰ Neelie Kroes, *Challenges to the Integration of the European Market: Protectionism and Effective Competition Policy* at 6 (Competition Law Association - Burrell Lecture 2006 ed., 2006).

⁷⁷¹ FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* at 126 (Free Press; Maxwell Macmillan Canada; Maxwell Macmillan International. 1992).

⁷⁷² Levitt, *THE MCKINSEY QUARTERLY*, *supra* note 764, at 20 (1984).

⁷⁷³ Drezner, *INTERNATIONAL STUDIES REVIEW*, *supra* note 767, at 53-54 (2001).

Fund studies, that despite the promising expectation in theory about globalization, “there is no proof in the data that financial globalization has benefited growth” in the developing countries.⁷⁷⁴

While on the other hand, it was reported that cross-border mergers as a form of the globalization process was significantly benefiting the US economy, and that approximately one third of the workload at the DOJ was related to cross-border mergers, and it was also reported that for a full quarter of a year all the merger transactions that were reported to the US authorities under the Hart-Scott-Rodino Act (hereinafter HSR)⁷⁷⁵ that at least one of the parties was an alien i.e. foreign party.⁷⁷⁶ To the contrary of that, it was reported that in the EU Member States most of the merger transactions were between domestic corporations,⁷⁷⁷ and that led inevitably the EU Parliament and Council to issue a special directive in order to encourage and to facilitate cross-border transactions.⁷⁷⁸

Generally speaking, the growth of the global economy needs technological means that are driven by capitalism,⁷⁷⁹ and in that context, it was conveyed that growth of the global economy during the last fifty years was driven by means of propagation of capitalism throughout the globe.⁷⁸⁰ Accordingly, that means that the spread of the investments across the globe is the main reason behind the growth of the global economy, but one might argue that these investments could be done through Greenfield FDI,⁷⁸¹ and cross-border mergers is not the only way it could be accomplished.

⁷⁷⁴ Eswar Prasad, et al., *Effects of Financial Globalisation on Developing Countries: Some Empirical Evidence*, 38 ECONOMIC AND POLITICAL WEEKLY 4319, at 4319 (2003); For further details about the impact of globalization on Egypt as it is classified as a developing country see generally Salaheldin Ismail Salaheldin, *The Impact of Globalization on Operations Management Activities in Egypt*, 6 THE JOURNAL OF BUSINESS IN DEVELOPING NATIONS 28(2002).

⁷⁷⁵ Hart–Scott–Rodino Antitrust Improvements Act of 1976 (Public Law 94-435, known commonly as the HSR Act), it will be discussed later in detail in the discussions of the merger control as an impediment on page 186 *infra*.

⁷⁷⁶ Douglas H. Ginsburg & Scott H. Angstreich, *Multinational Merger Review: Lessons from our Federalism*, 68 ANTITRUST LAW JOURNAL 219, at 219 (2000), citing C. Benjamin Crisman & Matthew S. Barnett, *Mergers & Acquisitions: Recent Trends in Antitrust Enforcement*, 1049 PLI/CORP PRACTISING LAW INSTITUTE 379, at 402 (1998).

⁷⁷⁷ For more details see Caterina Moschier & Jose Manuel Campa, *The European M&A Industry: A Market in the Process of Construction*, WP-762 INTERNATIONAL CENTER FOR FINANCIAL RESEARCH - IESE BUSINESS SCHOOL 1, at 1 (2008).

⁷⁷⁸ See Directive of the European Parliament and of the Council on Cross-border Mergers of Limited Liability Companies, 27.07.2005, PE-CONS 3632/05

⁷⁷⁹ FUKUYAMA, *The End of History and the Last Man*, *supra* note 771, at 126. 1992.

⁷⁸⁰ Joseph L. Bower, et al., *Global Capitalism at Risk: What Are You Doing About it?*, September HARVARD BUSINESS REVIEW 1, at 5 (2011).

⁷⁸¹ Greenfield FDI is a form of FDIs, as distinguished from cross-border mergers; means that the investor is directly investing in a foreign country by establishing a new operational facility from scratch, and not by acquiring of readily available one.

It is true that the FDI might be a Greenfield FDI, but in fact the empirical findings shows that during 2007 for instance, more than half of the FDI around the world were cross-border mergers not a Greenfield FDI and those cross-border mergers are more than 40% of the global activities in general.⁷⁸² In addition to that, cross-border mergers assumes that there are already established targets to be acquired, and those targets were established through either domestic investment or Greenfield FDI, and in both cases the cross-border could happen, and in that context it was reported by UNCTAD, that Greenfield FDI waves are always followed by a cross-border merger wave, and that is true in both the developed and the developing countries.⁷⁸³

It is noteworthy, as it was previously mentioned, that during the last decade of the 20th century there was an important regularly active category of players in the field of cross-border mergers as an FDI; the SWF, and that it was reported that in 2007 the total value of the cross-border merger transactions exceeded 48.5 billion US dollars,⁷⁸⁴ and the overall SWF across the globe were estimated by 6.5 trillion US dollars by the end of May 2014, the cross-border mergers also flows-in to the other way into the countries that own those SWFs, for example significant investments flows-in to the United Arab of Emirates (hereinafter UAE),⁷⁸⁵ and in the meantime UAE owns Abu Dhabi SWF, which is the second highest value among all SWFs in the world.⁷⁸⁶

Even though most of the FDIs are Greenfield FDIs that will not negate the fact that cross-border mergers are significantly influencing the growth of the global economy. But unfortunately, many scholars delved right ahead into the subject to answer questions, and contribute to the debate about the fears pertaining to globalization, but do not even think to put those questions into question i.e. the previously mentioned debate about globalization was one more step further from where it should be, the question that should be addressed is a preliminary question; is this a truthfully a globalized world, in other words has the globalization process reached its peak, or it is at a stage that needs more efforts to be added by all forms of FDI in

⁷⁸² Moschier & Campa, INTERNATIONAL CENTER FOR FINANCIAL RESEARCH - IESE BUSINESS SCHOOL, *supra* note 777, at 7 (2008); Neary, THE REVIEW OF ECONOMIC STUDIES, *supra* note 3, at 1229 (2007).

⁷⁸³ CÉSAR CALDERÓN, et al., GREENFIELD FDI VS. MERGERS AND ACQUISITIONS: DOES THE DISTINCTION MATTER? at 1-2 § N° 173 (Banco Central de Chile. 2002); For more about cross-border data *see generally* DEVELOPMENT, Cross-border Mergers and Acquisitions and Development, *supra* note 280. 2000.

⁷⁸⁴ KALSI, Sovereign Wealth Funds, *supra* note 6, at 16-17. 2008.

⁷⁸⁵ Anthony Richardson, et al., *Cross-Border M&A*, 9 ASIAN-MENA COUNSEL SPECIAL REPORT at 30-31 (2011).

⁷⁸⁶ For more details and full profile of all SWF across the globe see <http://www.swfinstitute.org> last visited October 1, 2014.

order to reach the expected progress, or it is just a mere myth and that globalization does not even exist.

In that context, Thomas Friedman,⁷⁸⁷ who is one of the prominent writers in that field, claimed in one of his books that the world is flat,⁷⁸⁸ but unfortunately, like many other scholars,⁷⁸⁹ after reading that book it would be easy to identify that those claims about the globalized world are just success stories of some well-known multinational corporations, but nothing about figures, data analysis, or any empirical findings that might help understanding precisely where the world is since the globalization process, in order to plan for more integration and economic growth in the future, or at least to put the fears from globalization in its actual size, and to stop overstating an overestimated statement that does not even exist.

In that regard it should be noted that one of the prominent economists, Professor Pankaj Ghemawat,⁷⁹⁰ has gone through extraordinary efforts to answer that said preliminary question, and he ends up with very interesting findings, after he used scientific methods of research, whereas he repeatedly analyzed recent data from 139 countries, which resemble an aggregate amount of 99% of the world's Gross Domestic Product (hereinafter World GDP), and 95% of the world's total population, and he developed what he named as "The Depth Index of Globalization," then he published an annual report in that regard, and the following map might help in illustrating his answer about to what extent the world is globalized.⁷⁹¹

⁷⁸⁷ Thomas Friedman (July 20, 1953), is an American journalist, he writes a twice-weekly column for The New York Times, his writing is mainly devoted to the global trade, globalization, and the Middle East, for more information about his biography, writings, and thoughts see his official website <http://www.thomasfriedman.com>.

⁷⁸⁸ THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (Farrar, Straus and Giroux, 2005).

⁷⁸⁹ As an example of other writings in the same line of *The World is Flat*, see generally RICHARD O'BRIEN, *GLOBAL FINANCIAL INTEGRATION: THE END OF GEOGRAPHY* (Council on Foreign Relations Press, 1992).

⁷⁹⁰ Prof. Pankaj Ghemawat (September 30, 1959) is an economist and strategist, who is interested in globalization researches, for more about his thoughts, works, and biography see his official website <http://www.ghemawat.com> last visited May 31, 2014.

⁷⁹¹ Pankaj Ghemawat & Steven A. Altman, *Depth Index of Globalization 2013 and the Big Shift to Emerging Economies*, 2013, at 2, available at <http://www.ghemawat.com/dig/>.

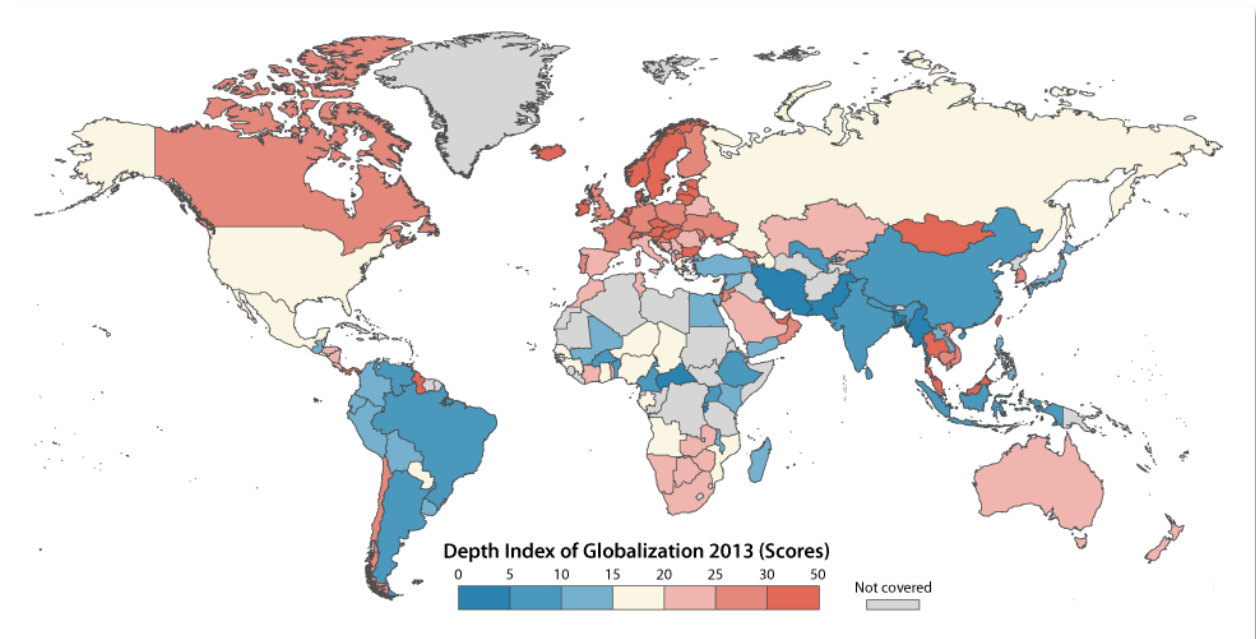


Figure 11: The Globalization Index⁷⁹²

In his article named “Why the World isn’t Flat,” which was written in response to the book by Thomas Friedman, he revealed that the empirical evidence proves that the actual percentage of the cross-border activities, when compared to the total activities does not indicate that the world is flat or even that the global economy reached respectable steps in that regard, but that the world is still in its initial step and in fact not more than semi-globalized.⁷⁹³ For instance, the Depth Index of Globalization of 2013 shows that capital flows (stocks, FDI, portfolio equity) accounts for 35% of the total aggregate capital investments,⁷⁹⁴ while all the other cross-border activities like immigration (tourists, employees), communication (telephony and web traffic), and charities accounts for figures close to 10% of the activities on the national level, with the exception to trade activities which might account for a little less than 30%.⁷⁹⁵

He finally concludes that:

The world remains “semi globalized.” And yet, globalization has progressed to an extent that rapid growth in emerging economies—sharply increasing those countries’ share of global economic activity—has the potential to provoke a big shakeup. This is the essence of semiglobalization: an accurate understanding of

⁷⁹² This map along with details and full country’s profile are available at <http://www.ghemawat.com/dig> last visited October 1, 2014.

⁷⁹³ Pankaj Ghemawat, *Why the World Isn't Flat*, FOREIGN POLICY 54, at 59 (2007).

⁷⁹⁴ Ghemawat & Altman, *Depth Index of Globalization 2013 and the Big Shift to Emerging Economies*, *supra* note 791, at 13. 2013.

⁷⁹⁵ Ghemawat, FOREIGN POLICY, *supra* note 793, at 54-57 (2007).

the world requires an appreciation for both the still large effects of national borders and cross-country distances as well as the significant interactions across them. Weak macroeconomic conditions are contributing to faltering globalization, and the emerging economies' slowdown adds to the gloom. However, a broader perspective suggests that—as tends to be the case sentiment has overshot reality. Even after the recent downward forecast revisions, the world economy is projected to grow at a compound annual rate of 3.8%— in real terms—over 2012-2018. That is a higher level than it managed to achieve over the course of the 1980s, the 1990s or, for that matter, the first decade of this century. The difference is driven by emerging economies [that] are now forecast to grow at a compound rate of 5.2%, versus 2.2% for advanced economies.⁷⁹⁶

In the same context, it was even claimed that despite the fact that there are two millennia that separate us today from the origins of the corporation idea, and all the development added by the means of technology throughout the history, and the industrial advancements we have reached, corporations are still having the same patterns and organization as it was during the Roman Empire, and even the Romans, if exist nowadays, would not find our modern corporations unfamiliar to them.⁷⁹⁷

Now it unmistakably appears that the global economy is open for more growth, and that will unquestionably drives the discussion to a more vital question; which is why there still is room for growth, in other words why the world is standing here and did not reached the globalization peak or end. One might say the answer to that question was the main interest of the countries in many forums whether under the auspices of GATT, the World Trade Organization (hereinafter WTO), the EU, and many other organizations that are concerned with the global economy and international trade. The debates revealed that the trade barriers generally and the tariffs specially are hindering the global economy growth, while all the other economy factors i.e. the four C's:⁷⁹⁸ corporations, capital, communications, and consumers, have reached the position of a flat world, with exception to the free movement of employees.⁷⁹⁹

In fact that is a wrong statement and is not based on solid evidence or actual figures, for instance, and according to a recent report from the World Economic Forum it was estimated that

⁷⁹⁶ Ghemawat & Altman, *Depth Index of Globalization 2013 and the Big Shift to Emerging Economies*, *supra* note 791, at 25. 2013.

⁷⁹⁷ Henry Hansmann & Reinier Kraakman, *Reflections on the End of History for Corporate Law*, No. 449 YALE LAW & ECONOMICS RESEARCH PAPERS 1, at 13 (2011).

⁷⁹⁸ The concept of the four C's was first developed by Kenichi Omae in his book, *KENICHI OMAE, THE END OF THE NATION STATE: THE RISE OF REGIONAL ECONOMIES* (Free Press. 1995).

⁷⁹⁹ *KENICHI OMAE, THE NEXT GLOBAL STAGE: CHALLENGES AND OPPORTUNITIES IN OUR BORDERLESS WORLD* at 20 (Wharton School Pub. 2005).

if all tariffs are removed worldwide that would boost trade activates only as little as 10%, and that would led to a very modest growth in the global economy, which is estimated to increase the World GPD only by 0.7%, while facilitating and improving pure domestic trade activities will lead to larger gains.⁸⁰⁰ On the other hand, there is a list of various barriers that still hinder the growth of the global economy especially in the cross-border mergers industry.⁸⁰¹

It was claimed that those barriers to the growth of the global economy are mainly related to “policy fumbles rather than macroeconomic fundamentals,” and that the future might witness a good progress if those policies are positively changed to serve that end.⁸⁰² In that context, unfortunately the contrary was reported, the cross-border merger transactions are struggling against protectionism policies during the last decade, and that was even more than what was witnessed during the late 1990s,⁸⁰³ which obviously means, at least from a cross-border merger perspective, that the national policies are not helping the world economy to move towards more progress or even to the right direction.

In particular, there was a thoughtful plea that called for more researches to identify and address more serious barriers in field of the cross-border mergers like protectionism policies, culture differences, taxations issues, issues facing the management of the transaction, market related issues such as antitrust issues, etc.⁸⁰⁴ It should be notes here that all the following discussions will be devoted to identify these barriers or impediments to the cross-border mergers and how it could be demolished in order to witness the expected growth of the global economy and reach the peak of an actual globalization, and not just a semi-globalized world.

III. Cross-border Mergers Impediments Overview

While facilitating cross-border mergers is not a goal in itself; the end goal is the growth of the global economy or to be more precise maximizing the global welfare, that discussion will

⁸⁰⁰ Ghemawat & Altman, Depth Index of Globalization 2013 and the Big Shift to Emerging Economies, *supra* note 791, at 36. 2013, citing Bain World Economic Forum & World Bank Company, *Enabling Trade: Valuing Growth Opportunities*, (2013).

⁸⁰¹ For more details about barriers that of cross-border integration, *See generally* Pankaj Ghemawat, *Borders, Differences, and the Law of Distance*, in *WORLD 3.0: GLOBAL PROSPERITY AND HOW TO ACHIEVE IT* (2011).

⁸⁰² Ghemawat & Altman, Depth Index of Globalization 2013 and the Big Shift to Emerging Economies, *supra* note 791, at 4, 25. 2013.

⁸⁰³ Ghemawat, *FOREIGN POLICY*, *supra* note 793, at 60 (2007).

⁸⁰⁴ Godden, et al., *PLI'S ANNUAL INSTITUTE ON SECURITIES REGULATION IN EUROPE*, *supra* note 438, at 1125-1126 (2001).

identify the barriers or impediments that face the parties in the cross-border mergers, as means of the growth of the global economy. Moreover, the discussion will be an overview of a dozen of those impediments in a nut shell, and then the next discussion will be directed and devoted to one of the main impediments, which is namely “merger control,” because merger control is typically one of the most complicated and influential impediments that hinders the cross-border mergers.

Actually the list of the impediments that faces the parties in the cross-border mergers is a long list; however impediments could be classified or categorized according to different aspects. For instance, the list could be categorized according to the timeline of the transaction, whereas there are some impediments before the closing of the transaction, such as all the regulatory premerger issues that could be the premerger control, national security clearance, stock exchange approval or foreign investments authorizations. While other impediments appear after the closing of the transaction, such as all the integration related issues for example the accounting standards, culture, operations, and languages issues. There also exist those issues related to the third parties for example the assignments of the agreements concerning IPR, franchises, and licensing, and also taxation issues.

Moreover, the list of impediments could be categorized according to the source of impediments, whereas some of the impediments could be attributed to the merging parties themselves such as all the integration related issues, others could be attributed to regulatory authorities such as all the differences between regulatory policies for example the merger control, specific-industry licensing, foreign investments authorizations, national security clearance, and stock exchange approval. Others could be attributed to other stakeholders such as those issues related to consumer protection, employees’ rights, and assigning the agreements with third parties.

Furthermore, the list might be categorized according to the weight of the impediments towards the transaction i.e. according to the magnitude of its effect on the transaction, whereas some of the impediments might have modest effect, while others might have a significant effect that lead to the failure or termination of the transaction or even sometimes to bankruptcy. However, according to the previously mentioned Pareto principle, small problems that weight less than 20% might lead to the 80% of the problems, thus it would not be just difficult to classify impediments according to that criteria, but also it would not be useful to do so.

It could easily be claimed that the common feature between all the impediments that faces cross-border mergers is that if it does not lead to the failure or termination of the transaction, it is expected to lead to losses, either in the form of direct financial losses or indirect damages, and that is mainly because all of the impediments share the same following common characteristics: (1) all lead to uncertainties, (2) all are time consuming, (3) all require some sort of payments. It should be also noted that some of those impediments are not limited only to the cross-border mergers, but also applied to the pure domestic mergers.

However, from a cross-border perspective it could be claimed that some of those impediments might form an additional layer added to the pure domestic transaction impediments, and that is because the merging parties will not just face some of those impediments, but will also face them in several fashions, whereas the transaction will be accorded under different legal systems, in all the concerned jurisdictions, and that will undoubtedly increase the uncertainty, cost, and time, and that will inversely lead to the increasing possibility of the failure for the surviving corporation or even closing the transaction.

It is noteworthy that the uncertainty will increase and reach its peak in the cases where the transaction is directly connected to one of those jurisdictions which in addition to the legal and regulatory impediments is politically unstable, such as most of the jurisdictions in the Middle East, whereas most of them are always struggling with political uncertainty,⁸⁰⁵ and especially during these days, after the recent incidents of what is known as “Arab Spring” in most of the countries in the Middle East.

Generally speaking, at least for the purposes of this discussion, all those classifications will not make any differences, whereas these classifications are just for the purpose of being more organized nothing more, and literally all the classifications are encompassing the same impediments. Therefore, the following discussion will address some of those impediments, and whenever possible, from a cross-border mergers perspective, and not accord to any of the said classifications, and it should be noted also that the order of addressing the impediments in the coming discussions will not mean or indicate any importance or weight of any of them, and it is simply arranged in an alphabetical order.

⁸⁰⁵ REED, et al., *The Art of M&A*, *supra* note 366, at 101. 2007.

1. *Employment Issues*

Despite the fact that the cross-border mergers or mergers in general, might have a negative impact on the employees of the merging parties, such as decreasing the number of employees and accordingly increase the unemployment rates,⁸⁰⁶ and that is an inevitable result of the failure of labor liberalization on the international level, that issue will be considered a fact and will be out of the scope of this dissertation. However, it should be noted that it was claimed that in a successful transaction, the employees, among other stakeholders, should be granted the opportunity to negotiate their share in the expected gains prior to closing the merger transaction.⁸⁰⁷

In that context, many efforts were done to protect the employees' rights in the merger transactions, specially the efforts done in the EU, which is in fact highly regarded,⁸⁰⁸ whereas the employees' rights are protected under several directives and regulations, for example in the EU the employees are granted the right to take a role in the premerger negotiations,⁸⁰⁹ and in addition to that, the European Council issued a special directive⁸¹⁰ to protect the employees' rights also after the closing of the merger transaction.

On the other hand, employment issues are also considered as an impediment to the success of the cross-border mergers, and those issues are ranging from the negative effect on the operations due to the psychological stress resulted from the uncertainties raised during the transaction, and the fear about their career plans and the future of the whole corporation, to the extent of more serious problems that might end up with great losses. Even the rights granted to employees in certain jurisdictions to participate in the premerger negotiations could be

⁸⁰⁶ Neary, *THE REVIEW OF ECONOMIC STUDIES*, *supra* note 3, at 1247 (2007).

⁸⁰⁷ Antony Page, *Has Corporate Law Failed? Addressing Proposals for Reform*, 107 *MICHIGAN LAW REVIEW* 979, at 979 (2009), citing FRANK H. FISCHER DANIEL R. EASTERBROOK, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* at 15-17 (Harvard University Press. 1991).

⁸⁰⁸ For more details about the history of protecting the employees' rights in cross-border mergers, in the EU, *see generally* Felicia Bejan, *The European Law Regarding the Impact of Merger on Employees' Rights*, 13 *ROMANIAN JOURNAL OF EUROPEAN AFFAIRS* 28(2013); and for more details about the situation in the Netherland *see* Dirk-Jan Smit, et al., *The Cross-Border Mergers Directive Implementation in the Netherlands* at 2 (Freshfields Bruckhaus Deringer 2008); and about the situation in Romania *see* Cătălin Micu & Nicolae Hariuc, *Legal Issues in Romanian M&A* at 301 (Financier Worldwide Booz & Company ed. 2008).

⁸⁰⁹ ANDENAS & FRANK, *European Comparative Company Law*, *supra* note 604, at 501. 2009., Article 16(3)(b) of Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, OJ L 310, 25.11.2005.

⁸¹⁰ Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

considered as an impediment, because in fact it could be time consuming if the employees and the other decision maker are not in the same line.⁸¹¹

One of those serious issues is what happens in some cases where the surviving corporation is controlled by SWF, and that might lead one to consider its employees as foreign government officials under the US Foreign Corruption Practices Act of 1977 (hereinafter FCPA),⁸¹² whereas according to that FCPA the bribery of foreign officials is prohibited and that might raise the liability of the surviving corporation.⁸¹³ Accordingly, those employees despite the fact that they are working for a foreign government will be considered as foreign officials under the FCPA, and the surviving corporation might suffer from significant liabilities out of that issue, just because it is controlled by SWF or in other words because it engaged in a cross-border merger transaction.

In addition to that, the acquirer should carefully investigate all the previous practices concerning the employees, otherwise that might raise future liabilities, or requires additional compliance costs, for instance those liabilities under some of the US legislations such as; the Worker Adjustment and Retraining Notification Act of 1988,⁸¹⁴ the Americans with Disabilities Act of 1990,⁸¹⁵ the Family and Medical Leave Act of 1993,⁸¹⁶ and unprecedented number of federal and state laws and regulations concerning the prohibition of discrimination in the workplace, health and safety, compensation and retirement plans, etc.⁸¹⁷

Another significant employment issue in the merger transactions is the issues known as golden parachutes and golden handshakes,⁸¹⁸ whereas some of the employees entered into agreements with their employer to be granted excessive payments if their employment contracts are terminated within a certain period after closing the merger.⁸¹⁹ Similarly, there is another issue known as golden handcuffs, whereas some of the employees will be paid certain amounts in order to stay i.e. not to leave the corporation after closing the merger. It was reported that those kinds of agreements inevitably led generally to “pay inflation” i.e. excessive raise in the range of

⁸¹¹ Lukanec, et al., *EMPLOYMENT & INDUSTRIAL RELATIONS LAW*, *supra* note 594, at 14-15 (2009).

⁸¹² Foreign Corruption Practices Act of 1977, 15 U.S.C. § 78dd-1, et seq.

⁸¹³ Aruna Viswanatha, U.S. Corporations Beg Clarity on Anti-Bribery Law (Thomson Reuters 2012).

⁸¹⁴ The Worker Adjustment and Retraining Notification Act, 29 U.S.C. 2101, et seq.

⁸¹⁵ The Americans with Disabilities Act of 1990, 42 U.S.C. § 12101

⁸¹⁶ The Family and Medical Leave Act of 1993, 29 U.S.C. 2601, et seq.

⁸¹⁷ ANDREW J. SHERMAN, *Mergers & Acquisitions from A to Z*, *supra* note 391, at 100-102. 2006.

⁸¹⁸ Golden parachutes and golden handshakes are similar to each other, but golden handshakes are more generous agreements.

⁸¹⁹ MILLER, *Mergers and Acquisitions: A Step-by-Step Legal and Practical Guide*, *supra* note 414, at 47. 2008.

salaries, and accordingly the surviving corporation will suffer losses that might be in hundreds of millions US dollars, in addition to the payments that will be made to satisfy the obligations under any of those agreements.⁸²⁰

Ironically, when the US government decided to severely tax the payments under the mentioned kinds of agreements, in an effort to put an end to them, that step on the other hand triggered a great raise wave of the figures stipulated in those agreements, and actually the wave started and never ended, because the US government decided to harshly tax amounts that exceeded certain threshold, and accordingly most of amounts were increased to reach just below that threshold, while the norm before that was far less than the threshold.⁸²¹

2. *Environmental Issues*

Neither the merging parties nor any other corporations were generally required to get an environmental clearance, before the late 1960s, or even to disclose any information about its hazardous wastes, but by the beginning of the 1970s, many countries required the disclosure of most of the information that related to the environmental issues, and in many cases it is a requirement to comply with certain defined standards and even to obtain certain licenses before releasing wastes. For instance, it is required under many federal and state laws in the US to disclose all the information related to the presence or use of hazardous materials, and to develop and report an “emergency and releasing plans” to the government authorities.⁸²²

One might think that the environmental clearance issues are limited only to those corporations that operating in certain industries, which is involved in gaseous emissions or even discharging of hazardous wastes, but in fact environmental clearance might be required from any merging parties operating in any industry, for instance under the law of the State of New Jersey, the acquirer shall obtain a state approval of the cleanup plan or the cleanup process related to release any kind of wastes related to industrial or commercial operations.⁸²³

To illustrate more, just consider how there is a web of laws in single jurisdiction i.e. the US, all the following laws might led to significant problems: (1) the Occupational Safety and

⁸²⁰ REED, et al., *The Art of M&A*, *supra* note 366, at 720-721. 2007.

⁸²¹ *Id.*

⁸²² ANDREW J. SHERMAN, *Mergers & Acquisitions from A to Z*, *supra* note 391, at 88-90. 2006.

⁸²³ REED, et al., *The Art of M&A*, *supra* note 366, at 408. 2007.

Health Act of 1970,⁸²⁴ (2) the Clean Water Act of 1972,⁸²⁵ (3) the Resource Conservation and Recovery Act of 1976,⁸²⁶ (4) the Toxic Substances Control Act of 1976,⁸²⁷ (5) the Comprehensive Environmental Response, Compensation, and Liability Act of 1980,⁸²⁸ (6) the Emergency Planning and Community Right-to-Know Act of 1986,⁸²⁹ and the list here is full of many other laws.⁸³⁰

Hence, those examples are just few examples concerning the laws on the federal level in the US, meanwhile the fact is that most of the states in the US have their own laws at the state level that will increase the picture more complexity. Moreover, in some other jurisdiction it is even required to obtain such environmental clearances not just in the case of typical merger transaction, but also if the corporation experiences other restructuring schemes such as spin-off, sale of asset, change of control, and in all cases other similar cases.⁸³¹

Accordingly, identifying the issues and allocate the liabilities that might develop under such a complicated web of different environmental laws in the different concerned jurisdictions, is undoubtedly considered an impediment to the cross-border mergers, because it is expected to be a very difficult task and it requires a specialized team of professionals to carry it out, during the due diligence process. Moreover, accomplishing those tasks is certainly time consuming and will use some financial resources, and ignoring it might led to losses and even the failure of the transaction, especially in cases that the acquirer failed to obtain the required environmental clearance, licenses, approvals, or even reporting information or plans.

3. Foreign Currencies Related Issues

The exchange rates were previously mentioned as an incentive that might play an important role in inducing the parties to enter into a merger transaction, and it was clearly mentioned also that the mere differences between exchange rates is not the actual indicator of the purchase power of the currency, which is actually the factor that might be considered as an

⁸²⁴ The Occupational Safety and Health Act of 1970, U.S.C. § 651 et seq.

⁸²⁵ The Clean Water Act of 1972, 33 U.S.C. § 1251 et seq.

⁸²⁶ The Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901

⁸²⁷ The Toxic Substances Control Act of 1976, 15 U.S.C. 2601–2692

⁸²⁸ The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675

⁸²⁹ The Emergency Planning and Community Right-to-Know Act of 1986, 40 CFR Parts 355, 370, and 372

⁸³⁰ ANDREW J. SHERMAN, *Mergers & Acquisitions from A to Z*, *supra* note 391, at 88-90. 2006.

⁸³¹ Micu & Hariuc, *Legal Issues in Romanian M&A*, *supra* note 808, at 301-302. 2008.

incentive to enter into cross-border mergers, whereas corporations holding a currency with strong purchasing power may expect to gain synergies by paying less, if it used a weaker purchasing power currency to finance the merger transaction.

In addition to that, it was clearly mentioned that the purchase power of any currency has no clear-cut effect as an incentive to induce the parties to enter into the cross-border merger transaction, because the gains that might be expected from the differences in the purchasing power of the currencies of the parties may be offset by remitting the earnings of the acquired corporation to the home country of the acquirer, whereas the purchasing power of the earnings currency will also be weak.

In that context, it should be noted here that even the process of remitting the earnings resulted from the target back to the home country of the acquirer is not that easy, and in most the jurisdictions are controlled by the government authorities, while in some other jurisdictions it is limited to certain amounts on an annual basis, that is considerably reported in the developing countries whereas most of them are aiming to target the foreign acquirer that will invest the earnings domestically instead of returning it back to its home country.⁸³²

To illustrate more about the foreign currencies related issues, there are possibilities from time to time one will face a currency crisis like that happened in Mexico in December 1994; where the Mexican Peso devaluated by approximately 50% and then totally collapsed.⁸³³ Therefore, the net wealth of the parties of the cross-border merger might be significantly affected by the fluctuation of the purchasing power of the different currencies used by them. Accordingly, the exchange rates issues should be of important consideration for the cross-border merger transaction, with high possibility that it will led to losses or even total failure of the transaction.

In addition to that, buying foreign currency is controlled in some jurisdictions by the government agencies, which is most probably the central bank, and sometimes is limited to certain small amounts on an annual basis, even if the surviving corporation will use the foreign currency to pay its obligations. In that regard, it should be noted that some corporation enter into loan agreements with any of its subsidiaries or even a parent corporation abroad, in order to obtain the needed foreign currency to pay its debt, and in that way it will hit another target with

⁸³² REED, et al., *The Art of M&A*, *supra* note 366, at 923-924. 2007.

⁸³³ For more details about the Collapse of the Mexican Peso, *see generally* JEFFREY TORNELL AARON VELASCO ANDRÉS NATIONAL BUREAU OF ECONOMIC RESEARCH SACHS, *THE COLLAPSE OF THE MEXICAN PESO: WHAT HAVE WE LEARNED?* (National Bureau of Economic Research. 1995).

the stone which is remitting earnings beyond any defined limits, but usually most of the governments are monitoring and counterattacking such practices.

For instance, the case in many jurisdictions like France, Japan, and Taiwan, is that the surviving corporation should apply for a government agencies approval in order to get the required amount of foreign currencies, especially in the case of loan agreements between a subsidiary and its parent corporation.⁸³⁴ Meanwhile, it was even argued that removing such control on foreign currency will not ruin the exchange rate management, and even if that issue is deregulated it is what is needed to harmonize the fiscal and monetary policies.⁸³⁵

To sum it up, it is undoubtedly clear now that all those issues that are related to foreign currency might be considered as an impediment that could hinder the cross-border mergers, whereas it might led to losses: (1) in the form of losses due to the exchange rates and currency value fluctuations, (2) due to difficulties of obtaining the required foreign currencies in order to pay debt or any other financial obligations, (3) because of the failure to send earnings out of the jurisdiction either to the home country of the acquirer or anywhere else, and it is also possible that any of those issues might led to the failure of the merger transaction.

4. Foreign Corruption Practices Issues

The FCPA is considered one of the impediments that hinder the cross-border merger transactions.⁸³⁶ Under the US legal system, and according to the FCPA, all the US corporations are required not to use any means to pay a foreign government official in order to influence him to assist the corporation in maintaining or to obtain business opportunities, and in the same line the US parent corporation will be also liable for any violation by any of its subsidiaries for the same, and the mentioned business opportunities definitely include the opportunity of entering into a cross-border merger transaction.

In fact that is not the case only in the US, but most of the jurisdictions worldwide are prohibiting the bribery of government officials, specially the countries of the Organisation for Economic Co-operation and Development (hereinafter OECD), but the case might be that the

⁸³⁴ REED, et al., *The Art of M&A*, *supra* note 366, at 921. 2007.

⁸³⁵ See generally Michael C. Webb, *International Economic Structures, Government Interests, and International Coordination of Macroeconomic Adjustment Policies*, 45 INTERNATIONAL ORGANIZATION 309 (1991); MICHAEL C. WEBB, *THE POLITICAL ECONOMY OF POLICY COORDINATION: INTERNATIONAL ADJUSTMENT SINCE 1945* (Cornell University Press. 1995).

⁸³⁶ REED, et al., *The Art of M&A*, *supra* note 366, at 918. 2007.

fact is that the US is the jurisdiction that most rigorously apply its rule, in addition the FCPA gives the problem a more cross-border dimension, because the law could be enforced against a non-US citizen who manage an offshore or non-US corporation but is working for a US subsidiary.⁸³⁷

In that context, it should be noted the DOJ started to enter into non-prosecution agreements in return for some payments, for example it was reported that the DOJ entered into such an agreement with Ralph Lauren Corporation to settle a violation for giving payments and gifts to an Argentinean government official with concern to custom clearance issues, and that was through one of its subsidiaries.⁸³⁸ Most importantly here is that there is no disclosure of the terms for that kind of non-prosecution agreements, in addition to that the fact that no clear policy exists, and therefore the uncertainty and unpredictability of the application of the law undoubtedly constitutes an actual impediment to the cross-border merger transactions.

To add more ambiguity and unclear application of the FCPA, there is no clear definition to identify who might be considered as a foreign official, as it was previously mentioned in the discussions of the employees' issues, if a US surviving corporation is controlled by SWF that might led to considering its employees as foreign officials, and that might raise problems concerning a violation of the FCPA rules, while in fact the employee is based in the US and working for the US corporation and does not belonging nor working for the government that own the SWF.

To the contrary, in some other jurisdictions, it is not only legal and permissible to spend money on meals and entertainment for the purposes of acquiring a new corporation i.e. merger transaction, but 50% of the spending is also deductible from the taxed income, that case is typically the case under the tax law in Austria.⁸³⁹ Thus, the differences between different jurisdictions will add an additional dimension to the problem and that increase the possibility of being accused under the FCPA or similar practices and that might lead to the failure of the transaction or even just losses due to the fines to be paid.

To illustrate more, assume that a US subsidiary based in Austria is planning to acquire another non-US corporation incorporated in Austria, and is controlled by an SWF of the

⁸³⁷ John Brantley & Martin Hunt, *The M&A World Comes to the United States at 200* (Financier Worldwide Booz & Company ed. 2008).

⁸³⁸ Pamela Park, *Regulation 2013: Enforcement Focuses on Overseas Activities While New Regulations Discourage Risk-Taking* (Thomson Reuters 2013).

⁸³⁹ PricewaterhouseCoopers International, *Worldwide Tax Summaries - Corporate Taxes 2011/12, 2012*.

Norwegian government, and during the course of preparation for the transaction, the employees at the US subsidiary that is based in Austria, spend money on the entertainment of an employee at the other Austrian based corporation, there will be a great possibility that the DOJ officials will consider this as a violation to the FCPA and that might have an impact on the reputation of the merging parties and might have impacts on the price of its shares in the stock exchange, and even put the merger transaction to an end.

5. Foreign Investment Authorizations

In almost all the jurisdictions around the world, there are either national laws or regulations that have some limitations for foreign corporations to enter into investment activities without a prior government authorization,⁸⁴⁰ and that obviously encompass the cross-border merger transactions, as it will be shown shortly. It should be noted also that the limitation could come in many fashions i.e. could be in many forms, ranging from totally banning foreigner corporations from participating in certain investment activity, to the extent of requiring a prior authorization, and finally by just requiring the disclosure of some information after closing the transaction.

For instance, as an example of the most restricted laws and regulations, is the countries of the Cooperation Council for the Arab States of the Gulf (hereinafter GCC),⁸⁴¹ whereas foreign corporations are banned from operating or doing any kind of business activities on the national level, unless they have a national partner whom should hold at least 51% of such partnership.⁸⁴² Accordingly, foreign corporations are totally banned from entering into a cross-border merger transaction to acquire more than 49% of any national corporation, and thus the national laws of all the countries of the GCC is considered as a typical example of the foreign investments authorization impediment.

⁸⁴⁰ Godden, et al., *PLI'S ANNUAL INSTITUTE ON SECURITIES REGULATION IN EUROPE*, *supra* note 438, at 1126 (2001).

⁸⁴¹ The GCC countries are Kingdom of Bahrain, Kingdom of Saudi Arabia, Kuwait, The Sultanate of Oman, Qatar, UAE, and for more information about the GCC see its official website <http://www.gcc-sg.org/eng>, last visited May 31, 2014.

⁸⁴² For example Article No. 2 of the Law No. 13 of 2000 (The Law Regulating the Investment of Non-Qatari Capital in Economic Activities), for more details about the situation in the UAE *see* Richardson, et al., *ASIAN-MENA COUNSEL SPECIAL REPORT*, *supra* note 785, at 30-31 (2011); Boryana Damyanova & Thomas Singer, *The Role of Multinational Companies in Dubai: Balancing Tradition and Modernization*, 2 NIMEP INSIGHTS - TUFTS UNIVERSITY 100, at 102 (2006).

The same also could be recognized in several jurisdictions all over the globe, for example according to the Egyptian law concerning the importing registry, no foreign corporations are allowed to involve in any importing activities in Egypt,⁸⁴³ and in the same line is the Egyptian law regulating the ownership of real estate and the unoccupied lands by foreigners, whereas no foreigners are allowed to own real estate in certain geographic areas.⁸⁴⁴ Therefore, in Egypt the case is that foreign corporations are totally banned from entering into certain cross-border merger transaction, which violates any of the mentioned restrictions, and obviously those laws are considered as example of the foreign investments authorization impediment in certain industries.

Moreover, the case is almost the same in other developed jurisdiction like Japan, whereas the direct merger transaction between a Japanese corporation and a foreign corporation is totally banned, even entering into a triangular merger between a Japanese corporation and a foreign corporation was also banned until recently, as it was allowed after a great debate ended on May 1, 2007, and in addition to that the foreign corporations are banned from introducing their shares in return for acquiring a Japanese target in addition to several taxation problems with regard to the permitted triangular cross-border transaction.⁸⁴⁵

Likewise, the case is almost the same in the US, whereas according to the International Investment and Trade in Services Survey Act of 1976,⁸⁴⁶ it is required to report any transaction in case where foreigners will acquire or acquired 10% or more of the voting shares of a US corporation whose worth is 1 million US dollars or more, or if the target has an annual sales, assets, or net income that is more than 10 million US dollars. In addition to that, many states in the US have enacted laws that are significantly influencing the foreign investment activities, and that has added a new dimension to the problem at both the state and the federal level.⁸⁴⁷

As it was previously mentioned, the situation is also the same in almost all the jurisdictions around the world, for instance in Canada, according to the Investment Canada Act of 1985,⁸⁴⁸ there is a comprehensive regime tailored specially to conduct a prior review and

⁸⁴³ Article No. 2 of the Law No. 121 of 1982 (Concerning the Importing Registry)

⁸⁴⁴ Law No. 230 of 1996 (Law Regulating Owning a Real Estate or Unoccupied Lands by Foreigners)

⁸⁴⁵ Gerstman, et al., *INTERNATIONAL LAWYER*, *supra* note 436, at 768-770 (2009).

⁸⁴⁶ The International Investment and Trade in Services Survey Act, 22 USC Ch. 46

⁸⁴⁷ Report to the Committee on Banking, Housing, and Urban Affairs, U.S. Senate: Sovereign Wealth Funds: Laws Limiting Foreign Investment Affect Certain U.S. Assets and Agencies Have Various Enforcement Processes. pt. 1-63 (2009).

⁸⁴⁸ Investment Canada Act, R.S.C. 1985, I-21.8

authorization of any foreign investment that exceeds certain threshold.⁸⁴⁹ Furthermore, according to the Australian Foreign Acquisitions and Takeovers Act of 1975,⁸⁵⁰ which is governing the cross-border merger transactions in Australia, any transactions to acquire a “substantial interest” (15% or more) of an Australian corporation, should be authorized by the Australian Treasury, if its value exceeds certain threshold.⁸⁵¹

In addition to those laws and regulation, it was reported that the government authorities in many jurisdiction, especially in most of the developing countries, may apply the rules in an arbitrary manner or even adopt certain measures that do not have any legal base, for instance it was reported that in China even if the foreign corporation followed all the rules, the cross-border merger transaction might not be closed as planned.⁸⁵² That kind of practices could be considered as an impediment by itself and was classified as a bureaucratic impediment, and the merging parties found themselves on the horns of a dilemma, should they do what others do, for example bribe or even spend on entertaining government officials and violate the FCPA and the similar laws, or cause failure of the transaction or even not closing it successfully or according to the schedule.⁸⁵³

In that context, it should be noted that while it is undoubtedly true that the case is just “where law ends ... tyranny begins”⁸⁵⁴ in most of the developed countries, the situation is not the same in most of the developing countries, whereas tyranny is all encompassing no matter what the law is. For instance, it was reported in most of the GCC jurisdictions, that granting a government officials’ personal consent for any foreign investment activities is more important than following the rules,⁸⁵⁵ for example it could easily be observed by any professional in the GCC region that some blue chip corporations are violating the laws and operating on the national level without any legal base, and the government authorities are turning a blind eye to this.

⁸⁴⁹ Subrata Bhattacharjee, Canada’s Foreign Investment Review Process at 219 (Financier Worldwide Booz & Company ed. 2008).

⁸⁵⁰ Act No. 92 of 1975 (The Foreign Acquisitions and Takeovers Act)

⁸⁵¹ Matthew Latham & Weyinmi Popo, Australia’s Foreign Investment Framework: A More Challenging Landscape Emerging for M&A at 318 (Financier Worldwide Booz & Company ed. 2008).

⁸⁵² Guoping, How to Speed up M&A Deals in China, *supra* note 471, at 333, 2008.

⁸⁵³ Renato Mazzolini, *Creating Europe’s Multinationals: The International Merger Route*, 48 THE JOURNAL OF BUSINESS 39, at 43-45 (1975).

⁸⁵⁴ William Pitt’s words from his speech on January 9, 1770, engraved in a stone at the DOJ building in Washington D.C.

⁸⁵⁵ Eleanor Kwak ET AL., The Middle East as an Emerging Market at 361 (Financier Worldwide Booz & Company ed. 2008).

Whether the measure is law or regulation or even just arbitrary administrative decision, it could be justified under many reasons such as those similar to the stretchy notion of national security, which could easily encompass all and any actions at anytime, and that will be discussed shortly during the discussions of the national security as one of the impediments that faces the cross-border mergers.⁸⁵⁶ Meanwhile, unsuccessfully some professionals tried to justify that kind of impediments, by claiming that it is just an application of reciprocity provisions,⁸⁵⁷ meanwhile that could be easily refuted because that claim could be used to justify only the requirement of such authorizations as a reaction to the requirement in other jurisdiction, and not to justify the action in both jurisdictions or at least the jurisdiction that was first started.

It was also held that such measures could be justified on public policy grounds, for instance due to the massive activities of the SWFs to purchase national corporations that are operating and serving basic needs to nationals, several jurisdiction especially from EU are attacking back those activities, for instance the Foreign Trade and Payments Act (Außenwirtschaftsgesetz) in Germany, require a prior authorization from the Federal Ministry of Economic Affairs and Energy in order to acquire more than 25% of any German corporation, if the acquirer is non-EU corporation, and in that regard the Federal Ministry of Economic Affairs has the authority to totally block the transaction.⁸⁵⁸

It is undoubtedly true that requiring such authorizations by certain jurisdictions is generally mere protectionism i.e. safeguarding national industries and corporations against the competition with the foreign corporations, and even it is a fair competition, and there are many examples from reality that indicates that trend,⁸⁵⁹ and that is even known as “investment protectionism.”⁸⁶⁰ To sum it up, whatever the justification might be, all the reasons do not negate the fact that the requirement of such authorization is considered as an impediment to the cross-border mergers.

⁸⁵⁶ See *infra* p.175.

⁸⁵⁷ Report to the Committee on Banking, Housing, and Urban Affairs, U.S. Senate: Sovereign Wealth Funds: Laws Limiting Foreign Investment Affect Certain U.S. Assets and Agencies Have Various Enforcement Processes at 19. 2009.

⁸⁵⁸ Gasperis, et al., *INTERNATINAL LAWYER*, *supra* note 461, at 392 (2009).

⁸⁵⁹ For examples about protectionism practices in the cross-border mergers industries within EU Member State, despite that fact that there are EC directives in that regard, but it always depends on the application not the rules, see Mimi Hu, *European Bank Mergers & Acquisitions*, *Development in Banking and Financial Law: 2006-2007 ANNUAL REVIEW OF BANKING AND FINANCIAL LAW* 126, at 131-132 (2007); Cecilio Madero Villarejo, *Recent Trends in EU Merger Control* at 12 (2011).

⁸⁶⁰ Ghemawat & Altman, *Depth Index of Globalization 2013 and the Big Shift to Emerging Economies*, *supra* note 791, at 56. 2013.

It should be noted that sometimes that kind of impediments could be circumvented in many ways, and that range from for instance from using the corporate structure solutions such as incorporating a national investment vehicle to overcome some of those impediments, or acquiring a controlling share that is just under the threshold, to the extent of lobbying and arranging for campaigns to obtain the required authorizations.⁸⁶¹ In that same context, incorporating a foreign investment vehicle in a jurisdiction that have certain privileges of accessing other jurisdictions, under certain cooperation agreements, and that is typically the case in the EU, whereas a non-EU corporation could incorporate a corporation in one of the EU jurisdictions that are friendly with foreign corporations, and then use it as an investment vehicle to conclude cross-border merger transactions in any other EU jurisdiction, making use of privileges granted to EU Member States to access each other.

6. Industry-Specific Limitations

Cross-border mergers are limited to one extent or another in certain industries, and those industries are almost the same in most of the jurisdiction all over the world. Generally speaking, the limitations are mainly found in the following industries: (1) domestic transportations, specially shipping, aviation, and airport operations, (2) telecommunication, (3) energy, specially power plants, (4) agriculture, (5) banking, and (6) media. It should be noted also here that while it seems at first sight that the industry-specific issues are similar to those issues related to the foreign investment authorization, the fact is that both are impediments but are not the same, for instance a cross-border transaction might not trigger the threshold required for the foreign investment prior authorization, but may trigger an industry-specific limitation, and vice versa.

For example, in Australia, according to the Shipping Registration Act,⁸⁶² for a ship to be registered in Australia, nationals should own its majority i.e. 51% of its shares. Moreover, according to the Australian Foreign Acquisitions and Takeovers Act of 1975,⁸⁶³ any foreign investment that will be involved in acquiring 5% or more of a corporation operating in the media

⁸⁶¹ Godden, et al., *PLI'S ANNUAL INSTITUTE ON SECURITIES REGULATION IN EUROPE*, *supra* note 438, at 1122 (2001); SWF owned the State of Qatar and this is an example of SWF that is using typically the pattern of acquiring controlling shares that are not triggering the threshold, for more details about this *see* Nair, *Qatar Builds up Xstrata Stake Ahead of Glencore Deal*, *supra* note 553, 2012; Riseborough, et al., *Qatar Holds Out on Glencore as Davis Heads for Exit*, *supra* note 553, 2012.

⁸⁶² Act No. 8 of 1981 (The Shipping Registration Act)

⁸⁶³ Act No. 92 of 1975 (The Foreign Acquisitions and Takeovers Act)

industry, should be reported to the government regulatory authorities, and the same is with regard to the aviation industry, a prior authorization is also required to enter into a cross-border merger transaction, and that is mainly justified on grounds for verifying that the transaction is not contradicting with the national interests.⁸⁶⁴

The paradigm in the US is almost the same, whereas according to the Jones Act of 1920, if a foreign corporation owns 25% of a vessel it will be deemed a foreign vessel and it is not allowed to carry cargo between two destinations in the US.⁸⁶⁵ In the agriculture industry, according to the Agricultural Foreign Investment Disclosure Act of 1978,⁸⁶⁶ all cross-border mergers should be disclosed after closing the transaction. In addition to that, there are many other examples in many other industries like aviation, automotive manufacturing, and mineral land leasing.⁸⁶⁷

In the same line, according to the Egyptian Law of Establishing the Egyptian Electricity Authority,⁸⁶⁸ the government used to be the only party that was allowed to own corporations that build, operate, and maintain power plants, but that law was amended in 1996, by the Law No. 100 of 1996, and according to that amendment the government could grant licenses to private sector parties, either national or foreign corporations, to build, operate, and maintain power plants. Meanwhile, no licenses were granted until now to any national or foreign corporation and that means that the government's application of the law is arbitrary and could be considered as hindering cross-border merger transactions regarding that industry.

In the same context, in the State of Oregon in the US, cross-border mergers in the utilities industry, and specially power plants, are also subjected to a prior authorization from the local authorities, and in most of the cases the authorization is not granted directly from any additional commitments, but in fact the authorization always encompass special tailored conditions, for example; not to sell certain assets in the future, and some other detailed commitments concerning the reliability of providing the services and not increasing the rates.⁸⁶⁹

⁸⁶⁴ Rod Halstead ET AL., *Control of Foreign Investment in Australia* at 324-325 (Financier Worldwide Booz & Company ed. 2008).

⁸⁶⁵ The Merchant Marine Act of 1920, P.L. 66-261.

⁸⁶⁶ The Agricultural Foreign Investment Disclosure Act of 1978, 7 U.S.C. 3501

⁸⁶⁷ REED, et al., *The Art of M&A*, *supra* note 366, at 907-911. 2007; Ghemawat & Altman, *Depth Index of Globalization 2013 and the Big Shift to Emerging Economies*, *supra* note 791, at 56. 2013.

⁸⁶⁸ Law No. 12 of 1976 (Establishing the Egyptian Electricity Authority).

