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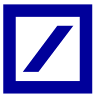
Deutsche Bank Research 

March 1, 2006

The "more economic approach" in EU merger control – A critical assessment

With the "more economic approach" the EU is taking a new tack on merger control policy. This is visible not only in the new SIEC prohibition criterion and the criteria for appraising horizontal mergers but also in more recent decision-making practice. Greater legal certainty, on the one hand, and improved decision-making, on the other, have been cited as the aims of the (increased) use of industrial economics models and quantitative analysis.

The objective of a (better) economic foundation in EU merger control is expressly welcomed. However, on closer analysis it is found that in point of fact the more economic approach in its present form creates less legal certainty, while the upshot in terms of the quality of the decision-making is at least unclear. At the same time, the (administrative) burden is likely to rise. Moreover, certain problems emerge for instance from the increasing involvement of economic experts or the possibilities for (industrial policy-related) political intervention.

In conclusion, a broader perception of an economics-based approach which takes account especially of the instutional implications is called for. Specific recommendations are the establishment of an independent competition authority and the stronger orientation of merger control to (more) general rules.

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The "more economic approach" in EU merger control – A critical assessment

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List of abbreviations

CET	Chief Economist Team at the Competition Directorate General
EAGCP	European Advisory Group on Competition Policy
ECMR	Merger Regulation
Form CO	Official notification form in EU merger control
HMG	Horizontal Merger Guidelines
SIEC	Significant impediment to effective competition (new prohibition criterion in EU merger control)
SLC	Substantial lessening of competition (prohibition criterion in US merger control)
SSNIP	Small but significant non-transitory increase in price

Introduction

The EU merger control regime is currently in the process of its most far-reaching reform since its introduction in 1990, central to which is the "more economic approach". This means the stronger focus on industrial economics models and quantitative methods of analysis, firstly in case investigations and, secondly, in formulating legislation and defining the criteria that are set. The new approach has had a tangible influence on the amended Merger Regulation (ECMR)[1] of May 2004 and the new Horizontal Merger Guidelines (HMG)[2] as well as on recent decision-making. Furthermore, the "more economic approach" is to be extended to other areas of competition policy such as the control of abusive practices under Article 82 of the EC Treaty and the control of state aid under Articles 86ff. of the EC Treaty (EACGP 2005; Monti 2004b; Röller 2005). This creates pressure for an adjustment of German competition policy as well (German Federal Cartel Office 2004; Hildebrand 2005; German Monopolies Commission 2005, Nos. 228ff.).

Consequently, it is imperative that the advantages and drawbacks associated with the new approach should be analysed critically and in their full breadth. The European Commission itself initially cited greater legal certainty and, in the course of the reform process, improved decision-making quality as the rationale for a stronger (industrial) economics-based approach. These aims are expressly welcomed, which is all the more reason to examine whether the "more economic approach" can meet these expectations. In the interest of a comprehensive review, account also needs to be taken of other aspects, namely the administrative burden and cost associated with the merger control process and the institutional implications. So far, insufficient consideration has been given to these aspects by the European Commission or in the academic discussion.

The paper is divided into four sections. The first section gives an overview of the new approach to EU merger control policy. The effects in terms of (administrative) cost, legal certainty and decision quality are then analysed (Section 2). Finally, the problems associated with the increasing involvement of economic experts and the further reforms needed with regard to the institutional framework are discussed (Section 3). The paper then ends with a summary and conclusion in Section 4.

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[1] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, in: Official Journal of the European Union L 24, 29/01/2004, pp. 1-22.

[2] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, in: Official Journal of the European Union C 31, 05/02/2004, pp. 5-18.

1. The new approach in EU merger control

1.1 Overview of the reform process

The merger control regime, which was only introduced in 1990, has since become a central instrument of EU competition policy (Kerber 2000; Levy 2003; Murray 2004; Pons/ Sautter 2004). Until the recent reform, the European Commission's Competition Directorate General and, in particular, the special "Merger Task Force" have been responsible for reviewing cases. However, the final decisions are taken by the College of Commissioners. They are subject to judicial review by the Court of First Instance and, in the last instance, by the European Court of Justice.

The present sweeping reform process was initiated by the European Commission at the end of 2001 with the presentation of its Green Paper[3] (Böge 2004; Budzinski/Christiansen 2005a; Lyons 2004). It gathered further momentum in the course of 2002 with the (first) reversal of Commission prohibition decisions by the Court of First Instance in three cases (Airtours, Schneider Electric, Tetra Laval).[4] The court found fault, on an unprecedented scale, with the economic arguments as well as with the handling of the evidence. In response, the Commission put the soundness of its economic analysis more and more in the fore of the reform. Under the motto of a "more economic approach" it sought to give stronger consideration to new industrial economics models and quantitative methods of analysis.