⁸⁶⁹ Thomas C. Havens, *Foreign Takeovers of U.S. Utilities - The British are Coming Again*, THE METROPOLITAN CORPORATE COUNSEL (1999).

Finally, it should be noted the industry-specific limitations are generally justified under the same reasons as the foreign investment authorization, and despite the fact that some or all of those reason could virtually justify the limitation, generally those limitations are based on a mere protectionism background, and the bottom line is that all proves and does not negate the fact that the industry-specific limitations are considered as an impediment to the cross-border merger transactions.

7. Integration Issues

It is undoubtedly true that the integration between the merging parties is one of the most crucial issues that faces the surviving corporation, whereas successful integration literally led to the success of the cross-border merger and otherwise it might lead to its failure, it is a matter of gaining the expected synergies or expecting losses, and accordingly it was claimed that “it is all about integration.”⁸⁷⁰ In that context, it should be noted that there are no straightforward answer to the question of how should the merging parties successfully integrate, whereas every transaction is a unique case in its own, and what worked for this might not work for that.⁸⁷¹

Meanwhile, breaking the integration process into small factors might help to identify the problems or the factors that led to consider the integration issues as an impediment to cross-border mergers. In that context, those factors could be generally identified and classified into three main categories, the first category is the integration of the human resources, which might include the following tasks to be accomplished: (1) developing an integration strategy and plan for employees, (2) integrating people coming from different cultures, (3) integrating employees speaking different languages, (4) hiring highly skilled managers that could lead the integration process, (5) integrating different employees’ assessment schemes, (6) integrating different employees benefits and rewarding schemes, and (7) preparing the employees psychologically for

⁸⁷⁰ Hopkins, *JOURNAL OF INTERNATIONAL MANAGEMENT*, *supra* note 2, at 226 (1999); David Eaton, *Cross-border M&A: Downstream Implications* at 154 (Financier Worldwide Booz & Company ed. 2008); REED, et al., *The Art of M&A*, *supra* note 366, at 61. 2007.

⁸⁷¹ Bijesh Thakker, *Necessities in a Cross-border Indian Deal* at 346 (Financier Worldwide Booz & Company ed. 2008).

the integration process and to get rid of “nationalistic atavism” i.e. sticking to the old national environment, and shifting to the new cross-border multinational environment.⁸⁷²

While it was claimed that the integration of the human resources and specially when they are coming from different cultures was not vital to the cross-border mergers,⁸⁷³ it was also claimed that it is the most important issue in terms of the integration issues that might face the cross-border mergers, whereas it was reported that it was the reason behind the failure in approximately 33% of the failed cross-border mergers.⁸⁷⁴ To show how that issue is important, consider for example the efforts done in that regard, during the integration process of the merger between Hewlett Packard and Compaq, there were 144 focusing group,⁸⁷⁵ and those focusing groups were conducted for two years in twenty two different jurisdictions.⁸⁷⁶

The second category of factors that could be identified, are factors that are related to the corporate structure issues, whereas under the different legal systems, the corporate structures are almost different, even the name of the same corporate structure are different, for instance the “Commanditaire Vennootschap” in Netherlands is known as “Association en Participation” in Belgium and as Limited Liability Partnership in the UK.⁸⁷⁷ However, the typical differences are mainly concerning different structuring requirements, for registration, for control, for managing, for operating, for licensing, and for taxation; as it will be discussed in more details during the discussions of the taxation as an impediment that faces the cross-border mergers.⁸⁷⁸

It is noteworthy that while it was claimed by a scholar that there are no cross-border difficulties at all and that it is just a myth, the same scholar himself clearly admitted that the structural issues under the different legal systems, especially when it comes to civil and common law systems, could be a serious issue that the merging parties would face along with other integration issues such as the different business and financial cultures, and he even gave

⁸⁷² Mazzolini, *THE JOURNAL OF BUSINESS*, *supra* note 853, at 45-48 (1975); Madura & Vasconcellos, *BEER*, *supra* note 634, at 7-8 (1988); Eaton, *Cross-border M&A: Downstream Implications*, *supra* note 870, at 154. 2008; Godden, et al., *PLI'S ANNUAL INSTITUTE ON SECURITIES REGULATION IN EUROPE*, *supra* note 438, at 1127 (2001).

⁸⁷³ REED, et al., *The Art of M&A*, *supra* note 366, at 661. 2007.

⁸⁷⁴ Hopkins, *JOURNAL OF INTERNATIONAL MANAGEMENT*, *supra* note 2, at 226 (1999); Robin Johnson, *Managing Pan-European Transactions for US Buyers* at 229-230 (Financier Worldwide Booz & Company ed. 2008); WESTON & WEAVER, *Mergers and Acquisitions*, *supra* note 240, at 91-92. 2001; ANDREW J. SHERMAN, *Mergers & Acquisitions from A to Z*, *supra* note 391, at 242. 2006.

⁸⁷⁵ Focusing Group is a method of qualitative research, under which certain groups of people are questioned about their beliefs, expectations, and attitudes towards something, such as an idea, product, service, or anything.

⁸⁷⁶ REED, et al., *The Art of M&A*, *supra* note 366, at 661. 2007.

⁸⁷⁷ Godden, et al., *PLI'S ANNUAL INSTITUTE ON SECURITIES REGULATION IN EUROPE*, *supra* note 438, at 1122 (2001).

⁸⁷⁸ *See infra* p.182.

examples of the structure differences between the EU Member States, for instance under the French civil legal system, if the transaction is a stock-for-stock transaction, the presented shares should be valued by “*Commissaire aux Apports*,”⁸⁷⁹ while that is not a requirement in the common law legal jurisdictions in the EU.⁸⁸⁰

The third category of integration factors that could be identified are the factors that are related to the integration of operations, particularly in the case where the merging parties will not operate autonomously, and that includes mainly the following issues: (1) developing an operation integration strategy and plan, (2) integrating the manufacturing plants, (3) integrating the distribution channels, (4) integrating the functional departments for example the marketing, sales, information technology, finance, human resources management, accounting departments, etc., (5) defining a geographic scale of the integration, (6) integration between business practices and standards prevalent in different jurisdictions, and (7) customers integrations, whereas sometimes in certain industries the customer used to be served in a specific way according to certain system.⁸⁸¹

An excellent example, in the context of integrating the business practices of the merging parties is the integration between the accounting standards, as it will demonstrate how the integration of the operations could be an impediment to the cross-border merger. In that context it should be noted first that almost each jurisdiction developed its own accounting standards, however by time and with the efforts to harmonizing those standards by the International Accounting Standards Board under the umbrella of the Foundation of the International Financial Reporting Standards (hereinafter IFRS), only two standards have become predominant in almost all the jurisdictions; the IFRS, and the Generally Accepted Accounting Principles (hereinafter GAAP).⁸⁸²

The differences between the IFRS and the GAAP standards are vital and sometimes lead to cross-border merger failures, in that context it was reported that in the case of the merger

⁸⁷⁹ *Commissaire aux Apports* is an auditor who is listed in a special list developed by the Court of Appeal of Paris

⁸⁸⁰ Godden, et al., PLI'S ANNUAL INSTITUTE ON SECURITIES REGULATION IN EUROPE, *supra* note 438, at 1122-1123, 1127 (2001).

⁸⁸¹ Eaton, Cross-border M&A: Downstream Implications, *supra* note 870, at 154. 2008; Madura & Vasconcellos, BEBR, *supra* note 634, at 8 (1988).

⁸⁸² Henry Hansmann & Reinier Kraakman, *The End of History of Corporate Law*, YALE LAW SCHOOL WORKING PAPER NO. 235; NYU WORKING PAPER NO. 013; HARVARD LAW SCHOOL DISCUSSION PAPER NO. 280; YALE SOM WORKING PAPER NO. ICF - 00-09., at 19-20 (2000); Huw Jones, *Global Regulators to Tighten up Bank Disclosures* (Helen Massy-Beresford ed., Thomson Reuters 2011).

between the German corporation Daimler-Benz and the American corporation Chrysler, due to the use of different accounting standards in both of corporations, and the listing disclosure requirements by the US Securities and Exchange Commission (hereinafter SEC), a 68 million US dollars of profits under the German accounting standards appeared as a 556 million US dollars of losses in 1993, and that significantly affected the price of the shares at the stock exchange, and accordingly Daimler decided to be unlisted because they thought it was better than experiencing those losses as result of the integration process.⁸⁸³

Finally, it should be noted that integration is not just about the general process, it is about all those issues as components of the process, whereas each of those integration components could be a success factor that contribute positively to the success of the cross-border mergers. At the same time it could be a serious issue that could negatively affect the pace of the integration process generally and accordingly the success of the merger transaction itself, and it might led to losses due weak performance, or even led to the total failure of that the concerned cross-border merger.⁸⁸⁴

8. National Security Clearance

As it was previously mentioned that most of the prior authorization of the foreign investment, with regard to the cross-border transactions, could be justified under the national security stretchy notion, and that under that notion the national authorities could easily block any cross-border merger at anytime, and that might be mere protectionism. It should be noted here that the national security clearance is an additional requirement that might be required from the parties of the cross-border mergers, and that clearance might be required in the following two cases.

The first case is simply when the cross-border merger transaction is related to defense or national security industries, while the second case is just because an FDI is planning to acquire a national target that has particular significant in the national economy, or sometimes it could be just a national corporation. In fact the second case should be categorized as an economic security case not a notional security one, and in that context it was claimed that the term national security

⁸⁸³ See Andreas Wöller, *How the Globalization of Capital Markets Has Affected the Listing Behavior of Foreign Issuers The Case of Daimler's Listing on the NYSE: The Case of Daimler's Listing on the NYSE (Part I)*, 38 DAJV NEWSLETTER 14, at 14-18 (2013).

⁸⁸⁴ REED, et al., *The Art of M&A*, *supra* note 366, at 661. 2007.

is used in the US instead of the economic security,⁸⁸⁵ and even sometimes instead of political goals.

For instance, according to the US legal system, under the Defense Production Act of 1950,⁸⁸⁶ as amended by the Foreign Investment and National Security Act of 2007,⁸⁸⁷ the Committee on Foreign Investment in the United States (hereinafter CFIUS) is responsible of reviewing the cross-border mergers that are just an FDI whenever the target is a US corporation. The review that is expected to be done by CFIUS is mainly concerned with the national security dimension of the transaction, however it is not that straightforward of a review i.e. it is not just a national security issue because it might encompass political and economic issues as well, and a brief look on the history of the 2007 amendment to the Defense Production Act will reveal such fact.

To elaborate more, the fact was that what triggered the amendment of the law was a cross-border merger transaction that did not constitute any threat to the national security, but it literally constitutes an economic security and protectionism. The story was all about a foreign corporation namely Dubai Ports World, which is owned by the UAE, and it was planning to acquire Peninsular and Oriental Steam Navigation Company, which has the right to run six US ports, and the transaction passed the national security review that was applicable before the amendments, and that in fact irritated the US legislator and led to the passing of an amendment to tighten the review for the FDI in general and accordingly to all the cross-border mergers.⁸⁸⁸

It should be noted also that while the prior review of the cross-border mergers by the CFIUS is still voluntary, and that means that the parties might opt not to disturb their schedule and not to disclose too much information about it and thus close the transaction prior to the review. But in the same time they should be aware of the risks behind that choice, because in fact the CFIUS will have the authority to review the transaction, of its own even if it was not notified, and if it found any threat to the national security it might advise the US President to use his

⁸⁸⁵ Deborah M. Mostaghel, *Dubai Ports World Under Exon-Florio: A Threat to National Security or a Tempest in a Seaport*, 70 ALBANY LAW REVIEW 583, at 585 (2007).

⁸⁸⁶ The Defense Production Act of 1950, 50 U.S.C. App. 2061 et seq.

⁸⁸⁷ The Foreign Investment and National Security Act of 2007, Pub.L. 110-49.

⁸⁸⁸ For more details about the Dubai Ports World incident *see generally* Mostaghel, ALBANY LAW REVIEW, *supra* note 885, (2007).

power, as granted by the law, to enjoin the already consummated transaction, and in that case the surviving corporation might face dissolution.⁸⁸⁹

Meanwhile, it should be noted that the national security clearance requirement is not applied to all transactions, for instance the outbound transactions or the acquiring target in one of the passive investment industries are not exposed to such requirement.⁸⁹⁰ On the other hand, if the transaction is related to certain industries like the defense, security, and telecommunication industries, another form of the national security clearance impediment is waiting for the merging parties, whereas in most jurisdictions a prior authorization is required in such transactions that directly related to one those industries. For instance, according to the US legal system, the US Department of Defense has the right to review the merger transaction related to the defense industry.⁸⁹¹

Finally, it would be useful to limit the high discretionary and stretchy notion of the national security, and particularly to limit the arbitrary application of the law by the national authorities, whereas it has been expected that Canada will introduce guidelines in that regard to serve all the parties i.e. the parties to the transaction and even the government officials, and according to the guidelines the parties of the transaction might have a more solid base for the decision toward the transaction.⁸⁹² Unfortunately, no guidelines were issued until now in that regard, and it should be noted that whatever the reasons might be behind any kind of national security clearance requirements, that will not negate that fact the of national security clearance requirements could be considered as an impediment that faces the cross-border mergers.

9. Professional Services

Despite that fact that the services provided by the professional such as the legal advisors, financial advisors, auditor and accountants, and management consultants, might be one of the success factors that could led to the success of cross-border mergers, those services providers could be an actual impediment to the transactions, and they might lead to poor performances or experiencing losses, or even the failure of the transaction. In addition to the heavy fees that could

⁸⁸⁹ Brantley & Hunt, *The M&A World Comes to the United States*, *supra* note 837, at 199-200. 2008.

⁸⁹⁰ MILLER, *Mergers and Acquisitions: A Step-by-Step Legal and Practical Guide*, *supra* note 414, at 167. 2008.

⁸⁹¹ Jonathan M. Epstein & David B. Dempsey, *National Security Issues in Cross-Border Mergers, Acquisitions, and Joint Ventures*, Northeast Edition THE METROPOLITAN CORPORATE COUNSEL (2004).

⁸⁹² Bhattacharjee, *Canada's Foreign Investment Review Process*, *supra* note 849, at 220. 2008.

be charged in return of such services, due to the complex nature of the cross-border mergers, and whether it is considered as an extra financial burden added to the cross-border transaction, if the services providers are not professional enough they will be an impediment that faces the cross-border mergers.

For instance, the legal advisor who will participate in the conclusion of the transaction must be fully aware of all the laws of the different legal systems in the different jurisdictions that are applicable to the transaction, not only that but how all those laws are interpreted and applied in real cases by both the government officials and the judges in courts, because one wants to avoid any fatal mistakes that could lead to future failure of the transaction or increase the liabilities of the parties, for example the transaction could be closed without having the required prior authorization from the concerned authorities and that in some cases might lead to dissolution, as it will be addressed in the discussions of the merger control as an impediment.

Furthermore, the list of examples of the issues that might cause a consequence due to the lack of full awareness of the different legal systems is too long, and in that context it could be claimed that the legal advisors that are involved in cross-border mergers, as well as all the other professional service providers involved in the transaction, should have a comparative mindset that allows them first to accept the fact that there might be different systems that are adopted in jurisdictions around the globe, and then to understand the differences between those systems, and finally how to tailor solutions that will make the transaction acceptable among all those different systems simultaneously.

From a practical point of view, some of the professional service providers do not even except that there are different systems than their own national system, and that might be attributed to many reasons, one of those reason is the limited international exposures, and another reason is that the practicing of the legal profession as well as many other professions is limited to the nationals in most of the jurisdictions,⁸⁹³ and most importantly the lack of comparative education is on the top of that list. All of the concerned professional service providers should be fully aware and deeply understand that the fact is that the “[l]aw can no longer be looked at in national terms,” and it was even claimed that most of the law schools are strictly “tied to their national perspectives.”⁸⁹⁴

⁸⁹³ Adam Palin, *International law Legal Studies in a Globalised Era*, FINANCIAL TIMES, November 19, 2012. 2012.

⁸⁹⁴ *Id.*

In the same context, it was argued that the legal advisor, as a law student, should be open to study comparative legal systems.⁸⁹⁵ In addition to the professional advisors of the parties, it could also be maintained that all the state officials should be open to that, or at least their skills should be upgraded to understand the new extra dimension of cross-border transactions. This is because they are engaged to a great extent in cross-border transactions, during the preparation phase or even after closing the transaction and they are directly involved in settling the disputed that might arise out of that kind of transactions. For example, it was claimed that judges are regularly the outcome of their national law schools, which focusing most of the time on that national legal system,⁸⁹⁶ therefore judges should receive some training, or at least be open to learn about the comparative judicial practices and administration of justice in other jurisdictions.⁸⁹⁷

It is noteworthy that, in an attempt to contribute in solving that problem and not to be a part of it, many law schools designated comparative law departments that hold the mission to design special programs for law students to study different legal systems from all around the globe, from a comparative perspective. Remarkably Robert H. McKinney School of Law is one of those first law schools to be part of that initiative. Moreover, it should be also noted here that the issue of globalization of the legal profession is also a heavily debated issue, and remarkably also it was highly debated during the symposium of “Globalization of the Legal Profession” that was held on April 2006, at the Indiana University School of Law.⁸⁹⁸

Finally, it is undoubtedly true that those professional service providers if they are not willing, not educated, or inexperienced with most of the different systems across the globe, and unaware of the “interactions and tensions” between them, they will be considered as serious impediment to the cross-border merger. Not only that, but also in addition they will lose the opportunity and will not have a chance to grow themselves, in the journey of that semi-globalized world in the globalization process.⁸⁹⁹

⁸⁹⁵ Pierrick Le Goff, *Global Law: A Legal Phenomenon Emerging from the Process of Globalization*, 14 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 119, at 123 (2007).

⁸⁹⁶ Crane, CHICAGO JOURNAL OF INTERNATIONAL LAW, *supra* note 397, at 157 (2009).

⁸⁹⁷ Matthias Lehmann, *From Conflict of Laws to Global Justice* (2011) Columbia University); DABBAH, *The Internationalisation of Antitrust Policy*, *supra* note 9, at 203. 2003.

⁸⁹⁸ For more details about the thoughts and claims expressed during that symposium *see generally* Goff, INDIANA JOURNAL OF GLOBAL LEGAL STUDIES, *supra* note 895, (2007).

⁸⁹⁹ Palin, FINANCIAL TIMES, *supra* note 893, 2012.

10. Stock Exchange Issues

In case that any of the merging parties are a public corporation i.e. its shares are publicly traded in the stock exchange, the rules applied to the concerned stock exchange might be considered as an impediment that faces the cross-border merger transaction. Generally speaking, the rules of the stock exchange can be an impediment that faces the cross-border mergers in two flavors, the first is in the case of the compliance towards those rules in different jurisdictions at the same time; whereas those rules might be contradicting to each other and led to serious problems, or even perplexing situation and consume resources if not contradicting to each other, and the second is the case when those rules are contradicting with other different set of rules that not even related to the stock exchange, as it will be explained in this discussion.

In that context, it was claimed that most of the problems relating to the differences between the rules of the stock exchange are already resolved by means of the harmonization efforts done under the International Organization of Securities Commissions (hereinafter IOSCO),⁹⁰⁰ whereas more than 124 securities commissions from around the globe are members to the IOSCO and almost have adopted the harmonized rules.⁹⁰¹ However, that claim could be refuted on the ground that the application of the rules by the different securities commissions, in the different jurisdictions, is the key to the problems, and the flaw is not just inherent in the rules itself, for instance the policies and the general environment in some jurisdiction might be more capitalist oriented, while other jurisdiction might be strictly oriented to the protection of the rights of the minority shareholders, thus the problems.

The previously mentioned merger between Daimler-Benz and Chrysler is an excellent example of the stock exchange rules as an impediment that faces the cross-border mergers, whereas according to the disclosure rules of the SEC, Daimler Chrysler was required to disclose its financial information as a foreign issuer such as, the net income, profits, and that disclosure should in accordance with the GAAP accounting standards, while Daimler Chrysler was required to disclose the same information in Germany according to the IFRS accounting standards,⁹⁰² and

⁹⁰⁰ For more details about the history of the IOSCO *see generally* PETTET, *Company Law*, *supra* note 125, at 329-330. 2005; REED, et al., *The Art of M&A*, *supra* note 366, at 919-920. 2007; Braithwaite & Drahos, *Globalisation of Corporate Regulation and Corporate Citizenship*, *supra* note 43, at 20-21. 2003.

⁹⁰¹ To see the full list of the members of the IOSCO visit the official website at <http://www.iosco.org/lists> last visited October 1, 2014.

⁹⁰² *See* Wöller, *DAJV NEWSLETTER*, *supra* note 883, at 14-18 (2013).

in that case the disclosure that was required under the filing of the form 20-F as per the SEC rules was almost the same to the disclosure required as the German rules.⁹⁰³

However, the rule that require the disclosure is not the problem, and that is definitely not the case, the case is that in doing so according to the two standards one will consume resources because it all has to be done twice and in accordance with two different standards, in addition to that as it was previously mentioned the difference between those two standards was not marginal, but in fact a 68 million US dollars profits under the IFRS appeared as a 556 million US dollars losses under the GAAP, and that significantly affected the price of the shares in the stock exchange and it end up with Daimler Chrysler deciding to be unlisted rather than experiencing these losses that resulted from the obligations under different set of rules.⁹⁰⁴

It is noteworthy that the securities commissions in some jurisdiction might apply the rules in a strict manner while in other jurisdiction the same rule could be waived, moreover and even in the same jurisdiction and the same authority officials could show tolerance to some transaction while rigidity to others, for instance it was reported that since 1990 the SEC is more friendly with the cross-border issuer than the domestic one,⁹⁰⁵ for example the SEC entered into negotiation with Daimler Chrysler with regard the accounting standards and the result was that the SEC allowed Daimler Chrysler to submit the financial reports every six months instead of quarterly, and even to submit the financial statements of the most recent two years instead of the required five years.⁹⁰⁶

In addition to that, as it was just mentioned the stock markets exchange rules might not contradict only with each other, but in fact it might also contradict with different set of rules that are not even related to the stock exchange, and that will definitely consume more resources and sometimes might lead to the failure of the transaction. For instance, according to the rules of most the stock exchanges, the announcement of the offer to acquire shares from the market should be timed by the closing date, while in most of the cases of the cross-border merger transaction is required to be reviewed once announced by the concerned antitrust authorities, not in just one but in many jurisdictions, and that always takes long time, accordingly the offer will

⁹⁰³ Form 20-F is form issued by the SEC, and must be filed by all “foreign private issuers” that have listed their shares in the US.

⁹⁰⁴ Wöller, DAJV NEWSLETTER, *supra* note 883, at 14-18 (2013).

⁹⁰⁵ Charles M. Nathan, et al., *Commission Adopts Regulations Regarding Takeovers and Shareholder Communications: Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offerings* at <http://www.friedfrank.com/siteFiles/Publications/259B10FB1E8B80C04E04B9ACE93ABE60.pdf>.

⁹⁰⁶ Wöller, DAJV NEWSLETTER, *supra* note 883, at 16 (2013).

lapse and making a new offer is not that easy due to the many complex issues such as the change in prices and even sometimes complying to a new set of rules adopted during the antitrust review period that usually takes six months.⁹⁰⁷

Lastly, it was claimed that with the more difficult listing and the general market rules, the more the successful corporation would try to be listed accordingly to those rules, as that will inevitably enhance the risk profile and corporate governance scheme of the surviving corporation.⁹⁰⁸ On the other hand, it is undoubtedly true that the rules of the stock exchange is not only an impediment to the surviving corporation, but also to financing the transaction itself in the case that the merging parties were planning to finance the transaction by issuing stocks, either shares or bonds of any kind.

11. Taxation Issues

Taxation on the national level i.e. pure domestic transaction is a very complicated issue, in addition to that the taxation of the transaction has significant effects, starting from the incentive to enter into a merger and passing by the structuring of the transaction and finally as a success or failure factor. However, when it comes to the taxation of the international transactions and the multinational corporations as an outcome of the cross-border mergers, taxation issues are highly complicated, and it was even claimed that as the international system developed and moved towards a globalized world without giving the proper attention to an international taxation system.⁹⁰⁹

In the same context, it was empirically reported that the tax consideration significantly affect the corporate restructuring decision,⁹¹⁰ and that it has a crucial impact on the interests of the merging parties and thus they should be fully aware of the taxation consequences and of all the available structuring options before taking their final decision, that includes not only the different taxation systems in the concerned jurisdictions but also any tax agreements between

⁹⁰⁷ See for example rule number 12.1 of the UK takeover panel code, as it stipulates that the offer automatically lapse in case of referring the transaction to the antitrust authorities.

⁹⁰⁸ Wöller, DAJV NEWSLETTER, *supra* note 883, at 17 (2013).

⁹⁰⁹ RAZIN & SLEMROD, Taxation in the Global Economy, *supra* note 664, at 11. 1990.

⁹¹⁰ Taxation of Cross-Border Mergers and Acquisitions: Philippines, *supra* note 665, at 5. 2012; Myron & Wolfson, THE JOURNAL OF BUSINESS, *supra* note 685, at S141-S164 (1990).

those jurisdiction.⁹¹¹ Therefore, it could be easily claimed that in all cases the taxation issues will at least consume the parties' resources if not lead to huge losses or even failure.

In the same context, it was empirically reported that the taxation policy significantly affected the general economic activities in the US,⁹¹² and regarding the FDI activities in the US a specialized empirical study also reported that the analysis of data revealed that taxation policy significantly affected the inbound flow of FDI i.e. to the US.⁹¹³ In fact that is not the case in the US only, but in almost all jurisdictions, the taxation issues are highly complicated and adversely affect the cross-border mergers, even within the members of cooperation unions like the EU.⁹¹⁴

Moreover, the effect of the taxation policy in certain jurisdiction is not just limited to the economic activities in general and the cross-border mergers in that jurisdiction, but it also affects the taxation policy of other jurisdictions. For instance, it was recounted that the tax policy reform of the US in 1986, directly triggered the Canadian government to change its own taxation policies, in the same direction, and in response to the said tax reform in the US.⁹¹⁵ That kind of simulative reaction on the international level is not limited to that instance and generally speaking is based on the fact that most of the countries are competing with one another to attract FDIs, and it was claimed that the race is always to same direction i.e. simplifying the taxation issues, in other words and to be more precise, the race is to the bottom.⁹¹⁶

Furthermore, the empirical findings reveal that the taxation policies also affect the R&D strategy of corporations, whereas there is evidence indicating that the R&D strategies directly respond to any change in the tax rates on the domestic level, and that was justified by the fact that the importation of technology is a substitute to the R&D activities of the corporations, thus any increase in the domestic tax rates will led to an increase in technology importation, which

⁹¹¹ Egypt Tax Guide 2012, *supra* note 664, at 1. April 2012; Driscoll, Taxable Acquisitions and Their Effect on Seller and Purchaser, *supra* note 433, at 81. 1956., and for more details about the tax effect on the parties of the transaction *see Id.* at 81-103.

⁹¹² For more details about the tax effect on merger activities *see* Myron & Wolfson, THE JOURNAL OF BUSINESS, *supra* note 685, at S141-S164 (1990).

⁹¹³ RAZIN & SLEMROD, Taxation in the Global Economy, *supra* note 664, at 71. 1990., and for more details on the effect of tax on FDI *see generally* JULIAN ALWORTH, THE FINANCE, INVESTMENT AND TAXATION DECISIONS OF MULTINATIONALS (Basil Blackwell. 1988). Mark. Gersovitz, *The Effects of Domestic Taxes on Foreign Private Investment*, in THE THEORY OF TAXATION FOR DEVELOPING COUNTRIES (David Newbery & Nicholas Stern eds., 1984).

⁹¹⁴ For more details about the relation between the merger directive, taxes systems, and *Societas Europaea* (European Company) *see generally* LUCA CERIONI, EU CORPORATE LAW AND EU COMPANY TAX LAW (Janet Dine ed., Edward Elgar. 2007).

⁹¹⁵ RAZIN & SLEMROD, Taxation in the Global Economy, *supra* note 664, at 1. 1990.

⁹¹⁶ CERIONI, EU Corporate Law and EU Company Tax Law, *supra* note 914, at 176. 2007.

inevitably means an outbound flow of investments and harming the domestic economy in general.⁹¹⁷

As it was previously mentioned that in certain jurisdictions like in the US and other countries that adopted a worldwide taxation policy, the returns of the national corporation are taxable even if realized abroad.⁹¹⁸ Actually, that worldwide taxation policy added another dimensions to the taxation problems, whereas in many cases there will be an overlapping jurisdictions and that may led to double taxation, in addition the overlapping jurisdiction consumes the resources of the surviving corporation in order to comply with several tax systems and to administer the taxation issues before all the concerned jurisdictions.⁹¹⁹

Moreover, as it was also reported that most of the corporations invented their own practices to circumvent some of the taxation issues, especially double taxation and the taxation policies in unfriendly jurisdiction, and that was done mainly by spreading the profits among non-arm's length corporations and transfer pricing techniques. However, the governments use to counterattack those practices through bilateral treaties,⁹²⁰ and in the meantime continue their race to the bottom by entering into treaties to avoid double taxation, and that led the parties of the cross-border mergers to consider what is known as "treaty shopping" in order to decide where to incorporate and what kind of structure should be used. Then the governments fight back again, as always, by entering into special treaties to stop the treaty shopping practices.⁹²¹

The list of examples for the battle between multinational corporations and the government on the tax issues is too long, however sometimes there are extreme responses from both of them, and that is considered to be out of the conventional examples, for example the Indian authorities entered into a dispute before the High Court of Bombay on the disagreement of taxing the off-shore cross-border merger between Vodafone International Holdings BV (a

⁹¹⁷ Martin S. Feldstein, et al., Taxes, Technology Transfer, and R&D by Multinational Firm at 246 (Jr. James R. Hines ed., University of Chicago Press 1995).

⁹¹⁸ For example the Philippine also have a worldwide taxation regime, Taxation of Cross-Border Mergers and Acquisitions: Philippines, *supra* note 665, at 8. 2012; RAZIN & SLEMROD, Taxation in the Global Economy, *supra* note 664, at 2. 1990.

⁹¹⁹ RAZIN & SLEMROD, Taxation in the Global Economy, *supra* note 664, at 2-3. 1990.

⁹²⁰ Most of the national taxing regimes regulates Transfer Pricing, for more information about the OECD countries' transfer pricing profile see <http://www.oecd.org/ctp/transfer-pricing/transferpricingcountryprofiles.htm>, moreover the Egyptian income tax law No.91 of 2005 regulates the Transfer Pricing practices, and for more about the Egyptian system see Egypt Tax Guide 2012, *supra* note 664, at 4. April 2012., meanwhile it is noteworthy that it is not easy to identify the effectiveness of the transfer pricing regulations as been indicated in RAZIN & SLEMROD, Taxation in the Global Economy, *supra* note 664, at 150-151. 1990.

⁹²¹ RAZIN & SLEMROD, Taxation in the Global Economy, *supra* note 664, at 26-27. 1990.

Dutch corporation) and Cayman Islands Holding Corporation (a Cayman Island corporation), because the transaction was alleged to have an indirect connection to Vodafone Essar Limited (an Indian corporation),⁹²² on the other hand Starbucks Corporation paid millions of sterling pounds to the UK authorities just to end the public criticism of its practices toward tax issues.⁹²³

Finally, despite the fact that addressing the issues that might result from the taxation policies in many jurisdictions and its effect on the cross-border mergers, or at least on the planning and structuring of the transaction, is not an easy task, but it could be easily claimed that in most of the cases the taxation issues are considered as an impediment that faces the cross-border mergers.⁹²⁴ In that context, some scholars actively call for the harmonization of the international taxation policies, in order to avoid the negative effects of the contradicting policies, or at least to lessen that effect, on the cross-border mergers.⁹²⁵

12. Successorship Issues

Changing the control of any of the parties of the cross-border merger will lead in most of the cases to the escalation of many problems, for example the issues related to the assignment of the agreements with third parties, the issues related to the assignment of the rights or privileges that that were granted to any of the parties under certain regimes such as investment incentives and industry-specific licenses, issues related to the assignment of the title and rights to real estate and IPR, and identifying the borderline that defines the liabilities of both the surviving corporation and the target towards other stakeholders, such as customers and employees and to no ending list of third parties, as the case might be.

For instance, under the legal systems of almost all jurisdictions, and according to the “change of control” clauses that are generally incorporated in most of the agreements, the assignment of rights and obligations to third parties due to the change of control, which might be the surviving corporation in that case, is prohibited unless otherwise authorized by the mutual consent of the parties or that might put the agreement itself to an end if not considered it a

⁹²² Gasperis, et al., *INTERNATIONAL LAWYER*, *supra* note 461, at 394-395 (2009).

⁹²³ Pamela Park, *Corporate Governance Watch: Public Opinion Influences Corporate Decision Making* (Thomson Reuters 2013).

⁹²⁴ Godden, et al., *PLI'S ANNUAL INSTITUTE ON SECURITIES REGULATION IN EUROPE*, *supra* note 438, at 1127-1228 (2001); Robert J. Peroni, *A Response to Dean Thompson's Paper on the Impact of Code Section 367 and the European Union's 1990 Council Directive on Tax-Free Cross-Border Mergers and Acquisitions*, 66 *UNIVERSITY OF CINCINNATI LAW REVIEW* 1271, at 1275 (1998).

⁹²⁵ Peroni, *UNIVERSITY OF CINCINNATI LAW REVIEW*, *supra* note 924, at 1281 (1998).

breach.⁹²⁶ Accordingly, the surviving corporation might lose the rights that were granted under those agreements, unless it got consent from the concerned parties, not only that but it might also bear unexpected liabilities out of the thin air such as in case where the assignment was considered a breach.

Another example, is from the US, whereas when the target or the acquirer is a party to a classified contract with the US government agencies i.e. those are the types of contracts that require access to confidential information, the assignment of those contracts to the acquirer or any other merging party should be reported to the CFIUS, and the parties should take acceptable measures according to the standards of the concerned government agency to ensure that those contracts will remain classified after the conclusion of the merger transaction, and that is known as “Foreign Ownership Control or Influence Mitigation Plan.”⁹²⁷

Moreover, according to the Communications Assistance to Law Enforcement Act of 1994,⁹²⁸ the US Federal Bureau of Investigation (hereinafter FBI) has the right to access the systems of corporations operating in the internet providing services and the telecommunication industry, and therefore any merger transaction concerning the acquiring of a US corporation operating in any of those industries, the FBI will have to arrange with the expected acquirer to ensure that the surviving corporation will continue to grant the FBI the same access, otherwise the FBI might not clear the transaction.⁹²⁹

Finally, it should be noted that those kinds of successorship issues are highly diverse and are not governed under the same rules or general principles in any single jurisdiction, therefore addressing those kind of issues will require unprecedented research efforts and it is out of the scope of this dissertation. However, it is undoubtedly true that arranging for handling those kinds of successorship issues will consume resources and might lead to losses or even to a merger failure, and thus are considered as impediments that face the cross-border mergers.

IV. Merger Control as a Cross-border Merger Impediment

The following discussion will prove that merger control is considered as an impediment that faces mergers generally, and even on the cross-border mergers level the case is worse; as it

⁹²⁶ MILLER, *Mergers and Acquisitions: A Step-by-Step Legal and Practical Guide*, *supra* note 414, at 20. 2008.

⁹²⁷ Epstein & Dempsey, *THE METROPOLITAN CORPORATE COUNSEL*, *supra* note 891, (2004).

⁹²⁸ The Communications Assistance to Law Enforcement Act of 1994, 47 USC 1001-1010

⁹²⁹ Epstein & Dempsey, *THE METROPOLITAN CORPORATE COUNSEL*, *supra* note 891, (2004).

will be revealed during the discussions, that merger control directly affect the success of cross-border mergers. Moreover, the discussion will be divided into two main parts, the first part will be merger control at a glance, whereas it will address the merger control systems at number of jurisdictions; first to show how the merger control systems varies from one another, and second to show that those systems are almost contradicting.

The second part of the coming discussion will mainly address the drawbacks of the different merger control systems, from a cross-border mergers perspective whenever possible. That part of the discussion will address the various drawbacks ranging from what might be considered as a foundational inherent fault in the system, to what is considered as an impediment that faces only or at least specifically the cross-border mergers, and finally to the negative effect of the differences between the systems adopted in the different jurisdictions that are concerned with the transaction, which might be none of the jurisdiction that are directly related or connected to the transaction, due the extraterritorial jurisdictional reach, as it will be shown in detail in the discussions of the US, EU, and Egyptian systems.

1. Merger Control at a Glance

Merger control is simply the process under which the competent authorities of a certain jurisdiction reviews certain merger transactions, in order to insure that the surviving corporation is raising an antitrust questions i.e. violations, and according to the results of that process the competent authority might block the transaction, require certain remedies to be done in order to authorize or clear it, or even enjoin the consummated transaction. In that context, it should be noted that if the review is prior to closing the transaction it is known as premerger control, while if the review is after closing the transaction it is known as post-merger control.

In the post-merger control case, the review will be similar to a great extent to the typical antitrust review of any antitrust case i.e. the review of the behavior of a corporation that is not engaged in any merger activity; therefore the premerger control is mainly concerned with the merger transaction itself more than the post-merger control. However, and despite the fact that the premerger review might have a greater effect on the cross-border mergers, the coming discussion will address both of the two forms in some details, as follows.

The merger control systems to be addressed in the coming discussion will be the US, EU, and the Egyptian merger control systems. As it previously mentioned during the introduction of

this dissertation, the main reasons behind the selection of those three systems namely is that the US merger control system was the first adopted merger control system in the world, in addition to that, both of the US and the EU jurisdictions are the most dynamic and active jurisdictions in that field.⁹³⁰ Moreover, the extraterritorial jurisdictional dimension of the application of the merger control, which uniquely characterizes both of the US and the EU systems, is an important reason, and more importantly both of the two systems are heavily imitated in many other jurisdictions around the globe.

Meanwhile, the Egyptian system was also selected because Egypt is a leading country in the Middle East & North Africa (hereinafter MENA) region, and the Egyptian system is generally a typical model of the merger control system that is adopted in most of the developing countries, and more importantly the Egyptian laws are widely copied in almost all of the Arab countries. Moreover, both the US and EU systems are premerger review systems, while the Egyptian system is a post-merger notification system, and those are typically the two types or forms of merger control.

Furthermore, the Egyptian legal system is considered to be a civil law system while the US is a common law system, and it will be more constructive to a comparison between the US system as a common law model and the Egyptian system as a civil law model. It should be finally noted that the discussion will just address each of those systems as is, but will not evaluate any of the values or goals behind them or the process of the review itself, and all the evaluations will come later in detail during the discussions of the drawbacks of the merger control systems.

a) US premerger control

In order to fully understand the US premerger control system one must evaluate its development over the period of a century and more, as it was previously mentioned that the US antitrust law i.e. the Sherman Act of 1890 might be considered the father of the modern antitrust laws, and that it was enacted to protect small businesses over the trusts of giant powerful businesses. It might be also held that the merger control system of the US was the first merger control system to be adopted in the world, whereas according to § 1 of the Sherman Act any

⁹³⁰ DABBAH, *The Internationalisation of Antitrust Policy*, *supra* note 9, at 278-279. 2003.

merger that would restrain trade is prohibited, and according to § 2 any merger that would monopolize or attempt to monopolize trade or commerce is also prohibited.

However the Sherman Act was rendered as incompetent to accomplish its mission, especially with regard to merger transactions, because the US courts found that not every merger that would restraint trade is prohibited under the law, but a narrower test i.e. “rule of reason”⁹³¹ should be applied in order to prohibit only of the mergers that are unreasonably restraining the trade.⁹³² In that context, it could be claimed that under the Sherman Act the case was not a premerger control, but it was just reviewing the behavioral practices of the surviving corporation, as similar to all the other corporations that are not engaged in any kind of merger transactions, and therefore the premerger control had not yet developed in the US i.e. until the beginning of the 20th century.

By the enactment of the Clayton of 1914, the US merger control system go one more step, whereas under the clear wording of § 7 of the Clayton Act, the merger transaction could be enjoined even before the occurrence of any actual anticompetitive behavior, but still that also is considered as post-merger control. In addition to that, there was a clear loophole in the wording of the Clayton Act, which was that it was limited to the purchase of shares and the merging parties could easily circumvent that by purchasing the assets of each other instead of the shares. Accordingly, the Celler-Kafeuver Act of 1950⁹³³ was enacted to amend § 7 of the Clayton Act and to close the mentioned loophole, and for that reason it was known as the “Anti-merger Act.”⁹³⁴

Starting from the enactment of the HSR in 1976 the US merger control system started to be a typical premerger control system i.e. shifted from a consummated merger review to administrative premerger review,⁹³⁵ whereas according to HSR a new section (§ 7A) was added to the Clayton Act, and according to that if one of the merging parties’ value reached a certain threshold or if the proposed transaction value reached a certain threshold, the parties should file a notification of the transaction, and wait for a specified number of days before consummating the

⁹³¹ For more details about the “rule of reason” in antitrust context *see generally* Pertiz, HASTINGS LAW JOURNAL, *supra* note 203, (1989).

⁹³² Koutsoudakis, DAYTON LAW REVIEW, *supra* note 198, at 245-246 (2009).

⁹³³ The Celler-Kafeuver Act of 1950, 64 stat. 1125 15 U.S.C. § 18

⁹³⁴ Koutsoudakis, DAYTON LAW REVIEW, *supra* note 198, at 246 (2009).

⁹³⁵ For more details about the transformation of the US merger control system to premerger review system *see* Spencer Weber Waller, *Prosecution by Regulation: The Changing Nature of Antitrust Enforcement*, 77 OREGON LAW REVIEW 1383 (1998).

transaction. Moreover, according to § 7A(a)(2) of the Clayton Act, the FTC should revise and could possibly change those thresholds on an annual basis.⁹³⁶

It should be noted that according to the HSR the waiting period before consummating the transaction might be extended in a case in which the authorities requested the submission of additional information from the parties, by issuing a “second request.”⁹³⁷ In that context, it should be also noted that according to the HSR, the merging parties are not literally required to comply with the “second request,” meanwhile the noncompliance and consummation of the transaction before a final approval, might lead to future enjoining of the consummated merger and that would unquestionably cost the parties more than compliance.

In that context, it is noteworthy that the main reason behind the mechanism of premerger notification that was developed by the HSR was to create “a mechanism to provide advance notification to the antitrust authorities of very large mergers prior to their consummation, and to improve procedures to facilitate enjoining illegal mergers before they are consummated,”⁹³⁸ in other words to “win a premerger injunction ... before ... the merging firms are hopelessly and irreversibly scrambled together”⁹³⁹ It was claimed even that the intent of enjoining illegal mergers before they are consummated was not a new one,⁹⁴⁰ whereas the court in its decision on *Brown Shoe Co., Inc. v. United States* in 1962, stated that the legislative intent of the Clayton Act was to “arrest mergers at a time when the trend to a lessening of competition ... was still in its incipiency.”⁹⁴¹

Furthermore, as another development was added to the system, § 7 of the Clayton Act was then extended to include transaction between “persons” and not just between “corporations” such as partnerships and JV, and that was accomplished by the Antitrust Procedural Improvements Act of 1980,⁹⁴² and according to that amendment the Clayton Act was broaden to include merger transactions that would affect interstate commerce even if the parties are not

⁹³⁶ The latest thresholds was announce on January 23, 2014 to be effective on February 24, 2014, for more details about the original threshold and the most recent threshold visit the official website of the FTC at <http://www.ftc.gov/enforcement/premerger-notification-program/current-thresholds> last visited October 1, 2014.

⁹³⁷ An official template of the “second request” is available online at the DOJ website <http://www.justice.gov/atr/public/242694.htm> last visited October 1, 2014.

⁹³⁸ S. Rep. No. 803, at 61 (1976) discussing the reasons for the enactment of HSR

⁹³⁹ H.R. Rep. No. 94-1373, at 2637 (1976).

⁹⁴⁰ Clarke, *The International Regulation of Transnational Mergers*, *supra* note 8, at 145. 2010.

⁹⁴¹ *Brown Shoe Co v. United States*, 370 US 294 (1962), 317.

⁹⁴² The Antitrust Procedural Improvements Act of 1980, 94 STAT. 1154 Pub.L. 96-349.

engaged in commerce, and that was by adding the phrase of “or in activity affecting commerce” after the phrase of “engaged in commerce.”⁹⁴³

When it comes to the administration of the system, it should be noted that the US premerger control system is administered by many government agencies. On the first place, on the state level, it is administered by state agencies, and that is in addition to the federal agencies on the federal level, and that obviously means that in a single transaction if the merging parties are involved in operations in more than one state, the transaction will be investigated in all the concerned states on the state level in addition to the federal agencies on the federal level.

On the state level, the US State Attorneys, under the directions of the State Attorneys General, are granted the right to enforce the provisions of the Sherman Act, under § 4, by initiating proceedings before the federal and state courts to prevent or even restrain any violations thereof. On the other hand, on the federal level, the DOJ was granted the same rights to enforce the provisions of the Sherman Act, under § 4, by initiating proceedings before the courts to prevent or even restrain any violations thereof.

In addition to that, according to the broad language of § 5 and § 45 of the Federal Trade Commission Act of 1914,⁹⁴⁴ the FTC is also involved in the enforcement of the Sherman Act through civil actions;⁹⁴⁵ therefore both the DOJ and FTC are responsible for the enforcement of the Clayton Act and premerger notification system on the federal level.⁹⁴⁶ Meanwhile, and to be more precise, the DOJ are granted the power to bring an action before the federal district courts for criminal penalties, recover damages,⁹⁴⁷ or to obtain injunctions for violations to the Sherman Act and the Clayton Act,⁹⁴⁸ while the FTC might only bring an action before the federal district courts to obtain injunctions, and that is also pending on the completion of all the administrative proceedings.⁹⁴⁹

By the same token, it should be noted that in order to cutback such overlaps between the agencies, either between the state and federal agencies or between the federal agencies themselves, two initiatives were developed; the first was that both the DOJ and the FTC entered

⁹⁴³ ROBERT S. SCHLOSSBERG & AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW, *MERGERS AND ACQUISITIONS: UNDERSTANDING THE ANTITRUST ISSUES* at 2-6 (ABA, Section of Antitrust Law 3rd ed. 2008).

⁹⁴⁴ The Federal Trade Commission Act of 1914, 15 U.S.C §§ 41-58

⁹⁴⁵ See *FTC v Motion Picture Adver. Co.*, 344 US 392 (1952); *FTC v Cement Inst.*, 333 US 683, 691 (1947)

⁹⁴⁶ 15 U.S.C. § 21 granted the FTC its authorities, and 15 U.S.C. § 25 granted the DOJ its authorities

⁹⁴⁷ 15 U.S.C. § 15a

⁹⁴⁸ 15 U.S.C. § 25

⁹⁴⁹ § 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 45

into cooperation protocols with the State Attorneys General in order to improve the level of communication and coordination between the agencies, those protocols are known as the Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and the State Attorneys General or shortened as “Compact.”⁹⁵⁰ The second initiative is that the FTC and DOJ entered into a memorandum of agreements concerning the adoption of clearance procedures for investigations in order to reduce the overlap between both of them.⁹⁵¹

From the organizational point of view, the FTC is mainly organized as bureaus and offices, and one of those bureaus is the Bureau of Competition, under which there are four mergers divisions and each is designated to certain industry, and there is one Premerger Notification Office (hereinafter PNO) that receives the HSR notifications.⁹⁵² On the other hand, the DOJ is mainly organized as divisions and offices, and one of those divisions is the Antitrust Division, under which there are offices and sections, one of those offices is the Office of Operations, and under that office there is Premerger Notification Unit.⁹⁵³ The following diagram might also help in understanding the hierarchy and cooperation between the different agencies that administer the premerger control system in the US.

⁹⁵⁰ An official template of the Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and the State Attorneys General is available online at the DOJ website <http://www.justice.gov/atr/public/guidelines/1773.htm> last visited October 1, 2014.

⁹⁵¹ An official template of the Memorandum of Agreement between the Federal Trade Commission and the Antitrust Division of the United States Department of Justice Concerning Clearance Procedures for Investigation is available online at the DOJ website <http://www.justice.gov/atr/public/10170.htm> last visited October 1, 2014.

⁹⁵² For more details about the merger divisions of the Bureau of Competition in the FTC see the official organization at <http://www.ftc.gov/about-ftc/bureaus-offices/bureau-competition/inside-bureau-competition> last visited October 1, 2014.

⁹⁵³ For more details about the offices and sections under the Antitrust Division in the DOJ see the official organization at <http://www.justice.gov/atr/about/sections.html> last visited October 1, 2014.

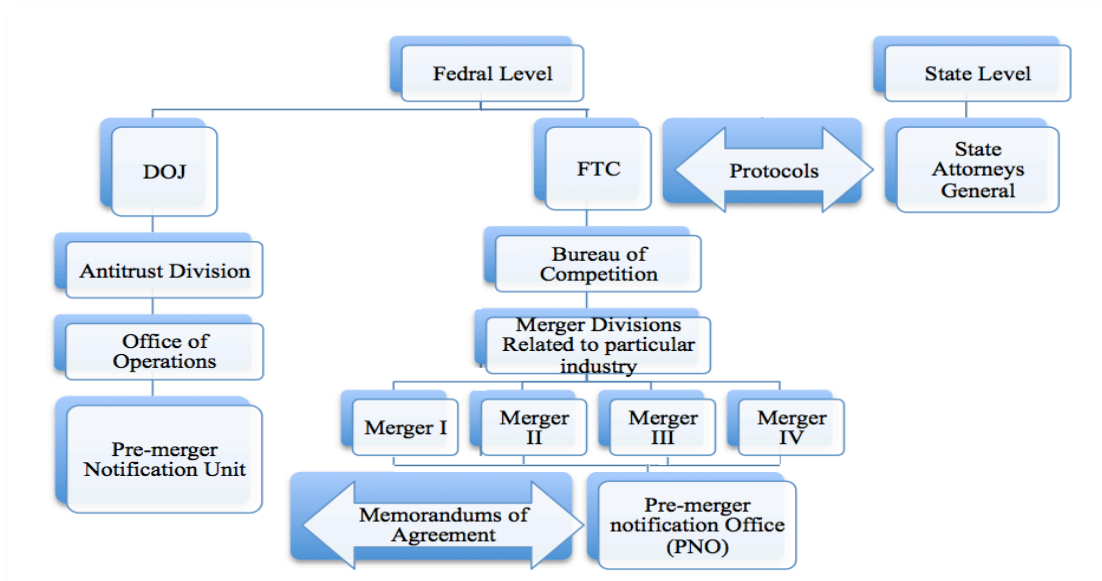


Figure 12: US antitrust system⁹⁵⁴

To show how the premerger control in the US process flows, consider the following typical HSR premerger control steps, if threshold was met: (1) filing and submitting the required notification forms along with the filing fees, to the FTC, the DOJ, and all the concerned State Attorneys General, (2) the Federal agencies will consult to determine which one will investigate the transaction, and that is known as the “clearance process,” and that agency might enter into a Compact with the concerned State Attorneys General, (3) the parties should wait for a certain period, during which the competent agency will start its investigations and gather information from the merging parties and other third parties,⁹⁵⁵ (4) the investigation agency might response as follows: early termination of the process before the waiting period elapses, or wait until it elapses, or issue a “second request” to gather additional information, (5) in the case of the “second request,” the waiting period will be extended to an additional waiting period but might be extended for more than that by agreement between the merging parties and the concerned agency, (6) before the elapse of the waiting period the competent agency may enter into an agreement with the merging parties to settle for restorations of the competition which is known as “consent decrees” or “remedies,” (7) in case that the waiting periods elapsed without any challenges or remedies, the parties may continue forward to consummate the transaction, (8) if

⁹⁵⁴ Data was derived from the previous discussions.

⁹⁵⁵ For more a general idea about the how the FTC and the DOJ review the merger transaction, and the assessment criterion *see* Clarke, *The International Regulation of Transnational Mergers*, *supra* note 8, at 107-112. 2010.

the merging parties did not agree for the remedies, or the agency found violations that are not restorable, the agency may start its procedures to obtain injunctions for violations or even to enjoin the consummated merger as the case might be.⁹⁵⁶

To sum it up, the premerger control process will start by the notification of the merging parties and will end with a decision of the competent agency, and that decision might be one of the four following possibilities: (1) early termination of the process before the end of the waiting period if no violation was found, (2) passive decision if no violation was found, i.e. no action was taken by the agency until the end of the waiting periods,⁹⁵⁷ (3) negotiating a consent decree if there are restorable violations, or (4) challenging the transaction before the courts. The most important issue to be noted here is that the agencies could not enforce the merger-control by itself but it should resort to the courts to do so.

In that context, it was claimed that the courts mainly depend on the guidelines issued by the agencies themselves in order to determine the legality of the merger transaction rather than the case law, and the role of the courts and the judicial review is just “symbolic,” and that the courts not only follow the agencies in its findings but also the review process practically does not exist,⁹⁵⁸ and in the meantime others claimed that there are judicial review process and even that review is heavily based on the “economic reasoning.”⁹⁵⁹

It was even maintained that the enforcement of the Clayton Act, literally by the federal agencies, led to the development of a highly complicated premerger control system, it was even reported that the FTC director admitted that the premerger control system has become comparable to the systems of taxation and securities complexities.⁹⁶⁰ Those complexities were the main reason behind issuing guidelines, and the first version of the guidelines were issued by

⁹⁵⁶ For more details about the federal premerger control process see ILENE K. AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW GOTTS, *THE MERGER REVIEW PROCESS: A STEP-BY-STEP GUIDE TO FEDERAL MERGER REVIEW* (Section of Antitrust Law, American Bar Association 3rd ed. 2006); ANTHONY W. IMUS NEIL W. AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW SWISHER, *PREMERGER NOTIFICATION PRACTICE MANUAL* (ABA Section of Antitrust Law 4th ed. 2007)., and for more details about the merger control in the US and other jurisdictions see ILENE K. AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW GOTTS, *THE MERGER REVIEW PROCESS: A STEP-BY-STEP GUIDE TO U.S. AND FOREIGN MERGER REVIEW* (ABA, Section of Antitrust Law 4th ed. 2012).

⁹⁵⁷ Clarke, *The International Regulation of Transnational Mergers*, *supra* note 8, at 147-148. 2010.

⁹⁵⁸ Waller, *OREGON LAW REVIEW*, *supra* note 935, at 1394-1395 (1998).

⁹⁵⁹ Dennis W. Carlton, *Does Antitrust Need to Be Modernized?*, 21 *THE JOURNAL OF ECONOMIC PERSPECTIVES* 155, at 155 (2007)., and it is noteworthy that the author of that article was Deputy Assistant Attorney General for Economic Analysis and as a Commissioner on the Antitrust Modernization Commission, which was established by the Congress in 2002 to investigate whether the antitrust laws and their administration needs to be modernized.

⁹⁶⁰ Hugh Latimer, *A Case of Runaway Notification Premerger Notification*, 3 *AEI JOURNAL ON GOVERNMENT AND SOCIETY* 46, at 46 (1979).

the DOJ in 1968,⁹⁶¹ and it was then revised in 1982, and then non-horizontal merger guidelines were issued in 1984,⁹⁶² and then both of the FTC and DOJ jointly issued new guidelines in 1992 which was then revised in 1997,⁹⁶³ and finally they also jointly issued new guidelines in 2010.⁹⁶⁴

In that context, it was claimed that in the case that the merger is contested before the court, the guidelines would not be legally binding to any party i.e. the agency itself, the merging parties, and the court.⁹⁶⁵ On the other hand, as it was previously mentioned that there are claims that the courts mainly depend on rather than issued guidelines to determine the legality of the merger transaction, and the role of the courts and the judicial review is just “symbolic,” which means that the guidelines are practically binding.

It is undoubtedly true that the merging parties and the competent agency are always keen to resolve any issues amicably before resorting to any judicial procedures, and in that regard the agencies designed a special route, which is negotiating remedies that might resolve the expected violations. The remedies in that regard can be classified under two categories, the first category is the behavioral remedies, in which the parties will consummate the transaction but under a commitment not to engage into certain operational behaviors that are expected to lead to antitrust violations, and it is officially known in the US systems as “conduct remedies.”⁹⁶⁶

On the other hand, the second category of remedies is the structural remedies, under which the merging parties agree to the divestiture of certain assets, or business units, or even rights like IPR, and in that context it was reported that the asset divestiture is considered the most popular structural remedy.⁹⁶⁷ Furthermore, and since the remedies are always negotiable between the agencies and the merging parties it could be a hybrid remedy between those two

⁹⁶¹ U.S. Department of Justice Merger Guidelines of 1968, available at the official website of the DOJ <http://www.justice.gov/atr/hmerger/11247.pdf> last visited October 1, 2014.

⁹⁶² U.S. Department of Justice Non-horizontal Mergers Guidelines, (June 14, 1984), available at the official website of the DOJ <http://www.justice.gov/atr/public/guidelines/2614.htm> last visited October 1, 2014.

⁹⁶³ U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, (April 2, 1992) (revised April 8, 1997), available at the official website of the DOJ <http://www.justice.gov/atr/public/guidelines/hmg.htm> last visited October 1, 2014.

⁹⁶⁴ U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, (August 19, 2010), available at the official website of the DOJ <http://www.justice.gov/atr/public/guidelines/hmg-2010.html> last visited May 31, 2014.

⁹⁶⁵ SHENEFIELD & STELZER, *The Antitrust Laws: A Primer*, *supra* note 178, at 65. 2001.

⁹⁶⁶ For more details about behavioral remedies *see* DEPARTMENT OF JUSTICE ANTITRUST DIVISION UNITED STATES, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES at 12-18 (U.S. Dept. of Justice, Antitrust Division. 2011).

⁹⁶⁷ Jo Seldeslachts, et al., *Settle for Now but Block for Tomorrow: The Deterrence Effects of Merger Policy Tools*, 52 JOURNAL OF LAW AND ECONOMICS 607, at 631 (2009); RICHARD G. BALTO DAVID A. UNITED STATES FEDERAL TRADE COMMISSION PARKER, *THE EVOLVING APPROACH TO MERGER REMEDIES* (Federal Trade Commission. 2000).

categories.⁹⁶⁸ In that context, it could be claimed that the agencies might resort first to the court in order to gain negotiating power or position over the parties i.e. referring the transaction to the court will put the parties under pressure while they negotiate the remedies to accept the agency proposal.

In fact the remedy agreements do not replace the judiciary role, whereas the according to Tunney Act of 1974,⁹⁶⁹ those kind of consent agreement are also subject to the judicial review before being effective. In the same context, it should be noted that third parties as well as all the competent agencies might challenge consummated merger transaction, for instance despite the fact that the transaction was not challenged by the FTC or DOJ, or in case that the merging parties have entered into a consent agreement with the FTC or DOJ, a State Attorneys General or a third party who meet the standing requirement before the courts might challenge the transaction,⁹⁷⁰ and it was even reported that State Attorneys General have shown a growing keenness to challenge merger transactions that were already approved by the federal agencies.⁹⁷¹

The most important characterization of the US premerger control system, which directly affects the cross-border mergers, is that the US premerger control system is characterized by its extraterritorial effect, whereas the US courts may apply the US antitrust laws to any transaction that is conducted in any other jurisdiction, and even between non-US corporations. That extraterritorial effect was first introduced in the case known as *Aloca* case, in that case the “effects doctrine” was developed, and under that doctrine the US courts could apply the US antitrust laws to any transaction that is expected to affect the US trade or commerce.⁹⁷²

The effects doctrine was then softened in the case of *Timberlane*, whereas the court decided to apply the rule of “reason comity”⁹⁷³ i.e. the court decided to give consideration to comity for the foreign defendant,⁹⁷⁴ and then one more development took place, under the

⁹⁶⁸ For more details about hybrid remedies see UNITED STATES, Antitrust Division Policy Guide to Merger Remedies, *supra* note 966, at 18-19. 2011.

⁹⁶⁹ The Antitrust Procedures and Penalties Act of 1974, 15 U.S.C. § 16

⁹⁷⁰ Nathan R. Viavant, *Agreeing To Disagree?: Continuing Uncertainties in Transatlantic Merger Clearance Post-EC Merger Regulation*, 17 TULANE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 177, at 194-195 (2008).

⁹⁷¹ GOTTS, *The Merger Review Process: A Step-by-Step Guide to Federal Merger Review*, *supra* note 956, at 283. 2006.

⁹⁷² *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

⁹⁷³ For more details about comity rule see generally Hessel E. Yntema, *The Comity Doctrine*, 65 MICHIGAN LAW REVIEW 9 (1966).

⁹⁷⁴ *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976).

Foreign Trade Antitrust Improvements Act of 1982,⁹⁷⁵ where the law required that the transaction should have “a direct, substantial, and reasonably foreseeable effect” on the US trade or commerce in order to apply the US laws, but it was argued that that law did not introduce a new clear rule that would end the debate of the effects doctrine and the rule of comity.⁹⁷⁶

That claim was actually supported by the decision of the court in the case of *Hartford Fire Ins. Co. v. California*, whereas the court limited the application of the comity to the cases where there existed a “true conflict” between the US and the foreign laws,⁹⁷⁷ moreover that decision in the *Hartford Fire* case and the previous claim was supported again by the decision of the court in the case of *United States v. Nippon Paper Industries*, where here the court emphasized that the rule of comity is “more an aspiration” than a rule.⁹⁷⁸

It should be noted here that the merger control system in the US is not just a premerger system, but also a post-merger control system, whereas the federal and state agencies are also competent to challenge any consummated merger, in cases that have not triggered the threshold or even if the merger was reviewed in the premerger stage and no violations were found, but the surviving corporation was engaged in anticompetitive behavior, or even in the situation where the surviving corporation breached the remedies agreement.

Finally, a recent example of the post-merger control in the US, is the merger between two corporations in the online reviews and ratings industry, namely Bazaarvoice and PowerReviews, whereas according to the fact that the transaction did not reach the threshold and the parties consummated the merger on June 12, 2012, but after six months the DOJ brought an action before the courts alleging that the merger violated § 7 of the Clayton Act, and the court held that the transaction violated the antitrust laws on January 8, 2014, and ironically the ruling did not consider some of the information derived from consumers while it did consider a quote by the CEO of one of the parties that indicated the transaction will allow them to take out their only competitor in the market.⁹⁷⁹

⁹⁷⁵ Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a

⁹⁷⁶ PAPADOPOULOS, *The International Dimension of EU Competition Law and Policy*, *supra* note 181, at 67. 2010.

⁹⁷⁷ *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

⁹⁷⁸ *United States v. Nippon Paper Industries Co. Ltd et al.*, 109 F.3d 9 (1st Cir. 1997).

⁹⁷⁹ *United States v. Bazaarvoice, Inc.* 13-cv-00133-WHO, slip op. (N.D. Cal., Jan. 8, 2014)

b) EU premerger control

The EU premerger control system was not a longstanding system like the US system, as it was previously mentioned during the discussion of the “trust and antitrust law” that the first step of the EU to consider antitrust rules was taken on March 25 1957, under the EEC, and then from that time on the antitrust system or set rules were generally considered as “a fundamental provision which is essential for the accomplishment of the tasks entrusted to the [EU] and, in particular, for the functioning of the internal market.”⁹⁸⁰

Moreover, the antitrust rules in the EU were mainly articulated in the Articles 85 and 86 of the EEC, which then become Articles 81 and 82 of the TEC, and currently become Articles 101 and 102 of the TFEU.⁹⁸¹ In that context, it was claimed that the adoption of and the EU antitrust rules was a result of both economic and political necessity,⁹⁸² while others maintained that it was mainly to serve the common market goals.⁹⁸³ On the other hand, other scholars argued that the idea behind the union and its treaties was namely to establish “an ever closer union among the peoples of Europe”⁹⁸⁴ and not only the establishing of a single market.⁹⁸⁵

It should be noted that the mentioned antitrust rules articulated in the TFEU does not mean that there exists a premerger control system in the EU, however those rules could be used as a post-merger control system, whereas if the surviving corporation engaged into anticompetitive behaviors, its behavior might be challenged as if it is a corporation that did not engaged in a merger transaction. Starting from September 21, 1990, which was the effective date of the first EU premerger control Council Reregulation,⁹⁸⁶ the EU joined the premerger control club by establishing its premerger control system that requires prior notification and review of certain merger transactions.

During the period from 1957 and until 1990, the EC tried to utilize the antitrust rules on a broad scale as a tool to challenge any merger transaction that would affect the markets in the EU, and in 1963 a group of experts were invited by the EC to study the negative effect of the issues

⁹⁸⁰ *Eco Swiss China Time Ltd v Benetton International NV* case C-126/97 [2000] 5 CMLR 816, para. 36

⁹⁸¹ Treaty on the Functioning of the European Union, Official Journal C 326, 26.10.2012, p. 47-390

⁹⁸² DABBAH, *The Internationalisation of Antitrust Policy*, *supra* note 9, at 30. 2003.

⁹⁸³ Kathryn Fugina, *Merger Control Review in the United States and the European Union: Working Towards Conflict Resolution*, 26 NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS 471, at 476 (2006).

⁹⁸⁴ The preamble of The Treaty Establishing the European Economic Community, Rome Treaty, 25 March 1957.

⁹⁸⁵ Christopher Bellamy, *Some Reflections on Competition Law in the Global Market*, 34 NEW ENGLAND LAW REVIEW 15, at 18-19 (1999).

⁹⁸⁶ Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, O.J. L 257/90, 21.12.1989, p.1-12.

of concentration of the market shares due to the merger transaction, and that group published its report which was known as the “Memorandum on the Concentration of Enterprises in the Common Market,”⁹⁸⁷ and they advised the EU to adopt a premerger control system in order to be more effective in protecting the markets, accordingly the EC proposed the adoption of a premerger control system in 1973, which was not adopted until 1989 by the Council Regulation No. 4064 of 1989.⁹⁸⁸

During that period i.e. from 1973 until issuing the Council Regulation No. 4064 of 1989, there was a great debate about the expansion of the EC powers to control merger transactions in the EU, and it was claimed that the debate was mainly due to the hesitation of the EU Member States to expand the EC powers in general and specifically in the merger control field.⁹⁸⁹ Meanwhile, the EU Court of Justice rendered in one of its decisions in 1973 that Article 86 of the EEC could be applied to the merger transaction,⁹⁹⁰ while the application of the Article 85 of the EEC did not apply until its decision in another case almost fourteen years later in 1987.⁹⁹¹

Finally the debate was officially settled to adopt a premerger control system in the EU, and the EC became the only body that is responsible for administering and enforcing the EU premerger control system, whereas any merger transaction that reached a certain threshold and are considered as having an EU dimension should be notified and approved first before being consummated. Moreover, after almost another fourteen years after the Council Regulation No. 4064 of 1989 was drafted,⁹⁹² the Council Regulation No. 139 of 2004⁹⁹³ significantly revised the 1989 Council Regulation, and many scholars considered that revision as a paradigm shift i.e. a

⁹⁸⁷ COMMUNAUTÉ EUROPÉENNE COMMISSION, *LE PROBLÈME DE LA CONCENTRATION DANS LE MARCHÉ COMMUN* (Services des Publications des Communauté Européenne Commission. 1966).

⁹⁸⁸ FRANCESCO RUSSO, et al., *EUROPEAN COMMISSION DECISIONS ON COMPETITION: ECONOMIC PERSPECTIVES ON LANDMARK ANTITRUST AND MERGER CASES* at 312-313 (Cambridge University Press. 2010); Mario Siragusa, *Merger Control and State Aids Panel: Merger Control in the European Community*, 9 *CONNECTICUT JOURNAL OF INTERNATIONAL LAW* 535, at 535-536 (1994).

⁹⁸⁹ PAPAPOPOULOS, *The International Dimension of EU Competition Law and Policy*, *supra* note 181, at 163-164. 2010.

⁹⁹⁰ *See* Case 6/72, *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities*, 1973 E.C.R. 215

⁹⁹¹ *See* joined Cases 142/84 and 156/84 *British-American Tobacco e.a. and Reynolds v Commission* (“Philip Morris”), [1987] ECR 4487.

⁹⁹² For more details about the development of the EU merger control system during the period from 1990 until 2003 *see generally* Nicholas Levy, *EU merger control: from birth to adolescence*, 26 *WORLD COMPETITION LAW AND ECONOMICS REVIEW* 195 (2003).

⁹⁹³ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), Official Journal L 24, 29.01.2004, p.1-22.

turning point in the EU premerger control system toward the US model,⁹⁹⁴ as it will be addressed shortly during the discussion of the merger control drawbacks.⁹⁹⁵

Furthermore, it was reported that after 2004 the EC role in enforcing the premerger control witnessed a significant increase due to the increased number of merger activities, especially in the “liberalized” industries during that period, such as the telecommunication, transportation, and energy industries, as the Commissioner Neelie Kroes recognized it,⁹⁹⁶ when she was responsible for Competition Policy from 2004 until 2009.⁹⁹⁷ More recently, the Commissioner who was responsible for Competition Policy until November 2014, Joaquín Almunia, mentioned in many occasions that the EC is seriously interested in going further with additional steps to expand its role to encompass the pre-review or control of the transactions even if it is concerning the acquisition of non-controlling minor shares.⁹⁹⁸

Mirroring the issue of the overlapping jurisdictions between the agencies in the US on both the state and federal levels, the EU premerger control system also trigger some issues concerning the overlap of jurisdictions between the national authorities of Member States and the EC, whereas according to the Council Regulation No. 139 of 2004 the general rule is that the merger transaction that has reached a certain threshold and have an EU dimension will exclusively be reviewed by the EC, but there are many exceptions to that general rule. For instance, according to the Council Regulation No. 139 of 2004, the parties may provide the EC with “reasoned submission” to assert its jurisdiction to review the merger transaction in situations where three Member States or more have jurisdiction over the same transaction, despite the fact that it did not reach the threshold requirement for the EC jurisdiction.⁹⁹⁹

Another example that did not follow the general rule of the jurisdiction of the EC over the merger transactions, is also according to the Council Regulation No. 139 of 2004, here the EC might refer the merger transaction to the competent authority of a Member State, despite the fact

⁹⁹⁴ GHOSAL & STENNEK, *The Political Economy of Antitrust*, *supra* note 710, at 262. 2007.

⁹⁹⁵ For a detailed analysis of the Council Regulation No. 139 of 2004 *see generally* Nicholas Levy, *Mario Monti's Legacy in EC Merger Control*, 1 COMPETITION POLICY INTERNATIONAL 99 (2005); Werner Berg, *The New EC Merger Regulation: A First Assessment of its Practical Impact*, 24 NORTHWESTERN JOURNAL OF INTERNATIONAL LAW AND BUSINESS 683 (2004).

⁹⁹⁶ Neelie Kroes is VP of the EC and she was the Commissioner responsible for Competition Policy from 2004 until 2009, and she is currently the Commissioner responsible for the Digital Agenda for Europe.

⁹⁹⁷ Kroes, *Challenges to the Integration of the European Market: Protectionism and Effective Competition Policy*, *supra* note 770, at 4. 2006.

⁹⁹⁸ Almunia, *EU Merger Control has Come of Age*, *supra* note 698, at 6. 2011; Joaquín Almunia, *Merger Review: Past Evolution and Future Prospects* at 5 (Law and Economics Conference on Competition Policy ed., 2012).

⁹⁹⁹ Article 4(5) of the Council Regulation No. 139 of 2004

that the EC has jurisdiction over the transaction, and it is mainly in the cases that the concerned parties provided the EC with a “reasoned submission” that indicated that the Member State should review the transaction distinctly.¹⁰⁰⁰ Moreover, according to the preamble of the Council Regulation No. 139 of 2004, referring to the review of the merger transaction from the EC to the competent authority of a Member State and vice versa should “take due account of legal certainty and the ‘one-stop shop’ principle” to avoid any overlap of jurisdictions.¹⁰⁰¹

In the same context, a working group known as “EU Merger Working Group” was established in Brussels in January 2010, that group consists of representatives from the EC and the national competent authorities of the antitrust enforcement from the EU Member States. On November 8, 2011, that working group adopted a set of best practices guide regarding the cooperation between the EC and the national antitrust authorities with regard to the multi-jurisdiction or cross-border merger control, and among those best practices was the set of practices that concerned the obtaining a of wavier from the merging parties to disclose confidential information to the EC or to the national competent antitrust authorities.¹⁰⁰²

Meanwhile, it should be noted that the EC is also as active as the DOJ and FTC with regard to issuing guidelines concerning the assessment criteria that are used in reviewing merger transactions, whereas it issued horizontal merger guidelines in 2004,¹⁰⁰³ and additional guidelines for the non-horizontal mergers in 2008,¹⁰⁰⁴ a notice concerning the definition of the “relevant market” for the purposes of applying the EU antitrust rules,¹⁰⁰⁵ a notice on the transaction referral between the EC and the national authorities,¹⁰⁰⁶ and lastly a notice on the procedure for treatment of the merger transaction that does not raise antitrust concerns.¹⁰⁰⁷

¹⁰⁰⁰ Article 4(4) of the Council Regulation No. 139 of 2004.

¹⁰⁰¹ Para 11 of the preamble of the Council Regulation No. 139 of 2004.

¹⁰⁰² EU Merger Working Group, Best Practices on Cooperation between EU National Competition Authorities in Merger Review, adopted 8 November 2011, a copy of the guide is available at the EC official website at http://ec.europa.eu/competition/ecn/nca_best_practices_merger_review_en.pdf last visited on May 31, 2014.

¹⁰⁰³ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 05.02.2004, at 5–18.

¹⁰⁰⁴ Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18.10.2008, at 6–25.

¹⁰⁰⁵ Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 09.12.1997, at 5–13.

¹⁰⁰⁶ Commission Notice on case referral in respect of concentrations, OJ C 56, 05.03.2005, p. 2-23

¹⁰⁰⁷ Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004, OJ C 366, 14.12.2013, p. 5–9.

In addition to that, the EC published two handbooks concerning all the rules that are applicable to the merger control system, the first one was in April 2010,¹⁰⁰⁸ and the second was in July 2013,¹⁰⁰⁹ both of the handbooks are devoted to being comprehensive of all the rules that are applicable on the merger transactions during the merger control process, such as guidelines, best practices, and also some practical information. Furthermore, the EC has published special annual reports concerning the “competition policy” in the EU, starting from its first report in April 1972 and the most recent report was published in May 6, 2014.¹⁰¹⁰ In addition to that, the EC has even published a glossary of the terms that are used in EU antitrust and merger control, in July 2002, in order to harmonize the use of the terms within the EU.¹⁰¹¹

Before addressing the typical steps of the EU premerger control process, a preliminary issue should be addressed first, which is defining the transactions that should be notified to the EC. In that concern there are two situations in which this applies, each case shall satisfy certain conditions; the first case is the case where: (1) the worldwide turnover of all the merging parties is more than 5 billion euros, and (2) the EU-wide turnover for each of at least two of the merging parties is more than 250 million euros, and (3) no more than two thirds of the EU-wide turnover of each party of the merging parties is within one and the same EU Member State.

The second case is the case where: (1) the worldwide turnover of all the merging parties is more than 2.5 billion euros, and (2) the combined turnover of all the merging parties is more than 100 million euros in each jurisdiction of at least three Member States, and (3) a turnover of over 25 million euros for each party of at least two of the parties in each jurisdiction of the three Member States included under 2, and (4) the EU-wide turnover for each of at least two merging parties is more than 100 million euros, and (5) no more than two thirds of the EU-wide turnover of each party of the merging parties is within one and the same EU Member State.

Now in order to show how the EU premerger control process flows, consider the following typical premerger control process, in a case which the EC is competent: (1) filing and

¹⁰⁰⁸ DIRECTORATE-GENERAL FOR COMPETITION EUROPEAN COMMISSION, EU COMPETITION LAW: RULES APPLICABLE TO MERGER CONTROL: SITUATION AS AT 1ST APRIL 2010 (Publications Office. 2010).

¹⁰⁰⁹ DIRECTORATE-GENERAL FOR COMPETITION EUROPEAN COMMISSION, EU COMPETITION LAW: RULES APPLICABLE TO MERGER CONTROL: SITUATION AS AT 1ST JULY 2013 (Publications Office. 2013).

¹⁰¹⁰ All the annual “Reports on Competition Policy” are available on the official website of the EC at http://ec.europa.eu/competition/publications/annual_report/#rep_1970 last visited May 31, 2014.

¹⁰¹¹ European Commission, Glossary of Terms Used in EU Competition Policy, Antitrust and Control of Concentrations, DIRECTORATE-GENERAL FOR COMPETITION EUROPEAN COMMISSION, GLOSSARY OF TERMS USED IN EU COMPETITION POLICY: ANTITRUST AND CONTROL OF CONCENTRATIONS (Office for Official Publications of the European Communities. 2002).

submitting the required notification form to the EC, free of charge, (2) the EC will investigate the merger transaction during a waiting period of twenty five days and during that period the EC will start its investigations and gather information from the merging parties and from other third parties that period is known as “phase I investigation,” (3) the EC might decide to respond as follows: unconditionally or conditionally clear the transaction, before the waiting period elapses, or just at the end of that period, or block the merger transaction, or require it to do an additional in-depth analysis in a “phase II investigation,” (4) the EC has ninety working days of phase II’s investigation to reach its final decisions, which is one of the same alternatives in phase I.¹⁰¹²

It should be noted that a conditional clearance of the merger transaction means that the EC found that there was a restorable violation of the antitrust rules, and that the merging parties offered an acceptable remedy to restore that expected violation, and those remedies the same as was previously mentioned in the US premerger control system could come in two forms, either behavioral remedies or structural remedies.¹⁰¹³ It is also noteworthy that the period of phase II’s investigation could be extended to more than ninety working days in two cases: (1) for an additional fifteen working days in cases where the merging parties offered a remedy after the fifty fifth working day of the original ninety working day period, (2) for an additional twenty working days upon the request of the merging parties or with their agreement.¹⁰¹⁴ However, as it was also previously mentioned the parties might agree to extend the waiting period to avoid any risks of enjoining the transaction in the future.

In addition to the differences between the premerger control in the EU and the US, from a policy perspective and its final goal, which will be discussed later during the discussion of the merger control drawbacks,¹⁰¹⁵ there are differences between the processes in both of those systems from a procedural perspective that could easily be identified as follows: (1) unlike the US system, there is no filing fees in the EU, (2) unlike the US authorities, the EC issues a final

¹⁰¹² For more details about the process of premerger control in the EU *see generally* EUROPEAN UNION, ANTITRUST MANUAL OF PROCEDURES: INTERNAL DG COMPETITION WORKING DOCUMENTS ON PROCEDURES FOR THE APPLICATION OF ARTICLES 101 AND 102 TFEU. (2012).

¹⁰¹³ Articles 6(2) and 8(2) of the Council Regulation No. 139 of 2004, and for more detailed analysis and discussions about the remedies in the EU *see generally* Robert A. Lipstein & Werner Berg, *Merger Remedies in the US and Europe*. (Global Legal Group 2009); and for more details about the classification of the merger remedies *see generally* Stephen Davies & Bruce Lyons, *Mergers and Merger Remedies in the EU: Assessing the Consequences for Competition*, (2007), for a template of structural remedy agreement *see* EUROPEAN COMMISSION, EU Competition Law: Rules Applicable to Merger Control: Situation as at 1st July 2013 at 321-333. 2013.

¹⁰¹⁴ Article 10 of the Council Regulation No. 139 of 2004

¹⁰¹⁵ *See infra* p.187.

decision concerning the merger transaction autonomously without referring the challenges to the judiciary for approval,¹⁰¹⁶ (3) unlike the US system, the EU review system is less complicated,¹⁰¹⁷ (4) unlike the US system, the enforcement of the EU premerger control is not litigation oriented, whereas the EC has the authority to impose a fine directly on the merging parties and also periodic penalty payments.¹⁰¹⁸

Despite the fact that the enforcement of the antitrust rules in the EU, and the premerger control system are not litigation oriented like in the US, it should be noted that all the decision issued by the EC during the review process or even concerning the enforcement of those rules are subjected to the judicial review by the Court of Justice of the EU. Accordingly, the merging parties may challenge any of the EC decisions during the course of the premerger control process, any of its decision concerning the imposing of fines or periodic penalties, or even cornering its final decision to block the transaction. On the other hand any third party could also challenge the EC final decision to clear the transaction, or even join the merging parties in their challenge of blocking a decision.¹⁰¹⁹ However, the ex-post review of the EC decision gives it advantage over the US authorities, with regard to its power to negotiate over the remedies.¹⁰²⁰

Moreover, the issues of the extraterritorial reach pop-up once again in the EU premerger control system, it was reported by the EC in one of its reports that the extraterritorial reach was first raised in a EC decision on the case of *Grosfillex-Fillistorf* in 1964,¹⁰²¹ whereas the EC was the first EU authority to apply the antitrust rules on non-EU parties despite the fact their behavior was even conducted outside of the EU territory, and that was due to the fact that the behavior was affecting the EU internal market.¹⁰²²

On the other hand, others claimed that the extraterritorial reach first arose in the decision from the EU Court of First Instance¹⁰²³ (hereinafter CFI) in the case of *Wood Pulp*,¹⁰²⁴ and in that

¹⁰¹⁶ For more an overview of the EC decision during the period from 1957 until 2008 see RUSSO, et al., European Commission Decisions on Competition: Economic Perspectives on Landmark Antitrust and Merger Cases, *supra* note 988, at 10-16. 2010., and for more details and analysis of the EC decision on merger control see *generally Id.* at 312-384.

¹⁰¹⁷ Eleanor M. Fox, *US and EU Competition Law: A Comparison*, in GLOBAL COMPETITION POLICY at 340-341, (Edward M. Graham & J. David Richardson eds., 1997).

¹⁰¹⁸ Articles 14 and 15 of the Council Regulation No. 139 of 2004.

¹⁰¹⁹ Para 17 of the Preamble and Article 16 of the Council Regulation No. 139 of 2004.

¹⁰²⁰ Keith R. Fisher, *Transparency in Global Merger Review: A Limited Role for the WTO?*, 11 STANFORD JOURNAL OF LAW, BUSINESS, AND FINANCE 327, at 333 (2009).

¹⁰²¹ Commission Decision of 11 March 1964 " Grosfillex-Fillistorf"; OJ No. 58 of 9 April 1964, at 915

¹⁰²² Commission of the European Communities, Eleventh Report on Competition Policy, Brussels, 1982, at 36.

¹⁰²³ The name of the court was changed to the General Court by the treaty of Lisbon of 2007.

case the EC enforced the antitrust rules against non-EU corporations, and when the decision was challenged before the court, the court decided that the antitrust rules could be applied against non-EU parties only if the conduct itself was a violation that happened within an EU territory.¹⁰²⁵ However, the extraterritorial reach of the EC is now a fact, and the EC has the authority to enforce the EU antitrust rules on any merger transaction regardless of the parties' domiciles, whenever the transaction reached the threshold and has an EU dimension, as it was previously mentioned.

In that context, it should be noted that the EC has entered into a cooperation agreement with the US in 1991, in order “to promote cooperation and coordination and lessen the possibility or impact of differences between the [p]arties in the application of their [antitrust] laws.”¹⁰²⁶ Unfortunately, that agreement was signed between the EC and the US, and that was then challenged by France before the European Court of Justice (hereinafter ECJ), and the ECJ annulled the agreement on the ground that the EC lack the capacity to conclude an agreement with foreign countries, and accordingly the agreement entered into force on April 10, 1995 after the adoption of joint decision between the EU Council and the EC,¹⁰²⁷ as it will be addressed later in detail during the discussions of the bilateral cooperation among other reform proposals.¹⁰²⁸

Finally, it should be noted that clearing the merger transaction by the EC means that the merger transaction itself was declared as not violating the antitrust rules, but it does not mean that it was granted immunity against any future antitrust review, because the EC will always has the authority to review any suspected behaviors that might raise an antitrust question. In other words, in order to be more precise, the EC clearing of the transaction means it is only giving a green light for the parties to consummate the merger transaction, and that there are no violations

¹⁰²⁴ Judgment of the Court (Fifth Chamber) of 31 March 1993. - A. Ahlström Osakeyhtiö and others v Commission of the European Communities. Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85.

¹⁰²⁵ Joseph P. Griffin, *EC and U.S. Extraterritoriality: Activism and Cooperation*, 17 *FORDHAM INTERNATIONAL LAW JOURNAL* 353, at 378-379 (1993); DABBAH, *The Internationalisation of Antitrust Policy*, *supra* note 9, at 176. 2003.

¹⁰²⁶ Article I (1) of the Agreement between the Government of the United States and the Commission of the European Communities Regarding the Application of Their Competition Laws, 23 September 1991, O.J. EUR. COMM. L 95/47; 30 *I.L.M.* 1487 (1991).

¹⁰²⁷ Case C-327/92, *France v. Commission*, 09.08.1994 [ECR] 3641.

¹⁰²⁸ *See infra* p.263.

of the antitrust rules based on the structure of the surviving corporation, and that any other future reviews will be concerned only about behavior not the structure.

c) Egypt post-merger control

As a matter of fact, the foundation of the Egyptian antitrust system was established before the EU antitrust system, whereas anticompetitive behaviors were criminalized as early as 1937, under Articles 345 and 346 of the Egyptian Penal Law.¹⁰²⁹ However, that does not have any indication to a solid antitrust system in Egypt, whereas Egypt as well as many other jurisdictions in MENA region, are not enforcing their antitrust rules seriously, if not at all, and it could be considered as one of those jurisdictions that are “antitrust havens.”¹⁰³⁰

Moreover, as it was previously mentioned that Prophet Muhammad, peace be upon him, forbid monopolistic behavior that would led to an increase in prices, some scholars also claimed that the antitrust origins and early development are associated with Islam and the Muslim World in general, and that even the roots of antitrust rules in Islam could be traced to the 7th century.¹⁰³¹ Meanwhile, it is surprising to find that those early foundations are not reflected currently in the Egyptian system, as one of the countries with a Muslim majority population, or any other country with a Muslim majority population in general. It was even reported that the word “competition” appeared in the rules of the GCC, as the only union resembling the EU in the Arab-Muslim countries, only three times; ironically one of them was concerning the competition in sports.¹⁰³²

However, in February 2005, Egypt adopted a new specialized law that is devoted to the protection of competition and prohibiting monopolistic behaviors¹⁰³³ and that was followed by executive regulations promulgated by the Egyptian Prime Minister’s decree of 2005,¹⁰³⁴ but in fact none of them stipulated any rules concerning merger transactions or a merger control system. In that context, it was maintained that many countries have adopted antitrust laws during

¹⁰²⁹ The Penal Code promulgated by Law No. 58 of 1937, Issue 71 August 5th

¹⁰³⁰ David J. Gerber, *Afterword: Antitrust and American Business Abroad Revisited*, 20 NORTHWESTERN JOURNAL OF INTERNATIONAL LAW AND BUSINESS 307, at 312 (2000); DABBAH, *The Internationalisation of Antitrust Policy*, *supra* note 9, at 3. 2003.

¹⁰³¹ DABBAH, *Competition Law and Policy in the Middle East*, *supra* note 353, at 19. 2007.

¹⁰³² *Id.* at 196.

¹⁰³³ The Law of Protection of Competition and Prevention of Monopolistic Practices, promulgated by Law No. 3 of 2005.

¹⁰³⁴ The Egyptian Prime Minister Decree No. 1316 of 2005, August 16th 2006

the same period only for the purpose of fulfilling their obligations under the framework of the WTO.¹⁰³⁵

On August 22, 2008, the said law was amended, by adding a second section to Article 19, and according to that section it became mandatory to submit a post-merger notification to the Egyptian Competition Authority, in situations where any of the merging parties' turnover reached a certain threshold, which is 100 Million Egyptian Pounds, which is approximately equivalent to 13 Million US dollars, as it appears in its most recent budget, and that notification shall be according to the rules and procedures to be stipulated by the executive regulation.¹⁰³⁶ Surprisingly, the executive regulations did not address the issue until more than two years later on November 13, 2010, and in addition to that it does not stipulate any rules or procedures concerning the submission of the post-merger notification except that it should be submitted within thirty days from the date of closing the transaction.¹⁰³⁷

Accordingly, the current Egyptian merger control system is classified as a post-merger control system, which in fact obviously means that there is no special set of rules that are designated to review merger transactions. In other words the antitrust review is not concerned about the structural issues of the transaction because it is more interested in reviewing the behavior of the surviving corporation, in the same manner as any other corporation that is not involved in a merger transaction. The Egyptian Competition Authority even mentioned that: "the Law does not provide for mergers control. However, [it] is responsible for receiving notifications from [parties] about any mergers or acquisitions, which they have conducted."¹⁰³⁸

Based on the fact the Egyptian merger control system is a post-merger control system, the following facts characterizing the Egyptian system: (1) there are no merger control review processes to be conducted, (2) there are no waiting periods for the parties to consummate the transaction, (3) the authority did not issue any guidelines concerning the merger control review, (4) there is no possibility to block the transaction, (5) there is no possibility to clear the transaction under a structural remedy, (6) neither the antitrust authority nor third parties have the rights or even the standing to challenge a merger transaction before the courts, (7) there is no possibility to enjoin a

¹⁰³⁵ DABBAH, *Competition Law and Policy in the Middle East*, *supra* note 353, at 209. 2007.

¹⁰³⁶ Article 19(2) of the Law of Protection of Competition and Prevention of Monopolistic Practices, as amended by Law No. 190 of 2008.

¹⁰³⁷ Article 44bis of the Prime Minister Decree No. 1316 of 2005 as amended by the Decree No. 2975 of 2010.

¹⁰³⁸ That was an answer to one of the frequently asked questions; does the law regulate Mergers and acquisitions? Available on the official website of the Egyptian Competition Authority at <http://www.eca.org.eg> last visited May 31, 2014.

merger transaction after it is consummated, and finally (8) there are no filing fees to be paid to the authority.

It is noteworthy here that the Egyptian antitrust law granted the Egyptian Competition Authority exclusive enforcement of the antitrust rules, and in that regard the authority was granted the rights to review and investigate all alleged anticompetitive behaviors, and in case of a violation it might order the parties to restore any caused harm or to discontinue the anticompetitive behavior, in addition to that the authority might start criminal procedures after an authorization from the Prime Minister, and in the situation the criminal court found a violation it could impose a fine ranging from 100 to 300 thousands Egyptian Pounds.¹⁰³⁹

Regarding the criminal procedures, it was claimed that due to the lack of an in-depth knowledge about the antitrust field, especially from the judges at the criminal courts, the criminal rulings depends heavily on the review and the investigation done by the antitrust authority.¹⁰⁴⁰ On the other hand in an interview with a Senior Judge at a criminal court in Egypt, he disclosed that referring the case to a technical expert in order to draw a complete picture about all the technical facts before deciding on the case is not only widely accepted but possibly a trend in the Egyptian judiciary system.

He also added that concerning the criminal proceedings in general, the right to refer the case to an independent expert was clearly granted to the court under Article 292 of the criminal procedures law,¹⁰⁴¹ and that right is heavily used in cases concerning the technical issues like those related to antitrust laws.¹⁰⁴² Moreover, in the line with those arguments, it is not just about referring the case to a technical expert, but in addition to that a specialized economic courts were established in Egypt by the means of Law of Economic Courts in 2008,¹⁰⁴³ the main aim behind establishing those courts was to decide on the cases that are related to economic issues, and among those issues is the antitrust issues, and was clearly stipulated by the law in Article 4(14) of the Law of Economic Courts.

Regarding all the other decisions made by the Egyptian Competition Authority i.e. that are not concerning the criminal procedures, as a general rule it could be challenged before the

¹⁰³⁹ Articles 20-26 of the Law of Protection of Competition and Prevention of Monopolistic Practices.

¹⁰⁴⁰ Firas El Samad, *Egypt*, in THE MERGER CONTROL REVIEW at 156, (Irene Knable Gotts ed. 2012).

¹⁰⁴¹ The Criminal Procedures Law promulgated by Law No. 150 of 1950.

¹⁰⁴² The full original manuscript is on file with the author.

¹⁰⁴³ The Law of Economic Courts promulgated by Law No. 120 of 2008.

Egyptian State Council,¹⁰⁴⁴ and also that includes its passive decisions, such as the implicit decision to not investigate or challenge certain anticompetitive behavior. The courts at the Egyptian State Council may wholly or partially annul the decisions of the authority; wholly annulling the decision is in the case of a procedural violation which means that the authority has to start the decision process again and take into account the procedures as stipulated by the court in its ruling. While partially annulling the decision is in the case of a substantive violation to the law and it means that the authority shall reissue its decision as per the interpretation of the law that was rendered by the court in its ruling.¹⁰⁴⁵

Concerning the issue of whether the Egyptian antitrust law has an extraterritorial reach; the Egyptian system has an extraterritorial reach similar in some extent to that of the US and the EU, whereas there is an extraterritorial reach in the event that the authority found that the anticompetitive behavior lessen, restrict, or harm the competition in the Egyptian markets, even if the behavior was conducted abroad.¹⁰⁴⁶

However, it was not reported that the Egyptian Competition Authority enforced the Egyptian antitrust laws over any abroad anticompetitive behavior and obviously any merger transactions domestically or abroad. Analyzing all the announced decisions of the authority would reveal that more than 95% of the investigations ended up by dismissing the complaints if it was submitted by third parties or terminating the procedures if it was initiated by the authority itself,¹⁰⁴⁷ and it was even reported that the submitted notifications concerning the merger transaction are just saved in the archives and nothing more.¹⁰⁴⁸

Finally it could be easily held that Egypt as well as many other jurisdictions are merger control heavens, and those jurisdictions are not just in the developing countries but there are also examples from the developed countries, for instance many developed countries like Australia, Luxembourg, New Zealand, and UK do not adopt a premerger control system, at least on the national level. In the same line, the adoption of a post-merger control in a handful of developing

¹⁰⁴⁴ The Egyptian State Council is an independent judiciary institution, responsible for settling disputes where the government, acting in its public capacity, is party to the litigation.

¹⁰⁴⁵ The Supreme Administrative Court, Case No. 8409/56, June 22nd 2013.

¹⁰⁴⁶ Article 5 of the Law of Protection of Competition and Prevention of Monopolistic Practices.

¹⁰⁴⁷ All the decisions are announced on the official website of the Egyptian Competition Authority at <http://www.eca.org.eg/ECA/Resolution/List.aspx?CategoryID=1> last visited on May 31, 2014.

¹⁰⁴⁸ *Cross-Border Merger Control: Challenges for Developing and Emerging Economies: Roundtable on Cross-Border Merger Control held at the Global Forum on Competition in February 2011*, (2011).

countries does not affect the competition in the markets, as it was reported in an empirical study that the competition in both the developing and the developed countries are almost the same.¹⁰⁴⁹

2. Drawbacks of Merger Control

Ironically, it was claimed that the US is no longer monopolizing the merger control system,¹⁰⁵⁰ and despite the fact that a handful of jurisdiction were adopting merger control systems during the development of the merger control history i.e. during the 20th century, it was reported that more than 110 jurisdictions have adopted a merger control system by 2010.¹⁰⁵¹ In the same context, it was also reported that Hong Kong was the latest jurisdiction to adopt a merger control system, whereas in 2013 it adopted a merger control system that is only limited to the merger transactions in the telecommunication industry.¹⁰⁵²

As a general rule, each system of those widespread merger control systems around the globe are considered as an impediment to merger transactions, and in fact it does not matter that the transaction was concluded in a jurisdiction where that system was adopted or not, as it was previously mentioned, that there is extraterritorial reach in almost all kinds of the merger control systems either the premerger or even the post-merger systems. In addition to that, and based on the fact that there are foundational flaws in the antitrust system, and that the merger control system is based on the antitrust ideology, those flaws are accordingly reflected in the merger control system.

Moreover, in case that the merger transaction is subjected to more than one of those merger control systems, the case will be more complicated and there will be more serious effects that are attributed to the system drawbacks, and in fact that is typically the case in a cross-border merger transaction. It is undoubtedly true that the combination of more than one merger control system constitute an additional layer of drawbacks that is supporting the claim that the merger control is considered an impediment that faces merger transactions. Thus, the coming discussion will address some of the drawbacks of the merger control systems pertaining to merger transactions, from a cross-border merger perspective.

¹⁰⁴⁹ UNCTAD, *The Role of Competition Policy in Promoting Economic Development: The Appropriate Design and Effectiveness of Competition Law and Policy* at 14 (2010).

¹⁰⁵⁰ Amanda P. Reeves & Maurice E. Stucke, *Behavioral Antitrust*, 86 INDIANA LAW JOURNAL 1527, at 1585 (2011).

¹⁰⁵¹ Clarke, *The International Regulation of Transnational Mergers*, *supra* note 8, at 142. 2010.

¹⁰⁵² PaRR 2013 Global Antitrust Trends. (2013).

It should be noted that the merger control drawbacks could be classified under many categories, for instance as a foundational and secondary drawbacks, and also could be categorized according to their weight i.e. their impact on the transaction and how much is the loss expected from it, or even according to its origins was it a result of the formalities and procedural requirements or a substantive issues. However, the order of addressing those inherent or foundational flaws and the drawbacks during the coming discussions will not indicate any specific importance or weigh, and it will be just arranged according to the alphabetical order.

a) Costs

At the first glance, someone might think that filing a merger notification according to the merger control system will cost only the filing fees as required per the concerned system or even systems, and in case that no filing fees is required, like for instance in EU,¹⁰⁵³ there merger control process will cost nothing. Unfortunately, that is undoubtedly a very superficial daydream, because in fact the cost of the merger control is not limited to the filing fees, and the list of cost factors is a very long one, and the costs are almost always very significant in many cases.¹⁰⁵⁴ Furthermore, that is very important to the extent that it might lead to the claim that the cost is considered as a tax on cross-border mergers.¹⁰⁵⁵

It is noteworthy that the International Competition Policy Advisory Committee (hereinafter ICPAC) was the first to submit a report that addressed the cost of merger control, and that report was submitted to the US Attorney General and the Assistant Attorney General for Antitrust in 2000.¹⁰⁵⁶ Meanwhile, PricewaterhouseCoopers¹⁰⁵⁷ carried out an important survey study in 2003 (hereinafter PwC Survey),¹⁰⁵⁸ which was commissioned by the International Bar Association and the American Bar Association, to determinate in detail the cost of merger

¹⁰⁵³ Some of the other jurisdictions that did not impose filing fees are: Belgium, Denmark, Egypt, Finland, France, Iceland, Japan, Norway, Sweden, and Turkey.

¹⁰⁵⁴ *Cross-Border Merger Control, Roundtable on Cross-Border Merger Control, supra* note 1048, at 12 (2011).

¹⁰⁵⁵ Report on the Costs and Burdens of Multijurisdictional Merger Review. (2004).

¹⁰⁵⁶ The International Competition Policy Advisory Committee was formed at the DOJ in November 1997 in order to address the international antitrust problems of the 21st Century, and after it submitted its final report to the Attorney General and the Assistant Attorney General for Antitrust, on February 28, 2000, and it was officially disbanded in June 2000.

¹⁰⁵⁷ PricewaterhouseCoopers is one of the well-known professional service provider firms, with offices in 157 countries over the world, and for more information about the firm visit its website at <http://www.pwc.com> last visited May 31, 2014.

¹⁰⁵⁸ PWC, et al., A TAX ON MERGERS? SURVEYING THE TIME AND COSTS TO BUSINESS OF MULTI-JURISDICTIONAL MERGER REVIEWS (PRICEWATERHOUSECOOPERS. 2003).

control, concerning the cross-border transactions. Since then, many other reports and studies followed, for instance the International Competition Network (hereinafter ICN)¹⁰⁵⁹ published a report concerning the merger notification filing fees in 2005, and it was mainly based also on a survey that was carried out by one of the working groups at the ICN.¹⁰⁶⁰

The long list of the cost factors actually begins with the cost of the hiring professionals from different industries for instance legal and financial advisors among other, not to help the parties closing the transaction, but in fact to provide them with their professional services in order to finalize the merger control process. According to the findings of the PwC Survey, the typical average value of a cross-border merger is 3.9 billion euros, and the parties file for premerger control in eight jurisdictions, and the average costs is 3.3 million euros, and it was also reported that the professional services costs “escalate dramatically” in cases where a violation is suspected by the authorities, and especially in cases where the authorities request an in-depth analysis,¹⁰⁶¹ like the “phase II investigation” in the EU system or the “second request” in the US system.

The cost of the professionals starts from determining the jurisdictions that the parties are required to notify,¹⁰⁶² and actually that is not an easy task, as it was previously shown that the transaction might not have any direct relation to a jurisdiction but the extraterritorial reach might lead to unexpected complexities. Therefore, the parties should carefully select competent professionals, with excellent knowledge about almost all the merger control systems, over the globe. The same is true as well for calculating the thresholds, because it is a complex task, as it will be addressed in some detail shortly. In that context, it was reported the legal services are the most expensive services, as it is illustrated in the following chart.

¹⁰⁵⁹The International Competition Network is a specialized network for the competition law enforcement, its members are the national competition authorities over the world, and its goals, role, and achievements will be addressed in detail during the discussion of the supranational institutions as a proposal for reform, *see infra* p.283, and for more current activities visit the official website at <http://www.internationalcompetitionnetwork.org> last visited May 31, 2014.

¹⁰⁶⁰ ICN Merger Notification Filing Fees: A Report of the International Competition Network. (2005).

¹⁰⁶¹ PWC, et al., A tax on mergers? Surveying the Time and Costs to Business of Multi-jurisdictional Merger Reviews, *supra* note 1058, at 5. 2003.

¹⁰⁶² Andre Fiebig, *A Role for the WTO in International Merger Control*, 20 NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS 233, at 241-242 (2000); Dane Holbrook, *International Merger Control Convergence: Resolving Multijurisdictional Review Problems*, 7 UCLA JOURNAL OF INTERNATIONAL LAW AND FOREIGN AFFAIRS 345, at 349 (2002); Hunt, NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS, *supra* note 709, at 154 (2007).

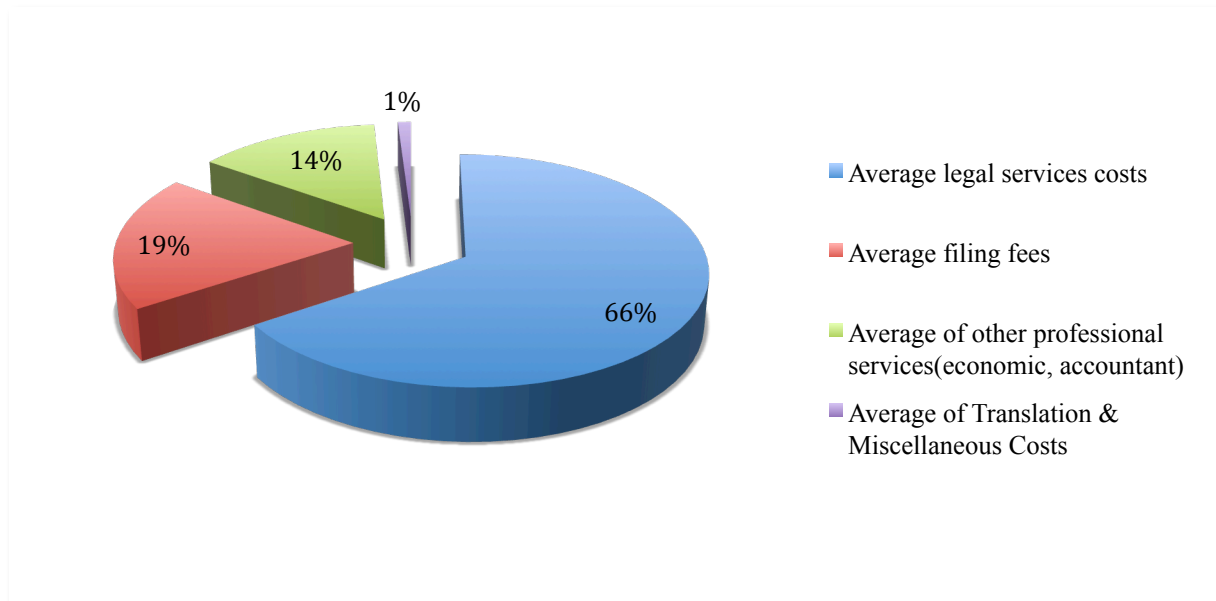


Figure 13: Average merger control cost segmentation¹⁰⁶³

The costs of compliance with different procedural and substantive rules is undoubtedly a cost factor to be considered in the list, such as submitting documents in different languages, like for instance it was reported in one of the cross-border mergers that the parties were required to submit filing in the following languages: Czech, English, German, Polish, Portuguese, Russian, Spanish, and Turkish.¹⁰⁶⁴ Moreover, that type of compliance costs range from just translating documents and rescheduling the transaction timing to handle those requirements, to the extent of a more complex issue might occur and put the transaction to an end, for instance in cases of different tender offer timing requirements or in the case of different accounting requirements. In addition to that, there are internal costs, which includes the costs of time of the employees, managers travel expenses, and miscellaneous overheads, and the average of those internal costs in the PwC Survey was 326,000 Euros per transaction.¹⁰⁶⁵

Regarding the cost of the filing fees, it should be noted that it is not only about the amount of the fee itself which might reach up to 280 million US dollars and only to file in one jurisdiction like the US, or the fact that the parties may pay fees for many jurisdictions, which

¹⁰⁶³ Data retrieved from, PWC, et al., A tax on mergers? Surveying the Time and Costs to Business of Multi-jurisdictional Merger Reviews, *supra* note 1058, at 21. 2003.

¹⁰⁶⁴ Clarke, The International Regulation of Transnational Mergers, *supra* note 8, at 385. 2010.

¹⁰⁶⁵ PWC, et al., A tax on mergers? Surveying the Time and Costs to Business of Multi-jurisdictional Merger Reviews, *supra* note 1058, at 18, 22. 2003.

can sometimes be more than thirty jurisdictions and six continents,¹⁰⁶⁶ like the transaction of ExxonMobil.¹⁰⁶⁷ Calculating the fees is not that easy, because the fees are not always flat and it was reported that it could suddenly amount to more than fourteen times of what was estimated by the parties.¹⁰⁶⁸

For instance, the initial filing fees in Switzerland are a fixed amount, but in case of an in-depth investigation the parties will pay fees on an per-hour rate, calculated according to the services provided and the level of experience of the officer involved in the review process, and it is even more complicated in Germany, whereas the fees are calculated according to the actual expenses and the “economic significance” of the transaction.¹⁰⁶⁹ Mentioning the expenses of the review process grabbed attention to a new cost factor in the list, which is the cost of running the concerned authority, specially the costs that are directly spent to conduct the merger control process or carry out the merger control enforcement task.