The most striking change in the amended Merger Regulation of May 2004 is the new prohibition criterion (Röller/Strohm 2005; Zimmer 2004). It springs from a political compromise reached between the representatives of the member states in the European Council. On the one hand, it constitutes a convergence with the Anglo-Saxon SLC ("substantial lessening of competition") test and is intended to close an alleged gap with regard to mergers in heterogeneous oligopolistic markets. On the other hand, it is an independent (European) formulation. Article 2 (3) ECMR now reads: "A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market." This is therefore referred to as the prohibition criterion of "significant impediment to effective competition" (SIEC). Compared with the old formulation of

[3] Green Paper on the Review of Council Regulation (EEC) No 4064/89, COM(2001) 745/6 final, 11/12/2001.

[4] Case T-342/99 – Airtours v Commission, 06/06/2002; Case T-310/01 - Schneider Electric v Commission, 22/10/2002; Case T-5/02 – Tetra Laval v Commission, 25/10/2002.

Article 2 ECMR, the relation between the constituent elements has been reversed.[5] The previous criterion of market dominance is still embodied in the rule, but it now only constitutes an example. The continued validity of previous case law as "guidance" is, however, expressly wished (ECMR, Reasoning No. 26).

The new SIEC test is given concrete form in the Horizontal Merger Guidelines, which are intended to provide "a solid economic framework for the assessment" (ECMR, Reasoning No. 28). Hence, the aim continues to be the prevention of (significantly increased) market power, which is understood to mean the ability of one or more firms to increase prices, to reduce output, choice or quality, or to diminish innovation at the expense of the consumer (Guidelines, paras 8f.). The Commission thereby compares, within the framework of the "competitive analysis in a particular case", the foreseeable impact of the merger with the situation which would have emerged without the merger (Guidelines, para 13). So the relevant issue is whether the merger to be reviewed can be expected with sufficient probability to have anti-competitive effects. While, at this level, the reform implies no fundamental change, the criteria set out in the Guidelines embody a number of new substantive aspects. Firstly, they include the application of the Herfindahl-Hirschman Index (HHI)[6] as a relevant structural feature to measure concentration levels in addition to market shares (Guidelines, paras 14ff.). Other points worth highlighting are the comments on the anti-competitive effects of mergers in an oligopolistic setting and on efficiency gains (see 1.2 below). In addition, with buyer power, market entry and the "failing firm defense", consideration is now given to already established criteria which can act as a "countervailing factor" to counteract increased market power (Guidelines, paras 64ff.).

Furthermore, there are also a number of important procedural changes not only in the Merger Regulation but also in the likewise redrafted Implementing Regulation[7] (Dittert 2004; Lingos et al. 2004). This includes in particular the possibility to extend the time limits in complex cases (Article 10 ECMR), the precise definition of the Commission's investigative powers and sanctions (Articles 11-15 ECMR) and firms' extended duties to furnish information (Articles 3, 4 DVO). Finally, the "more economic approach" has led to a number of organisational changes within the Competition Directorate General (Drauz 2002, p. 397; Pons/Sautter 2004, p. 57; Röller 2005, p. 15). One is the appointment of Prof. L.-H. Röller as

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[5] The old Article 2 (3) ECMR was formulated as follows: "A concentration which creates or strengthens a dominant position which would significantly impede effective competition in the common market or in a substantial part of it shall be declared incompatible with the common market."

[6] The HHI is the sum of the squares of the individual market shares of all the firms in the market.

[7] Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, in: Official Journal L 133, 30/04/2004, pp. 1-39.

the first Chief Economist who heads up a team of - at present ten – PhD industrial economists (Chief Economist Team, CET). In addition, the European Advisory Group on Competition Policy (EAGCP) has been set up as an academic advisory body which consists of around 20 leading European industrial economists recommended by the Chief Economist.[8] Regular seminars and conferences serve to further intensify the exchange of know-how. On the other hand, the Merger Task Force has been disbanded and its members have been integrated into the existing sector-specific directorates.