In that context, it was documented that some authorities consider the filing fees as “significant source of revenue.”¹⁰⁷⁰ However, in some case the cost will be fully paid by the merging parties like in Switzerland, but the case will not be the same if there are no filing fees or the filing fees are less than the actual costs, like in the case of filing before the EC, in those cases the costs will be incurred by the taxpayers. The fact is conducting the process of merger control is pricey, for instance, it was reported that that cost of reviewing a merger transaction in the UK ranges from 262,000 to 524,000 sterling pound per transaction.¹⁰⁷¹ Meanwhile, it was also reported that in most of the jurisdictions, the antitrust authorities are not even able to precisely calculate the cost of running the merger control process.¹⁰⁷²

Another cost factor to be added to the list is the cost incurred by third parties to respond to the request of the authorities, in order to submit information concerning the merger transaction, and those third parties are most probably competitors to the surviving corporation, or

¹⁰⁶⁶ SHENEFIELD & STELZER, *The Antitrust Laws: A Primer*, *supra* note 178, at 131. 2001.

¹⁰⁶⁷ Adam Frederickson, *A Strategic Approach to Multi-Jurisdictional Filings*, 4 EUROPEAN COUNSEL 23 (1999).

¹⁰⁶⁸ Holbrook, *UCLA JOURNAL OF INTERNATIONAL LAW AND FOREIGN AFFAIRS*, *supra* note 1062, at 353 (2002).

¹⁰⁶⁹ Merger Notification Filing Fees: A Report of the International Competition Network, *supra* note 1060, at 8. 2005.

¹⁰⁷⁰ The International Competition Policy Advisory Committee, U.S. Department of Justice, final report to the Attorney General and the Assistant Attorney General for Antitrust, on February 28, 2000, P.106.

¹⁰⁷¹ Merger Notification Filing Fees: A Report of the International Competition Network, *supra* note 1060, at 5. 2005.

¹⁰⁷² J. Willam Rowley QC & A. Neil Campbell, *Multi-jurisdictional Merger Review: Is it Time for a Common Form Filing Teaty?*

even a consumer at the corporate or individual level and they do not gain any direct benefit for complying.¹⁰⁷³ It could be asserted that the cost would be minimal in that case, but in fact responding to more than one antitrust authority, in different jurisdictions, in different languages, within certain deadlines, and sometimes disclosing confidential information, means that it consume a lot of resources not just minimal cost.

The list also includes the case where an antitrust authority blocked the cross-border merger due to an actual violation of its national rules, while that transaction was pro-competitive on the global scale i.e. globally efficient, the aggregate welfare will be decreased, and that could be at a significant cost.¹⁰⁷⁴ Obviously, the cost of the lessening the aggregate welfare would be worse in case where positive errors existed i.e. wrong assessments that led to blocking of a pro-competitive merger transaction, which is known as “type I errors.”¹⁰⁷⁵

On the other hand, in the case of the clearance of the transaction whenever the authorities found that there are no violations and the transaction is pro-competitive, all the listed costs above will practically be incurred by the consumer at the end, and that is in addition to the cost of deferring the gains that are expected from that pro-competitive transaction. Obviously those types of costs will be increased in cases with negative errors i.e. wrong assessments that lead to clearing an anticompetitive merger transaction, which is known as “type II errors.”

Blocking a globally efficient merger transaction might have additional costs, for instance the cost will be expanded to include the costs of losing the expected increase of welfare, due to the deterrence effect that occurred for third parties by blocking a transaction that they expected to be a successful model.¹⁰⁷⁶ In addition to that, blocking such transactions might lead to political costs,¹⁰⁷⁷ for instance it was reported that in the cases of McDonnell Douglas/Boeing and GE/Honeywell transactions, which were both blocked by the EC while cleared by the US agencies, the US government officials rigorously attacked the “EC Commission’s competence

¹⁰⁷³ PWC, et al., A tax on mergers? Surveying the Time and Costs to Business of Multi-jurisdictional Merger Reviews, *supra* note 1058, at 18-19. 2003.

¹⁰⁷⁴ Andrew T. Guzman, *Is International Antitrust Possible*, 73 NEW YORK UNIVERSITY LAW REVIEW 1501, at 1517 (1998); Hunt, *Northwestern Journal of International Law & Business*, *supra* note 709, at 156 (2007); Clarke, *The International Regulation of Transnational Mergers*, *supra* note 8, at 410. 2010.

¹⁰⁷⁵ Mark Anderson & Max Huffman, *Iqbal, Twombly, and the Expected Cost of False Positive Error* 20 CORNELL JOURNAL OF LAW AND PUBLIC POLICY 1, at 24 (2010); Clarke, *The International Regulation of Transnational Mergers*, *supra* note 8, at 413-414. 2010.

¹⁰⁷⁶ Hunt, *NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS*, *supra* note 709, at 156 (2007).

¹⁰⁷⁷ Fiebig, *NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS*, *supra* note 1062, at 244 (2000).

and credibility.”¹⁰⁷⁸ In addition to that, the antitrust issue was placed on the agenda of the Doha round of the WTO in the same year.¹⁰⁷⁹

Finally, challenging the merger transaction before courts in the judicial oriented systems like for instance in the US, will add costs to the list, and those costs are actually quite high because the parties will try to spend as much as they can afford to win the race, which will be administered under unclear antitrust rules.¹⁰⁸⁰ The case is almost the same in the other non-litigation oriented systems, whereas there is also a possibility that the merging parties or even third parties would challenge the decisions of the authorities before competent courts, like for instance in the EU system. To sum it up, in all cases, it is undoubtedly true that the costs of the merger control are incurred by the society i.e. all the parties, the judiciary institutions, the enforcement authorities, the taxpayers, the consumers, and the merging parties and even their competitors.

b) Different policies and enforcements

The problem of the different policies and different enforcements begins usually at a very early stage during the merger transaction, namely when calculating the threshold that trigger the merger control process, whereas a variety of threshold determinants methods are adopted in different jurisdictions. For instance, despite the fact that it is always maintained that the antitrust policies are focusing more on the structures of the transactions that would distort the markets concentration i.e. market shares, very few merger control systems consider the market share as a threshold that triggers the merger control.¹⁰⁸¹

In the same context, it should be noted that some jurisdictions mainly consider two factors, the first is the turnover and the second is the market share, and some other jurisdictions are adopting a very complicated threshold, for instance the threshold was determined on the value of the worldwide assets, and the transaction should go through with the merger control review if the value exceeds 100,000 times the monthly minimum wage as been determined

¹⁰⁷⁸ Cento Veljanovski, *EC Merger Policy After GE/Honeywell and Airtours*, 49 ANTITRUST BULLETIN 153, at 153 (2004).

¹⁰⁷⁹ Fisher, STANFORD JOURNAL OF LAW, BUSINESS, AND FINANCE, *supra* note 1020, at 331-332 (2009).

¹⁰⁸⁰ Easterbrook, TEXAS LAW REVIEW, *supra* note 742, at 4, 12-13 (1984).

¹⁰⁸¹ Fiebig, NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS, *supra* note 1062, at 239 (2000).

domestically,¹⁰⁸² while on the other hand most of the jurisdictions are just concerned with the turnover as a threshold.¹⁰⁸³

The fact that almost each jurisdiction have enacted a merger control system to serve particular interests lead to an inevitable result, which is that every policy is different, and even if the same policies are adopted, it will not be interpreted in the same context and it will always be enforced in a different manner. In that context, it was also claimed that defining the merger control policy is highly problematic due to the complexity of the rules and the vagueness of enforcement standards in almost all the cases,¹⁰⁸⁴ as it was previously mentioned that the general rule is that “where law ends ... tyranny begins.”¹⁰⁸⁵ However, in the case of cross-border merger transactions it is not just suffering from tyrant enforcing the policies but also from contradicting polices and enforcements, as it will be shown in the following discussion.

First and foremost, there are a set of different goals or objectives that stand behind the design of the antitrust policies in general, and its enforcement with respect to merger control specially, those objectives that aim to protect and promote of any of the following factors, either distinctly or in a combination with one another: (1) consumer welfare, (2) small businesses, (3) common market or single market integration, (4) economic freedom ideology, (5) fairness in markets, (6) social welfare, (7) environment protection, (8) political parties, (9) strategic planning, (10) trade policies, and (11) international relations.¹⁰⁸⁶

It is noteworthy that in order to show how the policies are based on different objectives, scholars are always making a comparison between the objectives of the US and the EU policies, and in that regard it was claimed that the EU system is more oriented to protect the competitors in the market in order promote the market integration.¹⁰⁸⁷ This was clearly announced in the TFEU, and it was even argued that Jean Monnet¹⁰⁸⁸ himself believed that promoting the competitiveness within the EU would lead to a common market that competes with the

¹⁰⁸² Holbrook, *UCLA JOURNAL OF INTERNATIONAL LAW AND FOREIGN AFFAIRS*, *supra* note 1062, at 353 (2002).

¹⁰⁸³ Fiebig, *NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS*, *supra* note 1062, at 239 (2000).

¹⁰⁸⁴ MASSIMO MOTTA, *COMPETITION POLICY: THEORY AND PRACTICE* at 1 (Cambridge University Press. 2004).

¹⁰⁸⁵ William Pitt's words from his speech on January 9, 1770, engraved in a stone at the DOJ building in Washington D.C.

¹⁰⁸⁶ MOTTA, *Competition Policy: Theory and Practice*, *supra* note 1084, at 17-28. 2004.

¹⁰⁸⁷ DABBAH, *The Internationalisation of Antitrust Policy*, *supra* note 9, at 50. 2003; Lee McGowan, *Theorising European integration Revisiting neofunctionalism and testing its suitability for explaining the development of EC competition policy?* European Integration Online Papers at <http://eiop.or.at/eiop/texte/2007-003.htm>.

¹⁰⁸⁸ Jean Omer Marie Gabriel Monnet (November 9, 1888 – March 16, 1979) was a French political economist and diplomat, and he is widely regarded as the chief architect of European unity, and as the founding fathers of the EU.

counterparts across the Atlantic and would give them the opportunity to overcome their war history and “national identity politics.”¹⁰⁸⁹

Meanwhile, others asserted that the EU system is shifting and developing towards the same goal of the US system, which is the protection of consumer welfare, and that has clearly been recognized since the issuance of the merger regulation and the horizontal merger guidelines in 2004,¹⁰⁹⁰ despite the fact that promoting the competition was the main goal of the EU merger regulation. For instance just reading the merger regulation of 2004 will reveal that, even the language of the regulation itself revealed that concept, whereas the phrase “common market” was mentioned fifty nine times, while the word “consumer” does not appear more than five times.¹⁰⁹¹

Moreover, concerning the claim that the US system is more oriented to protect and promote consumer welfare, it was previously discussed and shown during the discussion of the history of antitrust, that the main objective of adopting the antitrust laws in the US was to protect small businesses against trusts.¹⁰⁹² In that context, Judge Robert Bork even contended that the US courts for more than eighty years had not even developed a comprehensive idea about the objective of the antitrust policy in the US.¹⁰⁹³

It could be claimed here that many schools emerged in the US, and that was mainly to fill the gap between the policy and its objectives and the enforcement, and even the most popular school in that regard was developed by Judge Robert Bork himself, which was the Chicago School which was mainly based on the ideology of the “economic efficiency” of laws.¹⁰⁹⁴ In fact

¹⁰⁸⁹ TONY A. FREYER, *ANTITRUST AND GLOBAL CAPITALISM, 1930–2004* at 397 (Christopher Tomlins ed., Cambridge University Press. 2006).

¹⁰⁹⁰ Hunt, *NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS*, *supra* note 709, at 152 (2007).

¹⁰⁹¹ The Council Regulation No. 139 of 2004.

¹⁰⁹² *See supra* p.33.

¹⁰⁹³ BORK, *The Antitrust Paradox: A Policy at War with itself*, *supra* note 742, at 50-51. 1978; in the same line of criticizing antitrust and merger control *see generally* ARMENTANO, *Antitrust: The Case for Repeal*, *supra* note 712, 1999; BROZEN, *Concentration, Mergers, and Public Policy*, *supra* note 712, 1982; Fred L. Smith, *REGULATION: AEI JOURNAL ON GOVERNMENT AND SOCIETY*, *supra* note 712, (1983); Easterbrook, *TEXAS LAW REVIEW*, *supra* note 742, at 1-40 (1984); McChesney, *THE ANTITRUST BULLETIN*, *supra* note 712, at 359-382 (1986); MCCHESENEY & II, *The Causes and Consequences of Antitrust: The Public-Choice Perspective*, *supra* note 712, 1995; and SHUGHART, *The Organization of Industry*, *supra* note 712, 1997.

¹⁰⁹⁴ For more details about the ideas and thoughts of the Chicago School as presented by one of its leaders *see generally* Posner, *UNIVERSITY OF PENNSYLVANIA LAW REVIEW*, *supra* note 708, (1979).

that was not the only school but there were other schools like for instance the Harvard School, the Post-Chicago School and many others.¹⁰⁹⁵

Similar to the shifting of the EU system, it was also claimed that the US antitrust rules are not just shifting or developing with time, but also are significantly affected by the laws enacted at different times during more than a century of developments, each of them was enacted in different circumstances and to serve special goals.¹⁰⁹⁶ For instance, as it was previously mentioned, the HSR system was enacted as “a mechanism to provide advance notification to the antitrust authorities of very large mergers prior to their consummation, and to improve procedures to facilitate enjoining illegal mergers before they are consummated,”¹⁰⁹⁷ in other words to “win a premerger injunction ... before ... the merging firms are hopelessly and irreversibly scrambled together ...”,¹⁰⁹⁸ not to protect the small businesses from the trusts as the case was in the Sherman Act.

Studying the literature that tried to identify the objectives and goal of the different antitrust policies, which analyzed not only the policies of different jurisdictions, but also the enforcement of the policies by the different agencies and judiciary institutions, revealed that they are always trying to justify what they observe, and that they are always contradicting, it was even reported that they use technical terms like “consumer welfare” to indicate “economic welfare” and vice versa.¹⁰⁹⁹

Meanwhile, labeling every policy as a good or bad policy, or even the scholars as supporting or criticizing this or that antitrust policy or how it is enforced, is not the objective of this dissertation, but in fact identifying or pointing out the differences is just for the purpose of revealing that the merger control policies are different and even in cases where they are similar or typical, the enforcement itself is different, and that fact will inevitably lead to the result that the merger control is an impediment that faces the cross-border mergers.

¹⁰⁹⁵ For more details about the difference between the main schools of thought i.e. Chicago and Harvard Schools see generally; Kovacic, COLUMBIA BUSINESS LAW REVIEW, *supra* note 710, (2007); Huffman, ANTITRUST LAW JOURNAL, *supra* note 710, at 111-115 (2012); GHOSAL & STENNEK, The Political Economy of Antitrust, *supra* note 710, at 27, 32-34, 37-38, 44. 2007; Posner, UNIVERSITY OF PENNSYLVANIA LAW REVIEW, *supra* note 708, (1979).

¹⁰⁹⁶ Fox, US and EU Competition Law: A Comparison, *supra* note 1017, at 340. 1997.

¹⁰⁹⁷ S. Rep. No. 803, at 61 (1976) discussing the reasons for the enactment of HSR

¹⁰⁹⁸ H.R. Rep. No. 94-1373, at 2637 (1976).

¹⁰⁹⁹ Piero Morosini, et al., *National Cultural Distance and Cross-Border Acquisition Performance*, 29 JOURNAL OF INTERNATIONAL BUSINESS STUDIES 137, at 157 (1998).

When combining the problem of the contradicting merger control policies and enforcement with the extraterritorial reach of those systems, the inevitable result will be the blocking of most of the cross-border transactions in a way or another, and that was clearly mentioned during one of the speeches of the Chairman of the FTC, whereas he argued that the differences between the merger control systems will directly lead to the result that corporations would restrict their merger activities to those activities that are acceptable to all the systems over the globe at the same time.¹¹⁰⁰ Furthermore, it is undoubtedly true that the impact of the differences might be very expensive for all parties in many cases, as it might consume time in order to reconcile between them or in some cases the transaction is totally blocked.

It could be claimed here that cooperation between the authorities of the different jurisdictions may ease that problem, and that many jurisdictions nowadays are already parties of bilateral cooperation agreements, for instance the agreement between the EU and the US. Meanwhile, that claim could be easily refuted, and indeed those cooperation agreements do not mean that the problem is solved or even eased, for instance despite the fact that there is a cooperation agreement between the EU and US, that agreement did not prevent the contradicting decisions issued by the authorities in those jurisdictions concerning some cross-border mergers.

Ironically, it was argued that the EU and US by entering into such cooperation agreement, was just “agreed to disagree.”¹¹⁰¹ A good example of those contradicting decisions, is when the EC announced that the proposed merger between McDonnell Douglas and Boeing violating antitrust rules, while it was already cleared by the FTC on July 1, 1997, it was not further cleared by the EC until Boeing accepted to enter into a remedies agreement concerning the commercial jets industry for its European competitor Airbus,¹¹⁰² many other examples could be mentioned in that regard, such as the merger between General Electric and Honeywell in 2001.

In the case of General Electric and Honeywell, the EC blocked the transaction on July 3, 2001, while again it was already cleared by the FTC, and the EC commissioner at that time

¹¹⁰⁰ Timothy J. Muris, “Merger Enforcement in a World of Multiple Arbiters,” speech addressed before the Brookings Institution’s Roundtable on Trade and Investment Policy (21 December 2001), a copy is available on the FTC official website at http://www.ftc.gov/sites/default/files/documents/public_statements/merger-enforcement-world-multiple-arbiters/brookings.pdf last visited May 31, 2014.

¹¹⁰¹ Viavant, TULANE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW, *supra* note 970, at 201 (2008).

¹¹⁰² For more details about the case *see generally* Jeffrey A. Miller, *The Boeing/McDonnell Douglas Merger: The European Commission's Costly Failure to Properly Enforce the Merger Regulation*, 22 MARYLAND JOURNAL OF INTERNATIONAL LAW 359 (1998).

Mario Monti¹¹⁰³ claimed that the EC and the US authorities were working closely on the investigation of that merger transactions because it is in their common interest, but the different results could be considered a rare case, and it was just an outcome of different interpretations of the facts, and that it is not the pattern, and that was not due to political reasons or other different policy issues.¹¹⁰⁴ More recently, the EC blocked the merger transaction between NYSE Euronext and Deutsche Börse AG, while it was already cleared by the FTC.¹¹⁰⁵

Finally, it should be noted that the differences in the enforcement does not mean that in cases where the authorities approved the transaction there will not be a problem, that in fact is inaccurate, for instance, in the merger transaction between the US subsidiary of the Japanese Corporation Sony and Bertelsmann Music Group Music (BMG),¹¹⁰⁶ the reviewing authorities in both the US and EU approved the transactions but a third party challenged the EC decision before the CFI and the court annulled the EC approval decision,¹¹⁰⁷ which obviously consumed vast resources in order to challenge the ruling and restructure the deal, and in some other cases that might require additional costs attributed to the remedies agreement with the authorities.

c) Ex-ante is an additional layer

As it was previously mentioned that some jurisdictions are adopting a premerger control system like the US and EU, while others adopt post-merger review system like Egypt, and it was also mentioned that in the jurisdictions adopting a premerger control systems that does not mean that the authority are deprived from running an ex-post review in addition to the ex-ante review. Therefore, what distinguish the merger control review or the premerger control system, from the typical antitrust review or the post-merger control system, is not just the former is ex-ante regime while the latter is an ex-post one, but that the ex-ante review is an additional layer added to the ex-post or the typical antitrust review system.

It was also mentioned that the reason behind adopting the HSR, as an ex-ante merger control system, was to create “a mechanism to provide advance notification to the antitrust

¹¹⁰³ Mario Mont was the EC Commissioner responsible for Competition Policy from 1999 until 2004, and then he was appointed as the Italian Prime Minister.

¹¹⁰⁴ Commission Decision of 3 July 2001, Case COMP/M.2220, General Electric and Honeywell, 2001 O.J. (C 1746).

¹¹⁰⁵ Commission Decision of 1 February 2012, Case No COMP/M.6166, Deutsche Börse AG and NYSE Euronext, 2012 O.J. (C 440).

¹¹⁰⁶ The EC cleared the transaction, on July 19, 2004, Case COMP/M.3333 – Sony/BMG, Commission Decision.

¹¹⁰⁷ Case T-464/04, Impala v Commission, Judgment of the Court of First Instance, 13.07.2006.

authorities of very large mergers prior to their consummation, and to improve procedures to facilitate enjoining illegal mergers before they are consummated,¹¹⁰⁸ in other words to “win a premerger injunction ... before ... the merging firms are hopelessly and irreversibly scrambled together ...”¹¹⁰⁹ Indeed, that reason is not an exclusive reason for the adoption the HSR, but it was used to justify the adoption of the ex-ante merger control in other systems.

For instance in the EU, the same reason was mentioned in a General Court ruling as it stated that:

[T]aking into account the objective of the [antitrust] rules, as stated in paragraph 22 of this judgment, their application cannot depend on whether the market concerned has already reached a certain level of maturity. Particularly in a rapidly growing market, Article 102 TFEU requires action as quickly as possible, to prevent the formation and consolidation in that market of a competitive structure distorted by the abusive strategy of an [corporation] which has a dominant position on that market or on a closely linked ... market, in other words it requires action before the anti-competitive effects of that strategy are realized.¹¹¹⁰

Despite the fact of the rationality appealing reasons disclosed by both the EU and the US, to justify the adoption of an ex-ante merger control system, which is literally the same reason, that reason could not justify it. To elaborate more, even after clearing the merger transaction by the authorities, the merger might be enjoined, ironically even after “scrambled together.” For instance, a third party might challenge the decision of the EC if it cleared the transaction before the competent court, and that is what actually happened in the case of the merger transaction between Sony and Bertelsmann Music Group, and even on the other side of the Atlantic, a State Attorneys General might bring an action to enjoin a merger that has already cleared by the FTC.

In addition to that, the ex-ante review results are not 100% accurate in predicting the behavior of the surviving corporation or the market after consummating the transaction, and there are empirical findings to support that, and those findings are spelled out by the FTC itself. Whereas during the 1990s the FTC, DOJ, and the California Attorney General lost a total of six merger challenges in the health care industry namely hospitals before the courts, and thus the FTC decided to develop a “Hospital Mergers Retrospectives Project,” under which retrospective research was conducted to study some consummated merger transactions in California, in order

¹¹⁰⁸ S. Rep. No. 803, at 61 (1976) discussing the reasons for the enactment of HSR

¹¹⁰⁹ H.R. Rep. No. 94-1373, at 2637 (1976).

¹¹¹⁰ Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB.*, 17.02.2011 at 108

to update and evaluate the ex-ante assessment system, and to evaluate the impact of those transactions on the competition in the health care industry.

The FTC study concluded that there is “empirical evidence that the mergers were followed by substantial post-merger price increases that cannot reasonably be attributed to other causes,”¹¹¹¹ and in addition to that the study cited previous works that support those same findings. Accordingly, that study proved that the assessment criteria by the FCT might be right, but that is not the case, the case here is the failure of the ex-ante merger control system as whole, because in that case the US system is litigation oriented, the judiciary institution was a part of the ex-ante enforcement system and it decided in favor of the merger consummation even after providing the analysis or the reviewed reports that were created by the competent authorities.

Moreover, and in the same line of the FTC’s study findings, other empirical researches revealed that ex-ante review not only lead to the clearance of anticompetitive merger transactions, “type II” errors, but it is also highly predictable to block pro-competitive merger transactions, “type I” errors.¹¹¹² The most important question here is who will bear the cost of those errors, as well as all the other factors of cost that were previously identified, without delving into the discussion of is it the consumer welfare or the producer welfare, it is undoubtedly at the expense of the total welfare.

In that context, it could be claimed the rational decision to decide whether to opt for an ex-ante regime or an ex-post one, should be based on empirical findings that calculate the costs of the ex-ante enforcement policy, which includes all factors of costs, and the estimated opportunity cost or the losses that might result from losing the expected gains in “type II” error cases, and the anticompetitive effect that might be realized in “type I” errors cases. It was even reported that the success of the antitrust authorities to block a merger “breeds confidence” i.e. the authorities would find it an easy task to challenge transactions just by stating similar claims, and even without providing solid evidence derived from the analysis of an accurate data.¹¹¹³

Furthermore, not only does “success breeds confidence,” and even assume that the notifying parties did not incur any losses, and that the process was at the cost of zero expenses, the success also breeds deterrence i.e. the effect of blocking a merger transaction that was even

¹¹¹¹ Joseph Farrell, et al., *Economics at the FTC: Retrospective Merger Analysis with a Focus on Hospitals*, 35 REV. IND. ORGAN. REVIEW OF INDUSTRIAL ORGANIZATION 369, at 369-385 (2009).

¹¹¹² GHOSAL & STENNEK, *The Political Economy of Antitrust*, *supra* note 710, at 344. 2007.

¹¹¹³ Melissa Maleske, *How Antitrust Authorities View Mergers and Acquisitions* at 2 (InsideCounsel 2013).

wrongly expected by other corporations to realize gains would cost and lead to losses, and again those losses will be at the expense of the total welfare. In that context, it was held by George Stigler that the decrease in the number of merger transactions during the 1950s was attributed to the deterrence effect from the vigorous antitrust laws enforcement during that period.¹¹¹⁴ In the same line, it was also reported empirically that antitrust enforcement actions have a deterrence effect on a number of the merger transactions.¹¹¹⁵

In the same line, even the language that is used by the authority officials pointed out that they clearly threaten their future victims i.e. merging parties, for instance Joaquín Almunia, in his speech before an antitrust conference in New York, said that: “I would like to remind the lawyers in this hall and their colleagues elsewhere that playing one authority against the other does not pay ... [and] it will only complicate the review for everyone.”¹¹¹⁶ Surprisingly, some scholars are supporting that and even claimed that the antitrust policy should not only block transaction for its harmful effect, but it should also do so for the sake of the deterrence effect as a purpose itself.¹¹¹⁷

One empirical finding might put that debate to an end, whereas even in a voluntary merger control systems, namely Australia, it was found that “the notifying parties experience lower abnormal returns than those that choose not to notify.”¹¹¹⁸ To elaborate more, assuming that the ex-ante review was 100% accurate, and even after excluding all costs that might be incurred due to the ex-ante review process itself, and after excluding all type of errors, and neutralize any deterrence effect, just announcing that the parties notified authorities about the transaction and they expected a review process will lead to losses, even if the ex-ante review is voluntary and the merger was then cleared, nothing more than just announcing that the transaction will go through an ex-ante review.

The only claim that could be argued in that case; is that all those losses and costs might be less than the losses of the anticompetitive effect of a merger transaction that is not reviewed if the ex-post system is adopted. Actually, that argument could be easily refuted, because adopting

¹¹¹⁴ See generally George J. Stigler, *The Economic Effects of the Antitrust Laws*, 9 JOURNAL OF LAW AND ECONOMICS 225(1966).

¹¹¹⁵ Jo Seldeslachts, et al., *Journal of Law and Economics*, *supra* note 967, at 630-631 (2009).

¹¹¹⁶ Joaquín Almunia, *Policy Objectives in Merger Control* at 5 (IBA Antitrust Committee and the European Commission ed., 2011).

¹¹¹⁷ Jo Seldeslachts, et al., *JOURNAL OF LAW AND ECONOMICS*, *supra* note 967, at 607 (2009).

¹¹¹⁸ Chongwoo Choe & Chander Shekhar, *Compulsory or Voluntary Pre-Merger Notification? Theory and Some Evidence*, 28 INTERNATIONAL JOURNAL OF INDUSTRIAL ORGANIZATION 1, at 4 (2010).

an ex-post regime does not mean one is permitting an anticompetitive behavior, and simply the anticompetitive behavior would be challenged but under rules similar to any other anticompetitive behavior of a corporation that is not engaged in a merger transaction.

One more time someone could argue by saying that, by putting an anticompetitive behavior to an end in cases where that the transaction was consummated would led to much more losses than if it was blocked before “scrambled,” that claim was previously refuted on the basis that the claim is ignoring that fact the ex-ante regime is not granting immunity from scrambling, as it was previously mentioned that under the US ex-ante regime the scrambled transaction is uncovered and it might be challenged even after it is cleared by agencies, and accordingly the claim could be limited to just lessening the number of consummated mergers to be challenged. However, that will be also refuted later in detail during the discussions of the foundational errors in the antitrust system as an ideology.¹¹¹⁹

d) Exclusion of behavioral antitrust

The conventional or the neoclassical economic approach assumes that all humans are rational, and obviously the rationality of all human decisions, they believe that humans are just interested in profit maximization and all their decisions are based on that rational assumption, and to serve only that interest.¹¹²⁰ Meanwhile, on the other hand some prominent psychologists, who are extensively interested in studying human behavior and how humans make decisions, are focused on discovering the systematic departures from the standard models of rational choices, and that field of study is now known as behavioral economics.

In addition to the fact that the economic analysis of law is considered as one of the most appreciated improvements in legal intellectual “since the code of Hammurabi – since the very idea of having laws,”¹¹²¹ other scholars started to apply their findings from the behavioral economics in the field of the economic analysis of law, and then in a more focused step some

¹¹¹⁹ See *infra* p.235.

¹¹²⁰ Reeves & Stucke, INDIANA LAW JOURNAL, *supra* note 1050, at 1532 (2011).

¹¹²¹ NICHOLAS LEONIDAS GEORGAKOPOULOS, PRINCIPLES AND METHODS OF LAW AND ECONOMICS: BASIC TOOLS FOR NORMATIVE REASONING at 3 (Cambridge University Press. 2005).

scholars started to use those behavioral economics findings in the field of antitrust and merger control, which is now known as behavioral antitrust.¹¹²²

Professor Avshalom Tor was the first scholar to apply the behavioral economics findings in the field of antitrust as early as 2002, whereas he revealed for the first time that certain rules of the antitrust are not accurate due to the exclusion of findings of the behavioral economics, those rule of antitrust are namely: (1) barrier to entry, (2) predatory pricing,¹¹²³ as it will be discussed in more detail shortly. Indeed that first work opened the door for other scholars to continue their efforts in the same direction; some of those prominent scholars are: Oren Bar-Gill,¹¹²⁴ Maurice E. Stucke,¹¹²⁵ Amanda P. Reeves,¹¹²⁶ Max Huffman,¹¹²⁷ and William J. Rinner.¹¹²⁸

The impact of the findings from the behavioral economics on the antitrust rules in general and specifically on the merger control process, did not draw only the attention of those scholars, but also some official government authorities showed the same interest in learning from those findings or even studying the rationality of the human decisions by themselves, for example it was reported that the UK Competition and Market Authority¹¹²⁹ and the EC in the EU,¹¹³⁰ and even the FTC and DOJ in the US, are remarkably interested in behavioral economics or at least show signs that they are considering the behavioral economics result in the merger control process.¹¹³¹ For instance, a special section was designated in the DOJ guide to merger remedies of 2011, for the behavioral remedies.¹¹³²

To illustrate how the exclusion of the behavioral economics findings make the results of the merger control inaccurate, it would be rational to address first how the antitrust enforcement

¹¹²² Gregory J. Werden, et al., *Behavioral Antitrust and Merger Control*, 167 JOURNAL OF INSTITUTIONAL AND THEORETICAL ECONOMICS (JITE) / ZEITSCHRIFT FÜR DIE GESAMTE STAATSWISSENSCHAFT 126, at 127-128 (2011).

¹¹²³ See generally Tor, MICHIGAN LAW REVIEW, *supra* note 624, (2002).

¹¹²⁴ Oren Bar-Gill, *Bundling and Consumer Misperception*, 73 UNIVERSITY OF CHICAGO LAW REVIEW 33, at 53 (2006).

¹¹²⁵ See generally Dabbah, *Competition Law and Policy in the Middle East*, *supra* note 353, 2007. Maurice E. Stucke, *Morality and Antitrust*, 20th Anniversary Volume COLUMBIA BUSINESS LAW REVIEW 443 (2006).

¹¹²⁶ Amanda P. Reeves, *Behavioral Antitrust: Unanswered Questions on the Horizon*, 9 ANTITRUST SOURCE 1 (2010).

¹¹²⁷ Max Huffman, *Neo-Behavioralism?* (Available at SSRN: <http://ssrn.com/abstract=1730365> 2010); Huffman, ANTITRUST LAW JOURNAL, *supra* note 710, at 120-121 (2012).

¹¹²⁸ Avshalom Tor & William J. Rinner, *Behavioral Antitrust: A New Approach to the Rule of Reason after Leegin*, UNIVERSITY OF ILLINOIS LAW REVIEW 805 (2011).

¹¹²⁹ The competition authority in the UK was the Office of Fair Trading and Competition Commission until it was closed on April 1, 2014, and then its functions were transferred to the Competition and Market Authority.

¹¹³⁰ Reeves & Stucke, INDIANA LAW JOURNAL, *supra* note 1050, at 1530-1531 (2011).

¹¹³¹ Matt Tate, *Behavioral Economics: An Insight into Antitrust*, 37 LAW & PSYCHOLOGY REVIEW 249, at 268-269 (2013).

¹¹³² Antitrust Division, *Policy Guide to Merger Remedies*, June 2011, P.12-18

and the current assessment of the merger transaction depends mainly on the neoclassical economic approach. Indeed, the neoclassical economic approach does not have any roots in the early history of the antitrust rules, for instance the Congress in the US never supported either the neoclassical economic approach or the use of the economic analysis in the merger review, during the enactment of any of the antitrust laws.¹¹³³ Meanwhile, and to the contrary of that, most of the enforcement authorities in the EU and the US heavily depend on the neoclassical economic approach, in antitrust generally and in the merger control process specifically.¹¹³⁴

For instance, according the FTC and DOJ horizontal merger guidelines both assume the rationality of the merging parties and they mainly focus on that during the merger control process, whereas “[i]n evaluating how a merger will likely change a firm’s behavior, the Agencies focus primarily on how the merger affects conduct that would be most profitable for the firm.”¹¹³⁵ Furthermore, in the EU, since 2004 the EC shifted toward a more economic analysis approach, in one way or another that is similar to the US approach,¹¹³⁶ as it was also previously mentioned that the EU system was shifting toward the US antitrust policy goals. In addition to that, the judiciary as a part of the enforcement system is also involved in adopting the neoclassical economic approach.

For instance, that is the case in the US, whereas the courts used to refuse any claims that seemed or were deemed irrational, even if the claim is reflecting the reality, or to be more precise the claims that do not make “economic sense” are not accepted by the court.¹¹³⁷ In earlier cases, before adopting the economic analysis of Chicago School, the courts in the US used to apply the per se rule i.e. that certain facts are automatically considered as violating the antitrust rule, and then that changed and the courts departed to the rational economic analysis, mainly because courts assume that the per se rule sometimes led to false positives, and they believe that adopting the economic analysis is less harmful i.e. false negatives are less harm than false positives.¹¹³⁸

¹¹³³ Reeves & Stucke, *INDIANA LAW JOURNAL*, *supra* note 1050, at 1545-1547 (2011).

¹¹³⁴ Werden, et al., *JOURNAL OF INSTITUTIONAL AND THEORETICAL ECONOMICS (JITE) / ZEITSCHRIFT FÜR DIE GESAMTE STAATSWISSENSCHAFT*, *supra* note 1122, at 126-127 (2011); Fox, *US and EU Competition Law: A Comparison*, *supra* note 1017, at 340. 1997.

¹¹³⁵ U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, (August 19, 2010), at 2.

¹¹³⁶ Fox, *US and EU Competition Law: A Comparison*, *supra* note 1017, at 340. 1997.

¹¹³⁷ Christopher R. Leslie, *Rationality Analysis In Antitrust*, 158 *UNIVERSITY OF PENNSYLVANIA LAW REVIEW* 261, at 316 (2010).

¹¹³⁸ Reeves & Stucke, *INDIANA LAW JOURNAL*, *supra* note 1050, at 1549-1550 (2011).

In that context, it was claimed that the US courts, by adopting the neoclassical economic approach or the Chicago School ideas, it was just shifting from using the per se rule of considering certain structures or behaviors as illegal i.e. violations to the antitrust laws, to using the per se rule in the other direction by considering certain structures or behaviors as legal or compatible with the antitrust laws, such as the shifting from considering the vertical agreements between the parties of the vertical merger transactions as per se illegal to pre se legal.¹¹³⁹

The problem is actually getting more complicated when it comes to the judiciary institutions, as a part of the enforcement of the merger control policies, whereas it was stated that judges assume that the management of the merging parties are always taking rational choices to maximize their profit, and even if that assumption is true, the fact is that most of judges does not have the tools to comprehensively understand what might be the rational choice from a business perspective, and that is due to several reasons.¹¹⁴⁰ That claim is obviously true, not only because of the fact that judges might lack the businesses experiences, or that they do not have the corporate mindset, but also because they are not considering the irrational behaviors of the corporate management like the hubris as an incentive for the merger transaction.

The important question here should be why the neoclassical economic approach is not accurate, or to be more precise does the exclusion of the behavioral economics led to inaccuracy or false errors. Professor Coase himself,¹¹⁴¹ who was regarded as the founder of the conventional economic analysis of law, rejected the traditional model of thinking that the man is rationally maximizing his profits.¹¹⁴² Judge Posner¹¹⁴³ himself in his response to other scholars, regarding their claims on the direct relation between the economic analysis of the law and behavioral economics,¹¹⁴⁴ after insisting that his idea of that the behavioral antitrust is not a theory, he clearly admitted that “[he] did not doubt that there is something to behavioral economics, and that law can benefit from its insights.”¹¹⁴⁵

¹¹³⁹ Leslie, UNIVERSITY OF PENNSYLVANIA LAW REVIEW, *supra* note 1137, at 342 (2010).

¹¹⁴⁰ *Id.* at 285-286.

¹¹⁴¹ Ronald Harry Coase (December 29, 1910 –September 2, 2013) was a prominent economist and author.

¹¹⁴² For more details about his ideas *see generally* RONALD H. COASE, THE FIRM, THE MARKET, AND THE LAW (University of Chicago Press. 1988).

¹¹⁴³ Judge Richard Allen Posner (January 11, 1939) is a legal theorist and economist, and he is currently a Judge on the United States Court of Appeals for the Seventh Circuit and a Senior Lecturer at the University of Chicago Law School.

¹¹⁴⁴ Christine Jolls, et al., *A Behavioral Approach to Law and Economics*, 50 STANFORD LAW REVIEW 1471 (1998).

¹¹⁴⁵ Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, *see id.* at 1551, at 1551-1552, 1560.

In their response to Judge Posner, the same scholars published a paper, and they claimed that Judge Posner claims concerning that the irrational behavior is just a result of the lack of future data is totally wrong, because if that was the case then irrational behavior should not be a systematic one while the reality is that the irrationality of the human behavior is systematic.¹¹⁴⁶ In the same context, it is noteworthy that one of the most important findings of the behavioral economics is that the irrationality of the human behavior is systematic, and the human behavior is predictably irrational, for instance consumers are not taking the decision to buy certain goods at a certain price that will maximize their profit, but instead of that they just follow their previous experiences blindly, and that actually explain the fact that some consumers are loyal to certain brands.¹¹⁴⁷

The case of Whole Foods¹¹⁴⁸ is considered as good example to demonstrate that the exclusion of the behavioral economics led to inaccurate results, either type I positive errors or type II negative errors. In that case, the evidence presented to the court was mainly based on the neoclassical economic approach, whereas the test was that if the merger led to prices increase by 5% the consumer would shift to alternative goods or not, and the answer was yes and that means that the merger is not raising antitrust questions, and therefore the lower court rejected to block the transaction, meanwhile in appeal the court reversed the ruling, because according to the behavioral economics findings, the demand curve is not actually elastic which means that some of the consumers will not rationally react toward the price rise, and they will keep buying the products because they just consider it as a lifestyle essential.¹¹⁴⁹

Another example of the positive type I errors i.e. blocking a merger transaction that has a pro-competitive effect on the markets, as a result of the exclusion of the behavioral economics findings, is the case where the courts are applying the barrier to entry rule, in such case the court will block the transaction if it was expected that the merger transaction will give the surviving corporation certain market powers and new entrants will face some difficulties that might prevent them from entering the market. For example the capital required for investment is

¹¹⁴⁶ Christine Jolls, et al., STANFORD LAW REVIEW, *supra* note 1144, at 1593.

¹¹⁴⁷ For more examples and analysis of the biases and the irrational human behavior and how it is systematic and predictable *see generally* DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS (HarperCollins Publishers. 2008).

¹¹⁴⁸ FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1032 (D.C. Cir. 2008)

¹¹⁴⁹ Tate, LAW & PSYCHOLOGY REVIEW, *supra* note 1131, at 264-265 (2013).

considered a barrier to entry,¹¹⁵⁰ some scholars support that principle,¹¹⁵¹ while others do not consider the capital as barrier at all, like Stigler for instance.¹¹⁵²

On the other hand as an example of the negative type II errors, based on the neoclassical economic approach, is the courts in the US are considering that the expected predatory pricing behavior is not a rational decision to be expected from the surviving corporation, because that decision if taken will be a clear invitation for other competitors to enter the market and share the high profits, and therefore it did not consider it as a barrier to entry and accordingly it would clear the transaction if it was challenged on that ground, while on the other hand according to the behavioral economics findings, the expected predatory pricing behavior might be an indication of a significant market power that might lead to maximize the status quo biases of the new entrants and make them hesitant to enter the market, and thus it would be considered as barrier to entry, in some cases.¹¹⁵³

Someone might argue here that the behavioral economics is just about the same preferences of the deregulatory thinking, which means preferring the negative type II errors over the positive type I errors. Indeed, that claim is not true, the case here is about how the exclusion of the behavioral economics findings will lead to the ill-informed enforcement of the merger control rules, in other words deciding on the case without having the right data, and it is all about the enforcement or the assessments that should be based on empirical findings rather than just assuming economic rationality under the neoclassical economic approach.¹¹⁵⁴

Moreover, that discussion revealed that there are type I errors as well as type II errors in the merger control system due to the exclusion of the behavioral economics from the equation. It is undoubtedly true now, that the psychological findings of the behavioral economics are useful in the field of merger control, and it would help reach almost accurate results out of the assessment conducted during the merger control process, or at least give a clearer picture of the

¹¹⁵⁰ For more details about the barrier to entry see GEORGE J. STIGLER, *THE ORGANIZATION OF INDUSTRY* at 67 (R.D. Irwin. 1968); and more recently R. Preston McAfee, et al., *What is a Barrier to Entry?*, 94 *THE AMERICAN ECONOMIC REVIEW* 461, at 461-462 (2004).

¹¹⁵¹ ARMENTANO, *Antitrust: The Case for Repeal*, *supra* note 712, at 63. 1999; Stigler, *THE AMERICAN ECONOMIC REVIEW*, *supra* note 261, at 27 (1950); Gregory J. Werden & Luke M. Froeb, *The Entry-Inducing Effects of Horizontal Mergers: An Exploratory Analysis*, 46 *THE JOURNAL OF INDUSTRIAL ECONOMICS* 525, at 525 (1998).

¹¹⁵² J. STIGLER, *The Organization of Industry*, *supra* note 1150, at 70. 1968.

¹¹⁵³ Leslie, *UNIVERSITY OF PENNSYLVANIA LAW REVIEW*, *supra* note 1137, at 301-303 (2010).

¹¹⁵⁴ Almunia, *EU Merger Control has Come of Age*, *supra* note 698, at 4. 2011; Huffman, *ANTITRUST LAW JOURNAL*, *supra* note 710, at 106-108 (2012).

expected behavior of the surviving corporation and the market reaction towards that behavior or in other words the structure of the transaction.¹¹⁵⁵

However, behavioral economics cannot take the whole role of the economic analysis in the merger control process,¹¹⁵⁶ and in that regard what was suggested by Max Huffman parallels here very well; whereas he suggested a marriage between the neoclassical economic approach and the behavioral economics, and that marriage will not lead to contradicting results or rules, but the rational result should lead to a more “economically informed antitrust” that could maximize the gains from the merger transaction and minimize the losses due to both types of errors in the same time.¹¹⁵⁷

e) Extraterritorial reach

It was previously shown that there is extraterritorial reach in almost all the merger control systems; either premerger control systems or even in the post-merger control systems, and now the effect of that extraterritorial reach will be addressed here. First and foremost, it is undoubtedly accurate that every jurisdiction designed or even copied a merger control policy that serve its own interests, but in fact the “everyone for himself” approach combined with the extraterritorial reach led to the inevitable result that every jurisdiction is deciding for others not only for itself, for instance blocking cross-border mergers in certain industries will even effect that industry abroad, and that definitely means that the outcome of the overlapping extraterritorial reaching systems is that the corporation will settle for the “lowest common denominator” between the different systems, which is unfortunately not the expected optimum from the globalization.¹¹⁵⁸

In reality the case is worse, because it would not be just settling for the lowest common denominator, because due the fact that interaction between the different jurisdiction in the modern world is based on the notion of imperialism, i.e. that the most powerful jurisdiction used to enforce their policies and extending its enforcement in other jurisdictions by using all means from diplomacy to even military force. The reality is that the powerful jurisdictions are always

¹¹⁵⁵ Reeves & Stucke, *INDIANA LAW JOURNAL*, *supra* note 1050, at 1545 (2011); Reeves, *ANTITRUST SOURCE*, *supra* note 1126, at 5-7 (2010).

¹¹⁵⁶ Werden, et al., *JOURNAL OF INSTITUTIONAL AND THEORETICAL ECONOMICS (JITE) / ZEITSCHRIFT FÜR DIE GESAMTE STAATSWISSENSCHAFT*, *supra* note 1122, at 139 (2011).

¹¹⁵⁷ Huffman, *ANTITRUST LAW JOURNAL*, *supra* note 710, at 108 (2012).

¹¹⁵⁸ Crane, *CHICAGO JOURNAL OF INTERNATIONAL LAW*, *supra* note 397, at 148 (2009).

enforcing their policies over other jurisdiction, and that could be easily identified from the following two incidents: (1) none of the developing countries have ever blocked a transaction in a developing country, (2) most of the contradicting issues are happening only between the most powerful countries, for instance the US and the EU.

However, the other jurisdictions where the extraterritorial reach will take effect are not always idly, and it should be noted that in many cases the extraterritorial reach was counterattacked by those jurisdictions. For instance, in that context, three types of counterattacks were identified: the first one is the “diplomatic protest” and that was reported for more than twenty times in cases against the use of the US for its use extraterritorial reach, and the second one is legislative blocking under which legislation is enacted to put the extraterritorial reach to an end, and finally the third one is the judiciary blocking under which the courts blocks the application of the foreign jurisdiction rules on the national transactions.¹¹⁵⁹

It was claimed that the reason behind the problems that might rise from the extraterritorial reach is the absence of cooperation agreements between the different jurisdictions, and that the absence of that kind of agreements led to uncertainty in cross-border transactions and sometimes even to “political frictions.”¹¹⁶⁰ Meanwhile, that concept could be easily refuted, whereas despite the fact that there are a cooperation agreements between the US and EU, as it was previously mentioned, there still are problems in some cases and there are contradicting decisions, and in addition to that there are many other bilateral cooperation agreements and that does not solve the problem.

The case of the merger transaction of Gencor Ltd, will hit three birds with one stone, whereas it will show: (1) that the cooperation agreements did not solve the problem, and (2) that the extraterritorial reach may be used to the contrary i.e. to conclude such agreements, and (3) the reaction towards the extraterritorial reach. In that merger transaction, Gencor Ltd (South African corporation) proposed to jointly with Lonrho (a corporation incorporated in UK), acquire Implats (a South African corporation), most of the operations of those corporations were in the mining industry, and then the parties notified both the South African authorities and the EC, and the transaction was cleared by the South African authorities and blocked by the EC.¹¹⁶¹

¹¹⁵⁹ DABBAH, *The Internationalisation of Antitrust Policy*, *supra* note 9, at 187-190. 2003.

¹¹⁶⁰ Massimiliano Montini, *Globalization and International Antitrust Cooperation* at 4 (1999).

¹¹⁶¹ EC Decision 97/26/EC of 24 April 1996 Case No IV/M.619 — Gencor/Lonrho) (OJ 1997 L 11, p. 30)

It was reported in that high-level government officials from South Africa intervened politically to convince the EC to clear the transaction,¹¹⁶² but as it was expected due to the fact that the EU is more powerful than South Africa, there was no result in that direction, and thus Gencor Ltd challenged the EC blocking decision before the CFI, and it contended that the EC has no authority to decide on that transaction because it concerns the acquisition of a South African corporation by another South African corporation, and all are operating only in South Africa, and that the transaction will even be concluded in South Africa, however the court rejected all those claims and ruled for the EC.¹¹⁶³

After just a few months, exactly in June of the same year of the CFI ruling on the Gencor Ltd case, South Africa joined the list of countries that have a bilateral treaty with the EU; those treaties at least contain rules to govern the antitrust issues if not dedicated only to that issue.¹¹⁶⁴ At first glance of Articles 35 through 44 of the agreement between the EU and South Africa, an impression is given that the agreement was to avoid any future contradiction or extraterritorial reach, meanwhile a deep understanding of those articles reveal that the EU was just confirming its extraterritorial reach and imposing on South Africa the obligation to adopt antitrust rules within three years, and those expected rules should obviously be compatible with the language of the agreement, which is in fact similar to that used in the EU regulations. It was even claimed that this kind of agreements is known as “convergence through much cross-fertilization.”¹¹⁶⁵

In that context, it was held that the extraterritorial reach has an adverse effect in almost all of the jurisdictions, and it is considered as reason behind the fact that there are no incentives to enter into cooperation agreement or harmonization initiatives of the antitrust laws.¹¹⁶⁶ That claim is not an accurate one, because the fact is that the number of cooperation agreements have increased significantly in the last decade, and for example despite the fact that the EU heavily exercises its extraterritorial reach, it has also entered into cooperation agreements that at least include provisions concerning the antitrust rules with almost ninety jurisdictions, and the most

¹¹⁶² DABBAH, *The Internationalisation of Antitrust Policy*, *supra* note 9, at 177-179. 2003.

¹¹⁶³ Case T-102/96, *Gencor Ltd V. Commission*, 25th March 1999

¹¹⁶⁴ Agreement on Trade, Development and Co-operation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part, Council Decision of 29 July 1999, (99/753/EC)

¹¹⁶⁵ Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 *THE AMERICAN JOURNAL OF INTERNATIONAL LAW* 1, at 13 (1997).

¹¹⁶⁶ DABBAH, *The Internationalisation of Antitrust Policy*, *supra* note 9, at 165. 2003.

recent agreements were with Indian and Switzerland in 2013,¹¹⁶⁷ and it could be maintained here that the EU put pressure on those jurisdictions by using their extraterritorial reach and argued it would be easier for others to reshape their antitrust rule to be similar to the EU model or at least to be as an EU oriented model.

As it was previously mentioned, there are some jurisdictions that are not idle towards the extraterritorial reach and are counterattacking it by using legislative blocking, for instance the UK enacted the Protecting of Trading Interests Act of 1980 to serve as a “blocking statute.”¹¹⁶⁸ According to that Act, the UK limited the extraterritorial reach of the foreign laws in general by limiting the impact of decisions taken by foreign authorities that would affect trade in the UK, as well as limiting the obligation of parties to respond to any foreign request for disclosing information or handling documents, and even limiting the enforcement of foreign judgments.¹¹⁶⁹

Furthermore, there are also examples from the UK that use the judiciary as a blocking tool to counterattack the extraterritorial reach of the US, for instance as early as 1952, the Court of Appeal in one of its rulings¹¹⁷⁰ ordered the parties not to comply to the order issued by the US courts,¹¹⁷¹ and that was mainly based on the fact that the US used to extend the enforcement of its national laws to other jurisdictions based on the concept of extraterritorial reach which is not recognized by the UK judiciary system.¹¹⁷²

Surprisingly the extraterritorial reach is not only concerning the enforcement of the merger control system against anticompetitive behavior, but it is also about granting protection for the export associations antitrust violation, and that is typical in the US, whereas in 1918 the Webb-Pomerene Act was enacted to provide such protection for export associations.¹¹⁷³

¹¹⁶⁷ For the full list of the cooperation agreements between the EC and other countries see the official website of the EC at <http://ec.europa.eu/competition/international/bilateral/index.html> last visited October 1, 2014.

¹¹⁶⁸ Razeen Sappideen, *Harmonizing International Commercial Law through Codification*, 40 JOURNAL OF WORLD TRADE 425, at 444 (2006).

¹¹⁶⁹ For more details about that Act *see generally* A. V. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 257 (1981); A. Kapranos Huntley, *The Protection of Trading Interests Act 1980: Some Jurisdictional Aspects of Enforcement of Antitrust Laws*, 30 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 213 (1981).

¹¹⁷⁰ *British Nylon Spinners Ltd. v. ICI* [1953] 1 Ch. 19

¹¹⁷¹ *United States v. ICI*, 100 F. Supp. 504, at 592 (SDNY 1951).

¹¹⁷² DABBAH, *The Internationalisation of Antitrust Policy*, *supra* note 9, at 189-190. 2003.

¹¹⁷³ Webb-Pomerene Act of 1918, 15 U.S. Code § 61-66

Meanwhile, the application of that Act was refused by the ECJ.¹¹⁷⁴ That in fact led to a very strong claim that every jurisdiction is just looking after its own interests and is even protecting anticompetitive behavior of its national corporations in other jurisdictions, and the unanswered question will remain; why not block cross-border mergers that have anticompetitive effects on the global scale?¹¹⁷⁵

In that context, it should finally be noted that there are no justification for such extraterritorial reach other than nationalism as it is clearly apparent. It is noteworthy that even the US justification of its extraterritorial reach developed over the history to cope with the public and the international relations, for instance it was reported that at first the justification was to protect US-based exporting corporations, and then it turned out to be the protection of consumer.¹¹⁷⁶ Ironically, protecting the consumer is predictably a convincing justification, and it always works better than any other justification.

f) Foundational errors

The merger control is mainly based on antitrust as an ideology, and since there was a great debate about antitrust as an ideology, and even many scholars has refuted antitrust totally and called for the repeal of the antitrust, and most of those calls are actually based on both logical and empirical justifications,¹¹⁷⁷ which is might obviously be considered as a foundational error inherent in the merger control regime. However, that discussion will not address all those repealing calls and their justifications, but will be limited to some of those ideas that are directly related to the merger control regime.

To be more precise, the discussion will be limited to the assessment or tests done by competent authorities during the merger control process. In that context it should be noted that the tests begin with defining the market to which the output of the surviving corporation is

¹¹⁷⁴ Joseph P. Griffin, *Extraterritoriality in U.S. and E.U. Antitrust Enforcement*, 67 ANTITRUST LAW JOURNAL 159, at 179 (1999).

¹¹⁷⁵ HORST SIEBERT, *THE WORLD ECONOMY A GLOBAL ANALYSIS* at 400 (Routledge 3rd ed. 2007).

¹¹⁷⁶ DABBAH, *The Internationalisation of Antitrust Policy*, *supra* note 9, at 169-170. 2003.

¹¹⁷⁷ *See generally* BORK, *The Antitrust Paradox: A Policy at War with itself*, *supra* note 742, at 50-51. 1978; in the same line of criticizing antitrust and merger control *see generally* ARMENTANO, *Antitrust: The Case for Repeal*, *supra* note 712, 1999; BROZEN, *Concentration, Mergers, and Public Policy*, *supra* note 742, 1982; Fred L. Smith, *REGULATION: AEI JOURNAL ON GOVERNMENT AND SOCIETY*, *supra* note 712, (1983); Easterbrook, *Texas Law Review*, *supra* note 742, at 1-40 (1984); McChesney, *THE ANTITRUST BULLETIN*, *supra* note 712, at 359-382 (1986); MCCHESENEY & II, *The Causes and Consequences of Antitrust: The Public-Choice Perspective*, *supra* note 712, 1995; and SHUGHART, *The Organization of Industry*, *supra* note 712, 1997.

belonging, in order to assess whether it is expected that the transaction will affect the competition within that market. The step of defining the market is vital and highly problematic, it is vital because according to that definition the whole process will be done and problematic because there are no clear systematic criteria or approach to accomplish that task.¹¹⁷⁸ Despite the fact that that problem is vital, it will not be addressed here, because it is more related to errors in application and not as a foundational error.

Directly after the market definition, and in the case of horizontal mergers, the next step will be to calculate the concentrations in that identified market, and how much the proposed merger will make a change in the concentrations, in almost all the jurisdictions that is done by using the Herfindahl–Hirschman Index (hereinafter HHI).¹¹⁷⁹ According to the HHI, the market concentrations are calculated by squaring the market share of each corporation competing in the identified market, and then summing all the result, for example, certain market X is consisting of five firms with shares of 10, 15, 20, 25, and 30% of that market, the HHI is 2,250 ($10^2 + 15^2 + 20^2 + 25^2 + 30^2 = 2,250$).

Almost all the merger control authorities are not only using the same HHI method in calculating, but also almost interpret the results the same way. For instance, and according to the FTC and DOJ horizontal merger guidelines, a market with an HHI below 1,500 is an unconcentrated market, while a market with an HHI between 1,500 and 2,500 is a moderately concentrated market, while a market with an HHI more than 2,500 is a highly concentrated market.¹¹⁸⁰ Meanwhile, according to the EC guidelines for the assessment of horizontal mergers, the EC depends more on classifying the effect or the impact of the merger on the HHI of the market.¹¹⁸¹

The next step in the merger control process is to find out how much the HHI of the market is expected to increase as a result of the proposed merger, which is simply by recalculating the HHI of the market again and finding the difference between the old and the new

¹¹⁷⁸ For more details about the problem of market definition *see generally* Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST LAW JOURNAL 129 (2007).

¹¹⁷⁹ Herfindahl–Hirschman Index is widely accepted economic concept to measure the size of corporations in relation to certain market and as an indicator magnitude of competition among them. It was named after the two economists: Orris C. Herfindahl and Albert O. Hirschman,

¹¹⁸⁰ U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, (August 19, 2010) at.18-19.

¹¹⁸¹ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 05.02.2004, p.7.

HHI of the market and the result is known as “Delta,” or in another way just by doubling the product of the multiplication of the shares percentage of the merging corporations, for example if corporation X, which has a 25% market share, propose to acquire corporation Y, which has a 15% market share, the expected increase in the HHI of the market will be 750 ($25 \times 15 \times 2$).¹¹⁸²

Depending on the results of those calculations, the authorities will decide whether the transaction is not raising an antitrust question and accordingly it should be cleared, or that it might be likely to raise an antitrust question and needs further investigations. For instance in the US, if the expected future HHI of the market is still within the range of un-concentrated markets, there will be no need for further investigation and the transaction should be cleared, and if the Delta is less than 100 HHI the merger is unlikely to raise antitrust question, and in case the Delta is ranging between 100 and 200 HHI it potentially requires more investigation, while if the Delta is more than 200 HHI in a highly concentrated market, that is considered as primary evidence that the proposed transaction will enhance the market power of the merging parties.¹¹⁸³

Before advancing furthermore in the process of the assessment of the horizontal mergers, it should be pointed out here that those classification of the markets that range from un-concentrated to highly concentrated markets, and the implications or the effects of the results i.e. Delta are not based on any scientific methods or empirical findings, despite that the fact the calculations of the HHI is mathematical itself. That was even clearly mentioned in the FTC and DOJ horizontal merger guidelines, that all those classification and implications are based on the “experiences” of the authorities.¹¹⁸⁴ It is undoubtedly true, that just the “experiences” of the authorities is not an accurate or even reliable source of information, and it undoubtedly not free from biases or are objective enough to develop standards for market concentrations.

The question simply here should be as follows; what are the tools that the enforcement authorities, whether that be the competent agencies or even the judiciary, have in order to decide that if Delta is 201 HHI, for any type or category of products or services, in any industries, and at anytime, is considered enhancing the market power. While if Delta is 200 HHI, the case is not

¹¹⁸² See for example the EC explanations to the calculation method in Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 05.02.2004, at 15.

¹¹⁸³ U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, (August 19, 2010), at 19; for similar rules but with some variation see the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 05.02.2004, p.7.

¹¹⁸⁴ U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, (August 19, 2010), at 18-19.

the same, and one needs to ask is that decision based on any verified theory, empirical evidence, or even an economic rationale? The answer is clearly no; it is purely a claim of the “experiences” is indicating so. Ironically, the experiences of the authorities did not ever consider the high Delta HHI as an indication of the efficiency that is expected from the merger of the two successful corporations.

In addition to that, and regardless of the label or classification of a concentrated market or not, and that the HHI method might not work for every case, or that the merger is horizontal or not, the issue of the foundational errors are much more deeper, whereas it found its roots in the violations that the authorities search for in almost every merger transaction, during the assessment process. In other words, the foundational errors are namely what the authorities are looking for during the merger control process. The antitrust authorities are mainly looking for certain effects on the market, and those effects are mainly classified into three categories of effects: (1) unilateral or un-coordinated effects, (2) coordinated effects, (3) conglomerate effects.

Non-coordinated effects can come simply in two flavors, the first is the case of enhancing the market power of a single corporation to gain a dominant position, and the second flavor is to reduce the competition constrains in an oligopoly market,¹¹⁸⁵ but without any coordination between the merging parties and other players.¹¹⁸⁶ On the other hand, the coordinated effects simply means enabling or increasing the probability of the coordination between the corporations in the market to engage in anticompetitive behavior, and it does not matter if the coordination will be between the merging parties or the other players in the market and even without entering into any kinds of agreements.¹¹⁸⁷

In order to enable or increase a sustained coordinated effect, that simply requires three preconditions: (1) coordinating corporations should be able to monitor the loyalty of the parties to the coordination terms, (2) there should be a “credible deterrent” in case of violation to those terms, and (3) the coordination should not be disturbed by any third parties,¹¹⁸⁸ on the other hand

¹¹⁸⁵ Oligopoly market means the market that is dominated by small number of corporations.

¹¹⁸⁶ For more about the history of the non-coordinated effect in oligopolies markets in the EU merger control system see IOANNIS KOKKORIS, *MERGER CONTROL IN EUROPE: THE GAP IN THE ECMR AND NATIONAL MERGER LEGISLATIONS* at 2-3 (Routledge. 2011).

¹¹⁸⁷ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 05.02.2004, at 9; U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, (August 19, 2010), at 24-27; and for more details about coordinated effects see generally Janusz A. Ordover, *Coordinated Effects*, in *ISSUES IN COMPETITION LAW* (2009); William E. Kovacic, et al., *Quantitative Analysis of Coordinated Effects*, 76 *ANTITRUST LAW JOURNAL* 397(2009).

¹¹⁸⁸ Clarke, *The International Regulation of Transnational Mergers*, *supra* note 8, at 119. 2010.

the non-coordinated effect requires at least a third precondition which is the non-disturbance of any party other than the monopoly owners.

Accordingly, the sustained occurrence of any of these effects either coordinated or non-coordinated, are based on the assumption that there is a barrier to enter into the market, otherwise the coordinated effect or the non-coordinated effect will not sustain and one ends up with losses to the merging parties. In that context, the antitrust authorities used to assess whether an entry to the market could be “timely, likely, and sufficient” to counterattack the effects of the proposed merger transaction.¹¹⁸⁹

As it was previously shown, the rules towards the barrier of entry, as the antitrust authorities and the courts applied them in the US, are not based on the reality of the markets. In that concern, it was strongly asserted that the only actual barrier to entry that could be claimed by the antitrust proponent is that the capital required to enter to the market, and as it was previously mentioned that even capital required to enter the market is not a barrier, and the only barrier that might be considered in some cases is the cost of attracting the required capital,¹¹⁹⁰ and even that cost is expected to return back shortly in a high profit market taken by the merging corporations.

In addition to that, why the authorities are not taking into consideration the cases where the barrier to entry is a result of a legal barrier, like for instance other regulation issued by the government, for example requiring certain license to be granted by the government agencies before entering the market. Furthermore, it has never been claimed by the antitrust proponent that requiring a certain license is a barrier to entry, especially in the case where the licenses are limited in number, such as the license required in the telecommunication industry to enter the market of mobile phone operators or internet services providers, etc.

ExxonMobil is indeed a prime example to demonstrate that the coordinated effect might be just myth, whereas the daily coordination between the ExxonMobil branches or even subsidiaries in almost every country over the globe is undoubtedly more than the expected coordinated effect from an average merger transaction or even illegal cartels.¹¹⁹¹ Accordingly, the case is about the behavior and its implication or affects in the market not just the structure and what is expected from the structure. The antitrust authorities are simply claiming the same,

¹¹⁸⁹ U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, (August 19, 2010), at 27-29

¹¹⁹⁰ For more about the barrier to entry in the US courts *see generally* Werden & Froeb, THE JOURNAL OF INDUSTRIAL ECONOMICS, *supra* note 1151, at 525-526 (1998).

¹¹⁹¹ Easterbrook, TEXAS LAW REVIEW, *supra* note 742, at 1-2 (1984).

for instance Joaquin Almunia mentioned that his “main message is that market reality, and market reality alone, must lie at the core of our merger analysis.”¹¹⁹²

However, the reality is very different, but not from the expectation about the success percentage of the merger transaction, it is different from what the government officials are claiming, the authorities actually keep looking for any evidence that might support their claim that there are antitrust violations, even out of thin air. For instance, Jude Bork himself cited “pressures” within the authorities to “extend” the reach of antitrust laws.¹¹⁹³ It was even claimed that whenever the administrative authorities did not support the judiciary with convincing arguments, the judiciary helped, by refuting their arguments therefore the authorities keep improving their justification every time, in the same way the courts showed them in its previous rulings.¹¹⁹⁴

To elaborate more, consider the following example of the blocking of the merger transaction between Cadbury and Kraft, the EC announced that the parties own a high market share in Ireland, Poland, Romania, and UK, and that both corporations are competing in the Polish and Romanian markets and that would lessen the competition, while there is no competition between them in the UK and Irish markets.¹¹⁹⁵ In that case, it was clear that the EC was just trying to justify the remedies of divesting the operation in Poland and Romania as a precondition to clear the transaction. The interpretation of the whole picture might support that claim, because there was some news concerning a plan to relocate all the manufacturing facilities from UK and Ireland to Poland and Romania, for the purpose of savings by using cheaper labor.¹¹⁹⁶

Another example is the homogenous product industries, like cement for example or any other construction materials, whereas there are no significant differences between products other than the prices, it would be very easy to make a coordinated effect, and it is even a very well-known practice that is called Hardcore Cartel.¹¹⁹⁷ In those industries and despite the fact that it

¹¹⁹² Almunia, EU Merger Control has Come of Age, *supra* note 698, at 4. 2011.

¹¹⁹³ ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF at 415 (Basic Books 2nd ed. 1993).

¹¹⁹⁴ Donald G. J. R. Kempf, *Merger Litigation from the Birth of General Dynamics to the Death of Section 7*, 65 ANTITRUST LAW JOURNAL 653, at 653-654 (1997).

¹¹⁹⁵ Villarejo, Recent Trends in EU Merger Control, *supra* note 859, at 5-6. 2011.

¹¹⁹⁶ For news concerning the plan of relocating the manufacturing facilities of Cadbury from Bristol, UK to Poland see <http://news.bbc.co.uk/2/hi/8507066.stm> last visited on October 1, 2014.

¹¹⁹⁷ UNCTAD, The Role of Competition Policy in Promoting Economic Development: The Appropriate Design and Effectiveness of Competition Law and Policy, *spura* note 1049, at 15. 2010.

might be controlled or regulated by the antitrust laws, what is happening in the reality is that the regulatory authorities themselves turn a blind eye on such coordination practices, or the authorities might even promote coordination between the producers or service providers, and that is what typically happens in different industries like the telecommunication industry, whereas the authorities require coordination between the service providers.

As an example of the conglomerate effect myth, the merger transaction between Intel¹¹⁹⁸ and McAfee,¹¹⁹⁹ whereas the EC even after it decided that two corporations were operating in two different markets, it decided that those two markets are “neighbouring” and “complementary” markets which do not compete with each other, in other words it is a conglomerate merger, but it raised antitrust question concerning the conglomerate effect, for instance Intel might limit the McAfee products to its chips or even hamper its products when running on any other chips not produced by Intel, and the transaction was not cleared until the approval of some remedies.¹²⁰⁰

The EC in that case had not cleared the merger transaction until Intel committed to ensure that all the other corporations operating in the industry of technology security software will have the same access to the information that Intel might support McAfee with, and that McAfee products will be able to run effectively on devices that are not using Intel processors.¹²⁰¹ As it is simple and clear, those preconditioned remedies means that both Intel and McAfee should not violate the antitrust laws in the future, and the question here is should the antitrust authorities impose a commitment to abide the law, or it is just showing its power to postpone the transaction and that it is protecting the main competitor of Intel i.e. AMD, which is almost the only competitor in the semiconductor industry in the world.

Another noteworthy foundational myth, is that it has always held that the reason behind the antitrust laws are increasing the consumer welfare, and it has been shown several times before in the legislative intent, in almost all the jurisdictions, that they are not targeting the welfare of consumer, at anytime during the antitrust history. Moreover, despite the fact the

¹¹⁹⁸ Intel is a well-known US corporation specialized in semiconductor chips industry, for more information about the corporation visit its official website at <http://www.intel.com/content/www/us/en/company-overview/company-overview.html> last visited October 1, 2014.

¹¹⁹⁹ McAfee is a well-known US corporation specialized in technology security software and is now wholly owned subsidiary of Intel, for more information about the corporation visit its official website at <http://home.mcafee.com/Root/AboutUs.aspx> last visited October 1, 2014

¹²⁰⁰ Almunia, Policy Objectives in Merger Control, *supra* note 1116, at 3. 2011.

¹²⁰¹ Villarejo, Recent Trends in EU Merger Control, *supra* note 859, at 8-9. 2011.

enforcement of antitrust rules does not inevitably lead to the decrease in prices or even preventing the prices from increase, it could be assumed that the antitrust enforcement led to such result. But does that mean consumer welfare, no it does not, whereas the happiness economics¹²⁰² literature strongly asserted that consumer welfare is based on many factors; some of them are material like income, housing, wealth and others factors are related to the quality of life like health, social status, skills, education, security, and environment.¹²⁰³

Based on the assumption that the antitrust enforcement would successfully decrease the prices sustainably, that success could be contribute only to the material factors of welfare, which is already enhanced to an average satisfying level in the jurisdictions that are leading the antitrust law ideology i.e. the developed countries, and to the contrary most of the developing countries, which is deeply in need of those material improvements, the laws do not have any enforcement in reality and those jurisdictions are considered as antitrust heavens.¹²⁰⁴

Moreover, the idea of maximizing the consumer surplus is very material, and even sometimes offering the goods or services at a lower price is not for the good of the consumers, consider for example the case of cigarettes or even fast food and many other examples that demonstrates the rationale behind the antitrust laws might be the consumer surplus but that does not mean the consumer welfare.¹²⁰⁵ Furthermore, in some cases the consumer welfare is a relative concept and it is measured according to similar peers, and even sometimes the welfare might be achieved by having the ability to purchase very expensive goods that others could not easily afford.¹²⁰⁶ Accordingly, the most contended goal behind the antitrust laws appeared to be non-achievable by the means of the enforcement of the antitrust policies.

Meanwhile, there are other social effects that could not be ignored like for instance the impact of the merger transactions on employment,¹²⁰⁷ whereas it was previously mentioned that the merger might gain by sharing common teams, starting from the senior management levels to

¹²⁰² Happiness economics is that field of study that mainly focus on quantitative and theoretical study of happiness, well-being, quality of life, life satisfaction and related concepts, and typically require the combination between economics and other fields of study, for ex: psychology and sociology.

¹²⁰³ For more details *see generally* Organisation for Economic Cooperation and Development, *Better Life Initiative: Compendium of OECD Well-Being Indicators*, (2011).

¹²⁰⁴ Stucke, *FORDHAM LAW REVIEW*, *supra* note 745, at 2625-2626 (2013).

¹²⁰⁵ CAROL GRAHAM, *THE PURSUIT OF HAPPINESS: AN ECONOMY OF WELL-BEING* at 11 (Brookings Institution Press, 2011); Stucke, *FORDHAM LAW REVIEW*, *supra* note 745, at 2637 (2013).

¹²⁰⁶ For an excellent comprehensive analysis of the effect of antitrust policies on the consumer welfare *see generally* Stucke, *FORDHAM LAW REVIEW*, *supra* note 745, (2013).

¹²⁰⁷ Clarke, *The International Regulation of Transnational Mergers*, *supra* note 8, at 41-42. 2010.

all levels of workers, and that might led to an increase in the unemployment rates. However, it could be hesitantly claimed that from the total surplus perspective, the unemployed people themselves will share some of the gains, but that might be after struggling for some time.

The antitrust authorities and proponents maintained that there are harmful effects on the economy from the monopolistic behaviors i.e. unilateral effects, and they always cite some empirical researches that support their claims, in fact those empirical researches are not accurate and were heavily criticized by scholars.¹²⁰⁸ To the contrary of that, there are other empirical researches that revealed that the antitrust laws itself have a negative impact on the economy.¹²⁰⁹ At least such contradicting empirical results raise a point that the foundational assumptions of the harmful effects on the economy from the monopolistic behaviors are not a constant, and there is a probability of being just a myth. For instance, there are industries in the US that are exempted from the antitrust laws but are doing well such as insurance corporations and corporations in the baseball industry.¹²¹⁰

Furthermore, the authorities are investigating to find out everything out of thin air, and even if a certain transaction is expected to raise a certain violation and parties accordingly try to structure the transaction in a way that might fix that, unfortunately they will be able to easily figure out what the authorities are preparing for them. For instance, Joaquín Almunia admitted that the antitrust authorities have a “toolbox” of rules, and accordingly every time the parties might be surprised about which tool they decided to use in order to ruin the transaction.¹²¹¹

In the same line, and according to the *Parker* doctrine,¹²¹² and the Local Government Antitrust Act of 1984,¹²¹³ and because the errors are highly expected from the government officials during the merger control process and the antitrust reviews in general, the officers of the antitrust authorities were granted immunity against damages claims based on or related to the harm that they might cause to the parties while making decisions regarding their transactions.¹²¹⁴

¹²⁰⁸ ARMENTANO, Antitrust: The Case for Repeal, *supra* note 712, at 44-45. 1999, citing Stephen C. Littlechild, *Misleading Calculations of the Social Costs of Monopoly Power*, 91 THE ECONOMIC JOURNAL 348 (1981). For a statistical criticism of concentration-profit studies see EUGENE M. SINGER, ANTITRUST ECONOMICS AND LEGAL ANALYSIS at 31-33 (Grid Pub. 1981).

¹²⁰⁹ DiLorenzo, INTERNATIONAL REVIEW OF LAW AND ECONOMICS, *supra* note 180, at 73 (1985).

¹²¹⁰ For more details about the exemption of the baseball industry from the antitrust laws see J. Gordon Hylton, *Why Baseball's Antitrust Exemption Still Survives*, 9 MARQUETTE SPORTS LAW REVIEW 391(1999).

¹²¹¹ Almunia, Policy Objectives in Merger Control, *supra* note 1116, at 5. 2011.

¹²¹² *Parker v. Brown*, 317 U.S. 341 [1943]

¹²¹³ Local Government Antitrust Act of 1984, H.R. 6027 (98th).

¹²¹⁴ ARMENTANO, Antitrust: The Case for Repeal, *supra* note 712, at 46. 1999.

In addition to that, the fact is that the 21st century is witnessing the biggest shift from the industrial economy to a technology-oriented economy, and the intellectual capital is replacing the physical one, and that obviously means that IPR is a very important issue, to be more precise the protection of those rights is the key issue.¹²¹⁵ The fact that protecting IPR means granting certain exclusive rights to the owners is highly contradicting to the antitrust ideology, which is mainly considered to be about the anticompetitive effect of the use of such exclusive rights, and that might be considered as one of the foundational flaws of the antitrust that does not survive in the age of the technology-oriented economy.

Meanwhile, someone could claim that there is no relation between the IPR and the foundational errors of the merger control systems, but in fact they are directly interrelated to each other. To elaborate more, consider the fact that Google¹²¹⁶ acquired Motorola¹²¹⁷ for 12.5 billion US dollars, and the main incentive of the transaction was to collect the IPR of 17,500 patent and 7,500 pending patent application through that transaction, and the EC cleared that transaction after Google committed not to abuse the use of those IPRs.¹²¹⁸

Actually, that example raised a big question: what if the transaction was blocked for its expected antitrust violation, could the antitrust authorities actually prevent Google from acquiring those IPRs by means of purchasing all of them or getting license to use them. If the answer is yes then the IPR does not affect the foundation base of the merger control, but if the answer is no then the inevitable result should be that protecting IPR is contradicting with the rationale of antitrust rules and accordingly with the enforcement of the merger control system, and in fact the answer is no.

Meanwhile, the said conclusion does not mean that the antitrust authorities do not have the right to attack or challenge any future behavior of the merging parties, like for instance if the surviving corporation abused those rights that were granted under the IPRs, but to put everything

¹²¹⁵ SIEBERT, *The World Economy a Global Analysis*, *supra* note 1175, at 402. 2007; SHENEFIELD & STELZER, *The Antitrust Laws: A Primer*, *supra* note 178, at 85. 2001.

¹²¹⁶ Google is a well-known US corporation specialized in internet-related products and services and products; which includes online advertising, search engines, cloud computing, and software, and for more information about the corporation visit its official website at <https://www.google.com/intl/en/about> last visited October 1, 2014

¹²¹⁷ Motorola is a well-known US corporation specialized the mobile communications industry, for more information about the corporation visit its official website at <http://www.motorola.com/us/About-Motorola/Corporate-About-Motorola.html> last visited October 1, 2014

¹²¹⁸ Diane Bartz & Foo Yun Chee, *Google Wins US, EU Approval for Motorola Mobility Buy* (Alexei Oreskovic ed., Thomson Reuters 2012).

in its right context, the authorities will challenge those behaviors not the structure of the surviving corporation, in other words that will be an ex-post not ex-ante.¹²¹⁹

On the other hand, others asserted there are no contradictions between the IPR and the antitrust rules as it might seem at first sight, but seeing the accurate whole picture will reveal that both are complementary.¹²²⁰ Both of the two laws and their ideologies are complementary might be a correct claim to some extent, which is that both of them are protecting someone right to survive in the market, but in fact they are contradicting.

For instance, the proponent of the claim that the IPR and the antitrust laws are not contradicting, do not have any explanation to the fact that protecting the IPR grants the owner the right to exploit the patent for example exclusively. While on the other the patent itself might be considered as a market, for instance if there is only one drug that cures an epidemic disease, that drug could be considered as a market, the exclusively granted right will give its owner a dominant position in that market and the patent itself might be considered as a barrier to entry. In the same context, it is noteworthy that others even claimed that the IPR laws should be repealed, not only the antitrust laws.¹²²¹

g) Political influence

It is undoubtedly true that the political power is considered a commodity, and any party that wishes to possess some of that power, for the purpose of serving its interest, should buy it from the market and negotiate a deal with the owner, that owner is usually the political parties. The political party would bargain the political power in exchange for money, whereas it needs money for its operations, campaign, and elections, which is called in a misleading manner financing the elections.¹²²² Meanwhile, if the case is that the owner is the government administration i.e. the political party in charge, and using its power in favor of a private party is known as “rent seeking.”

¹²¹⁹ For ideas to solve this issue and to draw a separation line between the IPR and antitrust laws see what was suggested in Wolfgang Fikentscher, *The Draft International Antitrust Code (DIAC) in the Context of International Technological Integration - The Institutional and Jurisdictional Architecture*, 72 CHICAGO-KENT LAW REVIEW 533, at 540-541 (1996).

¹²²⁰ SHENEFIELD & STELZER, *The Antitrust Laws: A Primer*, *supra* note 178, at 88. 2001, citing Atari Games Corp. V. Nintendo of America, Inc., 897 F.2d 1572, 1576 (Fed. Cir. 1990).

¹²²¹ Carlton, *THE JOURNAL OF ECONOMIC PERSPECTIVES*, *supra* note 959, at 165-166 (2007).

¹²²² George J. Stigler, *The Theory of Economic Regulation*, 2 THE BELL JOURNAL OF ECONOMICS AND MANAGEMENT SCIENCE 3, at 12 (1971).

Furthermore, if the owner of the power is a regulatory authority, and that authority, regardless of the public interest, is taken over by the private interests of the players in the industry that it was empowered to regulate, that is known as “regulatory capture.” It is even argued that the antitrust enforcement in general is costly, and the merger control process is an expensive process, and that increases the possibility to be subjected to regulatory capture, and accordingly it is highly expected to be used as a tool to serve goals other than consumer welfare, such as the political goals to serve the private interests.¹²²³

The case is a typical one in the field of antitrust generally and the merger control especially, whereas almost all the scholars cited political goals as a goal of the antitrust policies.¹²²⁴ However, as it was noted that the political goals are not always for self-interest of the policy designer or the decision maker, and it was even claimed that the political goal of the antitrust policy might be the protection against any expected “excessive concentration of economic power [that] will breed antidemocratic political pressures,”¹²²⁵ in other words to prevent the political powers of the corporations that might be gained as a result of its economic power.¹²²⁶

In that context, it should be noted that it has been purported that the Chicago School was the first to argue that the antitrust regimes were developed to serve political goals through principles that seem “neutral on their face,” which might be of course the popular consumer welfare justification or any other legitimate goal.¹²²⁷ In fact, that claim is true and it might also simply answer the question of why there are different enforcement approaches notwithstanding the fact that the rules might be the same, whereas the different enforcement approaches are due to the different interpretation by the different administrations that is always affiliated to certain political party looking after different political goals.

The issue of the influence of political goals on the merger control enforcement have a special implications in the case of cross-border mergers, whereas political goals do not only vary

¹²²³ GHOSAL & STENNEK, *The Political Economy of Antitrust*, *supra* note 710, at 344. 2007.

¹²²⁴ DABBAH, *The Internationalisation of Antitrust Policy*, *supra* note 9, at 3, 50, 52-54. 2003; Stucke, *FORDHAM LAW REVIEW*, *supra* note 745, at 2603, 2637 (2013).

¹²²⁵ Robert Pitofsky, *The Political Content of Antitrust*, 127 *UNIVERSITY OF PENNSYLVANIA LAW REVIEW* 1051, at 1051 (1979).

¹²²⁶ Alan A. Fisher & Robert H. Lande, *Efficiency Considerations in Merger Enforcement*, 71 *CALIFORNIA LAW REVIEW* 1580, at 1582-1588 (1983).

¹²²⁷ Huffman, *Neo-Behavioralism?*, *supra* note 1127, at 1. 2010; COLINO, *Competition Law of the EU and UK*, *supra* note 185, at 11. 2011.

over the time within the same jurisdiction, but also varies simultaneously between the different jurisdictions, and obviously the probability of effect on cross-border merger is much higher than in domestic transaction.¹²²⁸ For instance, it was cited for many times that the EC politically blocked cross-border mergers, like for example the merger between McDonnell Douglas and Boeing or the merger between General Electric and Honeywell.¹²²⁹

Someone could claim that the EC decision to block cross-border mergers was mere protectionism, in other words blocking cross-border transaction in order to protect the European corporations from their foreign competitors, such as protecting Airbus in the case of McDonnell Douglas and Boeing. However, that could be easily refuted because the decision is not just based on protectionism, but in fact the protectionism within the EU context also has a political end, which is the integration of the Member States. In that context, it was also accurately claimed that the reason behind the foundation of the EU antitrust system was mainly the political and economic integration,¹²³⁰ and that could be clearly identified in both the policy and the enforcement, at least more easily than other systems like the US system.¹²³¹

Even reading the mandate of Joaquín Almunia as an EC Commissioner, will reveal that he understood his mission in the context of the political vision of the EU, whereas he said that: “[m]y vision for competition policy in Europe is linked to my political vision of Europe as an area of peace and stability, freedom and democracy.”¹²³² Accordingly, it would be obvious to claim that the EC while making a decision in a merger review is considering the integration of the European community as a whole and it might block a cross-border merger transaction to protect the interest of European corporations, regardless of any expected pro-competitive effect of the transaction.

In the same context, it should be noted that while the EC succeeded to block cross-border mergers that would not serve the political goal of the EU, it did not fully succeed to serve that same goal in the cross-border transaction done within the community level. For instance, there are many cases whereas the national authorities blocked or at least conditionally cleared cross-border transaction that were already cleared by the EC, for example; the merger transaction

¹²²⁸ DABBAH, *The Internationalisation of Antitrust Policy*, *supra* note 9, at 61. 2003.

¹²²⁹ Hunt, *NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS*, *supra* note 709, at 151 (2007); GHOSAL & STENNEK, *The Political Economy of Antitrust*, *supra* note 710, at 241. 2007.

¹²³⁰ DABBAH, *The Internationalisation of Antitrust Policy*, *supra* note 9, at 30. 2003.

¹²³¹ Fox, *US and EU Competition Law: A Comparison*, *supra* note 1017, at 350. 1997.

¹²³² Joaquín Almunia mandate is available on the official website of the EC at http://ec.europa.eu/commission_2010-2014/almunia/about/mandate/index_en.htm last visited on October 1, 2014.

between Autostrada¹²³³ and Abertis,¹²³⁴ which was cleared conditionally by the Italian authorities while it was cleared by the EC.¹²³⁵

In the US, the case is simply that there are different administrations, which are affiliated to different political parties, and that led to different enforcement approaches under the same set of rule, mainly to serve the political goals of those parties, for instance, it was reported empirically during the presidency period of the President George H.W. Bush,¹²³⁶ that the enforcement of the antitrust laws was much weaker than during the presidency period of President Bill Clinton.¹²³⁷

Furthermore, in a relatively more recent empirical research in 2012, it was also reported that President Barack Obama¹²³⁸ administration strengthened the merger control enforcement.¹²³⁹ Particularly, it could be easily claimed that the weaker enforcement during Bush administration could be attributed to the pro-capitalism ideology of the Republican Party to which President Bush belong, and the strengthened enforcement could be also attributed to the modern liberalism ideas of the Democrats Party to which both Presidents Clinton and Obama belongs.

In the same context, but to the contrary of the mentioned empirical findings, other contradicting results were also derived from empirical studies, whereas it was reported that there were no differences between the enforcement during President Bush administration and President Clinton administration,¹²⁴⁰ and even the same could be argued concerning the President Obama administration.¹²⁴¹

¹²³³ Autostrade is an Italian toll road operator corporation, for more details about the corporation visit its official website at <http://www.autostrade.it/en/chi-siamo> last visited on October 1, 2014.

¹²³⁴ Abertis is a Spanish toll road operator corporation, for more details about the corporation visit its official website at <http://www.abertis.com/what-is-abertis/var/lang/en/idm/327> last visited on October 1, 2014.

¹²³⁵ For more examples, especially in the energy industry, see Green & Staffiero, *THE HANDBOOK OF COMPETITION ECONOMICS*, *supra* note 705, at 10-12 (2007).

¹²³⁶ George Herbert Walker Bush (born June 12, 1924), he is an American politician (Republican), and was the 41st President of the United States from 1989 to 1993.

¹²³⁷ John D. Harkrider, *Antitrust Enforcement During the Bush Administration--An Economic Estimation*, 22 *ANTITRUST* 43, at 43, 46 (2008). William Jefferson Clinton (born August 19, 1946), he is an American politician (Democratic), and was the 42nd President of the United States from 1993 to 2001.

¹²³⁸ Barack Hussein Obama (born August 4, 1961) he is an American politician (Democratic), he was the 44th and the current President of the United States.

¹²³⁹ Daniel A. Crane, *Has the Obama Justice Department Reinvigorated Antitrust Enforcement?*, 65 *STANFORD LAW REVIEW* 13, at 16 (2012); William F. Shughart & Diana W. Thomas, *Antitrust Enforcement in the Obama Administration's First Term A Regulatory Approach*, No. 739 *CATO INSTITUTE POLICY ANALYSIS* 1, at 1 (2013).

¹²⁴⁰ Malcolm B. Coate & Shawn W. Ulrick, *Transparency at the Federal Trade Commission: The Horizontal Merger Review Process*, 73 *ANTITRUST LAW JOURNAL* 531, at 564 (2006).

¹²⁴¹ Jonathan B. Baker & Carl Shapiro, *Evaluating Merger Enforcement During The Obama Administration*, 65 *STANFORD LAW REVIEW* 28, at 31 (2012). Criticizing Crane, *STANFORD LAW REVIEW*, *supra* note 1239, (2012).

For instance, a former FTC Chairman tried to justify the contradicting results of the empirical studies that were conducted to answer the question of whether there were differences in enforcement between the different administrations, and he pointed out the fact that the number of transactions that were notified was different during the different administrations, and accordingly he concluded that there were more chances of enforcement and to challenge the transactions during the higher rate of notifications, and he also noted that there was a merger wave during President Clinton administration.¹²⁴² That justification could be easily refuted, because the results was not based on the number of transactions, but the results were basically calculated, similar to all the results in the empirical studies, based on the percentage, not on the numbers.

The political influence on the cross-border mergers is not just coming from the enforcement authorities; basically it could come from outside i.e. political intervention from foreign countries to influence the competent authorities, typically in order to clear a transaction. An example of the outside political effect was the previously mentioned incident of the political intervention to clear the Gencor transaction. Furthermore, the political influence would not affect only the merging parties, but it might also lead to political frictions and sparks between the different jurisdictions to which the parties belong, like for instance between the US and the EU as it was also previously discussed.

Accordingly, the political influence has some implications within the cross-border mergers especially when the case is accompanied by the application of the extraterritorial reach.¹²⁴³ However, it could obviously be realized that both the political influence on cross-border mergers and the extraterritorial reach are limited to only the powerful government authorities, and that might explain the fact that problems always occur when the US and the EU are the most connected jurisdictions to the transaction, and it also explains that most of the developing countries are considered as merger control heavens. To be more precise, the extent of exercising the political power simply depends on the power of the intervening party itself, as a result of imperialism.

Finally, it was even held that a better understanding of both antitrust policies and enforcement generally, and of merger control specifically, requires a good understanding of

¹²⁴² Timothy J. Muris, *Facts Trump Politics: The Complexities of Comparing Merger Enforcement over Time and Between Agencies*, 22 ANTITRUST 37, at 37-38 (2008).

¹²⁴³ Hamner, THE JOURNAL OF TRANSNATIONAL LAW & POLICY, *supra* note 672, at 394 (2002).

political science as well as the legal and the economics side of the field,¹²⁴⁴ and that led some voices to call for establishing independent authorities that could enforce the policies in a less subjective and politically oriented environment.¹²⁴⁵ Ironically, the political power that designed the policies or contributed to the enactment of laws, might be misused or even monopolized,¹²⁴⁶ and despite the fact that there might be checks and balances to put any violations to an end, there are no government authorities that are granted the rights to control the misuse of the political power, through an ex-ante process.

h) Privacy and data related issues

One of the most important categories of problems that might be considered as a drawback of the merger control system are those issues related to the data and privacy, in addition to any accuracy problem thereof, those issues could be identified as follows: (1) the cost of gathering or disposing the required data or information by the merging parties or even by third parties like consumer and competitors, (2) breaching the privacy of the merging parties, (3) disclosing the data or information to public, or competitors, or even sharing it with other authorities. All those issues are problems at least from the merging parties' perspective, regardless of the legal point of view, and regardless of whether any action in that regard was considered a violation or even is permissible under law.

The privacy issues are not even addressed by the law in many jurisdictions, mainly in the developing countries, for instance neither Egypt nor any of the G.C.C. countries enacted any law to protect the privacy of data or even the right to access to public information. Meanwhile, in most of the developed jurisdictions the disclosure of confidential data or information, or breaching the privacy of the parties might lead to serious legal problems, and based on that fact some of those developed jurisdictions have enacted special laws to grant the antitrust authorities the power to share some of the data and information at least with the other antitrust authorities.¹²⁴⁷

¹²⁴⁴ DABBAH, *The Internationalisation of Antitrust Policy*, *supra* note 9, at 57. 2003.

¹²⁴⁵ Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 *THE AMERICAN ECONOMIC REVIEW* 291(1974).

¹²⁴⁶ Stigler, *THE BELL JOURNAL OF ECONOMICS AND MANAGEMENT SCIENCE*, *supra* note 1222, at 12 (1971).

¹²⁴⁷ For full detailed laws and provisions that are related to the privacy and freedom of information around the globe see <http://www.right2info.org/laws/constitutional-provisions-laws-and-regulations#section-36> last visited October 1, 2104.

For instance, according to the confidentiality article i.e. Article VIII of the cooperation agreement between the US and the EU, no party is obliged to disclose any information with regard to antitrust issues in case that the disclosure is forbidden by law or if the disclosure is not in the interest of the party who possess the information, without any reference to the interests of the merging parties or any other third parties. Meanwhile, and for the purpose of circumventing any laws that prohibit the disclosure of the information to foreign authorities with regard to the antitrust or merger control investigation, the US enacted the International Antitrust Enforcement Assistance Act of 1994,¹²⁴⁸ in order to be able to share the information and data with other foreign antitrust authorities who are parties to one of the cooperation agreements with the US.¹²⁴⁹

As an example from the US on breaching the privacy of the employees of the merging parties, is the case of the merger transaction between Bazaarvoice and PowerReviews, as it was previously mentioned that the court held that the transaction violated the antitrust laws, without making any consideration to the data derived from the consumers, while it had extraordinary consideration for a quote made by the CEO of one of the parties in an email, that was sent by him internally, under which he indicated that the transaction will allow them to take out their only competitor.¹²⁵⁰

In the same context, in an interview with one of the senior management staff member of one of the biggest corporation in the State of Indiana in the US, he revealed that as a response to those types of practices by the government authorities, they issued internal instructions in that regard to the employees, under which they should limit the use of the emails to only formal level of communications, and they designed and developed an internal policy to clean the email accounts of the employees periodically.¹²⁵¹

One more dimension of the problem is the fact that many of the merger control authorities are currently using social media in their announcements, for instance the FTC, DOJ, and EC have accounts on Twitter. That trend might be beneficial for some people, for instance it would be much easier for journalists or researches to follow-up with latest news, and it might be also helpful for consumers to get some tips or guidelines from time to time. Meanwhile, it might

¹²⁴⁸ The International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C. Chapter 88, § 6201-§ 6212

¹²⁴⁹ Diane P. Wood, *The Internationalization of Antitrust Law: Options for the Future*, 44 DEPAUL LAW REVIEW 1289 (1995); DABBAH, *The Internationalisation of Antitrust Policy*, *supra* note 9, at 222-223. 2003; Sharon E. Foster, *While America Slept The Harmonization of Competition Laws Based Upon the European Union Model*, 15 EMORY INTERNATIONAL LAW REVIEW 467, at 493 (2001).

¹²⁵⁰ *United States v. Bazaarvoice, Inc.* 13-cv-00133-WHO, slip op. (N.D. Cal., Jan. 8, 2014)

¹²⁵¹ The full original manuscript is on file with the author.

not be acceptable from the merging parties side, to find the authorities announcing the blocking of their transaction instantly on the social media, or that they are requiring a second request or remedies negotiations, especially in the cases where any of the merging parties are listed in the stock exchange, whereas that might lead instantly to losses or even pressure the parties into accepting certain remedies proposed by the authorities.

Some authorities might explain that on the ground that the trend of using the social media is a part of fulfilling their obligation according to the transparency policies or as imposed by laws with concern to the right to access to information, but what about the confidentiality of the details of the transaction, does the authorities have the right to reveal all the details or just to a certain extent and many other problematic issues in that regard. As an example from Canada, the Canadian Competition Bureau started by the end of 2011 to publish a monthly list of the reviewed mergers, and the Canadian Bar Association maintained that the Competition Bureau is not entitled to do so, and in addition to that it is also violating the law.¹²⁵²

It is undoubtedly true that announcing information about the transaction in certain stages might harm the merging parties, or put them under pressures to conclude the transaction with certain commitments, or led them to put it to an end, and that is certainly a drawback of the merger control system, especially in case of blocking the transaction while the parties did not engaged in any actual anticompetitive behavior. Ironically, it could be claimed that by revealing information about the transaction and the parties thereof, whether in social media or in a monthly report, or by any means that could reach the competitors of the merging parties might harm the competition in the market, and could be considered as anticompetitive behavior done by the antitrust authorities.

i) Remedies

As it was previously mentioned that in most of the cases the authorities are using the remedies option as a precondition to clear the transaction, and in the EU the EC has the power to enter directly into such agreements. Meanwhile, the case in the US is not the same, because it is more judiciary-oriented system, and that depends mainly on how powerful the competent antitrust agency is itself, for instance according to the Federal Trade Commission Act,¹²⁵³ it is

¹²⁵² John Mackie, Canada's Competition Bureau Provides a Peek at Merger Reviews (Thomson Reuters 2012).

¹²⁵³ The Federal Trade Commission Act of 1914, 15 U.S.C §13 (b)

much easier for the FTC to meet the requirement for obtaining a preliminary injunction against merger transactions than for the DOJ.¹²⁵⁴ Accordingly, it could be argued that the FTC is using that open door to the court to put the merging parties under pressure to accept certain remedies or even gain a more powerful position in negotiating the remedies.

It was also previously mentioned that there are two types of remedies, the behavioral remedies and the structural remedies. In that context, it was reported that when deciding whether to impose structural or behavioral remedies, the antitrust authorities tend to impose structural remedies, and it was rightly asserted that the choice is almost based on the fact that behavioral remedies are not as easily monitored by the authorities.¹²⁵⁵ It is noteworthy here that it was claimed that the structural remedies are generally preferred in cases that there is strong evidence that indicates the problem is due to the structure rather than the behavior of the players in the market.¹²⁵⁶

Regarding the behavioral remedies, it could be maintained that the type of remedies are in fact a mere commitment to abide by the law and not to violate the antitrust rules, as the authorities see or interpret it, in the future. Accordingly, we can come to a conclusion that the premerger control itself could be used as a more easier tool to control the future behavior of the corporations in the market than monitoring the behaviors of the corporations in the market on a daily and continuous basis. In other words, the whole economy may pay for the cost of the merger control process, in addition to the costs of type I and type II errors, in order to save the efforts or even just the laziness of the antitrust authorities.

To be more precise, the behavioral remedies are undoubtedly a drawback of the premerger control systems, whereas it might have negative effects on the performance of the merging parties or on the market in general, while it did not bring any additional benefits to be added to the enforcement of the antitrust laws in general. In addition to that, the authorities do not opt for imposing such a category of remedies unless it seems that the structural remedies are

¹²⁵⁴ For more details about the standards that are adopted by the US courts that grant the FTC a preliminary injunction concerning the merger transactions see D. Daniel Sokol, *Antitrust, Institutions, and Merger Control*, 17 *GEORGE MASON LAW REVIEW* 1055, at 1076-1077 (2010).

¹²⁵⁵ Fisher, *STANFORD JOURNAL OF LAW, BUSINESS, AND FINANCE*, *supra* note 1020, at 334 (2009); 2008/C 267/01 *Commission Notice on Remedies Acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004*, 51 *OFFICIAL JOURNAL EUROPEAN UNION INFORMATION AND NOTICES C 1*, at 16 (2008).

¹²⁵⁶ Donald F. Turner, *The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 *HARVARD LAW REVIEW* 655, at 671 (1962).

not acceptable by the parties and the transaction is not considered an actual threat to the competition in the market.

In the same context, in some cases the authorities prefer the behavioral remedy if it is beneficial for the performance of the national corporations. In an attempt to revamp the behavioral remedies, some prominent scholars suggested that the merging parties might enter into an “incentive contracts” with the authorities, under that agreement that the price increase or production decrease should be linked to mutual penalties and rewards.¹²⁵⁷ That suggestion appears to be valid on its face, but undoubtedly it does not add anything new to the idea of the behavioral remedies other than paying incentive rewards to the merging parties to keep their obligation to abide by the antitrust laws, or the “incentive contracts” provisions in their proposal.

On the other the hand, the structural remedies are also considered as a merger control systems drawback, because it turned out to be ineffective from the practical point of view. That claim is mainly based on the findings of a study that was conducted by the FTC in 1995 to evaluate the structural remedies, whereas according to the findings; (1) the merging parties tend to look for a weak buyer who is acceptable to the authorities, and accordingly it would easy to compete with him in the future and even plan for his failure, and (2) most of the buyers are not well informed to make the purchase decision or even the future operational decisions to run the divested asset or unit.¹²⁵⁸

Accordingly, in a typical structural remedy the merging parties will either arrange to engage into future collusions with the buyer, which is certainly a behavior that will be ex-post challenged under the antitrust laws, or they might make use of the fact that the duration until closing the remedies agreement is virtually long, and thus focus on how to put impediments before ones success or even to make sure that one will fail by time. In both of those two assumptions the structural remedies is neither effective nor efficient, and in an effort to justify that failure the EC tried reluctantly to improve the criteria upon which it accepts the buyer.¹²⁵⁹

It undoubtedly true that the EC according to those improvements also hit another target with the same stone, which is selecting a European buyer to better serve the political goal of the

¹²⁵⁷ Gregory J. Werden, et al., *Incentive Contracts as Merger Remedies*, Paper No. 05-27. VANDERBILT LAW AND ECONOMICS RESEARCH PAPERS 1, at 2 (2005).

¹²⁵⁸ Federal Trade Commission, Staff of the Bureau of Competition, *A Study of the Commission’s Divestiture Process*, August 6, 1999, P.8 available at the official website of the FTC at http://www.ftc.gov/sites/default/files/documents/reports/study-commissions-divestiture-process/divestiture_0.pdf last visited on October 1, 2014

¹²⁵⁹ Fisher, *STANFORD JOURNAL OF LAW, BUSINESS, AND FINANCE*, *supra* note 1020, at 349 (2009).

integrated community, for example the merger transaction between a European and US corporation, namely EMI¹²⁶⁰ and Universal.¹²⁶¹ The transaction was approved by the Canadian, Japanese, New Zealand, and US authorities, but the EC required a long list of structural remedies which was mainly the divestiture of the EMI entities in ten EU Member States and most of the music labels owned by EMI,¹²⁶² while they claimed that the transaction affects the EU market in general in addition to the markets in twenty six EU Member States.¹²⁶³

If the case was that the EC decision was only concerned about the expected anticompetitive behavior from the merger structure, it would be expected to negotiate the divestiture of all the business units or operations in the EU, and may be even those outside the EU, but in fact the EC based the decision apparently on the reason that the required divestitures are adequate to restore the competition in the markets to the premerger period.¹²⁶⁴ That justification seems to be valid on its face, but unfortunately that was not the case because the EC does not have the tools that give the accurate results, like for instance to divest the assets in eleven not in ten EU Member States, whereas economists rightly held that there is no “systematic econometric evidence on the question of whether ordered remedies achieve what they are supposed to achieve

... »¹²⁶⁵

In the US the case was almost the same, whereas the FTC tried to cover its face by issuing statements on negotiating merger remedies in April 2003 and in January 2012, in both of the two statements the FTC tried to mention clearly its policy and best practices in negotiating merger remedies, but it was clear that they were trying to appear more efficient by requiring an acceptable buyer who is “competitively and financially viable,” and that to be decided by the FTC.¹²⁶⁶ In that context, it was reported that since 2007 all the merger transactions in the

¹²⁶⁰ EMI was a British music publishing corporation, for more details about the EMI visit its official website at <http://www.emimusicpub.com/about/index.php> last visited on May 31, 2014.

¹²⁶¹ Universal Music Group is a US music publishing corporation, for more details about Universal Music Group and its history visit its official website at <http://www.universalmusic.com/company/history> last visited on May 31, 2014.

¹²⁶² Commission clears proposed merger between Universal and EMI Music subject to conditions-frequently asked questions European Commission - MEMO/12/696 21/09/2012.

¹²⁶³ Joaquín Almunia, Universal Music Group/EMI Music at 3 (2012).

¹²⁶⁴ Commission clears proposed merger between Universal and EMI Music subject to conditions-frequently asked questions European Commission - MEMO/12/696 21/09/2012.

¹²⁶⁵ GHOSAL & STENNEK, *The Political Economy of Antitrust*, *supra* note 710, at 304. 2007.

¹²⁶⁶ Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies, January 2012, P.10, available at the official website of the FTC at <http://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf> last visited on October 1, 2014.

pharmaceutical industry that were cleared under remedies, the FTC required that the divestiture should be for a certain buyer of its choice.¹²⁶⁷

However, those statements of the best practices and the claims therein will not resolve the failure of the structural remedies because the cautiousness in the acceptance of the buyer will not negate the said assumptions of future collusions or the planned failure, and the fact that the parties might sell the asset or the business units in question apart from the remedies negotiations. Furthermore, the structural remedies did not lead to anticompetitive behaviors in case of the expected collusions, in some other cases it actually lead to the loss of the expected gains from the whole merger transaction and accordingly losses to the total surplus in the economy.

Finally, it should be mentioned that both the structural and behavioral remedies are neither effective nor efficient because both of them are missing three of the four elements of a good remedy, which are; (1) efficiently maintaining the same level of competition prior to the merger transaction, (2) minimizing the loss of the expected gains from the merger transaction, and (3) efficient reallocation of assets.¹²⁶⁸ Meanwhile the only element that might be successfully ensured was the fourth element, which is minimizing the cost of the merger control enforcement.

j) Time consuming

First, it should be noted that the discussion here will be limited to the time consuming as a drawback of the premerger control regimes, and not with regard to the post-merger control regimes. As it was previously mentioned during the discussion of the merger control systems, the waiting time factor for the final decision of the competent authorities in the premerger control process is almost determined in all the systems by the antitrust laws and regulations.¹²⁶⁹

From a practical point of view, in most of the cases the merging parties will not obtain a final decision during the time that is stipulated by the antitrust laws and regulations, and literally in those cases the merging parties are not required to wait for more time in order to consummate the transaction and they can proceed to the next step. However, consummating the merger transaction before obtaining a final approval, might led to future enjoining of the consummated

¹²⁶⁷ A. Lipstein & Berg, *Merger Remedies in the US and Europe*, *supra* note 1013, at 13 (2009).

¹²⁶⁸ Davies & Lyons, *supra* note 1013, at 9-10 (2007); and for more details and comprehensive study about the literature on merger remedies *see Id.* at 9-37.

¹²⁶⁹ *See supra* p.187.

merger and that might be at a significant cost for the parties, and in most of the cases it would cost them more than the cost of the additional waiting time.