First effects of the "more economic approach" are also visible in the Commission's case practice, although its implementation is still by no means completed.[9] So far there has been no prohibition on the basis of the new SIEC test, nor has a merger been approved on the grounds of efficiency gains. Nonetheless, there is evidence of greater recourse to statistical and econometric methods of analysis (German Federal Cartel Office 2004, pp. 4ff.; Hofer et al. 2005; German Monopolies Commission 2005, Nos. 798ff.; Van Bergeijk/Klosterhuis 2005). At the same time, economic experts being involved more strongly, both in the Commission and on behalf of the companies (see 3.1 below). This begins with the delineation of the relevant market in product and geographic terms with the aid of price correlation analyses, co-integration analyses and especially the hypothetical monopolist or SSNIP ("small but significant non-transitory increase in price") test. A current example is the Blackstone/Acetex case[10], for which econometric studies were undertaken both by the economists engaged by the firms and by the CET (Durand/Rabassa 2005). The field extends even further to include the differentiated analysis of the effects of the merger on the basis of simulation models (see 1.2 below). The Volvo/Scania case[11] is the earliest example with the study by Ivaldi/Verboven (2001), although at that time the Commission still avoided explicitly citing it in the reasoning for its decision. This was different in later cases such as General Electric/Instrumentarium[12] or Oracle/PeopleSoft[13]. These instruments are likely to acquire still greater importance.

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[8] The present members include Marc Ivaldi, Bruce Lyons, Massimo Motta, Damien Neven, Paul Seabright, Frank Verboven and Martin Hellwig, who have all published articles on various aspects of the more economic approach (see references). In July 2005, a working group also submitted a widely-heeded reform proposal for the application of the control of abusive practices pursuant to Article 82 of the EC Treaty (EAGCP 2005).

[9] It is beyond the scope of this paper to discuss the Commission's entire case practice. Cases of special relevance are cited by way of example.

[10] Case No COMP/M.3625 - Blackstone/Acetex, in: Official Journal L 312, 29/11/2005, pp. 60-62.

[11] Case No COMP/M.1672 - Volvo/Scania, in: Official Journal L 143, 29/05/2001, pp. 74-132.

[12] Case No COMP/M.3083 - GE/Instrumentarium, in: Official Journal L 109, 16/04/2004, pp. 1-63.

[13] Case No COMP/M.3216 - Oracle/PeopleSoft, in: Official Journal L 218, 23/08/2005, pp. 6-12.

1.2 Anti-competitive effects and efficiencies as a "countervailing factor"

The Guidelines introduced the differentiation – originating from US practice - between coordinated and non-coordinated effects for the first time. This differs from the earlier distinction between "single firm" and collective market dominance (see Kerber 2000, pp. 72ff.). While coordinated effects represent a further refinement of the concept of collective dominance, the intention, with the inclusion of unilateral effects, is explicitly to close a gap existing under the old Merger Regulation with regard to anti-competitive mergers in oligopolistic markets "below" the market dominance threshold (Röller/Strohm 2005, No. 18; Zimmer 2004). Conversely, for the first time, efficiencies as a "countervailing factor" can result in approval despite market dominance. These concepts constitute the substantive core of the "more economic approach".

Unilateral effects can emerge if competitive pressure from one (or more) sellers is removed. This can lead to increased market power especially for the merging firms, thus widening the scope for profitably increasing prices or reducing output. This does not require an aligned reaction on the part of the remaining competitors nor a dominant position in the sense of the old Merger Directive. Rather, the decisive factor is the degree of substitutability between the products of the merging parties and those supplied by other producers. Unilateral effects are therefore likely to occur primarily in differentiated product markets. The Guidelines cite, as conducive factors, high market shares and a high level of competition between the merging parties, the lack of alternatives for customers and the unlikelihood of supply being increased by competitors (Guidelines, paras 27ff.).

The assessment of unilateral effects in the concrete case requires a quantitative projection of the (short-term) price and volume changes as a result of the merger. So-called "merger simulation models" are normally used for this purpose (e. g. Capps et al. 2003; Dubow et al. 2004; Van Bergeijk/Klosterhuis 2005). For simulation models of this kind, information is needed on the form or structure of the given market and the primary competitive parameters (price, quantity, capacity).[14] The degree of substitutability can be measured primarily on the basis of the "diversion ratio"[15]. In addition, the own-price elasticities and cross-price elasticities[16] of the

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[14] Price competition is also known as Bertrand behaviour. Only if the firms first select capacities independently of each other and then fix the price are the market results according to Kreps/Scheinkman (1983) identical to the quantity competition à la Cournot.

[15] The diversion ratio indicates what portion of the reduction in sales of a given product resulting from a price increase – other conditions being equal - is absorbed by another product.