In addition to the timing stipulated by the antitrust laws, some authorities announced time standards according to it the merging parties should expect to get a final decision, according to those standards the time of the process fluctuates according to the complexity of the merger transaction. For instance the Canadian Competition Bureau issued the Fees and Services Standards in 2010, and updates it from time to time, according to which the filing process might be finished as short as fourteen calendar days in the cases of the “non-complex” transactions, and it might be finished in forty five calendar days in the cases of the “complex” transactions, in addition to the standards of period for filing, there are standards also for giving a written opinion on the transaction.¹²⁷⁰

Again those standards might be extended and the merging parties should rationally wait to obtain a final approval, and the case will be highly problematic if the concerned authority was very passive and did not respond to the premerger notification in a proper timing that fits the merging parties, or even not respond at all. In Egypt, as it was previously mentioned, the parties might resort to the courts of the State Council and challenge the passive decision of the authorities, and the court in those types of cases might rule for the merging parties and impose an obligation on the authorities to proceed in the process, and it might also grant them damages.

It is noteworthy that the real average duration for the review process, according to the PwC Survey, ranges from two months in some cases to seventeen months in other cases.¹²⁷¹ Moreover, there was an interesting finding in the PwC Survey, which was that neither correlation nor causality was identified between the number of jurisdictions to which the merger transaction was under review and the total duration of the merger control process,¹²⁷² but that does not also mean that merger control process will not take a longer time in a cross-border transaction.

The problem also is more complicated in the cross-border mergers because in almost all of the cases the approval of more than one authority is required, some might clear it, and others might conditionally clear it, and even others clear conditionally but for different condition, and it

¹²⁷⁰ Competition Bureau Fees and Service Standards Handbook for Mergers and Merger-Related Matters at 11, available at the official website of the Canadian Competition Bureau [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-fees-service-handbook-merger-2013-e.pdf/\\$file/cb-fees-service-handbook-merger-2013-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-fees-service-handbook-merger-2013-e.pdf/$file/cb-fees-service-handbook-merger-2013-e.pdf) last visited October 1, 2014.

¹²⁷¹ PWC, et al., A tax on mergers? Surveying the Time and Costs to Business of Multi-jurisdictional Merger Reviews, *supra* note 1058, at 19. 2003.

¹²⁷² *Id.* at 23.

might be totally blocked by others. The problem is not only because of the contradicting decisions, but also because those different decisions probably will not be announced at the same time, but in fact during a period of time, during which there will be uncertainties and that undoubtedly that will led to losses in most of the cases.¹²⁷³

Despite the fact that the merger control authorities have different review timing, and the fact that the laws also determine different timing, an interesting empirical study reported that the review of cross-border merger transactions takes almost the same time in all the jurisdictions, but what might led to reaching a final decision in different times with some other external factors that are not related to the review process itself.¹²⁷⁴ For instance, there might be different time frames for the merger process itself in the concerned jurisdictions, for example obtaining a foreign investment approval or national security authorization might take some time and delay the merger control decision.

In all events the time is vital and very important, and it does not matter whether the transaction will be cleared or not, undoubtedly the time creates uncertainties, and that might significantly affect the daily operations of the merging parties.¹²⁷⁵ For instance, in the event that the merger was cleared but after a time that exceeded the expected timing, the flow of the overall progress of the merger transaction will be delayed, and that will lead to uncertainties, and it would be a good opportunity for the competitor to attract some customers or even the employees of the merging parties.¹²⁷⁶

In addition to that, the merger control process also consumes the time of the employees of the merging parties, and according to the PwC Survey, which tried to identify the time spent by the employees who are engaged in the merger control process, the time consumed ranged from three hours per week, to seventy five hours per week, during the whole merger control process duration.¹²⁷⁷ Finally, the time of the employees that might be consumed during the merger control process, starts as early as before the notification, by helping the professional advisors to

¹²⁷³ David Harrison & Rachel Cuff, *Developments in Merger Control in the EU and Worldwide* at 53 (Financier Worldwide Booz & Company ed. 2008).

¹²⁷⁴ Moschier & Campa, INTERNATIONAL CENTER FOR FINANCIAL RESEARCH - IESE BUSINESS SCHOOL, *supra* note 777, at 33 (2008).

¹²⁷⁵ Sokol, GEORGE MASON LAW REVIEW, *supra* note 1254, at 1078 (2010).

¹²⁷⁶ QC & Campbell, Multi-jurisdictional Merger Review: Is it Time for a Common Form Filing Teaty?, *supra* note 1072, at 11-12. 1999.

¹²⁷⁷ PWC, et al., A tax on mergers? Surveying the Time and Costs to Business of Multi-jurisdictional Merger Reviews, *supra* note 1058, at 27. 2003.

identify the jurisdictions that should be notified, and then in preparing and filing documents, the never ending meetings in order to follow-up and sometimes negotiate with the authorities for remedies, and that end by the last step in the merger control process, which might be before the courts.

IV. Conclusion

There are many conclusions that could be mentioned here as an outcome of the previous discussions, the first conclusion is that there are many incentives that drives the corporations to enter into merger transaction, and some of those incentives are myths and even others are personal and those might be considered the reasons behind the failure of some of the transaction, whereas measuring the success or failure of the transaction depends on what were the incentives of the transaction and that varies in each case.

The second conclusion is that most of the empirical findings are not accurate enough to be generalized as a rule for all cases, and that the mergers might be efficient and adds to the total welfare if it was fixed and guided to that direction, while the success factors were improved and the failure factors were eliminated. The third conclusion is that there are multiple success factors and failure factors of the mergers, and that those factors should not be wrongfully weighted, because what might be categorized as having a small effect could lead to the total failure of the transaction and *vice versa*, and that could be explained under the Pareto principle of 80/20.

The fourth conclusion was a very surprising one, which is the fact that the world is not that flat, because the old shibboleths and all the concerns and fears from the globalization monster appeared to be myths, and the fact is that the globalization process was not measured enough to know how far the world is actually globalized, and how humanity could benefit from such a process in order to improve the quality of life and the general welfare on the planet, and undoubtedly the more the FDI is encouraged the more the benefit will be maximized, and that could be achieved by means of facilitating the cross-border mergers.

The fifth conclusion is that in addition to the complexity of the merger transaction dynamic that was addressed in the first part, merger transactions might face unprecedented amount of impediments, and thus any corporation planning to enter into any kind of transaction should be ready and equipped with all the tools and resources that are required not only to

successfully consummate the transaction but also that will lead to realize the expected gains in the most efficient way.

The sixth conclusion is that not only the corporation should be interested in success of the mergers, but also all the members of the society should be interested in reaping the fruits of the general welfare, and thus they should be engaged in initiatives that serve that end. For instance law schools should be ready to equip their graduates with the modern comparative legal mindset to take on their role in cross-border transactions. Meanwhile, that does not mean that the society should sacrifice the employees, as almost the only drawback of successful mergers, but that the state should also be engaged, and its role towards the merger should be also reinvented to protect that sublime goal.

The seventh conclusion is that the premerger control system is an actual impediment that faces the pure domestic mergers as well as the cross-border mergers, but the case is far worse in the latter, and that the system is full of inherent flaws and drawbacks that have developed throughout the history, and those flaws and drawbacks of the system will at least offset some of the expected gains from the transaction if not all, and that is definitely at the cost of society or the general welfare.

The eighth conclusion was not surprisingly in fact as much as it is important to be pointed out, the merger control authorities are mainly concerned with consumers protection, and even they are not taking into consideration accurate review standards that could lead to serving the consumer welfare or even the general welfare. For instance, the behavioral antitrust is a promising field of studies that might help the regulators to better understand the economy and maximize the general welfare.

The ninth conclusion is that each jurisdiction is only concerned with its own internal market, as far as the issue is related to the mergers, and none are concerned with the global market and to the contrary the countries are encouraging the exporting cartels and anticompetitive behavior on the global scale as long as it will influence the internal domestic markets. In addition to that, the EU is very active and putting forth effort to shape and fertilize the domestic merger control systems across the globe according to its own system, and both of the EU and US are using their power to extend or impose their own preferences on merger transactions in different jurisdictions.

Chapter Three: Proposals for Reform

The previous discussions addressed the origin of the corporation and its development throughout the history, and the relation between it and the state, and it also showed that cross-border mergers might be one of the tools that could help all the society members in reaping the fruits of the economic growth. In addition to that, it was revealed that there are impediments that face the merger transactions generally and the cross-border mergers specifically, and one of those impediments is the merger control generally, and mainly the premerger control scheme. In the coming discussion the main issue that will be addressed is the possibility of adopting reforming proposals, in order to mitigate if not to overcome all the previously discussed drawbacks of the merger control system.

It should be noted that most of the literature that discussed or even introduced proposals for reformation, in the merger control field, were generally limited to a great extent to the reformation of the antitrust rules and not merger control as an issue of its own. However few scholars have tried to introduce proposals for the reformation of the merger control system, and those proposals were mainly devoted to overcome the impediments in the field of the cross-

border mergers. Accordingly, the coming discussion will address both kinds of those proposals, from a cross-border mergers perspective, whenever that is possible. The proposals that will be addressed could be classified under many criteria; for instance, it could be classified according to the number of the expected participants to the adoption of the proposal to bilateral, regional, and multilateral solutions.

However, in that discussion the solutions will be classified and addressed according to its profoundness into two main categories, in the first category there will be procedural proposals, as modest solutions, which are namely: (1) jurisdictional rules, (2) common online filling system, and (3) mutual recognition. While in the second category there will be other proposals that are concerned by both the procedural and substantive aspects of the current systems, as radical proposals, which are namely: (1) bilateral cooperation agreements, (2) international merger control rules, (3) supranational premerger control institution, and finally (4) merger deregulation. Each one of those procedural proposals and radical proposals will be addressed in turn.

Each proposal will be tackled from two aspects; the first aspect is the description of the proposal itself and any previous attempts to introduce it, if any. The second aspect to be tackled in each proposal is the assessment of the proposal, in order to understand to what extent those proposals would actually contribute to the reformation of the current merger control systems. Accordingly, a preliminary issue should be addressed before delving in this discussion, which is developing the assessment criteria that will be used in the evaluation of each one of those proposals.

Firstly, the assessment criteria will be derived from the problem itself i.e. the drawbacks of the merger control system itself, accordingly the factors of the assessment will mainly be based on the previously identified drawbacks, and that means that each proposal will be assessed to identify its impact in solving each of those drawback. For instance the effectiveness of the proposal will be measured by identifying the effect of the proposal on each of the drawbacks, and the effect could be a negative effect; which means that the proposal will not help in overcoming the drawback or it will make it worse, or a positive effect; which means that the proposal will help to overcome the drawback or just improve the system.

Secondly, each of the proposals will be assessed not only according to its effectiveness, but it will be also assessed according to the following five standards: (1) adequacy: in case that the proposal has positive effect, is it expected to totally resolve the issue, (2) time: the expected

effect will be realized instantly, (3) efficiency: does it require and additional resources more than the current situation to realize the expected effect, (4) fairness: are the benefits of the expected effect serve the interest of all the parties equally, like for instance in both the developing and the developed countries, and finally (5) flexibility: is the proposal flexible to overcome the drawback and could it be easily changed or amended in the future if required.

To sum it up, the assessment of each of the proposals will be according to six standards; those five standards and in addition to that the first primary standard i.e. its effectiveness, and that will be assessed with regard to each of the ten drawbacks that was addressed in the previous part, and that means that each proposal will be tested under sixty different questions. It should be noted also here that regarding the answers for those sixty questions it would be more accurate and easier if based on the “Yes” or “No” methodology.

To be more precise, in order to assess the proposal the following method will be applied, simply “Yes” will be the answer to the question in case it has a positive effect, and that will equal the score of one, while “No” will be the answer to the question in case of the negative effect, and that will score zero, and at the end of each assessment the total of all the results of the sixty questions will be summed up, and accordingly it would be easy to the rank the proposals according to their scores, in order to identify which proposal will most improve the current merger control systems, and consequently will facilitate the cross-border mergers.

I. Bilateral Cooperation Agreements

1. Proposal Description

The bilateral cooperation agreements is one of the most cited proposals as a solution to overcome the problem of the multijurisdictional merger control systems that faces the cross-border mergers, and it was simply stated as a bilateral agreement “to promote cooperation and coordination and lessen the possibility or impact of differences between the [p]arties in the application of their [merger control systems].”¹²⁷⁸ It should be noted that this kind of bilateral agreements could also be devoted to the cooperation in the procedural matters, as well as the

¹²⁷⁸ Article I (1) of the Agreement between the Government of the United States and the Commission of the European Communities Regarding the Application of Their Competition Laws, 23 September 1991, O.J. EUR. COMM. L 95/47; 30 I.L.M. 1487 (1991).

provisions that enhance the cooperation in the merger control review process itself, to be more precise to cooperate with regard the technical issues of the process.

In that regard, it was also claimed that the bilateral cooperation agreements is just a soft law instrument, and it is mainly used as one of the best alternatives for the harmonization mechanisms of the different laws on the international level, especially in the field of the enforcement of the antitrust laws.¹²⁷⁹ Moreover, it was maintained that the EU heavily used that form of agreements to harmonize the antitrust laws around the globe according to its standards,¹²⁸⁰ as it will be addressed shortly. On the other hand, it was correctly asserted that those agreements if limited to the procedural issues could be generally considered as the well-known Mutual Legal Assistance Agreements, and nothing more than that.¹²⁸¹

The bilateral cooperation agreements should encompass and address the merger control issue from more than one dimension, first it should address the notification mechanism that will be used between the authorities, second it should address the comity issues, third it should also address the exchange of information between the authorities, fourth it should set a mechanism to cooperate in the investigating the merger transaction, fifth it should address the issues of the mutual recognition for some of the procedural decisions and its enforcement like for example the request of certain documents from the parties, etc., all these issues are among other general issues such as the periodical meetings between the officials and the predominant national laws of the parties.

One of the most important issues in that type of agreement is the issue of comity, in that regard two kinds of comity should identified; the negative comity means that whenever a party found that investigating a merger transaction is in the interest of the other party the former will not investigate it and leave the transaction to be investigated by the later, and the positive comity means that whenever a party expect that a merger transaction within the other party's jurisdiction but found it will affect the former jurisdiction, that former might request from the later party to investigate the transaction.¹²⁸²

¹²⁷⁹ PAPAPOULOS, *The International Dimension of EU Competition Law and Policy*, *supra* note 181, at 52, 58-59. 2010.

¹²⁸⁰ Foster, *EMORY INTERNATIONAL LAW REVIEW*, *supra* note 1249, at 515 (2001).

¹²⁸¹ *Id.* at 489.

¹²⁸² As an example of the positive comity see Article V of the Agreement between the Government of the United States and the Commission of the European Communities Regarding the Application of Their Competition Laws, 23 September 1991, O.J. EUR. COMM. L 95/47; 30 I.L.M. 1487 (1991).

In the same context, it should be noted that due to the weight of the issue the parties might enter into a special agreement to govern and set rules for the comity issues, for example the EU and the US entered into an agreement in 1998, to that effect, and in order to enhance the cooperation between the two parties generally. According to that agreement a broad meaning of the positive comity was added to the bilateral cooperation agreement and for example it became permissible to request the imposition of remedies to restore the expected results from the transaction, even in the case that the remedies were not in the same line with the rules under the national laws of the requesting party.¹²⁸³ It was expected that the positive comity provisions in the bilateral cooperation agreements or the positive comity agreements will put the extraterritorial reach to an end,¹²⁸⁴ while it was previously shown that that was not true.

Another crucial issue is the exchange of information, as it was previously mentioned during the discussion of the privacy and data problems as a drawback of the merger control system.¹²⁸⁵ In the context of the bilateral cooperation agreement, it should be noted that the issue was addressed in most of the cooperation agreements, for instance in the agreement between the EU and the US, but that literally is more than imposing an obligation on the authorities to provide another authority the information whenever that is permissible under the former authority's national laws, and that disclosure should not even contradict with the interest of the disclosing authority, as it was previously addressed.

One more dimension of the bilateral cooperation agreement is the technical assistance, which is simply exchanging the technical experiences between the parties to support each other from time to time. However, that dimension could be achieved without that kind of agreement, for instance it was reported that the EC is a very active party in arranging and even sponsoring projects to enhance the expertise of the government officials in other jurisdictions even if there are no cooperation agreements.¹²⁸⁶ Meanwhile, it could be claimed that organizing and financing that kind of projects is not for free, and the EC is trying to fertilize the foreign jurisdictions with its own enforcement rules or criteria through those projects.

As an example in that regard, after the collapse of the Soviet Union, the EU offered technical and financial assistance to the countries of Central and Eastern Europe in the field of

¹²⁸³ Montini, Globalization and International Antitrust Cooperation, *supra* note 1160, at 8-9. 1999.

¹²⁸⁴ Brendan Sweeney, *Globalisation of Competition Law and Policy: Some Aspects of the Interface Between Trade and Competition*, 5 MELBOURNE JOURNAL OF INTERNATIONAL LAW 375, at 397 (2004).

¹²⁸⁵ See *supra* p.250.

¹²⁸⁶ DABBAH, The Internationalisation of Antitrust Policy, *supra* note 9, at 131-132. 2003.

antitrust laws, under the PHARE program, and that undoubtedly led to the fact that those countries adopted antitrust laws similar to those adopted on the EU level.¹²⁸⁷ That attempt is logically accepted on its face, because the assistance that was offered by the EU was for the purpose of supporting those countries to join the EU as members, but that does not exclude the fact that they could otherwise have the chance to join the EU without even adopting an antitrust laws like for instance both UK and Luxembourg are EU members but neither of them have adopted a premerger control systems.

It was argued that the procedural bilateral cooperation agreement solution could be developed by time to form a more comprehensive solution, whereas it simply starts as a bilateral agreement between the competent merger and the control authorities to first improve the cooperation between them, but then that will inevitably led to plurilateral agreements i.e. many agreements each of them is concluded between a limited number of parties, and those agreements will include to some extent similar set of rules, and if then by time a minimum standards or set of merger control rules were developed and incorporated in those agreements, in addition to a dispute scheme, it will be considered as a complete solution to the problem.¹²⁸⁸

The early attempts of using the bilateral cooperation agreements as a solution could be traced to 1959, whereas the US investigated a “patent pool” in the Canadian radio and television industry that was structured to get rid of the US corporations in that industry from the Canadian markets, and the Canadian government reacted vigorously toward the US investigation, and that issue led to settle the problem by strengthening the cooperation between the two jurisdictions not in the form of actual bilateral agreement but under what was known at that time as the Fulton-Rodgers Understanding of 1959.¹²⁸⁹

It should be noted that the solution is currently adopted in many jurisdictions, and there are a huge number of bilateral cooperation agreements, for example as it was previously mentioned that there are more than ninety cooperation agreements between the EU and other countries that at least include a provision in that regard if not devoted to cooperation in the

¹²⁸⁷ Foster, EMORY INTERNATIONAL LAW REVIEW, *supra* note 1249, at 475 (2001).

¹²⁸⁸ Fox, THE AMERICAN JOURNAL OF INTERNATIONAL LAW, *supra* note 1165, at 13 (1997).

¹²⁸⁹ Improving Bilateral Antitrust Cooperation: Remarks by Charles S. Stark Chief, Foreign Commerce Section Antitrust Division U.S. Department of Justice, At a Conference on Competition Policy in the Global Trading System: Perspectives from Japan, the United States, and the European Union, June 23, 2000, at 2, a copy is available at the official website of the DOJ at <http://www.justice.gov/atr/public/speeches/5075.pdf> last visited October 1, 2014; PAPADOPOULOS, The International Dimension of EU Competition Law and Policy, *supra* note 181, at 52-53. 2010.

merger control field. Meanwhile, there have been modest attempts on the other side of the Atlantic from the US in that regard, whereas it has entered into agreements with only thirteen jurisdictions, starting with Australia in June 1982 and the EU in September 1991, and finally with Colombia in September 2014.¹²⁹⁰

In that concern it could be claimed that the sedentary policy of the US in entering into such bilateral cooperation agreement is attributed to the fact that the US is powerful enough to impose the enforcement of its decision or in other words use its extraterritorial reach. Moreover, that explanation is in the same line with the fact that the US limited its bilateral cooperation agreements to some powerful jurisdictions like Canada, the EU, Germany, and Russia, and some other close trade partners such as Japan and China from Asia, and Brazil, Chile, and Colombia from South America.

The case was almost the same in the EU i.e. they were so selective in the jurisdictions that they enter into cooperation agreement with, and that was clearly announced by Jean-Francois Pons, who was the Deputy Director General for the Competition in the EC, clearly said that: “[w]hile we have considered going further and concluding further bilateral agreements, we are not inclined to do so where it would be a waste of scarce resources, particularly for countries with whom we would only co-operate concerning one or two cases a year.”¹²⁹¹ However, that ideology was changed and to the contrary the EU then became very active in order to serve its goal of spreading the EU merger control ideas.

Furthermore, no other jurisdictions are as active in that regard like the EU or even the US, for instance with regard to the MENA region, no cooperation agreements were concluded between any of its jurisdictions, and that was mainly attributed to the freshness of the adoption of antitrust systems.¹²⁹² On the other hand that claim is not accurate, because for example Egypt adopted its antitrust system even before the EU, but the fact is that countries in the MENA region are not enforcing their laws in a way that causes problems especially in the merger control field, and it was previously mentioned that it could be deemed as an antitrust or merger control heavens.

¹²⁹⁰ For the full list of the cooperation agreements between the US and other countries *see* the official website of the DOJ at <http://www.justice.gov/atr/public/international/int-arrangements.html> last visited October 1, 2014.

¹²⁹¹ Jean-Francois Pons, *International Co-operation in Competition Matters - Where Are We Four Years After the Van Miert Report?* Speech before the European Commission, July 9, 1999, a copy is available at the EC official website at http://ec.europa.eu/competition/speeches/text/sp1999_015_en.html last visited October 1, 2014.

¹²⁹² DABBAH, *Competition Law and Policy in the Middle East*, *supra* note 353, at 316. 2007.

Finally, it should be noted here that the implementation of that kind of agreements led to some practical conflicts between the parties, especially in investigating merger transactions, and the inevitable result of that was the development of another type of instrument to settle those conflicts, or to be more precise to set out the best practices in cooperation between the parties of the cooperation agreement. For instance, best practices rules in investigating merger transactions was issued concerning the cooperation agreement between the EU and the US in 2002,¹²⁹³ and more recently a similar one was issued concerning the cooperation agreement between Canada and the US in March 2014.¹²⁹⁴

2. Proposal Assessment

Based on the addressed description and on the previous attempts to adopt the bilateral cooperation agreement as a proposal to improve the current multijurisdictional merger control systems, in order to overcome the drawbacks of that system, and all the improvement that could be added to such proposal in order to enhance it, that proposal will be assessed in the coming discussion, and then the discussion will be followed by a table that displays the answers to all the assessment question, in just “yes” or “no,” as the most simple approach and then the table will be followed by a chart to show the final assessment result and the percentages of the expected positive effect and negative effect of that proposal.

First concerns the cost issue, the bilateral cooperation agreement is effective, whereas it is expected to decrease the cost of running the antitrust authorities especially in the case of sharing the gathered information, and reviewing the transaction in one of the two jurisdictions. In the case of positive comity, however it is not considered as adequate because it will not affect all the other factors of the merger control costs. Moreover, the cost reduction will be recognized instantly as soon the parties entered into the bilateral agreement. Furthermore, that proposal will be efficient in reducing the cost, because it will not consume additional resources to have the cost reduction effect.

¹²⁹³ US-EU Merger Working Group, Best Practices on Cooperation in Merger Investigations, 2002, a copy is available on the official website of the EC at http://ec.europa.eu/competition/international/bilateral/eu_us.pdf last visited on October 1, 2014.

¹²⁹⁴ Canada-U.S. Merger Working Group, Best Practices on Cooperation in Merger Investigations, March 25, 2014, a copy is available on the official website of the DOJ at http://www.justice.gov/atr/public/press_releases/2014/304654.pdf last visited on October 1st, 2014.

Meanwhile, it is expected that not all the parties will benefit from that said cost reduction, for instance some countries might suffer from the costs of its obligations under the agreement, starting with the burden of adopting a merger control system or amending its own system to cope with the agreement, and even reviewing the transaction in the case of positive comity while that jurisdiction might not have been interested in reviewing such transaction. Moreover, that proposal is not flexible i.e. it will not be easily changed in order to be improved in the future because the renegotiating and amending of a bilateral agreement needs time and the case will be worse in the event of changing many bilateral agreements.

Second is concerning the different enforcement issue, the proposal will not have any effect on the issue of the different enforcement that has resulted from the different goals of the different jurisdiction, because each party of the agreement might end up with different results, as it was previously shown in the cases of the contradicting results or decisions rendered by the EC and the US agencies despite the fact that there were cooperation agreement between them, and an agreed best practices in cooperation in the merger control process, and a detailed agreement devoted to govern the positive comity requests.

Third is concerning the ex-ante review issue, that proposal also will not have any effect on the drawback of reviewing the merger transaction before it is consummated, and the merger control will remain an additional layer to the general antitrust investigations of the anticompetitive behavior of the corporations not engaged in a merger transaction, and in addition to that the transaction will also remain uncovered and might be enjoined at anytime even after “scrambled.” Fourth is concerning the exclusion of the behavioral antitrust findings, that proposal will not have any effect in that regard, and the merger control systems will continue exclude those valuable findings.

Fifth is concerning the extraterritorial reach issue, the proposal might be effective, whereas the agreement generally and specially the positive comity provisions that could be incorporated therein might help to lessen the extraterritorial reach of the parties, but that it is not adequate as it will not put the problem to an end because not all the jurisdiction will be bound by the same set of rules and they might circumvent the comity rules in order to serve their own interests by using the means of power and imperialism. Accordingly that proposal will not be fair in granting its benefits to all the parties because the more powerful jurisdiction will gain over the less powerful jurisdiction. Moreover, that effect of the proposal could be realized instantly, but it

is not flexible i.e. it will not be easily changed in order to be improved in the future because the renegotiating and amending of a bilateral agreement needs some time and the case will be worse in the situation of changing many bilateral agreements.

Sixth is concerning the foundational errors issue, nothing in that proposal will lead to affect those errors, because the merger control rules will remain based on the antitrust faulty ideologies. Seventh is concerning the political influence issue, the proposal might be effective and lessen the political friction of the extraterritorial reach, but it will not be adequate because it will not have any effect on the political influence towards the merger control systems, whereas it will remain the same after entering into a bilateral cooperation agreement.

Eighth is concerning the privacy and data issue, the proposal will be effective because for instances gathering the data might be easier and also exchanging the information between the authorities might be permissible, but the proposal will not be adequate in overcoming the whole issue because the fact that the exchanging of the information is permissible does not negate the fact that the practice might be harmful and lead to losses of the parties. On the other hand all the parties will realize the expected effects from the proposal instantly, but it will need some additional resources such as enacting national domestic laws in order to realize those effects.

Ninth is concerning the remedies issue, the proposal will not change or negate the fact that both the behavioral and structural remedies are missing the main preconditions that are required for the good effective and efficient remedy. Tenth is concerning the time consuming issue, that proposal might be effective and reduce the time that is required to finish the merger control process, but it will not be considered as adequate to overcome the issue because its effect on reducing the time is minimal, meanwhile the time reduction might be recognized instantly, and it will be fair because all the parties will benefit from the time reduction, but it is not flexible because it will not be easily changed in order to be improved in the future because renegotiating and amending a bilateral agreement needs some time and the case will be worse in the case of changing many bilateral agreements.

Standard \ Issue	Effectiveness	Adequacy	Time	Efficiency	Fairness	Flexibility
Cost	Yes	No	Yes	Yes	No	No
Different enforcements	No	No	No	No	No	No
Ex-ante review	No	No	No	No	No	No
Behavioral antitrust	No	No	No	No	No	No
Extraterritorial reach	Yes	No	Yes	Yes	No	No
Foundational errors	No	No	No	No	No	No
Political influence	No	No	No	No	No	No
Privacy and data issues	Yes	No	Yes	No	Yes	No
Remedies	No	No	No	No	No	No
Time consuming	Yes	No	Yes	Yes	Yes	No

Table 2: Bilateral cooperation agreement – assessment

As general remarks on the proposal of the bilateral cooperation agreements, as it could be clearly identified from the previous table, that proposal has a positive impact on only four drawbacks, and even that impact was not adequate in any case, and the proposal was not fair in almost all the cases, which means that the most powerful jurisdictions will benefit the most from it while the other jurisdictions are expected to suffer from losses or costs, whereas the administration of the expected network of cooperation agreements might consume its resources, in addition to that, it is expected that those bilateral cooperation agreements might be drafted in a way to serve the developed or the most powerful countries over the other, as an inevitable result of the imperialism. Moreover, that proposal is not flexible because it will not be easy to change it, in order to be improved upon in the future.

Finally, and according to the result revealed in the previous table there are only thirteen instances during which the proposal of the bilateral cooperation agreement has a positive effect on the drawbacks of the current merger control systems, and there are forty seven instances during which the proposal has a negative effect on the drawbacks of the multijurisdictional merger control systems, which means that the proposal might improve the current situation by 21%, as shown in the following chart.

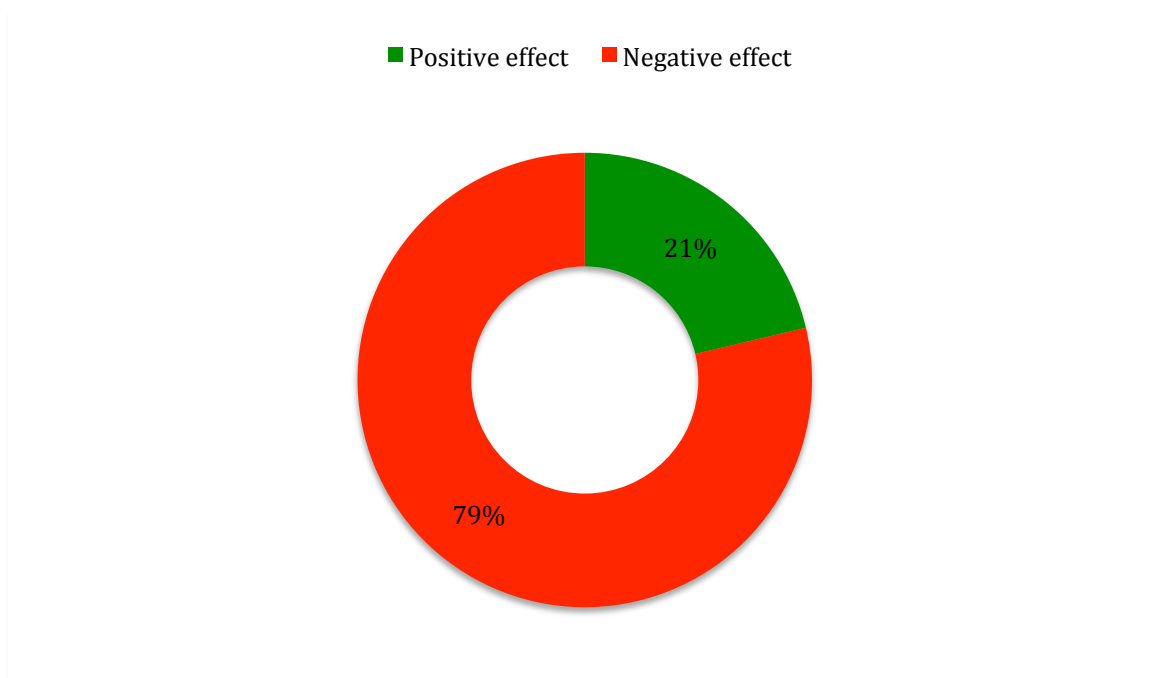


Figure 14: Bilateral cooperation agreement – assessment

II. International Merger Control Rules

1. Proposal Description

The proposal of the international merger control rules could be simply described as the adoption of a binding set of rules to govern the merger control process, and those rules are adopted on the international level, either under the patronage of an international institution or just as an international treaty. It should be noted here that the binding international set of rules were always proposed in the field of antitrust generally, but not with regard the merger control. That kind of proposal or approach to overcome the multijurisdictional contradicting systems is generally known as the harmonization or even the globalization of law.

Surprisingly, and despite the fact that almost all the countries around the globe agreed to attack the corporations in general and to control it, the same countries do not agree on a common set rules on how to attack the anticompetitive behavior of those corporation,¹²⁹⁵ as it was previously shown that each jurisdiction has its own different goals and different policies that

¹²⁹⁵ Karl M. Meessen, *Competition of Competition Laws*, 10 NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS 17, at 22 (1989).

serve these goals, different set of antitrust rules, different merger control regimes, and finally different enforcement and implementation of those rules and policies.

In that context it was claimed that in order to adopt such a harmonized set of international rules in the field of antitrust three preconditions should be satisfied,¹²⁹⁶ and those preconditions could be identified in the field of merger control by means of analogy as follows: (1) political consent on the rightfulness of the cross-border mergers and on the right of the authorities to control those mergers, (2) common answers to perplexing questions like for instance whether to opt for ex-ante or for an ex-post regime, what should be the threshold, and what technical standards should be used for the review, etc., and (3) the creation of an independent agency that decides on the cases whenever there are contradicting results in different jurisdictions.

In addition to those preconditions, a more important preliminary condition could be added here, which is political will. For instance it was reported that the US is always opposing any attempts to harmonize the antitrust laws on the international level, and that was attributed to the fact that it finds it advantageous to use its own political and economic power to impose its own rules rather than enter into such kind of international commitment.¹²⁹⁷ Moreover, some other countries are also find it better to be survive without international commitment, for instance Russia is one of those countries, and it was even reported that it withdrew from international treaties like for example its withdrawal from the Energy Charter Treaty in July 2009.¹²⁹⁸

In addition to that most of the developing countries are skeptical about any attempts to adopt a harmonized law, as they considered it as an attempt to control their national systems.¹²⁹⁹ Furthermore, it was argued that the harmonization might lessen the benefit of the learning experience that could otherwise be gained from the different jurisdictions.¹³⁰⁰ Meanwhile, and on the other hand, other countries are welcoming the harmonization attempts especially in the antitrust field, and they are even active in that regard, namely the EU.¹³⁰¹ As it was previously

¹²⁹⁶ Crane, CHICAGO JOURNAL OF INTERNATIONAL LAW, *supra* note 397, at 151-154 (2009).

¹²⁹⁷ Foster, EMORY INTERNATIONAL LAW REVIEW, *supra* note 1249, at 498 (2001).

¹²⁹⁸ RAFAEL LEAL-ARCAS, INTERNATIONAL TRADE AND INVESTMENT LAW: MULTILATERAL, REGIONAL, AND BILATERAL GOVERNANCE at 6 (Edward Elgar. 2011).

¹²⁹⁹ Sweeney, MELBOURNE JOURNAL OF INTERNATIONAL LAW, *supra* note 1284, at 385 (2004).

¹³⁰⁰ Henrik Horn & James Levinsohn, *Merger Policies and Trade Liberalisation*, 111 THE ECONOMIC JOURNAL 244, at 270 (2001).

¹³⁰¹ Foster, EMORY INTERNATIONAL LAW REVIEW, *supra* note 1249, at 471 (2001).

shown, the EU is entering into a huge number of bilateral cooperation agreements in order to set its own standards in that field and to become the most acceptable standards around the globe.

It was also purported that political consent should also accompanied with social consent, and even the rules should be widely discussed before adopted,¹³⁰² and the discussion should be flexible and open to suggestions from all the stakeholders. In the same context, it was reported that nine groups might help in adopting new laws or set of rules in general, and those groups are: (1) bureaucrats and civil servants, (2) corporations, (3) elected representatives and government officials, (4) policy experts, (5) political parties, (6) pressure groups, (7) professional consultancies, (8) think tanks, and (9) supranational and regional institutions.¹³⁰³ It would be obvious to claim that all those groups should be invited to participate in the discussions and the process of adopting the proposed set of rules.¹³⁰⁴

The proposed set of rules might cover only the merger control procedures or it might be expanded to encompass both the procedural and the substantive rules. In that context, it was claimed that limiting the rules to those dealing with the procedural issues are easier to be adopted on the international level, because it will reduce the costs and time of the review process and it will not be opposed under sovereignty claims,¹³⁰⁵ in addition to that it will not delve into the debate between the different goals. Meanwhile, by limiting the scope of the proposal to the procedural rules the proposal will not help in overcoming the issues of contradicting decisions as a main result of the different substantive rules i.e. review standards.

Accordingly, those set of rules should encompass both set of rules, but the substantive rules should be drafted as a “linking principles of constitutional generality, built on a strong base of roots-up convergence,”¹³⁰⁶ which means that those set of rules will deal with the more general principles and review standards in order to draw the framework that the national laws and the

¹³⁰² Kathryn Gordon, *Rules for the Global Economy: Synergies Between Voluntary and Binding Approaches*, No. 1999/3 OECD WORKING PAPERS ON INTERNATIONAL INVESTMENT, at 14 (2000).

¹³⁰³ David P. Dolowitz & David Marsh, *Learning from Abroad: The Role of Policy Transfer in Contemporary Policy-Making*, 13 GOVERNANCE 5, at 10-11 (2000).

¹³⁰⁴ BOAVENTURA DE SOUSA SANTOS, *THE RISE OF THE GLOBAL LEFT: THE WORLD SOCIAL FORUM AND BEYOND* at 183-184 (Zed Books. 2006).

¹³⁰⁵ Holbrook, *UCLA JOURNAL OF INTERNATIONAL LAW AND FOREIGN AFFAIRS*, *supra* note 1062, at 370-375 (2002); Ginsburg & Angstreich, *ANTITRUST LAW JOURNAL*, *supra* note 776, at 230-231 (2000).

¹³⁰⁶ Fox, *THE AMERICAN JOURNAL OF INTERNATIONAL LAW*, *supra* note 1165, at 13-15 (1997).

authorities decisions will abide, and thus the national laws will continue to be applied, but the enforcement will be within the supremacy of the constitution like set of rules.¹³⁰⁷

That approach is to a great extent similar to the approach that is used in many other fields, like for instance in successfully harmonized rules in the field of labor rights under the International Labour Organization (hereinafter ILO),¹³⁰⁸ and in the field of the IPR under the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter TRIPS).¹³⁰⁹ Moreover, the proposed approach is more similar to that used in the EU directives, whereas the directives push down the rules to be implemented by the national authorities, and is more dedicated to the issues of the cross-border dimension.¹³¹⁰ In that context, the almost successful implementation of directives in the EU as a harmonized set of rules is a good example to be followed in the field of rule harmonization.¹³¹¹ Meanwhile, it was claimed that as the proposed rules goes deeper to address the details of the enforcement it will be significantly difficult,¹³¹² and it will lose its flexibility to keep pace with the economic developments.¹³¹³

It is noteworthy here that despite the fact that the proposed harmonized set of rules will induce the change from above to below not from below to above,¹³¹⁴ and that might be similar to the other policy transfer mechanisms such as the imposition and diffusion. But unlike the harmonization the imposition and the diffusion are not deliberate mechanisms i.e. either dictated by a more powerful party in the case of imposition or unconsciously imitation of that powerful party.¹³¹⁵ In that context the previously mentioned technical assistance is a good example of the

¹³⁰⁷ Holbrook, UCLA JOURNAL OF INTERNATIONAL LAW AND FOREIGN AFFAIRS, *supra* note 1062, at 366-367 (2002).

¹³⁰⁸ RODRÍGUEZ GARAVITO & SOUSA, Law and Globalization From Below: Towards a Cosmopolitan Legality, *supra* note 763, at 84. 2005.

¹³⁰⁹ Sweeney, MELBOURNE JOURNAL OF INTERNATIONAL LAW, *supra* note 1284, at 418 (2004).

¹³¹⁰ Hunt, NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS, *supra* note 709, at 168 (2007).

¹³¹¹ Sappideen, JOURNAL OF WORLD TRADE, *supra* note 1168, at 451 (2006); Almunia, EU Merger Control has Come of Age, *supra* note 698, at 3. 2011.

¹³¹² Sweeney, MELBOURNE JOURNAL OF INTERNATIONAL LAW, *supra* note 1284, at 418 (2004).

¹³¹³ Meessen, NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS, *supra* note 1295, at 21 (1989).

¹³¹⁴ Joseph Lookofsky, *The Harmonization of Private and Commercial Law: "Towards a European Civil Code"*, 39 SCANDIANVIAN STUDIES IN LAW 111, at 116 (2000).

¹³¹⁵ See generally Helge Jörgens, *Governance by Diffusion: Implementing Global Norms through Cross-National Imitation and Learning*, in GOVERNANCE FOR SUSTAINABLE DEVELOPMENT: THE CHALLENGE OF ADAPTING FORM TO FUNCTION (William M. Lafferty ed. 2004); Busch Per-Olof, et al., *The Global Diffusion of Regulatory Instruments: The Making of a New International Environmental Regime*, 598 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 146, at 149 (2005).

diffusion mechanism, and that could be achieved by means of organizing and financing workshops and through conferences.¹³¹⁶

In the same context, it could be maintained that the proposed set of rules could be non-binding like for instance the City Code on Takeovers and Mergers in the UK, which is practically binding but with no legal effect,¹³¹⁷ but in fact that claim is not true because in order to avoid any arbitrary implementation it should be binding.¹³¹⁸ Meanwhile, for the purpose of the ease of the implementation it might be more appropriate to introduce an obligation that impose a gradual change in the national laws to be compatible with the proposed set of rules within a certain period, like for instance the obligation on Russia to adopt laws that are compatible with those that are adopted in the EU.¹³¹⁹

Accordingly, the current proposal should be implemented gradually,¹³²⁰ in a progressive approach that begins with encouraging the different jurisdiction to adopt and enforce its national merger control rules, and then in the next step is to identify the common rules that are shared between most of them to be the base of negotiating and drafting the unified binding rules. The next step is to expand the scope of the unified rules to encompass the previously debated issues, and in the final step to adopt a dispute resolution mechanism or supranational supervisory institution.¹³²¹ In the same context, it was reported that while there are significant differences between the two main merger control systems namely of the US and the EU, there are enough common rules that could lead to the development of a proposed harmonized set of rules.¹³²²

It should be noted that determining what are the rules to be adopted, or in other words the selection of the set of rules that will most fit all the countries is a highly problematic task. That will even start from determining the authority that will carry out that task, in a democratic way

¹³¹⁶ John J. Parisi, *Cooperation Among Competition Authorities in Merger Regulation*, 43 CORNELL INTERNATIONAL LAW JOURNAL 55, at 61 (2010).

¹³¹⁷ For more details about the City Code on Takeover and Mergers see Jeffery Roberts, et al., *The City Code on Takeovers and Mergers -- An Introduction*; PETTET, *Company Law*, *supra* note 125, at 393-395. 2005.

¹³¹⁸ Jacqui Hatfield, *Global Harmonised Standards -- Are they Achievable?* (Thomson Reuters 2012).

¹³¹⁹ Council and Commission Decision of 30 October 1997 on the conclusion of the Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Russian Federation, of the other part, Official Journal L 327, 28.11.1997, p. 1-2.

¹³²⁰ Montini, *Globalization and International Antitrust Cooperation*, *supra* note 1160, at 16. 1999.

¹³²¹ Foster, *EMORY INTERNATIONAL LAW REVIEW*, *supra* note 1249, at 495 (2001).

¹³²² Fox, *US and EU Competition Law: A Comparison*, *supra* note 1017, at 354. 1997.

that is less effected by imperialism.¹³²³ Meanwhile, it will be easier if the negotiations and the adoption of such set of rules are sponsored by an already established international organization, in that regard it was claimed that the WTO might carry out the role of introducing such set of rules on the international level,¹³²⁴ and others held that it could be any other supranational panel, whether international or multinational or even regional institutions like the North American Free Trade Agreement (hereinafter NAFTA) and the OECD.¹³²⁵

The early attempts of the harmonization or the globalization of law in general could be trace back to the *Lax Mercatoria* that was developed during the middle ages, whereas it was used as an international law of commerce.¹³²⁶ On the other hand, with regard to the antitrust law, it was argued that the first attempt to introduce an international antitrust was under the patronage of the UN,¹³²⁷ however that claim was not accurate and the first attempt was the within the framework of the protection of patents and other industrial property under Article 10 bis of the Paris Convention for the Protection of Industrial Property of 1883,¹³²⁸ and that article was even added in 1900 to the Brussels Revision of the Paris Convention.¹³²⁹

The second attempt was initiated by the US, whereas in 1945 it called for the formation of the International Trade Organization (hereinafter ITO), and that was under the patronage of the Economic and Social Council of the UN (hereinafter ECOSOC), whereas the ECOSOC adopted a resolution in February 1946 to draft the charter of the ITO, which was known then as the Havana Charter,¹³³⁰ chapter V of that charter was mainly devoted to a set of unified binding antitrust rules, but it failed due to the opposition from the US Congress on the basis of

¹³²³ Loukas Mistelis, *Is Harmonisation a Necessary Evil? - The Future of Harmonisation and New Sources of International Trade Law*, in FOUNDATIONS AND PERSPECTIVES OF INTERNATIONAL TRADE LAW at 7, (Ian F. Mistelis Loukas A. Cremona Marise Fletcher ed. 2001).

¹³²⁴ Sokol, GEORGE MASON LAW REVIEW, *supra* note 1254, at 1098-1099 (2010); Fox, THE AMERICAN JOURNAL OF INTERNATIONAL LAW, *supra* note 1165, at 13 (1997); Fisher, STANFORD JOURNAL OF LAW, BUSINESS, AND FINANCE, *supra* note 1020, at 375 (2009).

¹³²⁵ Michael J. Trebilcock, *Competition Policy and Trade Policy—Mediating the Interface*, 30 JOURNAL OF WORLD TRADE 71, at 105 (1996).

¹³²⁶ Mistelis, *Is Harmonisation a Necessary Evil? - The Future of Harmonisation and New Sources of International Trade Law*, *supra* note 1323, at 7. 2001.

¹³²⁷ Hamner, THE JOURNAL OF TRANSNATIONAL LAW & POLICY, *supra* note 672, at 403 (2002).

¹³²⁸ The Paris Convention for the Protection of Industrial Property, March 20, 1883, a copy of the latest version as revised at Stockholm in 1967 is available on the official website of the World Intellectual Property Organization at http://www.wipo.int/treaties/en/text.jsp?file_id=288514 last visited on October 1, 2014.

¹³²⁹ Fikentscher, CHICAGO-KENT LAW REVIEW, *supra* note 1219, at 534 (1996).

¹³³⁰ Havana Charter for an International Trade Organization, April 1948, a copy of the charter is available on the official website of the WTO at http://www.wto.org/english/docs_e/legal_e/havana_e.pdf last visited October 1, 2014.

sovereignty. The US and Canada among others tried to introduce an international agency as an alternative to that chapter in 1953, which led Norway to suggest that the GATT take that role in 1958, but all those efforts were to no avail.¹³³¹

The third attempt was in 1980, at the conclusion of the UN Conference on Restrictive Business Practices, which was held under the patronage of the UNCTAD, the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practice,¹³³² were adopted for the first time after thirty years of continuous effort.¹³³³ Those rules were mainly devoted to a set of unified binding antitrust rules, but it failed due to the lack of a binding legal base, whereas it takes the form of recommendations.¹³³⁴ In that context, it is noteworthy that efforts of the UN Conference on Restrictive Business Practices have not stopped until now, whereas it is held every five years to review the mentioned set of rules, which means that it was already met six times and the seventh is planned to take place on July 6, 2015.¹³³⁵

The fourth and the most recent attempt, is a draft of international antitrust rules that were prepared by a group of scholars known as the Munich Group,¹³³⁶ and it was known as the Draft International Antitrust Code (hereinafter DIAC), and they presented their proposal i.e. the DIAC to the Director General of the GATT, literally the DIAC is the most comprehensive unified set of antitrust rules that are administrated by an autonomous institution.¹³³⁷

There were also other previous attempts to harmonize the antitrust laws but on a regional level, in that regard the EU cross-border merger regulation is the most notable attempt,¹³³⁸ and

¹³³¹ Trebilcock, *JOURNAL OF WORLD TRADE*, *supra* not 1325, at 88 (1996); DABBAH, *The Internationalisation of Antitrust Policy*, *supra* note 9, at 247-250. 2003; Foster, *EMORY INTERNATIONAL LAW REVIEW*, *supra* note 1249, at 498, 505, 505-506 (2001); Levi-Faur, *ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE*, *supra* note 370, at 18 (2005).

¹³³² The Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices, 5 December 1980, UNCTAD Doc. TD/RBP/Conf. 10/Rev. 1, a copy of the latest version of 2000 is available on the official website of the UNCTAD at <http://unctad.org/en/docs/tdrbpconf10r2.en.pdf> last visited October 1, 2014.

¹³³³ Stuart E. Benson, *The U.N. Code on Restrictive Business Practices: An International Antitrust Code is Born*, 30 *THE AMERICAN UNIVERSITY LAW REVIEW* 1031, at 1031 (1981).

¹³³⁴ Trebilcock, *JOURNAL OF WORLD TRADE*, *supra* not 1325, at 89 (1996); Benson, *THE AMERICAN UNIVERSITY LAW REVIEW*, *supra* note 1333, at 1033-1034 (1981).

¹³³⁵ For more details about the seventh conference and its agenda visit the official website of the UNCTAD at <http://unctad.org/en/pages/MeetingDetails.aspx?meetingid=609> last visited October 1, 2014.

¹³³⁶ The members of the Munich group were, in alphabetical order, the Professors: Akira Shoda, Andreas Fuchs, Andreas Heinemann, Eleanor M. Fox, Ernst-Ulrich Petersmann, Hans Peter Kunz-Hallstein, Josef Drexl, Lawrence A. Sullivan, Stanislaw J. Soltysinski, Ulrich Immenga, Walter R. Schlupe, Wolfgang Fikentscher.

¹³³⁷ For a full comprehensive details about the DIAC, and how it was drafted, as presented by one of the scholars of the Munich Group see Fikentscher, *CHICAGO-KENT LAW REVIEW*, *supra* note 1219, (1996).

¹³³⁸ Directive of the European Parliament and of the Council on Cross-border Mergers of Limited Liability Companies, 27.07.2005, PE-CONS 3632/05

there were also some modest attempts within the trade partners of NAFTA,¹³³⁹ whereas only five articles under Chapter 15 of the NAFTA are imposing a minimal obligation to adopt national antitrust rules.¹³⁴⁰ On the other hand, with regard to the Arab countries, and despite that fact that almost all the members of the Arab League are considered as antitrust heavens. They did not implement their antitrust laws seriously, there was a draft of unified antitrust laws that were prepared under the patronage of the League's Economic and Social Council,¹³⁴¹ and meanwhile there are no similar attempts on the GCC level as it was previously discussed.

2. Proposal Assessment

Based on the addressed description and on the previous attempts to adopt international merger control rules as a proposal to improve the current multijurisdictional merger control systems, in order to overcome the drawbacks of that system, and all the improvements that could be added to such proposal in order to enhance it, that proposal will be assessed in the coming discussion, and then the discussion will be followed by a table that displays the answers to all the assessment question, in just "yes" or "no," as the most simple approach. A chart to show the final assessment result and the percentage of the expected positive effect and negative effect of that proposal will then follow a table.

First is concerning the cost issue, the international merger control rules are expected to be effective with that regard, whereas it is expected to decrease the cost of running the regulatory authorities especially in the case of sharing the gathered information, similarly in the case of reviewing the transaction in only one jurisdiction under the positive comity. Meanwhile, the effect of the international merger rules is not considered as adequate, because it will not affect all the other factors of the merger control costs. Moreover, the cost reduction will take time. In order to be recognized each jurisdiction will need time in order to change its national law to be compatible with the international rules.

In addition to that, it is expected that not all the parties will benefit from that said cost reduction, for instance some countries might suffer from the costs of its obligations under the new system, starting from the burden of adopting merger control system or amending its own

¹³³⁹ Wood, DEPAUL LAW REVIEW, *supra* note 1249, at 1294 (1995).

¹³⁴⁰ For more a general idea about the antitrust rules under the NAFTA *see* Trebilcock, JOURNAL OF WORLD TRADE, *supra* not 1325, at 92 (1996).

¹³⁴¹ DABBAH, Competition Law and Policy in the Middle East, *supra* note 353, at 13. 2007.

system to cope with the new one, and even reviewing the merger transactions in case of positive comity while that might not be of the interest of the reviewing jurisdiction.

Second is concerning the different enforcement issue, the proposal might be effective, whereas it could help to entirely overcome the different enforcement issues because that set of international rules might adopt a dispute resolution mechanism that could put the contradicting decisions to an end, and accordingly it is adequate to resolve the issue, but it might need time to settle any disputes before the competent agency or authority. Moreover, it is expected to be unfair because the least powerful developing countries might take into consideration the political and economic consequences before making a decision to enter into a dispute with a more powerful country, and in situations where the corporation itself will have a stand before the competent agency or authority, it should also do the same.

Third is concerning the ex-ante review issue, it is not expected that the current proposal has any effect on the issue that the ex-ante review is considered as an extra layer to the merger control. Fourth is concerning the exclusion of the behavioral antitrust findings, the proposal is effective, whereas it might significantly help to overcome the drawback of the exclusion of the behavioral antitrust findings by taking into account those findings while drafting the new rules, and undoubtedly that will be adequate to overcome that drawback if it encompassed all the findings in that regard. Conversely that effect will take some time to be realized, at least time to change the national laws to be compatible with the new international rules. In addition to that, it is expected that all the parties will benefit from overcoming such drawback equally.

Fifth is concerning the extraterritorial reach issue, that proposal might be effective, whereas it could help in completely overcoming the issue of the extraterritorial reach by incorporating rules to identify the competent jurisdiction to review the transaction, and it might also include a dispute settlement mechanism in that regard, and accordingly it will be adequate to resolve that issue, but that effect might take time to be realized especially to adopt national laws and to avoid any judicial decision to the contrary or even time to settle any disputes. Moreover, that proposal will not be fair in granting its benefits to all the parties because both the corporations and less powerful jurisdictions should take into consideration any consequences of entering into a dispute with more powerful jurisdictions in cases that extend its competencies over the cross-border merger transactions.

Sixth is concerning the foundational errors issue, nothing in that proposal will have an effect on or lead to overcome those errors, because the merger control rules will remain based on the antitrust faulty ideologies. Seventh is concerning the political influence issue, the proposal might be effective and lessen the political friction of the extraterritorial effect in addition to rent seeking problems because the new set of rules will be binding, but it will not be adequate because still the influence will not be totally eliminated and the implementation of the rules might be subjected to regulatory capture. Moreover, the effect of the proposal on the political influence issues might be realized instantly, but one more time it will not be fair because both the corporations and less powerful jurisdictions should take into consideration any consequences of entering into a dispute with more powerful jurisdictions in case in which it extend its competencies over the cross-border merger transactions.

Eighth is concerning the privacy and data issue, the proposal might be effective, whereas for instance, gathering the data might be easier and also exchanging the information between the authorities might be permissible, but the proposal will not be adequate in overcoming the whole issue because the fact that the exchanging of the information is permissible does not negate the fact that the practice might be harmful and lead to losses for the parties, and in addition to that, realizing that modest effect will take some time, at least in order to change the national laws to permit the exchange of information with the other authorities. On the other hand, all the parties will realize the expected effects from the proposal in the same way, which means that the proposal is fair in that regard.

Ninth is concerning the remedies issue, the proposal will be effective, whereas it will help in overcoming the remedies issue by avoiding it totally, for instance no remedies are required if the new system adopts the clear or block approach, and accordingly it will be also adequate, and the effect could be realized instantly as soon as the use of remedies is banned under the new rules. All the parties will realize the benefits from that change equally, which means that the proposal will be fair.

Tenth is concerning the time consuming issue, that proposal might be effective, whereas it might reduce the time that is required to finish the multijurisdictional merger control process, but it will not be considered as adequate to overcome the issue because its effect on reducing the time is minimal. Meanwhile, the effect of the time reduction might be recognized instantly, and it

does require time to realize it, and in addition to that the proposal might be considered fair because all the parties will benefit from the time reduction equally.

Finally, that proposal is considered as inefficient with regard to all the issues, because it will always require additional resources in case where it is effective, and that is either due to the changing of the national law and enforcement systems or to benefit from the rules itself, like for instance to overcome the different enforcement drawback by using the dispute settlement mechanism. In addition to that, the proposal is also considered as not flexible with regard to all the issues, because it cannot be easily changed for improvement in the future, because the renegotiating and amending that set of international rules and the national laws will face difficulties and at least it will need some time.

Standard \ Issue	Effectiveness	Adequacy	Time	Efficiency	Fairness	Flexibility
Cost	Yes	No	No	No	No	No
Different enforcements	Yes	Yes	No	No	No	No
Ex-ante review	No	No	No	No	No	No
Behavioral antitrust	Yes	Yes	No	No	Yes	No
Extraterritorial reach	Yes	Yes	No	No	No	No
Foundational errors	No	No	No	No	No	No
Political influence	Yes	No	Yes	No	No	No
Privacy and data issues	Yes	No	No	No	Yes	No
Remedies	Yes	Yes	Yes	No	Yes	No
Time consuming	Yes	No	Yes	No	Yes	No

Table 3: International merger control rules – assessment

As general remarks on the proposal of the bilateral cooperation agreements, as it could be clearly identified from the previous table, that the proposal has a positive impact on almost all the drawbacks except for the foundational errors of the antitrust ideology. The effect is adequate in most of the cases, most of the effects need time to be realized and it is fair in some cases while unfair in others. Moreover, that proposal is not flexible because it will not easily be changed, and it is not efficient because it always needs additional resources in order to adopt new merger control regimes or even amend the existing one, as it was previously mentioned.

Finally, and according to the result revealed in the previous table there are only nineteen instances during which the proposal of the international merger control rules has a positive effect on the drawbacks of the current merger control systems, and there are forty one instances during which the proposal has a negative effect on the drawbacks of the multijurisdictional merger

control systems, which means that the proposal might improve the current situation by 32%, as shown in the following chart.

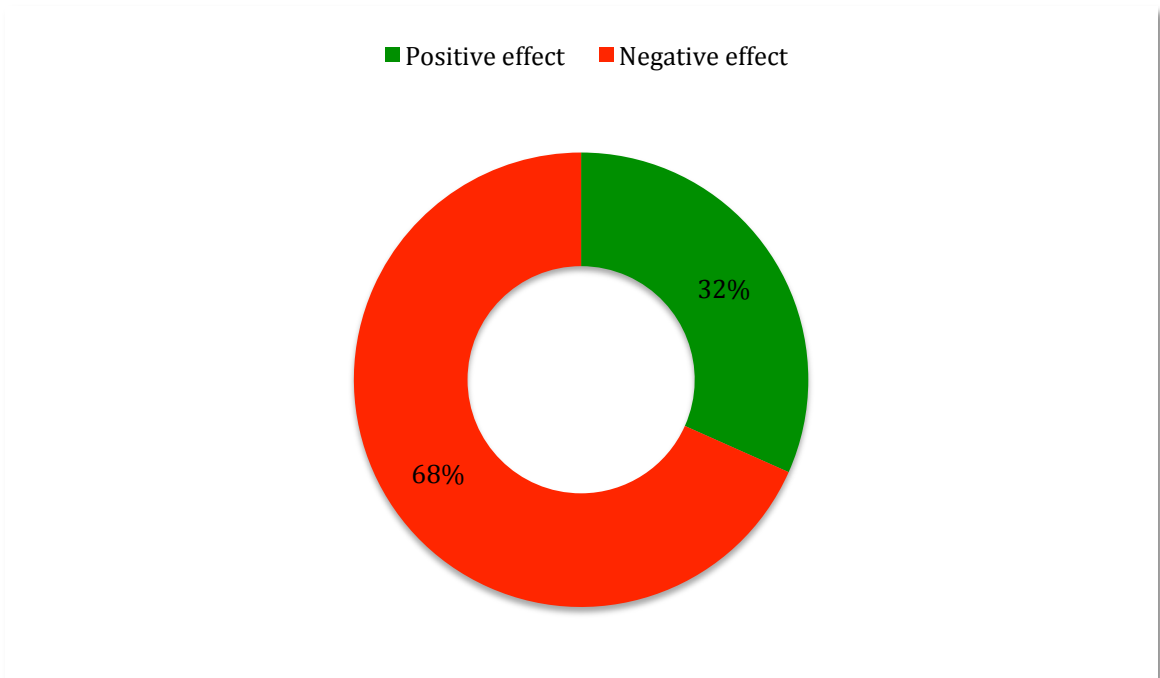


Figure 15: International merger control rules – assessment

III. Supranational Premerger Control Institution

1. Proposal Description

The proposal of supranational institution could be simply described as the adoption of a unified set of premerger control rules. To create an independent supranational premerger control institution to enforce and administer those rules over the cross-border merger transactions that proposal could be adopted through a new international agreement or by the means of making use of one of the already existed international institutions like for instance the WTO, or one of the UN agencies for example the UNCTAD, the OECD or the ICN, and according to that proposal, the national authorities role will be limited to act as a national enforcement arm for that supranational institution.

That proposal is based on the fact that the harmonization of the laws through a unified set of international rules is not effective enough to overcome the drawback of the multijurisdictional merger control systems, because the enforcement of such unified rules by the different

authorities will lead to contradiction or at least different results, and that will not overcome those drawbacks, and it might be considered as “convergence” not a true harmonization. On the other hand in order to achieve the true harmonization benefits the enforcement of those set of unified rules should be carried out by an independent institution on the international level, in other words, that proposal should address the three components of the harmonization; the procedural issues the substantive issues, and the institutional issues.¹³⁴²

Despite the fact that the supranational institution will be more efficient to carry out the merger control task, and creating such a institution will lead to uncountable benefits such as: (1) economy of scale regarding the review process,¹³⁴³ (2) eliminate the extraterritorial reach, (3) eliminating any chance for nationalistic atavism, and (4) decrease the uncertainty rate due to the expected uniform application of the unified rules,¹³⁴⁴ it is expected unfortunately that the creation of the proposed supranational institution could face strong opposition.

The first and most important ground for opposition is that creating the proposed supranational institution will disturb the international political order which is based on the old notion of sovereignty,¹³⁴⁵ which was established under the treaties of the Peace of Westphalia in 1648,¹³⁴⁶ whereas it was claimed that the parties would lose their control over the merger review on the national level without even realizing any actual gains.¹³⁴⁷ However, that assertion could easily be refuted, whereas retaining the current merger control regimes that are mainly characterized by its extraterritorial reach is already contradicting with the sovereignty claims.

Moreover, the parties will not lose its sovereignty at any time because it could withdraw from whatever instrument that was used to create the supranational institution, at any time. Furthermore, and to cut it short sovereignty is a relative concept that has its own limitations,

¹³⁴² Crane, CHICAGO JOURNAL OF INTERNATIONAL LAW, *supra* note 397, at 151, 156 (2009).

¹³⁴³ Holbrook, UCLA JOURNAL OF INTERNATIONAL LAW AND FOREIGN AFFAIRS, *supra* note 1062, at 361 (2002).

¹³⁴⁴ Ginsburg & Angstreich, ANTITRUST LAW JOURNAL, *supra* note 776, at 223 (2000).

¹³⁴⁵ For an excellent detailed discussion about the sovereignty and the international antitrust policies see DABBAH, The Internationalisation of Antitrust Policy, *supra* note 9, at 139-158. 2003, citing all the previous literature on the same topic most notably: Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A United Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST LAW JOURNAL 713 (1997); Susan Beth Farmer, *Altering the Balance Between State Sovereignty and Competition: The Impact of Seminole Tribe on the Antitrust State Action Immunity Doctrine*, 23 OHIO NORTHERN UNIVERSITY LAW REVIEW 1043 (1997); Susan Beth Farmer, *Balancing State Sovereignty and Competition: An Analysis of the Impact of Seminole Tribe on the Antitrust State Action Immunity Doctrine*, 42 VILLANOVA LAW REVIEW 111 (1997); Joseph P. Griffin, *When Sovereignties May Collide: In the Antitrust Area*, 20 CANADA-UNITED STATES LAW JOURNAL 91 (1994); Steven L. Snell, *Controlling Restrictive Business Practices in Global Markets: Reflections on the Concepts of Sovereignty, Fairness, and Comity*, 33 STANFORD JOURNAL OF INTERNATIONAL LAW 215 (1997).

¹³⁴⁶ PAPADOPOULOS, The International Dimension of EU Competition Law and Policy, *supra* note 181, at 47. 2010.

¹³⁴⁷ Ginsburg & Angstreich, ANTITRUST LAW JOURNAL, *supra* note 776, at 225 (2000).

which means that it should be exercised within its framework and with the total respect of others' sovereignties i.e. within the rules of the public international law, and finally to sum it up any harm to "sovereignty [should be] horizontal, not vertical," and that undoubtedly means that when the countries are granting a supranational institution delegation or power those countries will not relinquish their sovereignties on the horizontal level.¹³⁴⁸

In that context, it was maintained the countries are responding differently to the unification of each of the three components of the harmonization, whereas the procedural issues are the easiest issues to be unified because it seem to has a modest sovereignty concerns, while the substantive issues might trigger more serious sovereignty concerns from most of the jurisdictions, and finally the institutional issues will seem as a significant threat to sovereignty.¹³⁴⁹ It is noteworthy here that limiting the proposal of the supranational institution to a dispute resolution agency, as was suggested by ICPAC in its report.¹³⁵⁰ This idea might not find the same magnitude of opposition but it will also only address some drawbacks and while ignoring most of the others.

Furthermore, it was claimed that the best approach to adopt such a kind of proposal is the spill-over approach as explained under the neofunctionalism theory,¹³⁵¹ which mainly utilizes the successful creation of the EU as an example to design hypotheses that work for other regional or supranational institutions. Whereas according to the spill-over effect the initial task is granted to a supranational institution and then the economic interests of the parties of the institution will drive the institution to expand its tasks, and the parties representatives in institution or its employees will be more involved and engaged until they are "creating their own logic" that support their existence and power.¹³⁵²

The second possible ground for opposition might be the fact that while the transaction might have a precompetitive effect in a jurisdiction but conversely at the same time have an anticompetitive effect in another jurisdiction, and in such cases that might lead to one of the two

¹³⁴⁸ DABBAH, *The Internationalisation of Antitrust Policy*, *supra* note 9, at 146-147. 2003.

¹³⁴⁹ Crane, *Chicago Journal of International Law*, *supra* note 397, at 157 (2009).

¹³⁵⁰ The International Competition Policy Advisory Committee, U.S. Department of Justice, final report to the Attorney General and the Assistant Attorney General for Antitrust, on February 28, 2000, at 57.

¹³⁵¹ Neofunctionalism was built on the works of the German political scientist Ernst Bernard Haas (1924 – March 6, 2003), for more details about neofunctionalism and the spill-over theory *see* Ernst B. Haas, *International Integration: The European and the Universal Process*, 15 INTERNATIONAL ORGANIZATION 366 (1961); Rafael Leal-Arcas, *Theories of Supranationalism in the EU*, 8 THE JOURNAL OF LAW IN SOCIETY 88(2007).

¹³⁵² Haas, INTERNATIONAL ORGANIZATION, *supra* note 1351, at 372 (1961).

possibilities; the first is to clear the transaction and that will not be considered as fair, at least from the perspective of the jurisdiction that expected to suffer losses from that transaction, and the second is to block the transaction and that also will be considered as unfair from the stance of the jurisdiction that is expecting to gain from that transaction.¹³⁵³ In other words, it might be expected, according to those claims that the supranational institution will most probably opt for the second option and will end up settling the cross-border transactions based on the “lowest common denominator” of the interests of the concerned jurisdictions.

However, the case might not be that bad, because the institution might make use of some economic principles in order to lessen the harm that is expected to affect all the parties. For instance, according to the Pareto Efficiency principle,¹³⁵⁴ the supranational institution might decide to clear the transaction in a way that will not cause any harm to any jurisdiction and in the same time the other jurisdictions will still gain efficiency by using both kinds of remedies. For example, if both kinds of remedies are not enough to avoid any harm or to ensure gaining efficiencies the institution might use the Kaldor–Hicks Efficiency principle,¹³⁵⁵ according to which the parties who experience gains should be willing to compensate the parties who suffer losses, and that might be similar to the idea of “incentive contracts,”¹³⁵⁶ which was previously addressed during the discussion of the remedies as a drawback of the merger control systems.¹³⁵⁷

Running the proposed supranational institution requires funds, and despite the fact that some of the cost that will be saved from running the national premerger control will be offset by the costs required to run the proposed institution. The filing fees could significantly contribute to granting the continuous smooth running of the institution, as it was previously shown that some national authorities depend mainly on the filing fees. In that context, it was suggested that such

¹³⁵³ Ginsburg & Angstreich, ANTITRUST LAW JOURNAL, *supra* note 776, at 226 (2000).

¹³⁵⁴ The Pareto Efficiency principle was named after the Italian economist Vilfredo Pareto, for more details about the Pareto Efficiency principle *see generally* Vijay K. Mathur, *How Well Do We Know Pareto Optimality?*, 22 THE JOURNAL OF ECONOMIC EDUCATION 172 (1991).

¹³⁵⁵ The Kaldor–Hicks Efficiency principle was named after both the economists Nicholas Kaldor and John Hicks, for more details about the Kaldor–Hicks Efficiency principle *see generally* PETER NEWMAN, THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW at 417-421 § 2 (Palgrave Macmillan, 2002); Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 THE ECONOMIC JOURNAL 549 (1939); J. R. Hicks, *The Foundations of Welfare Economics*, *see id.* at 696.

¹³⁵⁶ The incentive contracts was first suggested by Gregory J. Werden (Senior Economic Counsel at the Antitrust Division in the DOJ) and other scholars in their article Werden, et al., *Vanderbilt Law and Economics Research Papers*, *supra* note 1257, (2005).

¹³⁵⁷ *See supra* p.252.

institution could be financed by the member states in a way similar to the UN system, and that could be in addition to a scaled filing fees according to the volume of the transaction.¹³⁵⁸

One more important question here should be whether the proposed institution would have jurisdiction over all the merger transactions or only the cross-border mergers; in that regard it was claimed, in the field of harmonizing contract laws, that limiting the harmonization solution to the cross-border transactions is considered a vital contribution to solve the problem.¹³⁵⁹ Despite the fact that limiting the proposal to cross-border mergers might be limiting its benefits, but in the meantime it will avoid some other drawbacks if it is extended to encompass all the transactions, for instance it will be difficult if not impossible to review such huge amount of transactions by just one institution, which will definitely increase the process time. In addition to that, in most of the pure domestic transaction the international link or dimension that could justify the referral to the proposed international institution will be missing.

It should be noted that the proposal here is not about a regional institution, whereas a regional institution will not help in overcoming the multijurisdictional merger control systems even if it is a successful institution, and the existence of the EC is proof of that. Meanwhile the formation of the proposed supranational institution might benefit from the efforts that are already done on many regional levels. In that context, some might think that the EC is the only example while the fact is to the contrary and there are many efforts that are already in place,¹³⁶⁰ but it might be the most successful and powerful regional merger control system.

The most cited forum to carry out the task of the international antitrust tasks is the WTO, and in that regard many reasons were cited, and those reasons start by mentioning that the Havana Charter was an attempt to create the ITO as it was already addressing the antitrust issues, followed by the Uruguay round,¹³⁶¹ and finally the Doha round,¹³⁶² as it was previously shown as a response to the contradicting decision between the EU and the US. In addition to those reasons, the success of the WTO breeds confidence in its system, for instance the success of negotiating and adopting the TRIPS was consider an indicator to the success of similar future attempts in

¹³⁵⁸ Hunt, *NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS*, *supra* note 709, at 164 (2007).

¹³⁵⁹ Commission European, *Green Paper from the Commission on Policy Pptions for Progress Towards a European Contract Law for Consumers and Businesses*, (2010).

¹³⁶⁰ For a list of more than fifteen regional communities that already adopts antitrust provision *see* DABBAH, *Competition Law and Policy in the Middle East*, *supra* note 353, at 325. 2007.

¹³⁶¹ Daniel Steiner, *The International Convergence of Competition Laws*, 24 *MANITOBA LAW JOURNAL* 577, at 614 (1997).

¹³⁶² Fisher, *STANFORD JOURNAL OF LAW, BUSINESS, AND FINANCE*, *supra* note 1020, at 331-332 (2009).

closely related fields i.e. the antitrust and the TRIPS.¹³⁶³ In the same line, the opponents towards the selection of the WTO as forum for the supranational institution agreed that the harmonized set of rules could be adopted under its patronage but the enforcement should be left to the national institutions.¹³⁶⁴

Moreover, the WTO even has a good experience in reviewing the antitrust policies, whereas it reviewed all the antitrust policies that are submitted by the countries as during the accession procedures.¹³⁶⁵ Furthermore, it was over-cited that the WTO has a well-designed dispute settlement mechanism,¹³⁶⁶ and that even the Dispute Settlement Body of the WTO (hereinafter DSU) was already engaged in antitrust disputes, at least for one time, and that was based on a complaint from the US against Mexico. The DSU established a panel in that regard and the panel submitted its report on April 2, 2004,¹³⁶⁷ and the parties then reached an agreement on June 1, 2004 to comply with the report findings.¹³⁶⁸

The OECD is amidst the institutions that were suggested to take on the role of the supranational antitrust institution. Some argued that the limited membership of the OECD to the most industrialized trading countries is an advantage because all of them already have antitrust rules in place;¹³⁶⁹ meanwhile its agenda and funding sources might lead to a fear of bias towards its founding developed countries, at least from the developing countries point of view.¹³⁷⁰ Accordingly, it is not surprisingly that the US is promoting the selection of the OECD to adopt such proposal,¹³⁷¹ but was surprising is that it is not the stance of EU.

¹³⁶³ Steiner, MANITOBA LAW JOURNAL, *supra* note 1361, at 615 (1997).

¹³⁶⁴ The International Competition Policy Advisory Committee, U.S. Department of Justice, final report to the Attorney General and the Assistant Attorney General for Antitrust, on February 28, 2000, at 278-279.

¹³⁶⁵ Accession to the World Trade Organization Procedures for Negotiations Under Article XII, Note by the Secretariat, WT/ACC/1 (95-0651), Mar. 24, 1995, § II (2) (e), a copy of the note is available on the official website of the WTO at last <http://ecampus.wto.org/admin/files/ACC/E/M1/WTACC1.pdf> visited on October 1, 2014.

¹³⁶⁶ Hunt, NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS, *supra* note 709, at 163 (2007); Ernst-Ulrich Petersmann, *International Competition Rules for the GATT-MTO World Trade and Legal Systemx*, 27 JOURNAL OF WORLD TRADE 35 (1993); Steiner, MANITOBA LAW JOURNAL, *supra* note 1361, at 615 (1997).

¹³⁶⁷ Panel Report, Mexico - Measures Affecting Telecommunications Services, WT/DS204/R (Apr. 2, 2004).

¹³⁶⁸ For more a summary of the dispute timeline visit the WTO official website at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds204_e.htm last visited on October 1, 2014, and for a more excellent analysis of the case *see generally* Eleanor M. Fox, *The WTO's First Antitrust Case - Mexican Telecom: A Sleeping Victor for Trade and Competition*, 9 JOURNAL OF INTERNATIONAL ECONOMIC LAW 271 (2006).

¹³⁶⁹ Steiner, MANITOBA LAW JOURNAL, *supra* note 1361, at 604 (1997).

¹³⁷⁰ Christoph Bail, *Coordination and Integration of Competition Policies: A Plea for Multilateral Rules*, in COMPETITION POLICY IN AN INTERDEPENDENT WORLD ECONOMY (E. Kantzenbach, et al. eds., 1993).

¹³⁷¹ Foster, EMORY INTERNATIONAL LAW REVIEW, *supra* note 1249, at 500 (2001).

In that context, it was reported that the EU opposes the OECD as a proposed forum for international antitrust law for the same reasons of unfairness or biases toward the developed countries, despite the fact that its members belong to the developed countries, and in addition to that reason the EU also opposes the OECD on the ground of its missing a dispute settlement mechanism.¹³⁷² The EU justification is not convincing, and it could be claimed here that use of the over-cited lack of the dispute settlement mechanism and the unreasonable fear of bias against the developing countries is plainly to justify its stance against the suggestion that is supported by the US, and that might be because the EU does not have a better weightiness in the OECD over the US.

It should be pointed out here that the fact is that the lack of the dispute settlement mechanism is over-cited not only with regard to the OECD, but also for all the other proposed institutions,¹³⁷³ with the exception of the WTO because it has a dispute settlement mechanism in place. However, the efforts required to create a new dispute settlement mechanism, similar to that of the WTO or even a more enhanced mechanism, is not comparable to the efforts required to adopt the proposal of the supranational merger control institution. Therefore, it could be claimed that the lack of the dispute settlement mechanism is not a prerequisite to adopt the proposal, while it is still a precondition to the success of the institution in carrying out its tasks.

Despite the fact that the UNCTAD has made continuous efforts in the field of the international antitrust rules, as it was previously shown during the discussions of the proposal of the international merger control rules,¹³⁷⁴ it was not often suggested to be a supranational premerger control institution.¹³⁷⁵ Regardless of the fact this effort is not binding, the developed countries did not show tolerance towards this effort under the umbrella of the UNCTAD, because combining the two roles of supporting the development and guarding the competitiveness in the market might be led “schizophrenia,”¹³⁷⁶ in other words the developed countries fear the bias treatment towards the developing countries.¹³⁷⁷

¹³⁷² *Id.* at 497.

¹³⁷³ Hunt, *NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS*, *supra* note 709, at 160-161 (2007); *Id.* at 161.

¹³⁷⁴ *See supra* p.272.

¹³⁷⁵ Steiner, *MANITOBA LAW JOURNAL*, *supra* note 1361, at 604 (1997).

¹³⁷⁶ Mark R. Joelson, *Harmonization: A Doctrine for the Next Decade*, 10 *NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS* 133, at 138 (1989).

¹³⁷⁷ Foster, *EMORY INTERNATIONAL LAW REVIEW*, *supra* note 1249, at 497-498 (2001).

The ICN also could be a possible forum, whereas it was mainly founded as a gathering venue for all the antitrust authorities around the globe, and despite the fact that the ICN does not have any binding authority over its members, no one can ignore its role in the development of the antitrust rules around the globe, at least when compared to role of the WTO.¹³⁷⁸ It should be noted here that despite that non-binding nature of the ICN most of its members are showing at least some readiness to be part of progress in the field of merger review, for instance Charles A. James, who was Assistant Attorney General in charge of the DOJ antitrust division in 2002, clearly stated that: “if we are true to our calling, we will identify new ways in which we can work together to enhance the efficiency and effectiveness of merger review around the world.”¹³⁷⁹

Furthermore, it was also reported the EC commissioner Mario Monti was also an important proponent to the creation of the ICN.¹³⁸⁰ In addition to the general framework of the ICN, it has a special working group for the merger control issues and its main task is to enhance the merger control rules in order to eliminate uncertainties in the process, and it is already working on two of the three dimension of the real harmonization, namely the procedural and the substantive issues,¹³⁸¹ which means that the ICN is just missing the third institutional dimension to some extent, because it already has some sort of structure, at least a de facto presence within the international community.

Finally, it should be noted that the proposal of the supranational premerger control institution could be implemented under the patronage of any of those institution, and it is not a prerequisite that the same institution carry out the task itself, but it could be just a forum for discussion, because the discussion itself is a vital issue, as it was previously mentioned that it should be a political willingness to understand that there are drawbacks of the current multijurisdictional merger control systems and any unilateral solution will not work, and then they decide to select the most appropriate venue for the implementation of the proposal itself. In the same context, it is undoubtedly true that even the corporation or at least multinational

¹³⁷⁸ Hunt, *NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS*, *supra* note 709, at 160-161 (2007).

¹³⁷⁹ Charles A. James, *Guiding Principles and Recommended Practices for Merger Notification and Review* at 8 (U.S. Department of Justice 2002).

¹³⁸⁰ PAPADOPOULOS, *The International Dimension of EU Competition Law and Policy*, *supra* note 181, at 249. 2010.

¹³⁸¹ DABBAH, *The Internationalisation of Antitrust Policy*, *supra* note 9, at 256-257. 2003.

corporations should be represented and has a role in the discussion because they are a party to the issue.¹³⁸²

2. *Proposal Assessment*

Based on the addressed description of the proposal to adopt a supranational premerger control institution, as an attempt to improve the current multijurisdictional merger control systems, in order to overcome the drawbacks of that system, that proposal will be assessed in the coming discussion, and then the discussion will be followed by a table that displays the answers to all the assessment question, in just “yes” or “no,” as the most simple approach and then table will be followed by a chart to show the final assessment result and the percentage of the expected positive effect and negative effect of that proposal.

First is concerning the cost issue, the creation of the supranational institution is expected to be effective with that regard, whereas it is expected to decrease the cost of running the national regulatory authorities because it will take on the role of reviewing all the cross-border transactions and it will not be reviewed in more than one jurisdiction, but it is not considered as adequate because it will not influence all the other factors of the merger control costs and even its creation requiring funding. Meanwhile, the cost reduction will not take time and will be realized instantly, and it will be fair because all the parties will benefit from that said cost reduction.

Second is concerning the different enforcement issue, the supranational institution proposal is considered effective, whereas it will help to entirely overcome the different enforcement issues because that it will adopt a unified set of international rules and a dispute resolution mechanism that could put any decisions regarding its own competency to an end, and accordingly it is adequate to resolve the issue, the expected effect could be realized instantly upon the creation of the institution. Meanwhile, the expected effect will not be realized fairly because as was previously mentioned it will not be easy for the institution to decide in cases where some parties are expecting gains while other might experience losses.

Third is concerning the ex-ante review issue, the proposal of the supranational institution will not have any effect, whereas it will be mainly created to be a premerger control authority.

¹³⁸² Philip Lowe, *Keynote Address*, 14 *GEORGE MASON LAW REVIEW* 871, at 876 (2007).

Fourth is concerning the exclusion of the behavioral antitrust findings, the proposal might be effective, whereas it could take into consideration those findings either in the unified rules or during the merger review process, and undoubtedly that will be adequate to overcome that drawback, and the effect will be realized instantly upon the creation of the institution. In addition to that, it is expected that all the parties will benefit from overcoming such drawback equally i.e. the proposal is expected to be fair in that regard.

Fifth is concerning the extraterritorial reach issue, that proposal will be effective, whereas clear rules will identify its competency to review the cross-border mergers, and it might also include a dispute settlement mechanism in that regard, and accordingly it will be adequate to resolve that issue, and that effect will be realized instantly upon the creation of the institution. Moreover, that supranational institution proposal is expected to be fair in granting its benefits with regard to overcoming the extraterritorial reach issues to all the parties equally.

Sixth is concerning the foundational errors issue, nothing in that proposal will have an effect on or lead to overcome the those errors, because the premerger control rules will remain based on the antitrust faulty ideologies. Seventh is concerning the political influence issue, the proposal will be effective and eliminate the political friction of the extraterritorial effect in addition to rent seeking problems because the new set of rules will be binding and will be administered by a supranational authority, and accordingly it is considered as adequate. Moreover, the effect of the proposal on the political influence issues might be realized instantly, and it will be fair in granting its benefits with regard to the overcoming of the political influence issues to all the parties equally.

Eighth is concerning the privacy and data issues, the proposal might be effective, whereas for instance, the exchanging of information between the authorities might be permissible and regulated by the unified set of rules, but the proposal will not be adequate in overcoming the whole issue because the fact that the exchanging of the information is permissible does not negate the fact that the practice might be harmful and led to losses to the parties, and in addition to that, realizing that effect will take some time at least in order to change the national laws to permit the exchange of information with the proposed supranational institution. On the other hand, all the parties will realize the expected results from the proposal in the same way, which means that the proposal is fair in that regard.

Ninth is concerning the remedies issues, the proposal of the supranational institution will not be effective in that regard, whereas if the institution is conducting a premerger control and it needs at least one type of remedy in order to clear the transaction that is expected to be efficient in certain jurisdictions, and in the same time will restore any expected harm to other jurisdiction from the same transaction.

Tenth is concerning the time consuming issue, that proposal of the supranational institution might be effective, whereas it might reduce the time that is required of the premerger control process, but it will not be considered as adequate to overcome the issue because there still are time requirements to finish the process and get a final decision. Meanwhile, the effect of the time reduction might be recognized instantly, and it does require time to realize it, and in addition to that the proposal might be considered fair because all the parties will benefit from the time reduction equally.

Finally, that proposal of the supranational institution is considered as inefficient with regard to almost all the issues, because it will always require additional resources in case it is effective, and that is mainly because of the additional funding required to create and run the institution. In addition to that, the proposal is also not flexible with regard to all the issues, because it will not be easily to be changed to be improved in the future, because the renegotiating and amending the international agreement that created the institution and the unified set of rules will face difficulties and at least be time consuming.

Standard \ Issue	Effectiveness	Adequacy	Time	Efficiency	Fairness	Flexibility
Cost	Yes	No	Yes	No	No	No
Different enforcements	Yes	Yes	Yes	No	No	No
Ex-ante review	No	No	No	No	No	No
Behavioral antitrust	Yes	Yes	Yes	No	Yes	No
Extraterritorial reach	Yes	Yes	Yes	No	Yes	No
Foundational errors	No	No	No	No	No	No
Political influence	Yes	Yes	Yes	No	Yes	No
Privacy and data issues	Yes	No	No	No	Yes	No
Remedies	No	No	No	No	No	No
Time consuming	Yes	No	Yes	No	Yes	No

Table 4: Supranational institution – assessment

As general remarks on the proposal of the supranational institution, it could be clearly identified from the previous table that proposal has a positive impact on most of the drawbacks,

but the effect is not adequate in many of those cases. Meanwhile the effects are almost realized instantly and it does need time to be realized, and it is fair in some cases while unfair in other. Moreover, the proposal is not flexible because it will not be easy to change, and it is not efficient because it will always need additional resources in order to fund the creation and running of the institution, as it was previously discussed.

Finally, and according to the result revealed in the previous table there are only twenty two instances during which the proposal of the supranational premerger control institution has a positive effect on the drawbacks of the current merger control systems, and there are thirty eight instances during which the proposal has a negative effect on the drawbacks of the multijurisdictional merger control systems, which means that the proposal might improve the current situation by 37%, as shown in the following chart.

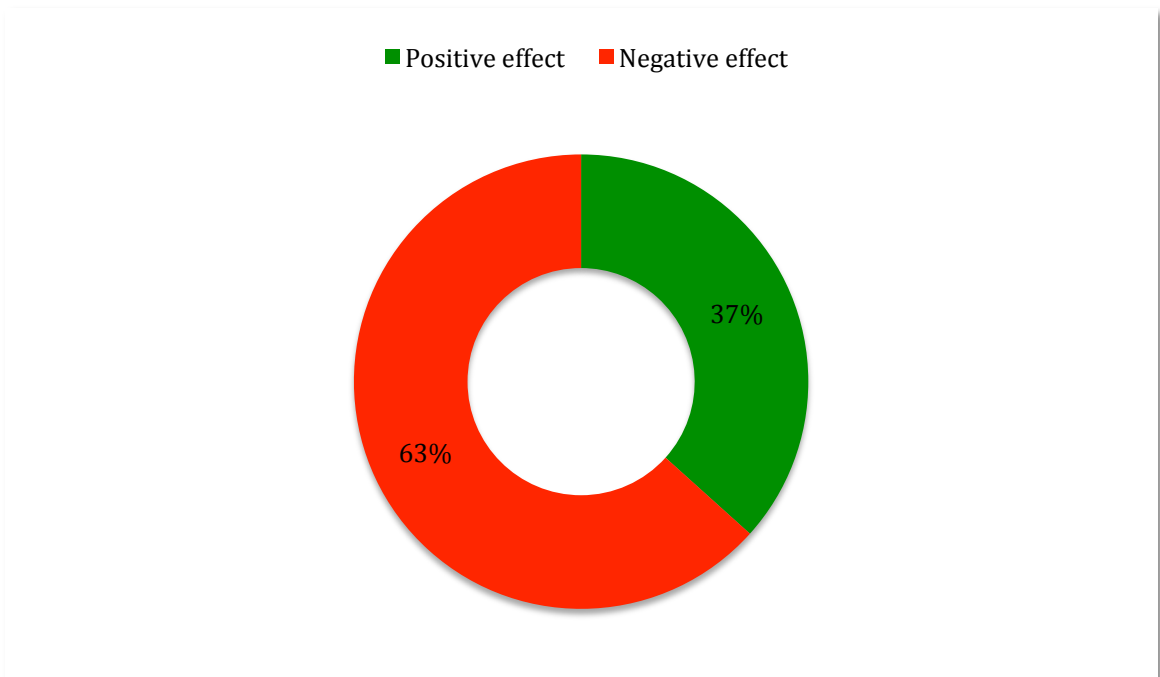


Figure 16: Supranational institution – assessment

IV. Procedural Proposals

The following proposals could be considered as minimal proposals because they are all tackling the drawback from a procedural perspective, and those kinds of procedural proposals could be adopted more easily than other proposals encompassing substantive issues, and that is

from both aspects i.e. the negotiation as well the drafting. Meanwhile, that does not mean or indicate any weight of any of them, whereas each of those proposals might contribute to overcome the drawbacks of the current multijurisdictional premerger control systems as is similar to the other proposals encompassing the substantive issues.

1. Jurisdictional Rules

a) Proposal Description

The proposal of the jurisdictional rules is simply tackling the drawbacks of the current multijurisdictional merger control systems from the private international law perspective, whereas a set of rules will be adopted to define the jurisdiction that will review and decide on the cross-border merger transaction, and those set of rules could be adopted through an international agreement under the patronage of one of the international institution. However, it could be more appropriate if the adoption of such rules was under the patronage of the Hague Conference on Private International Law, which is a multilateral organization specialized in the cooperation in the cross-border civil and commercial matters, to be more precise it specializes in the harmonization of the rules of private international law.¹³⁸³

It should be noted that this proposal was not suggested before in literature as a solution to overcome the drawback of the multijurisdictional merger control systems, but it was developed by a way of analogous from a previous proposal concerning the harmonization of the private international law rules, and that proposal was mainly for the purpose of solving the problem of determining the nationality of the corporation, and whether it is a foreign or national corporation, and to determine the applicable law on the merger transaction.¹³⁸⁴ Meanwhile, the current proposal of jurisdictional rules addresses the issue of determining the jurisdiction that will review and decide on the cross-border merger transaction, either as the most connected jurisdiction to the transaction or the most affected jurisdiction, or any other criteria the parties of the international agreement may opt for.

¹³⁸³ The Hague Conference on Private International Law encompasses more than 140 countries, and for more information about it visit its official website at http://www.hcch.net/index_en.php?act=text.display&tid=26 last visited on October 1, 2014.

¹³⁸⁴ Mathias M. Siems, *The European Directive on Cross-Border Mergers: An International Model?*, 11 COLUMBIA JOURNAL OF EUROPEAN LAW 167, at 167-168, 176 (2005).

Finally, it is undoubtedly true that negotiating and drafting the details of this proposal is problematic, and it might not be easy to get an international consensus in order to be a workable proposal. In addition to that, and in order to ensure the precise and accurate implementation of those jurisdictional rules, a dispute settlement scheme should be adopted, and that could be done through creating a new institution for that purpose or even to grant one of the already existing institutions the right to deciding on such disputes, like the DSU for instance.

b) Proposal Assessment

Based on the addressed description of the jurisdictional rules control as a proposal to improve the current multijurisdictional merger control systems, that proposal will be assessed in the coming discussion, and then the discussion will be followed by a table that displays the answers to all the assessment question, in just “yes” or “no,” as the most simple approach and then a table will be followed by a chart to show the final assessment result and the percentage of the expected positive effect and negative effect of that proposal.

First is concerning the cost issue, the proposal is expected to be effective with that regard, whereas it is expected to decrease the cost of running the regulatory authorities because it is expected to review the transaction by only one jurisdiction, but it is not considered as adequate because it will not affect all the other factors related to the merger control costs. Moreover, the cost reduction will be realized instantly after adopting such rule without requiring any additional resources, and it is expected that all the parties will benefit from that said cost reduction equally.

Second is concerning the different enforcement issue, the proposal will be effective, whereas it will help to entirely overcome the different enforcement issues because that set of jurisdictional rules will identify a single authority to decide on the transaction, and accordingly that effect is also adequate. Meanwhile, it might be inefficient to overcome that drawback because it might require additional resources to run the dispute resolution mechanism that will resolve the disputes regarding the contradicting decisions on which authority is competent, and accordingly it is expected to be unfair because the least powerful countries will take into consideration the political and economic consequences before making a decision to enter into a dispute with a more powerful country, and in the case that a corporation itself will have a stage to settle the disputes it should also do the same.

Third is concerning the ex-ante review issue, the proposal might not have any effect on the issue of that the ex-ante review as it is considered an extra layer to the merger control because that set of rules might lead to changes in the national systems that adopt a premerger control regime. Fourth is concerning the exclusion of the behavioral antitrust findings, the proposal will also not have any effect on the national systems that exclude the behavioral antitrust findings.

Fifth is concerning the extraterritorial reach issue, that proposal will be effective, whereas its main purpose is to completely overcome the issue of extraterritorial reach by identifying the competent jurisdiction that will review the transaction, and accordingly it will be adequate to resolve that issue, and that will be realized instantly upon adopting those rules. Meanwhile, it will be inefficient in some cases because it might require additional resources to run the dispute resolution mechanism that will resolve the disputes regarding the contradicting decisions on which authority is competent, and accordingly it is expected to be unfair, as it was just previously shown during the discussion of the different enforcement issue.¹³⁸⁵

Sixth is concerning the foundational errors issue, nothing in that proposal will have an effect on or lead to overcome the those errors, because the merger control rules will remain based on the antitrust faulty ideologies. Seventh is concerning the political influence issue, the proposal might be effective and lessen the political friction of the extraterritorial effect, but it will not be adequate because there still is influence and that will not be totally eliminated and the national merger control rules and the review standards might be effected by the problems of rent seeking and the regulatory capture. Meanwhile, the effect of the proposal on the political influence might be realized instantly, without requiring any additional resources, and will be realized equally to all the parties.

Eighth is concerning the privacy and data issue, the proposal might be effective, whereas for instance, there will not be a reason to exchange information between the authorities, but the proposal will not be adequate in overcoming the whole issue because it will change the fact that the practice might be harmful and lead to losses for the parties of the transaction, but that effect will be realized instantly and will not require any additional resources to be realized, and all the parties will realize the expected effects in the same way, which means that the proposal is fair concerning the privacy and date issue.

¹³⁸⁵ See *supra* p.216.

Ninth is concerning the remedies issue, the proposal will be not have any effect in that regard, because the remedies are a substantive issue of the national laws. Tenth is concerning the time consuming issue, that proposal might be effective, whereas it will reduce the time that is required to finish the merger control process to the time of the process in only one jurisdiction, but it will not be considered as adequate to overcome the issue because the process will still take time to be finished. Meanwhile, the effect of the time reduction might be recognized instantly upon adopting the rules, and it will require additional resources to realize that effect, and in addition to that the proposal might be considered fair because all the parties will benefit from the time reduction equally.

Standard \ Issue	Effectiveness	Adequacy	Time	Efficiency	Fairness	Flexibility
Cost	Yes	No	Yes	Yes	Yes	No
Different enforcements	Yes	Yes	Yes	No	No	No
Ex-ante review	No	No	No	No	No	No
Behavioral antitrust	No	No	No	No	No	No
Extraterritorial reach	Yes	Yes	Yes	No	No	No
Foundational errors	No	No	No	No	No	No
Political influence	Yes	No	Yes	Yes	Yes	No
Privacy and data issues	Yes	No	Yes	Yes	Yes	No
Remedies	No	No	No	No	No	No
Time consuming	Yes	No	Yes	Yes	Yes	No

Table 5: Jurisdictional rules – assessment

As general remarks on the proposal of the jurisdictional rules, as it could be clearly identified from the previous table, the proposal has a positive impact on many of the drawbacks, but the effect is not adequate in most of the cases, but on the other hand whenever it is effective it does not need time in order to be realized. Meanwhile, the effects will not be realized to all the parties fairly in many of the cases, and the proposal is not flexible, because it will not easily be changed, and it is not efficient in some cases because additional resources might be required to settle any disputes concerning the implementation of the rules.

Finally, and according to the result revealed in the previous table there are only twenty two instances during which the proposal of the jurisdictional rules has a positive effect on the drawbacks of the current merger control systems, and there are thirty eight instances during which the proposal has a negative effect on the drawbacks of the multijurisdictional merger

control systems, which means that the proposal might improve the current situation by 36%, as shown in the following chart.

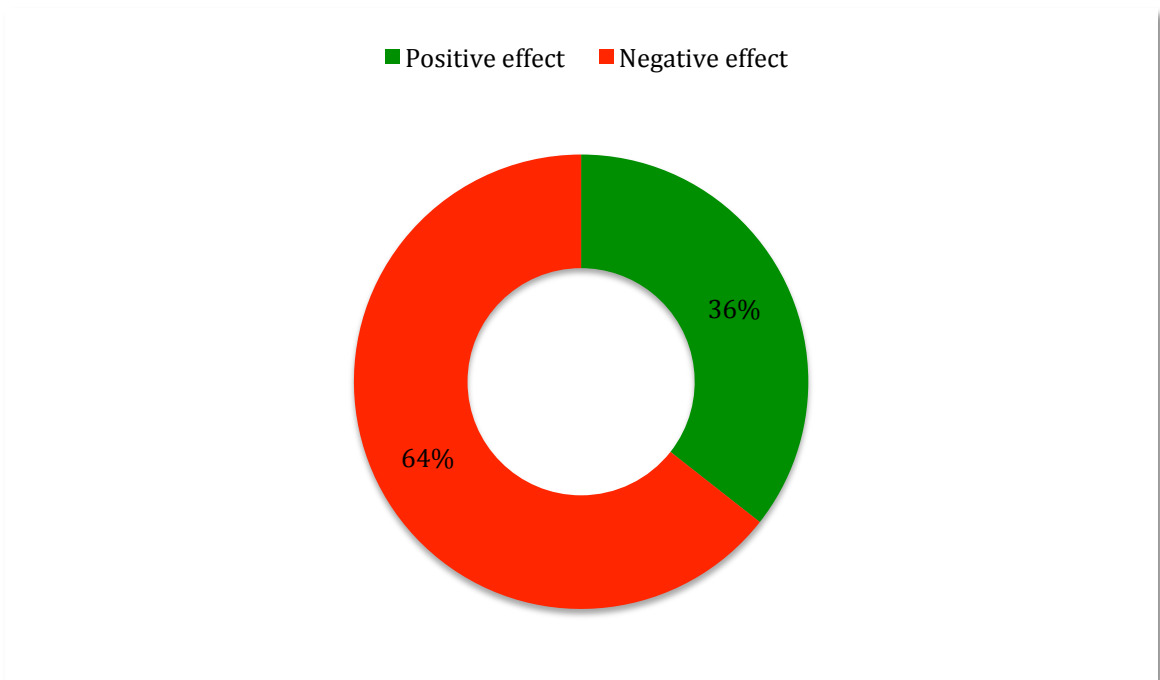


Figure 17: Jurisdictional rules – assessment

2. Common Online Filing System

a) Proposal description

The proposal of the common online filing system could be simply described as the adoption of one filing system that is a comprehensive and harmonized notification form, filing procedures, and filing time, and that the common online filing system should be adopted on the international level i.e. in all jurisdictions around the globe. The proposed common online filing system could be adopted through an international agreement and administered autonomously in each jurisdiction, or it might be administered through a supranational agency, that supranational agency could receive all the notifications and review the formalities and then feed them into the national systems in order to review the transaction itself.¹³⁸⁶

¹³⁸⁶ Clarke, *The International Regulation of Transnational Mergers*, *supra* note 8, at 463. 2010.

It should be noted that the proposal of the common filing system was already suggested by some scholars in the literature, and in addition to that it was also suggested on the institutional level by some institutions like for instance the OECD published a report that suggested the adoption of a common filing system,¹³⁸⁷ and the American Bar Association (hereinafter ABA), whereas the ABA issued a report in 1991 on the international merger control systems and in which it suggested the adoption of harmonized filing requirements and timing as a solution to overcome the multijurisdictional merger control system.¹³⁸⁸

It was reported that there was a previous attempt, in September 1996, to adopt a harmonized filing form and procedures in France, Germany, and UK, but unfortunately it was maintained that the idea was not successful, because for instance the coordination between the national authorities in those jurisdictions with regard the filing time led to a delay in some cases, and it was even reported that the form was used only one time in Germany, and that is due to the fact that the filing requirement in Germany is much easier than the other common filing requirements.¹³⁸⁹

Meanwhile, this is the first time that the common filing system was suggest to be an online system, and that is mainly to keep pace with the technological advancement and to make the process more efficient while saving time and money. To be more precise, the common filing system could be designed as an online server where the parties of the transaction could log in and complete all the required forms and information and submit the supporting documents, and the competent merger control authority will be granted access to such information.

In the same context, it was claimed that the common filing system should be designed to include the forms and all the procedures required in the two stages of merger review,¹³⁹⁰ because the merger control systems in most of the jurisdictions are designed as a two stage process, for instance “phase I investigation” and “phase II investigation” in the EU system, and the “second request” in the US system, as it was previously addressed during the discussions of both of the two systems.¹³⁹¹

¹³⁸⁷ For more details about that report see DIANE P. WOOD & RICHARD P. WHISH, *MERGER CASES IN THE REAL WORLD: A STUDY OF MERGER CONTROL PROCEDURES* (Organisation for Economic Co-operation and Development; OECD Publications and Information Centre. 1994).

¹³⁸⁸ Special Committee on International Antitrust Report Working Draft. (1991).

¹³⁸⁹ QC & Campbell, *Multi-jurisdictional Merger Review: Is it Time for a Common Form Filing Treaty?*, *supra* note 1072, at 18. 1999.

¹³⁹⁰ Clarke, *The International Regulation of Transnational Mergers*, *supra* note 8, at 479. 2010.

¹³⁹¹ *See supra* p.187.

Finally, concerning the language of the filing, as an analogy of the International Patent System under the Patent Cooperation Treaty, the parties of the transaction might chose to submit the notification in any language used in the UN if the receiving office is a common receiving office, otherwise it should be in the national language of the domestic offices.¹³⁹² On the other hand, it was claimed that there was no need to determine a common filing language because it will not be easy for the different countries to agree on a single filing language and that even the cost of translating the filing documents to different languages is “legitimate” and the parties of the transaction should bear it.¹³⁹³

b) Proposal assessment

Based on the addressed description of the common online filing system as a proposal to improve the current multijurisdictional merger control systems, in order to overcome the drawbacks of that system, that proposal will be assessed in the coming discussion, and then the discussion will be followed by a table that displays the answers to all the assessment question, in just “yes” or “no,” as the most simple approach and then table will be followed by a chart to show the final assessment result and the percentage of the expected positive effect and negative effect of that proposal.

First is concerning the cost issue, the proposal is expected to be effective with that regard, whereas it is expected to decrease the cost for parties to notify all the competent jurisdictions according to one common online filing systems, but it is not considered as adequate because it will not affect all the other factors of the merger control process’s costs. Moreover, the cost reduction will be realized instantly after adopting such common online filing systems and without requiring any additional resources, and it is expected that all the parties will benefit from that said cost reduction equally, which means it will be fair.

Meanwhile, the proposal will be not have any effect on the drawbacks from the second until the ninth, because the proposal is literally limited to the notification form, procedures, and timing, therefore it will not influence any aspect of the other drawbacks of the multijurisdictional merger control systems. Tenth is concerning the time consuming issue, that proposal might be

¹³⁹² The official languages that are used at the United Nations are: Arabic, Chinese, English, French, Russian, and Spanish.

¹³⁹³ Clarke, *The International Regulation of Transnational Mergers*, *supra* note 8, at 476. 2010.

effective, whereas it will reduce the time that is required to file a notification according to the different systems in all the competent jurisdictions, but it will not be considered as an adequate to overcome the issue because the process will still take time to be finished in all the jurisdictions. Meanwhile, the effect of the time reduction might be recognized instantly upon adopting the common system, without any additional resources, and it will be considered as fair because all the parties will benefit from the time reduction equally.

Standard \ Issue	Effectiveness	Adequacy	Time	Efficiency	Fairness	Flexibility
Cost	Yes	No	Yes	Yes	Yes	Yes
Different enforcements	No	No	No	No	No	No
Ex-ante review	No	No	No	No	No	No
Behavioral antitrust	No	No	No	No	No	No
Extraterritorial reach	No	No	No	No	No	No
Foundational errors	No	No	No	No	No	No
Political influence	No	No	No	No	No	No
Privacy and data issues	No	No	No	No	No	No
Remedies	No	No	No	No	No	No
Time consuming	Yes	No	Yes	Yes	Yes	Yes

Table 6: Common online filing system – assessment

As general remarks on the proposal of the common online filing system, as it could be clearly identified from the previous table, that proposal has a positive impact only on cost and the time drawbacks, and even the effect is not adequate on both drawbacks, but on the other hand the expected effect does not need time or additional resources in order to be realized. In addition to that, expected effect will be realized equally to all the parties, and the proposal is will be flexible whereas the parties might easily agree to changed it in the future for improvements, because it is highly expected that the different countries could agree to a harmonized procedural issues easy.

Finally, and according to the result revealed in the previous table there are only ten instances during which the proposal of the common online filing system has a positive effect on the drawbacks of the current merger control systems, and there are fifty instances during which the proposal has a negative effect on the drawbacks of the multijurisdictional merger control systems, which means that the proposal might improve the current situation by 17%, as shown in the following chart.