[16] Own-price elasticity indicates the extent to which demand changes if the own product price is changed. Conversely, the cross-price elasticity of demand indicates how strongly demand for a product changes in response to changes in the price of another product, assuming that all other conditions remain constant.

relevant products must be known and any cost changes and competitors' reaction to the merger need to be estimated. The concept and the simulation models have already been in use in US merger control for some time (Starek/Stockum 1995). The theoretical background is the industrial economics models on incentives for mergers in oligopolies that have been developed primarily since the 1980s.[17]

Coordinated effects, on the other hand, result if the merger for the first time enables or makes it easier for the remaining market players to implicitly coordinate their behaviour. The term tacit collusion is also used, since there are no explicit agreements, which would also be in violation of Article 81 of the EC Treaty. Competition between the firms which are coordinating is (largely) eliminated. Therefore, collectively, they have market power which may involve increasing prices, limiting output or dividing up the market. In contrast to unilateral effects, this is more likely to emerge in homogeneous markets. The Guidelines define four cumulative criteria (Guidelines, paras 39ff.). First, it must be relatively simple to reach a common understanding on the terms of coordination. The coordinating firms must also be able to monitor each other's behaviour and they must be able to discipline any deviation. Finally, the reactions of customers and current and future competitors should not be able to jeopardise the coordination. In the concrete case, a number of structural features of the firms and markets concerned are assessed such as market shares and the number of firms, market transparency, degree of product homogeneity and demand patterns.

All in all, these criteria dovetail more or less exactly with the rulings in the Court of First Instance's Airtours decision (Bishop/Ridyard 2003, p. 360f.). At the same time, they are closely aligned to the industrial economics analysis of collusion in oligopolistic markets.[18] Another aspect to be assessed is the existence of so-called "maverick" firms with characteristics not typical of the industry which therefore have a strong incentive to deviate from or disrupt coordination. A problem emerges especially if such a firm is likely to be removed as the result of a merger. The commentaries in the Guidelines are therefore largely in line with US practice (Baker 2002).

The second important change is the consideration given to efficiencies as a "countervailing factor" to counteract increased market power, although the conditions for their consideration are very restrictive (Guidelines, paras 76ff.). For instance, the efficiencies must be merger-specific and must be verifiable, and they must – at least in part – benefit consumers. Here, the burden of

[17] Key studies are Deneckere/Davidson (1985), Farrell/Shapiro (1990) and Werden/Froeb (1994).

proof lies with the firms, in contrast to the normal merger control procedure. In this connection, the expected efficiency gains have to be weighed quantitatively against merger–related losses in economic welfare (Colley 2004). This can only be done on the basis of an individual in-depth analysis, which also requires the use of a simulation model (German Federal Cartel Office 2004, pp. 7ff.). So, here, there are certain parallels with the assessment of unilateral effects. All in all, another economic concept has been incorporated which, based on the theory of Williamson (1968) and known as "efficiency defense", is already established practice in US merger control.

To sum up, the Commission has adopted a number of new microeconomic concepts in EU merger control and has formulated detailed criteria for their application in the Guidelines. At the same time this represents a (further) alignment to US practice (Coppi/Walker 2004). That the Commission's motives have been in this direction was clearly evident. Firstly, "transatlantic convergence" has been presented in a very positive light (e. g. Röller 2005, p. 13; other references in Christiansen 2005, p. 293). Secondly, the Commission is no doubt anxious to avoid harsh criticism of the kind encountered in the aftermath of the General Electric/Honeywell case[19] and the resulting loss of face. From an economic point of view, such a convergence is to be welcomed if this reduces the transaction costs for cross-border mergers. One criticism, however, is that the convergence with US practice was not explicitly formulated as a goal of the reform and could therefore not be discussed. Furthermore, there are still important differences in the underlying assumptions and convictions (e. g. Denzel 2004; Mueller 1997) and in the institutional framework.

2. Substantive effects of the "more economic approach"

In the following, the effects of the reform on the decision-making process in EU merger control are examined in order to be able to make a rough estimation of the associated costs and benefits.[20] Here, it is helpful to resort to the so-called "error cost approach" which was developed in the economic analysis of law to analyse the welfare effects of legal rulemaking (Christiansen/Kerber 2005, pp. 7ff.; Ehrlich/Posner 1974). The key factors are, on the one hand, the administrative cost of the proceedings and, secondly, the frequency of errors. These two points are discussed separately below. Legal certainty is another economically relevant aspect.

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[18] A fundamental earlier work was the study by Stigler (1964). More recent studies model the problem on game theory (for an overview see Bagwell/Wolinsky 2002; Jacquemin/Slade 1989).

[19] Case No COMP/M.2220 - General Electric/Honeywell, in: Official Journal L 48, 18/02/2004, pp. 1-85.

[20] Sections 2.1 and 2.2 especially are an important further development of my analysis in Christiansen (2005, p. 287ff.).

2.1 Increased administrative burden

The cost of the EU merger control process depends primarily on the extensive rules in the Merger Regulation and the Implementing Regulation (Dittert 2004; Lingos et al. 2004). The old Merger Regulation[21] had already contained strict time limits for the proceedings, disclosure requirements and rules on professional secrets, rights of hearing and liaison with the competition authorities of the member states. The structure of the official notification form (Form CO), the rights of hearing and inspection, and the handling of confidential information had also been regulated in the old Implementing Regulation[22]. Regarding the scope of the proceedings, the Commission still aims in particular to involve competitors and customers of the merging parties (e. g. Drauz 2002, p. 397). The upshot is that this framework of formal and informal rules results in a complex "bargaining game" between the authority/authorities and firms, involving a considerable burden in terms of time and cost (Neven et al. 1993, pp. 150ff.).[23]

In the course of the reform process these rules have been changed in such a way that the administrative burden rises. To begin with, the (new) Article 3 (2) of the Implementing Regulation requires that the notification form and all documents must be submitted in the originals and in 35 copies (!) as compared with the 24 and 19 copies previously required. Furthermore, the notifying parties have to furnish more extensive information (Lingos et al. 2004, pp. 80ff.). The market share threshold for details about competitors has been lowered from 10% to 5%. In addition, for the first time pre-merger and post-merger HHI values have to be calculated for all the affected markets (Section 7.3 of Form CO). Particularly exacting requirements are associated with the newly incorporated “efficiencies defense”, which is conceived as a case-by-case review with the burden of proof lying with the firms (Section 9.3 of Form CO). The efficiency gains not only have to be quantified, but evidence has to be produced that they can only be realised by the merger and that they – at least in part – benefit consumers. Furthermore, the Guidelines (para 88) contain a list of acceptable documents which has to be observed and includes documents such as internal management documents or pre-merger studies conducted by external experts. All in all, the new rules lead to a considerably increased burden for firms in the notification procedure, not only in respect of the “efficiencies

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[21] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, in: Official Journal L 395, 30/12/1989, pp. 1-12.

[22] Commission regulation (EC) No 3384/94 of 21 December 1994 on the notifications, time limits and hearings provided for in Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, in: Official Journal L 377, 31/12/1994, pp. 1-27.

[23] According to the results of a survey published in Voigt/Schmidt (2005, p. 8f.) before the reform it already took firms more than 64 man/days on average to prepare the notification documents, and roughly 8 meetings on average were held between company representatives and the authority.

defense". This affects the Commission, too, since it has to examine and consider all the documents.

Beyond the formal procedural rules, increasing quantitative analysis also means a considerably greater administrative burden. Just the market delineation using the SSNIP test increases the data required versus the traditional relevant market concept (Hildebrand 2005, pp. 514f.). This applies still more to the new simulation models, whose informative value depends to a crucial extent on the quality and completeness of the empirical data, which again results in considerable costs (German Federal Cartel Office 2004, p. 6; Capps et al. 2003; Dubow 2004, p. 117; Van Bergeijk/Klosterhuis 2005). Ideally, information needs to be submitted by all firms operating in the relevant market and, at the same time, needs be comparable and be available over a given period of time. Further costs result from the specification and testing of the econometric models. Again, this affects not only the firms involved but also the authority since it has to conduct its own studies and examine those submitted by the firms. It also has to make the data files and calculations accessible for inspection by the firms in a specially shielded "data room".[24] This was particularly evident in the critical General Electric/Instrumentarium and Oracle/PeopleSoft cases, both of which involved unilateral effects on bidding markets (Hofer et al. 2005, pp. 160ff.; Käseberg 2005; Loriot et al. 2004; Pflanz 2005). In each case the Commission conducted its own quantitative analyses of the bidding data in order to assess the relevant degree of substitutability. The companies, or the consultants engaged by them, submitted extensive studies, too: in the first case RBB Economics for General Electric and NERA Economic Consultants for the competitor Philips, and in the second case PeopleSoft itself and Lexecon for the bidder Oracle.

The proceedings could become even more cumbersome in the case of the "efficiencies defense" where the (unilateral) price effects and the efficiency gains have to be estimated and then weighed against each other. The quantitative analysis also tends to stretch out the proceedings. In the Oracle/PeopleSoft case, for instance, the Commission had to suspend the time limits for six months until Oracle submitted further data (Pflanz 2005, p. 123). The new possibility to extend the time limits in complex