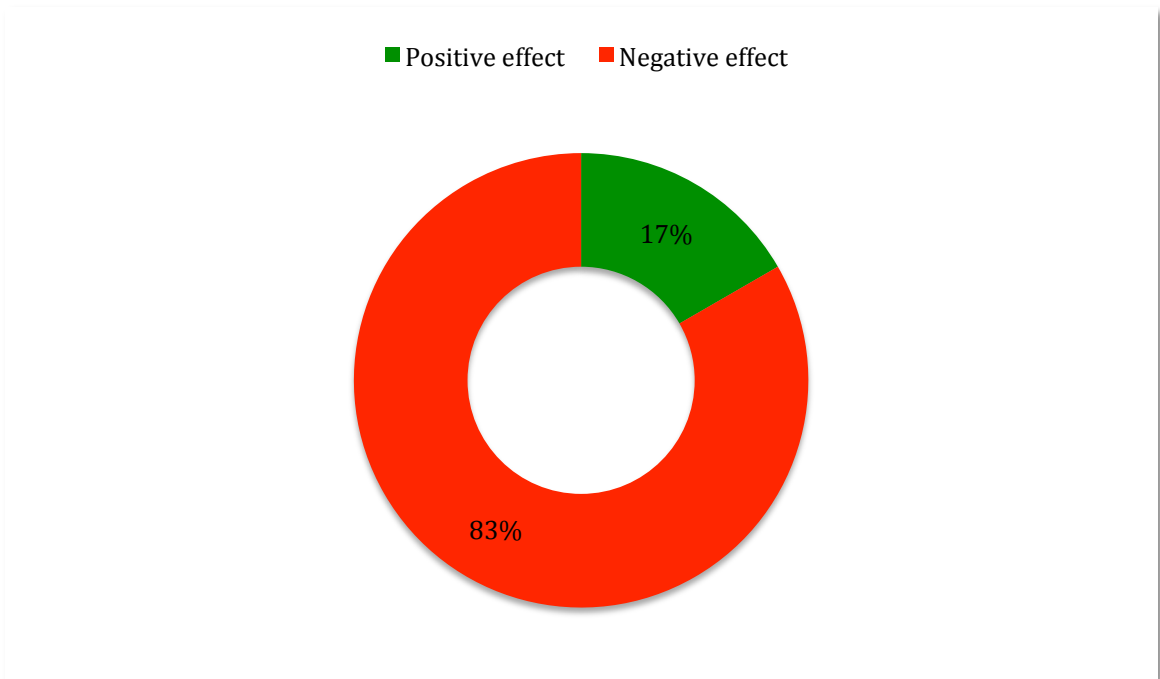


Figure 18: Common online filing system – assessment

3. *Multilevel Monitoring System*

a) Proposal description

The proposal of the multilevel monitoring systems is a three level hierarchical system, under that system the highest level is the global level, at that level there will be a supranational global institution as a dispute settlement body, and it will be entitled to receive complaints regarding the merger control decisions issued by the lower levels with regard to the transactions that have global dimension, and that institution will be empowered to prohibit any restrictive or discretionary practices by the authorities in the lower levels. In the second level, which will be the regional level, there will be a number of supranational regional institutions that cover the world, those institutions will be similar to the global one but they will be concerned only with the transactions that have a regional dimension.

The third level will be the national level, at that level the national competent authorities will conduct the merger control review according to the national laws, but the process should be done in accordance with any previous decisions rendered by the regional and the global institutions. The multilevel monitoring systems could be adopted through an international

agreement, and it could be done under the patronage of one of the already existed institutions such the WTO, or the whole system might be created within the WTO itself. It should be noted that that proposal was created by a way of analogy from the proposal of the German Professor Wolfgang Kerber, who suggested the creation of multilevel system but his idea was that the institutions at each level of the system would be competent to review certain transactions, which is not the case here in that multilevel monitoring system.¹³⁹⁴

In addition to that, the proposal of the multilevel monitoring system could be enhanced by the adoption of the unified merger control rules, as it was explained under the proposal of the international merger control rules. However, it was generally claimed that as an alternative to the harmonization of laws, whereas the harmonization of the rules thought to be unrealistic and unattainable, the mutual recognition agreements¹³⁹⁵ are good options to be adopted in order to harmonize the enforcement of the antitrust rules.¹³⁹⁶

Therefore, the mutual recognition agreement could be added to the multilevel monitoring system, whereas all the countries that are parties of that agreement, and members of the system, will mutually acknowledge the filing system and the review standards of each other, or in other words acknowledge the decision taken by the competent authority with regard to the formalities of the notification in addition to the results of tests done during the merger control process, but for the purposes of sovereignty the national authorities will retain the right to conduct its own review and even reach a new outcome.

b) Proposal assessment

Based on the addressed description the adoption of the multilevel monitoring system as a proposal to improve the current multijurisdictional merger control systems, in order to overcome

¹³⁹⁴ For more details about the multilevel system that was proposed by Prof. Wolfgang *see* Wolfgang Kerber, 2003, An International Multi-Level System of Competition Laws: Federalism in Antitrust, In: Drexl, Josef, and Peter Behrens. The Future of Transnational Antitrust: From Comparative to Common Competition Law, (Berne: Staempfli & Kluwer), at 269-300. 2003.

¹³⁹⁵ The mutual recognition agreements are a well-known concept, and are used as an agreements between the trade partners, and it became more common with regard the technical standards, specially under Article 2.7 of the WTO Agreement on Technical Barriers to Trade, and also is well known in the EU whereas a special directive was issued regarding the mutual recognition of professional qualifications (Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, Official Journal L 255/22, 30.09.2005, p. 22-142), for more an evaluation study about conducted mutual recognition agreements *see generally* Productivity Commission, January 2009, Review of Mutual Recognition Schemes, Research Report, Canberra.

¹³⁹⁶ Meessen, NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS, *supra* note 1295, at 21 (1989).

the drawbacks of that system, and the improvements that could be added to such proposal in order to enhance it, that proposal will be assessed in the coming discussion, and then the discussion will be followed by a table that displays the answers to all the assessment question, in just “yes” or “no,” as the most simple approach and then table will be followed by a chart to show the final assessment result and the percentage of the expected positive effect and negative effect of that proposal.

First is concerning the cost issue, the multilevel monitoring system is expected to be effective and decrease the cost of running the regulatory authorities especially in the case of fully utilize the mutual recognition agreements, but it is not considered as adequate because it will not affect all the other factors of the merger control costs. Moreover, the cost reduction will take time in order to be recognized because the different jurisdiction will be bound by the decision of the others.

Second is concerning the different enforcement issue, the proposal might be effective, whereas it could help to entirely overcome the different enforcement issues because the system will be used as a dispute resolution mechanism that could put the contradicting decisions to an end, and accordingly it is adequate to resolve the issue, but it might need time to settle any dispute brought before the regional or global institution. Third is concerning the ex-ante review issue, it is not expected that the current proposal has any effect on the issue of that the ex-ante review as it is considered as an extra layer to the merger control. Fourth is concerning the exclusion of the behavioral antitrust findings, the proposal is not also expected to have any effect on the drawback of the exclusion of the behavioral antitrust findings.

Fifth is concerning the extraterritorial reach issue, that proposal might be effective, whereas it could help in completely overcome the issue of the extraterritorial reach by referring the jurisdictional issues to the regional or the global institution as the case might be, and accordingly it will be adequate to resolve that issue, but that effect might take time in order to be realized to settle the disputes in that regard. Sixth is concerning the foundational errors issue, nothing in this proposal will effect on or lead to overcome those errors, because the merger control rules will remain based on the antitrust faulty ideologies.

Seventh is concerning the political influence issue, the proposal might be effective and lessen the political friction of the extraterritorial effect, but it will not be adequate because there still influence will not be totally eliminated and the implementation of the rules might be

subjected to regulatory capture and rent seeking. Moreover, the effect of the proposal on the political influence issues might require some time in order for it to be realized because it is expected to take time in case of the mutual recognition and in the case of disputes. Eighth is concerning the privacy and data issue, the proposal will not have any effect in that regard. Ninth is concerning the remedies issue, the proposal will not also have effective on the remedies issue.

Tenth is concerning the time consuming issue, that proposal might be effective, whereas it might reduce the time that is required to finish the multijurisdictional merger control process, but it will not be considered as an adequate to overcome the issue because its effect on reducing the time is minimal. Meanwhile, the effect of the time reduction might require some time in order to be recognized, for instance the time required to settle the disputes before the regional or the global institution. Meanwhile, the proposal might be considered fair because all the parties will benefit from the time reduction equally.

Finally, that proposal is generally considered as inefficient with regard to all the issues, because it will always require additional resources, both to create and run the global and the regional institutions and even to use the dispute settlement mechanism. In addition to that, the proposal is also considered as not flexible with regard to all the issues, because it will not be easy for it to be changed for improved in the future, because the renegotiating and amending of that kind of international agreements will face difficulties and at least it will need some time. Moreover, it is expected that the proposal will be unfair because the least powerful developing countries might take into consideration the political and economic consequences before making a decision to enter into dispute with a more powerful country, and in cases that the corporation itself will have a stand before the dispute settlement body, it should also do the same.

Standard \ Issue	Effectiveness	Adequacy	Time	Efficiency	Fairness	Flexibility
Cost	Yes	No	No	No	No	No
Different enforcements	Yes	Yes	No	No	No	No
Ex-ante review	No	No	No	No	No	No
Behavioral antitrust	No	No	No	No	No	No
Extraterritorial reach	Yes	Yes	No	No	No	No
Foundational errors	No	No	No	No	No	No
Political influence	Yes	No	No	No	No	No
Privacy and data issues	No	No	No	No	No	No
Remedies	No	No	No	No	No	No
Time consuming	Yes	No	No	No	Yes	No

Table 7: Multilevel monitoring system – assessment

As general remarks on the proposal of the multilevel monitoring system, as it could be clearly identified from the previous table, that proposal has a positive impact on some of the drawbacks, which are mainly procedural related issues, and the effect is adequate in most of the cases, and in most of the cases the effects need time to be realized, and it is unfair in almost all the cases. Moreover, that proposal is not flexible because it will not be easy to change, and it is not efficient because it always needs additional resources in order to create and run the global and the regional institutions and also to refer and settle the disputes before both of them.

Finally, and according to the result revealed in the previous table there are only eight instances during which the proposal of the multilevel monitoring system has a positive effect on the drawbacks of the current merger control systems, and there are fifty two instances during which the proposal has a negative effect on the drawbacks of the multijurisdictional merger control systems, which means that the proposal might improve the current situation by 13%, as shown in the following chart.

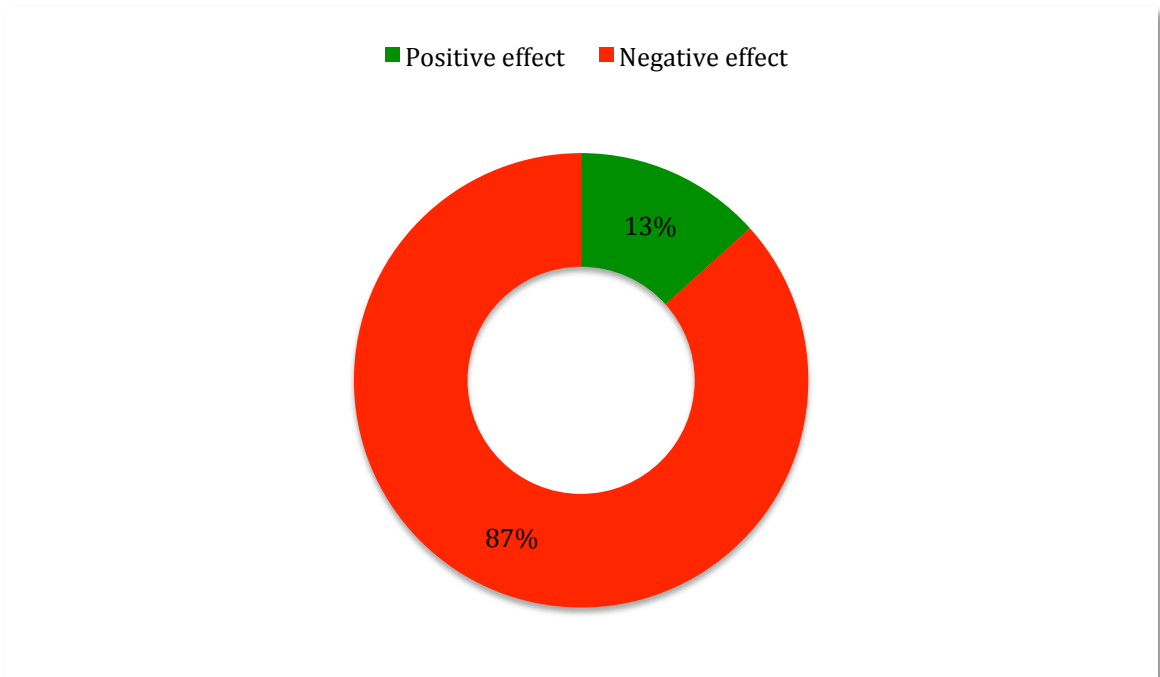


Figure 19: Multilevel monitoring system – assessment

V. Mergers Deregulation

1. Proposal Description

The proposal of the merger deregulation could be simply described as repealing the merger control system in all the countries that adopt such system, and accordingly the merging parties will not be required to notify any jurisdiction, before or after they consummate their transaction anymore and the proposal could be adopted through an international agreement to that effect. However, the merging parties will not be granted immunity from further investigations with regard to their future behaviors, in case that they violate the antitrust laws. In addition to that, the international agreement will include some rules to impose on the national antitrust authorities to take into consideration the behavioral antitrust findings whenever they challenge any future behavior as violating its national antitrust laws.

Accordingly, the merger deregulation proposal as portrayed varies from the merger control conventional wisdom in two main aspects; the first is that both of the merger control systems will be repealed, and the second is that the national antitrust authorities will be committed to take into consideration the behavioral antitrust findings as a general obligation. It

should be noted here that some scholars claimed that the technical meaning of the “regulations” should be limited to the industry-specific regulation while with regard to antitrust the word “policy” should be used, and that is mainly to differentiate between those different set of rules. They even claim that deregulation means a shift from the industry-specific regulations to enforcement of only the antitrust policy.¹³⁹⁷

That claim might be true, however, regarding the current proposal the meaning of deregulation is not too far from that, whereas adopting the proposal will lead to shifting from the merger control system to the conventional enforcement of the antitrust rules. Furthermore, it should also be noted that the repealing of the merger control system will not mean the repealing of the merger control as a part of the antitrust policy, because the policy here will be the adoption of the deregulation approach instead of the premerger review regime.

It is noteworthy here that even deregulation will be accorded under the supervision of the judiciary, which means that the courts will warrant that the authorities will not intervene or hinder the merger transactions. Not only this, but the third parties should be granted rights to challenge the merger transaction on the basis of the antitrust rules, because it is undoubtedly true that whenever third parties are granted a stage to challenge the mergers they will seek to weaken their opponents power in the market, in other words they will focus on limiting the competition rather than promoting it.¹³⁹⁸

Literally, there is no need for creating a new dispute settlement mechanism, it is already in place, whereas in most of the systems the administrative decision could be challenged before the courts, as it was previously shown in Egypt and the EC, and even under the Administrative Procedure Act¹³⁹⁹ and the Hard-Look doctrine,¹⁴⁰⁰ the courts in the US shall review the decision of the administrative agencies and ensure that it is not arbitrary or unreasoned. Meanwhile, based on the fact that the judicial system in the common law systems could be considered as a regulatory institution, due to the fact that whenever the courts did not find a statute or to be more precise a clear act, it might give the experts and the politicians room to help decide the case,¹⁴⁰¹

¹³⁹⁷ Christian Kirchner, *Competition Policy vs. Regulation: Administration vs. Judiciary*, in THE INTERNATIONAL HANDBOOK OF COMPETITION at 306, 308-309, (Manfred Neumann & Jürgen Weigand eds., 2004).

¹³⁹⁸ Easterbrook, TEXAS LAW REVIEW, *supra* note 742, at 39 (1984).

¹³⁹⁹ The Administrative Procedure Act of 1946, 5 U.S.C. 55-551, et seq.

¹⁴⁰⁰ For more details about the relation between the deregulation and the Hard-Look doctrine see Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 THE SUPREME COURT REVIEW 177 (1983).

¹⁴⁰¹ Cass R. Sunstein, *Deregulation and the Courts*, 5 JOURNAL OF POLICY ANALYSIS AND MANAGEMENT 517 (1986).

and the case is almost the same in the civil law systems under the administrative judiciary institution, the deregulation should be clearly binding and no decision should be taken towards the merger transaction as a tool of restructuring the corporations.

In fact the merger control is an application of the state regulatory role that started during the end of the 19th century, and even the antitrust laws started to flourish during that very period, and that step to take that role was triggered by many factors as it was discussed before during the discussion of the history of antitrust laws.¹⁴⁰² That regulatory role of the state is highly debatable in general, whereas from a liberal perspective it is considered as a “triumph of democracy,” while on the other hand, from the conservative perspective, it is considered as “counter productive.”¹⁴⁰³

In that context, the scholars of the Chicago School, which could be coined as a conservative school, maintain that regulations are mainly designed to control the competition in the market by keeping the profits high for the players in the markets and minimize their risk, and that is mainly to serve the rent seekers or the regulatory capture, which will not be a success by any chance in granting the benefits that are comparable to those benefits under the market forces.¹⁴⁰⁴ As an example of how the regulatory practices is even harming the competition in the markets, is the coordination or “collision” that is required or at least permitted between the licensees, in certain industries,¹⁴⁰⁵ like the telecommunications for instance.

Actually, the deregulatory ideology or at least the refusal of the regulatory notion is as early as the age of Adam Smith, whereas the essence of the deregulation could easily be identified in what he said in his book in 1776, as he clearly said that:

People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible, indeed, to prevent such meetings, by any law [that] either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from

¹⁴⁰² See *supra* p.33.

¹⁴⁰³ Horwitz, *THEORY AND SOCIETY*, *supra* note 359, at 139-140 (1986).

¹⁴⁰⁴ See generally Richard A. Posner, *Theories of Economic Regulation*, 5 *THE BELL JOURNAL OF ECONOMICS AND MANAGEMENT SCIENCE* 335 (1974); George J. Stigler, *THE BELL JOURNAL OF ECONOMICS AND MANAGEMENT SCIENCE*, *supra* note 1222, at 3 (1971); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 *JOURNAL OF LAW AND ECONOMICS* 211 (1976).

¹⁴⁰⁵ Christopher C. DeMuth, *Deregulation Review*, 53 *ANTITRUST LAW JOURNAL* 189, at 189 (1984).

sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less render them necessary.¹⁴⁰⁶

Adam Smith is clearly supporting the idea that the market forces will drive the players in the market to the general welfare, and he also was realistic and understood that the players in the market might enter into some arrangement from time to time, but he was also claiming that the law would not be cable of putting such arrangement to an end. However, he was not supporting or encouraging the laws to take the role of hindering such arrangement that would be against the free market ideology nor “facilitating” it, which means he was not endorsing the regulatory role of the state.¹⁴⁰⁷

Moreover, the merger control authorities are usually justifying the merger control costly system according to the same regulatory reasoning, which was claimed to have six reasons, but there are in fact only five reasons: (1) protecting the legitimate interests or rights of certain groups, like for example the employees’ rights or any of the previously discussed merger control goals, (2) achieve redistribution goals, which might be the redistribution of wealth or power, (3) prevent parties from causing harm to themselves “paternalistic,” such as changing consumer decisions to be more rational, (4) responding to interest groups’ pressure, like for instance the farmers pressure to enact the Sherman Act, and (5) substitute the market forces in order to offset any harm that might be caused to the society.¹⁴⁰⁸ In addition to that it was held that the main incentive for the merger is the getting rid of the competitors and that should be controlled through the merger control,¹⁴⁰⁹ and even the liberalized policies will not lead to growth.¹⁴¹⁰

Those justifications could easily be refuted under the very interesting findings of one of the most important empirical studies done on mergers consummated in a voluntary merger control systems, whereas the merging parties have the option to go for an ex-ante merger control by notifying the transaction before its consummation and get cleared or blocked, or otherwise to consummate the transaction, and in that situation the authorities might investigate the transaction and challenge it, and that is typically the case in Australia, where that research was conducted.

¹⁴⁰⁶ SMITH, *An Inquiry Into the Nature and Causes of the Wealth of Nations*, *supra* note 112, at 183. 1976.

¹⁴⁰⁷ ARMENTANO, *Antitrust: The Case for Repeal*, *supra* note 712, at 105-106. 1999.

¹⁴⁰⁸ Kirchner, *Competition Policy vs. Regulation: Administration vs. Judiciary* at 313. 2004; Sunstein, *JOURNAL OF POLICY ANALYSIS AND MANAGEMENT*, *supra* note 1401, at 518-520 (1986).

¹⁴⁰⁹ George J. Stigler, *Mergers and Preventive Antitrust Policy*, 104 *UNIVERSITY OF PENNSYLVANIA LAW REVIEW* 176, at 177 (1955).

¹⁴¹⁰ MANUEL AGOSIN & DIANA TUSSIE, *TRADE AND GROWTH: NEW DILEMMAS IN TRADE POLICY* at 26 (St. Martin's Press. 1993); *The Global Governance of Trade: As if Trade Really Mattered*. (2001).

The findings of that study revealed the following facts: first, under the voluntary merger control system the following facts were observed: (1) mergers that have insignificant gains for both the merging parties and social welfare, the parties opt for premerger control of the transaction and they are cleared under remedies, (2) mergers that have insignificant gains for merging parties and significant gain for social welfare, the parties opt for not post-merger control, and if investigated it is unconditionally cleared, (3) mergers that have significant gains for the merging parties and insignificant gains for social welfare, the parties opt for post-merger control, and if investigated it will be challenged; second, the results is the same under the compulsory premerger control system but with an additional costs for running the system.¹⁴¹¹

In addition to that, there are some other arguments that might support the merger deregulation proposal, some of those arguments are mainly: (1) the drawbacks of the merger control systems are insufficiently justified, if not considered as unjustified at all, (2) the merger control system impedes innovation and leads to the decrease of productivity,¹⁴¹² (3) the regulation enforcement is always fluctuating to serve different groups at different times,¹⁴¹³ which leads to uncertainties, (4) the authorities are not just using technical standards in its review, but its decisions are always politically influenced,¹⁴¹⁴ (5) the empirical research findings are confirming that the high market power or even the dominant position are “no longer bad news,” the use of that power in a manner that violates the law is the issue, i.e. it is the behavior not the structure.¹⁴¹⁵

It could be also claimed that the empirical findings revealed that deregulation would lead to a high probability that foreigners will control certain types of assets or even whole industries.¹⁴¹⁶ That claim could be easily contested because the issue here should be directly addressed by putting a limitation on the purchase of assets by foreigners or certain groups, regardless of the legitimacy of that purpose, but not by imposing a merger control system. In the same line, it was claimed that there is no empirical evidence that supports the idea that there is a link between the international trade and the taking of an international action towards the merger

¹⁴¹¹ Choe & Shekhar, *INTERNATIONAL JOURNAL OF INDUSTRIAL ORGANIZATION*, at 27 (2010).

¹⁴¹² Sunstein, *JOURNAL OF POLICY ANALYSIS AND MANAGEMENT*, *supra* note 1401, at 519 (1986).

¹⁴¹³ Peltzman, *JOURNAL OF LAW AND ECONOMICS*, *supra* note 1404, at 227 (1976).

¹⁴¹⁴ Sunstein, *JOURNAL OF POLICY ANALYSIS AND MANAGEMENT*, *supra* note 1401, at 521 (1986).

¹⁴¹⁵ George F. Kopits, *Dividend Remittance Behavior within the International Firm: A Cross-Country Analysis*, 54 *THE REVIEW OF ECONOMICS AND STATISTICS* 339, at 347 (1972).

¹⁴¹⁶ Stacey Kole & Kenneth Lehn, *Deregulation, the Evolution of Corporate Governance Structure, and Survival*, 87 *THE AMERICAN ECONOMIC REVIEW* 421, at 424 (1997).

control, while on the other hand the same scholar reluctantly affirm at the end of his research that his research “does not consider the possibility of multinational firms as only purely domestic mergers are analy[z]ed. Relaxing this restriction would complicate the analysis, but would be an important advance since international mergers are an increasingly important policy concern.”¹⁴¹⁷

In addition to that it was correctly claimed the antitrust rules are more concerned with giving new entrant and access to the market, but if and only if that will be precompetitive, which means by default that the antitrust rules could be considered as a limitation to free trade policies that have a wider goal, which is granting the access to the markets for all players at all the times. Therefore, it could be claimed that the merger control rules as an application of the antitrust rules are hindering the free trade and access to the markets,¹⁴¹⁸ in other words the state replaced the tariffs at the gate by non-border barriers from inside.¹⁴¹⁹

To be more precise while trying or claiming the removal of the private anticompetitive barriers it created its own barriers, and it was even claimed that in order to keep pace with the free trade principles the competition policies and the merger control should be adopted on the global scale, for instance exporting cartel should be allowed no more.¹⁴²⁰ It is noteworthy here that it was reported that the physical barriers i.e. borders or even bad infrastructure are hindering free trade when the gates are opened only at the doors.¹⁴²¹

In that same context, it could be easily proved that the process of merger control itself is considered as fiscal and non-fiscal barrier according to the WTO. To elaborate more, conducting the merger control review process, with all of its complexities, costs, and time consuming, will undoubtedly make the trade more difficult and more expensive, and that is clearly violating Article XI of the GATT, and that violation could not be justified under any of the justifications that are allowed under the Article XX of the GATT. It does not make sense that while it is expected that that semi-globalized world will take more steps everyday toward the economic progress and reaping the fruits of the globalization process under the WTO and other similar initiatives, the corporations are expecting to experience such kind of barriers.

¹⁴¹⁷ Horn & Levinsohn, THE ECONOMIC JOURNAL, *supra* note 1300, at 269-270 (2001).

¹⁴¹⁸ Sweeney, MELBOURNE JOURNAL OF INTERNATIONAL LAW, *supra* note 1284, at 377, 414 (2004).

¹⁴¹⁹ *Id.* at 380.

¹⁴²⁰ Foster, EMORY INTERNATIONAL LAW REVIEW, *supra* note 1249, at 479-484 (2001).

¹⁴²¹ For example see the comparison between the change in trade rates after the broke of Czechoslovakia into Czech Republic and Slovakia, and similarly after the unification of West and East Germany in PANKAJ GHEMAWAT, WORLD 3.0: GLOBAL PROSPERITY AND HOW TO ACHIEVE IT at 44-45 (Harvard Business Review Press. 2011).

Furthermore, the rationale behind the deregulation proposal could be identified in the following points: (1) the empirical findings are that the deregulated industries are experiencing gains and that led to a total surplus and offset any harm caused to the members of the full picture,¹⁴²² (2) the regulations are not economically rational because they are always enforced by the administrative bureaucratic institutions,¹⁴²³ which always consume taxpayers resources in order to keep it running, or the merging parties resources to deal with it, (3) deregulation encourages innovation and that will lead to production efficiencies,¹⁴²⁴ (4) it was empirically reported that the deregulation led to the demolition of the cartels formed under regulations, and that inevitably led to an increase in competition in the market,¹⁴²⁵ and (5) market forces are efficiently serving the interests of all the parties in the society.

In that context, it was claimed that the impact of deregulation on the unemployment rates is clear, and the increase of the unemployment rates was attributed to the weakening of the labor unions as an inevitable result of the deregulation.¹⁴²⁶ Even the average compensation of the employees is decreased in order to keep pace with the cost reduction and the competition in the markets.¹⁴²⁷ Accordingly, the merger deregulation may have some drawbacks on employees and even on the shareholders of the inefficient corporations, those drawbacks are mainly a result of the merger itself not the repealing of the merger control systems, because the merger control system in fact was never concerned with the employment issues.

¹⁴²² Kole & Lehn, *THE AMERICAN ECONOMIC REVIEW*, *supra* note 1416, at 422 (1997); Randall S. Kroszner & Philip E. Strahan, *What Drives Deregulation? Economics and Politics of the Relaxation of Bank Branching Restrictions*, 114 *THE QUARTERLY JOURNAL OF ECONOMICS* 1437, at 1457 (1999); Stigler, *THE BELL JOURNAL OF ECONOMICS AND MANAGEMENT SCIENCE*, *supra* note 1222, at 10 (1971); Steven A. Morrison & Clifford Winston, *Airline Deregulation and Public Policy*, 245 *SCIENCE* 707, at 711 (1989); Patrick Massey, *Competition and Deregulation: A Review of the Irish Experience*, 47 *ANTITRUST BULLETIN* 716, at 744 (2002); for detailed information and empirical findings about many successful deregulated industries (airline, trucking, railroads, banking, and telecommunications) in the US see Horwitz, *THEORY AND SOCIETY*, *supra* note 359, at 149-164 (1986); Ernst R. Berndt, et al., *Cost Effects of Mergers and Deregulation in the U.S. Rail Industry*, 4 *THE JOURNAL OF PRODUCTIVITY ANALYSIS* 127 (1993); Kenneth D. Boyer, *Equalizing Discrimination and Cartel Pricing in Transport Rate Regulation*, 89 *JOURNAL OF POLITICAL ECONOMY* 270 (1981); Henry McFarland, *The Effects of United States Railroad Deregulation on Shippers, Labor, and Capital*, 1 *JOURNAL OF REGULATORY ECONOMY* 259 (1989); Wesley W. Wilson, *Market-Specific Effects of Rail Deregulation*, 42 *THE JOURNAL OF INDUSTRIAL ECONOMICS* 1 (1994); Barry T. Hirsch, et al., *Earnings and Employment in Trucking: Deregulating a Naturally Competitive Industry*, in *REGULATORY REFORM AND LABOR MARKETS* (James Peoples ed. 1998).

¹⁴²³ Horwitz, *THEORY AND SOCIETY*, *supra* note 359, at 148, 169 (1986).

¹⁴²⁴ Elizabeth E. Bailey, *Deregulation: Causes and Consequences*, 234 *SCIENCE* 1211, at 1211-1212, 1216 (1986).

¹⁴²⁵ Horwitz, *THEORY AND SOCIETY*, *supra* note 359, at 167 (1986).

¹⁴²⁶ *Id.* at 164-165.

¹⁴²⁷ Kevin E. Henrickson & Wesley W. Wilson, *Compensation, Unionization, and Deregulation in the Motor Carrier Industry*, 51 *JOURNAL OF LAW AND ECONOMICS* 153, at 173 (2008).

In the context of designing solutions for the employment issues, it should be noted that solution especially with regard to employment issues should be tailored carefully to fit the different jurisdictions, whereas each jurisdiction has its own characteristics, and what works for some countries might not work for others, for instance the developing countries should get different unconventional care that takes into consideration the very low standard of living.¹⁴²⁸

Finally, and despite the fact that it could be claimed that repealing the merger control system would be considered a milestone in the race between the different jurisdiction to attract FDI generally and the cross-border mergers specifically, which is known as the race to the bottom, and that race to the bottom will end up by “demolition of society.”¹⁴²⁹ However, it the contrary that could be claimed, i.e. that the merger deregulation will be an actual milestone but towards recovering from the drawbacks’ effects that were experienced under the merger control system, as an application of the regulatory state theory, and it will undoubtedly help all the jurisdictions to reap the fruits of globalization.

2. Proposal Assessment

Based on the addressed description to repeal the merger control system and deregulate mergers, to improve the current multijurisdictional merger control systems, in order to overcome the drawbacks of that system, and all the improvement that could be added to such proposal in order to enhance it, that proposal will be assessed in the coming discussion, and then the discussion will be followed by a table that displays the answers to all the assessment question, in just “yes” or “no,” as the most simple approach and then table will be followed by a chart to show the final assessment result and the percentage of the expected positive effect and negative effect of that proposal. It could be claimed that by repealing the system no drawbacks are expected, and there is no need to assess the proposal because it will score 100% improvement, but the fact is that some of the drawbacks are not an original result from the merger control system, but they are inherited from its predecessor i.e. antitrust flaws.

First is concerning the cost issue, the merger deregulation proposal is expected to be effective regarding the cost issues, whereas it is expected not only to decrease the costs but it will

¹⁴²⁸ Rafael Leal-Arcas, *A New Era in Global Economic Governance*, INTERNATIONAL SECURITY FORUM 1, at 3 (2009).

¹⁴²⁹ KARL POLANYI, *THE GREAT TRANSFORMATION* at 73 (Beacon Press. 1957).

remove it all, therefore it will be considered as adequate because it will not affect all the other factors of the merger control costs. In addition to that, the cost elimination will be realized instantly upon adopting the proposal, and it will be recognized equally in all jurisdictions, which means that it will be fair in that concern.

Second is concerning the different enforcement issue, the proposal will be effective, whereas it will entirely overcome the different enforcement issues because obviously there are no decisions at all to be contradicting, and accordingly it is adequate to resolve the issue instantly and fairly. Third is concerning the ex-ante review issue, the proposal removes the extra layer of the premerger control approach, and undoubtedly that will be adequate to overcome the drawback, and it will be also realized instantly and equally in all jurisdictions.

Fourth is concerning the exclusion of the behavioral antitrust findings, the proposal will be effective, only if the general obligation of considering the behavioral antitrust findings was incorporated in the international agreement, and in that case it will totally overcome the drawback of the exclusion of the behavioral antitrust findings and undoubtedly that will be adequate, but that effect might take some time in order to be realized, at least the time required to change the national laws to be compatible with the new international rules. However, it is expected that all the parties will benefit from overcoming such drawback equally.

Fifth is concerning the extraterritorial reach issue, that proposal will be effective, whereas it will totally eliminate the extraterritorial reach because no decision will be rendered concerning a merger transaction in other jurisdictions or even domestically, and without any need to run a dispute settlement mechanism in that regard, and accordingly it is considered adequate to resolve that issue, and the effect will be realized upon the adoption of the international agreement. Sixth is concerning the foundational errors issue, nothing in that proposal will have effect on or lead to overcome the those errors, because the post-merger control rules i.e. the antitrust rules will remain as it is, based on its faulty ideologies.

Seventh is concerning the political influence issue, the proposal might be effective and lessen the political friction of the extraterritorial effect and the different enforcement issues, but the rent seeking and regulatory capture problems will remain, accordingly it will be considered as inadequate, but the effect will be realized instantly and fairly by all the parties in all jurisdictions. Eighth is concerning the privacy and data issue, the proposal will be effective, no information will be gathered by any means from the merging parties, third parties, and even the

authorities in other jurisdictions, and no announcement will be made regarding the transaction from a merger control perspective, accordingly the proposal will be also adequate and the effect will be realized instantly and equally by all the parties in all jurisdictions.

Ninth is concerning the remedies issue, the proposal will be effective, whereas it entirely eliminates the need for remedies, accordingly under that proposal the parties will avoid it totally, with regard to the transaction itself, and does not negate that the national systems may impose any penalties and restoring measures to restore any anticompetitive behavior in future, that are not related to the structure of the transaction. Moreover, that effect will be realized instantly and fairly to all the parties in all jurisdictions.

Tenth is concerning the time consuming issue, that proposal might be effective, whereas no time is required in order to go through the multijurisdictional merger control processes, and the merging parties will consummate the transaction right away according to their schedule, without any time delay that resulted from the merger control process, accordingly it will be considered as adequate to overcome the issue. Meanwhile, the effect of the time reduction will be recognized instantly upon the adoption of the international agreement, whereas it could be also applied to the pending transactions before the enforcement authorities, and in addition to that the proposal is fair because all the parties will benefit from the time reduction equally in all jurisdictions.

Finally, that merger deregulation proposal is considered as efficient with regard to all the issues, because it will not require any additional resources in order to be effective, it even does not need a monitoring institution or a dispute settlement mechanism. The proposal is also considered as flexible with regard to its effect in all the cases and it has positive effects, because any parties of the international agreement might withdraw from the agreement at anytime to opt for a better solution or even for its old premerger control system.

Standard \ Issue	Effectiveness	Adequacy	Time	Efficiency	Fairness	Flexibility
Cost	Yes	Yes	Yes	Yes	Yes	Yes
Different enforcements	Yes	Yes	Yes	Yes	Yes	Yes
Ex-ante review	Yes	Yes	Yes	Yes	Yes	Yes
Behavioral antitrust	Yes	Yes	No	Yes	Yes	Yes
Extraterritorial reach	Yes	Yes	Yes	Yes	Yes	Yes
Foundational errors	No	No	No	No	No	No
Political influence	Yes	No	Yes	Yes	Yes	Yes
Privacy and data issues	Yes	Yes	Yes	Yes	Yes	Yes
Remedies	Yes	Yes	Yes	Yes	Yes	Yes
Time consuming	Yes	Yes	Yes	Yes	Yes	Yes

Table 8: Merger deregulation – assessment

As general remarks on the proposal of the merger deregulation, as it could be clearly identified from the previous table, that proposal has a positive impact on almost all the drawbacks except the foundational errors that are based on the antitrust ideology, and the effect is adequate in almost all the cases except the political influence because the rent seeking and regulatory capture will still have a role in society, and almost all the effects will be realized instantly and it could be applied on the pending cases before the antitrust enforcement authorities, and all the effects of the proposal will be fair and realized equally in the cases. Meanwhile the effect of the proposal on the behavioral antitrust issues might require some time to be realized, because it might require some time to enforce the behavioral antitrust findings on the national level.

Moreover, the merger deregulation proposal will be flexible, whereas it could easily be changed in the future, because for instance any party of the international agreement could withdraw at anytime and shift back to the old merger control system. In addition to that, the proposal will be efficient because it will not require any additional resources, at anytime, in order to adopt the merger deregulation international agreement or even to implement it, because of the fact that there will not be any merger control system to be enforced.

Finally, and according to the result revealed in the previous table there are fifty two instances during which the proposal of the merger deregulation has a positive effect on the drawbacks of the current merger control systems, and there are only eight instances during which the proposal has a negative effect on the drawbacks, those negative effects are closely related to the antitrust flaws and do not repealed merger control systems, which means that the merger

deregulation proposal might improve the current situation by 87%, as shown in the following chart.

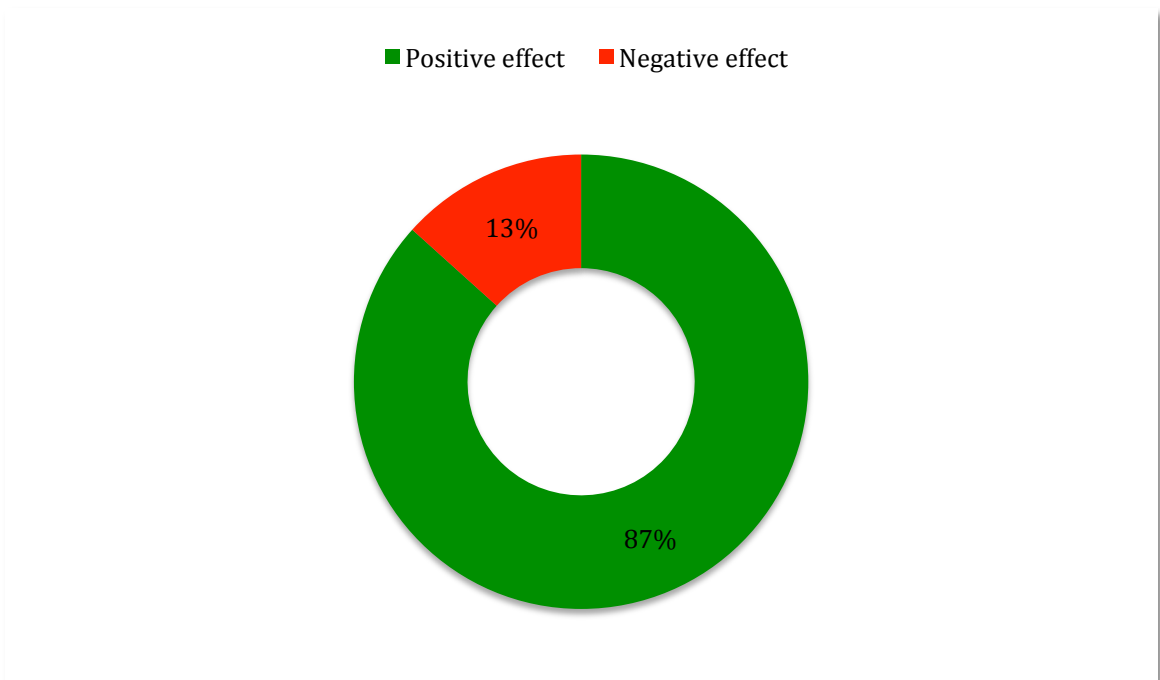


Figure 20: Merger deregulation – assessment

V. Conclusion

Many conclusions could be identified from that third chapter of this dissertation, the first one is that there are many proposal that could be useful to improve the current multijurisdictional merger control systems, some of them have a minimal effect while others are promising, and there were even previous attempts to adopt some of them, not specially for the merger control but at least on the antitrust scale. However, there are no previous attempts to assess the effect of any proposal on the current merger control systems, and all discussions in that regard was limited to only a narrative discussion that addresses the advantages and the disadvantages of the proposal without developing any assessment criteria, under which a comparison could be effective.

The second conclusion is that the ranking of the proposal is as follows: the least successful proposal is the common online filing system because it scored only 17%, and that proposal was followed by the proposal of the bilateral cooperation agreements, whereas it scored 21%, while the proposal of the international merger control rules, the proposal of the

jurisdictional rules, and the proposal of the supranational institution, were within the same range whereas they scored 32%, 36%, and 37% respectively, and in the first place is the merger deregulation, as it was expected to be the most promising solution, whereas it was expected to significantly improve the current merger control systems, whereas it scored 87%.

The third conclusion is that any of the discussed proposals could be improved, and that could be by considering certain enhancing success factors such as adopting dispute settlement mechanism, and it even could be accomplished by combining a proposal with one another i.e. hybrid solutions, and generally speaking all the proposals will require time, not only to realize their effect in cases that they have effected, but also to adopt them on international scale. However, before the time required, the preliminary issue to be resolved is the political will of the parties, which seems to be the most impediment towards the adoption of a solution on the international scale, and that is mainly attributed to the fact that each jurisdiction is more concerned with its own interests not the interests of the general welfare on the global scale.

The fourth conclusion is that the merger deregulation will lead almost to similar protective results that are expected under the premerger control system but at no cost to anyone, but it will not lead to 100% improvement for the current multijurisdictional merger control systems, as it seems to be at the first glance that by entirely repealing the system it will lead to instantly overcoming all the drawbacks, but the fact is that the considering of the behavioral antitrust findings, which in fact might be a solution to part of the antitrust foundational errors, will require some time and efforts, because a lot of research efforts are required in that field in order to build up a more solid real basis for the antitrust.

The fifth conclusion is the fact that the mergers might have negative effects on employment rates or that the industry-specific deregulation might have negative effects on the employees' rights in general, it does not mean that the merger deregulation have any direct effect on employees' rights or on the unemployment rates, because the fact is that the premerger control does not have any effect or even concern in employment related issues, accordingly its repeal will not have any effect in that regard.

Moreover, and to the contrary, the mergers will be consummated in all the cases whether there is merger control or not, and that means that in the case of merger control the merging parties would be more inclined to offset their losses under that process by any means, which will most probably be either by increasing prices or reducing the number of employees. Accordingly,

both the consumer and the employees should be the main focus of the regulatory authorities, and all the efforts of society should be directed to adopt the appropriate measures or laws to protect them.

Conclusion and Recommendations

Out of clutter, find simplicity. From discord, find harmony. In the middle of difficulty, lies opportunity.

– Albert Einstein

Firstly, it should be noted here that that final conclusion will not sum up and repeat each single conclusion that was mentioned in the previous conclusions that were mentioned at the end of each chapter, but it will address the question of “so what,” what are all those conclusions about, and what are the general ideas they left behind, in other words what did this dissertation add to the legal literature in general, and to the literature in the cross-border mergers field specifically, and what are the recommendations suggested for the public policy designer and the decision maker, at all levels around the globe.

Throughout this dissertation, the discussions addressed and tackled the very deep origin of the corporation as one of the most successful institutions throughout the history, how it proliferated and developed, contributed to the success and failure of the economy, used as a tool

for good and for war, and how it was struggling from times when it is heavily used or regulated, in the past and the present, but it seem it is ready to rebound for a future toward that hovers on new horizons. Instead of imaging the corporation as gigantic monster that will put the human dreams of prosperity to an end, the reinvention of the corporation as a tool for human prosperity is imaginable.

It was also clear throughout the whole dissertation that the corporation was invented and developed for the good of people, but at several times, it was wrongfully used, sometimes by people as managers or shareholders, other times by the state. On the other hand, there is always a tension between the state and corporations, and tension is not always for the good of people, and it is not even rationally justified in most of the cases. Moreover, the most important fact was that the globalization process will lead to the prosperity of the humanity, but the pace of that process is not as much expected, or at least as always been presented by anti-globalization proponents.

The good news is that there are opportunities to come, and the current global economy is far from being globalized, but unfortunately the attention of almost all the countries was not towards seeing these opportunities, and they even considered the flat world as a granted fact, and thus they were very busy during most of the 20th century discussing and negotiating how they could divide the pie after removing the tariff barriers, because they were thinking that removing the tariff barriers was the best solution that will lead to reach the peak of the economic growth, and it will be enhanced by removing some of the non-tariff barriers.

As it was mentioned before that removing the tariff barriers was not that significant and that just improved border administration and logistics infrastructure will lead to more than double the effect of the tariff barrier removing. In addition to that, the obligation to remove non-tariff barriers was carefully designed to appear as removing all the barriers, but what happened was prohibiting the application of those non-tariff barriers in a discriminatory or arbitrary manner. That means that the state could legitimately hinder trade or the provision of services as long as it is hindered equally for both nationals and foreigners, or not in an arbitrary manner, and it was justified under any one of the flexible justifications of Article XX of the GATT.

On the other hand, the opportunities or to be more precise the possibilities are waiting on the other side, experiencing torture from the state i.e. the FDIs and specially if they are not a green field like for instance cross-border mergers are not welcomed. Despite the fact that the FDI in general is more promising to accelerating the progress of economic growth, and in the right

direction of serving the general welfare of the humans, and even the fact that the cross-border mergers is one of the best option that the FDI can offer, the state in different jurisdictions were not welcoming to the possibilities offered and they even counterattack it under the merger control system, in addition to many other impediments that were also designed by the state.

While those possibilities are promising, no one could ignore the negative effects of the cross-border mergers on the society, like for instance the bad effect on employment and also some undesirable practices that make use of the consumers' biases. Meanwhile, the other fact that could not be ignored is the that the regulatory approach is highly debatable, some claimed that it is not working anymore, and others argued for deregulation, but the debate should be turned to the question of when regulations could be used, and in what direction it should be used i.e. what are the interests that should be to severed.

All that means is that the state could regulate corporations but the public policy should be designed to give the state a super role in many directions at both ends of the spectrum, at one end of the spectrum the state should be required to give a hand and facilitate entry to domestic markets, not only by means of deregulation but also by offering real help and support, and in that regard all the members in the society should be encouraged to engage in that process, and at the other end of the spectrum there is a crucial unanswered question of how the law could efficiently empower the state to monitor and challenge those practices before the courts, whenever they cause harm to employees or consumers.

In fact that is not a new invention of solution out of the box, it is already there in the box, it is an already existing old solution, at least from the Islamic perspective, whereas the state is regarded as the overseer that should not intervene in markets unless certain practices will lead to the total collapse of the markets, otherwise it should be left to self-correct mechanism,¹⁴³⁰ by the means of the invisible hands, as it was then articulated by Adam Smith, and endorsed by most of the conservative scholars. Accordingly, role of the state should be reinvented, not only on a notional domestic scale but also on the global scale; the pie itself could be expanded before even dividing it.

Based on what Max Huffman claimed with concern to the marriage between the neoclassical school of economics and the behavioral antitrust, now it could be argued that the state should be divorced from the influence of the regulatory theory, and it should always take

¹⁴³⁰ DABBAH, Competition Law and Policy in the Middle East, *supra* note 353, at 24. 2007.

good care of employees and consumers to protect them from any harm that might be caused by corporations. Moreover, all the members of society, the state; the corporations; the people whether they are employees, researchers, or consumers; education and research institutions, should be considered as one family living under the same roof, and each member should identify and carry out his tasks in order to win his portion of the pie in the race to the top, in other words every member of the family will contribute to the growth and increase welfare for all the other family members.

One more separation should be done, which is the separation between the state as a public policy designer, and the state as an administrative enforcement authority, in order to avoid the possibility of the influence of the rent seeking and regulatory capture issues on its enforcement decisions. The proposed separation or split of the state roles could be achieved by adopting a two-tier administrative body approach,¹⁴³¹ and that will also be subjected to the judicial review at all the time.

Whether adopting deregulation policies with regard to mergers or with regard to industry-specific issues, no policy is expected to win an undivided support from all the parties of the full picture, for instance the employees and even shareholders of the inefficient corporations will always suffer from mergers in general and its deregulation specially,¹⁴³² but the employees are already suffering even under the regulatory merger control system because that issue is not of the concern of the state, and even in some countries it is explicitly mentioned that the effect of a merger on unemployment is not considered.¹⁴³³

It is undoubtedly true that there is no clear cut comprehensive evidences to understand and theorize what is happening in the full picture, or to assert that there are certain gains or drawbacks as result of the cross-border mergers, but there is always a possibility for positives and negatives, and the right answer to the question should be always not only how to look for the opportunity but also how to create it by making use of all the tools in the global box. Otherwise, if the state failed to carry out its role to protect the employees for instance that will undoubtedly “undermine the social contract created within individual states.”¹⁴³⁴

¹⁴³¹ Stephen Weatherill, *The Changing Law and Practice of UK and EEC Merger Control*, 11 OXFORD JOURNAL OF LEGAL STUDIES 520, at 543 (1991).

¹⁴³² Massey, *ANTITRUST BULLETIN*, *supra* note 1422, at 757 (2002).

¹⁴³³ ILZKOVITZ, et al., *European Merger Control: Do We Need an Efficiency Defence?*, *supra* note 667, at 58. 2006.

¹⁴³⁴ Karen E. Bravo, *Transborder Labour Liberalization: A Path to Enforcement of the Global Social Contract for Labour*, THE FOUNDATION FOR LAW, JUSTICE AND SOCIETY 1, at 2 (2009).

Now it become more obvious that more studies and efforts should be done toward answering the unanswered questions, which is how the law could be designed and enforced efficiently to grant the state the power to monitor and challenge anticompetitive practices before courts, whenever those practices cause any harm to employees or consumers. If this dissertation should call for one action, that action should be further research to answer that unanswered question, with no compromises in mind, but the law as a tool should be designed to encompass the good for all the members in society.

At the end, it should be pointed out that previous researchers and professionals, poor and rich humans, adults or even kids, all have dreamed and some of those dreams come true. Meanwhile, those dreams came true not as a result of just imaging that they happen, but the imagination was a fuel sometimes for the dreamer and other times for others, a fuel to take serious steps in attempting to achieve it. Someday, someone dreamed of the EU or even of the US, the WTO, and those are all now facts from the past.

The dream of that someday, the political will might agree to the reinvention of the role of the state in all jurisdictions, and all the other members of society will cooperate for their own prosperity and general welfare, and no one will suffer anymore in order to experience a higher quality of life. Albert Einstein said that: “[i]magination is more important than knowledge,”¹⁴³⁵ meanwhile if this dissertation will leave the literature with one message, it will be every rational human should keep asking and questioning, and that will someday lead to better imagined solutions for problems in all fields, those solutions could be from outside the box, and also from inside the box like merger deregulation.

¹⁴³⁵ ALICE CALAPRICE, *THE EXPANDED QUOTABLE EINSTEIN* at 7 (Princeton University Press 2nd ed. 2000).

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V. France

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VI. Germany

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VII. Qatar

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VIII. United Kingdom

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- 2- Bubble Act 1720 (6 Geo I, c 18).
- 3- Joint Stock Companies Act 1844 (7 & 8 Vict. c.110).
- 4- Protection of Trading Interests Act 1980.
- 5- The Competition Act 1998.
- 6- Enterprise Act 2002.

IX. United States

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- 2- New Jersey General Corporation Act of 1896.
- 3- Delaware General Corporation Law of 1899 (21 Del. Laws-273)
- 4- Clayton Antitrust Act of 1914, *codified at* 15 U.S.C. §§ 12–27
- 5- The Federal Trade Commission Act of 1914, 15 U.S.C §§ 41-58
- 6- Webb-Pomerene Act of 1918, 15 U.S. Code § 61-66
- 7- The Merchant Marine Act of 1920, P.L. 66-261.

- 8- The Securities Act of 1933, codified at 48 Stat. 74, 15 U.S.C. § 77a et seq.
- 9- The Administrative Procedure Act of 1946, 5 U.S .C. 55-551, et seq.
- 10- The Celler-Kafeuver Act of 1950, 64 stat. 1125 15 U.S.C § 18
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- 13- The Clean Water Act of 1972, 33 U.S.C. § 1251 et seq.
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- 15- The Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901.
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- 18- Foreign Corruption Practices Act of 1977, 15 U.S.C. § 78dd-1, et seq.
- 19- The Agricultural Foreign Investment Disclosure Act of 1978, 7 U.S.C. 3501, et seq.
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- 26- Family and Medical Leave Act of 1993, 29 U.S.C. 2601, et seq.
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- 28- The International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C. Chapter 88, § 6201-§ 6212
- 29- Sarbanes Oxley Act of 2002 (Pub.L. 107–204, 116 Stat. 745, enacted July 30, 2002)
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- 31- The Foreign Investment and National Security Act of 2007, Pub.L. 110-49.

X. Sweden

- 1- Insurance Contracts Act (Försäkringsavtalslag (SFS 2005:104))

XI. International Treaties

- 1- GATT 1994: General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 17 (1999), 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994).
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- 4- PCT: Patent Cooperation Treaty, June 19, 1970. TIAS 8733; 28 UST 7645; 9 I.L.M. 978 (1970)
- 5- TBT: Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS.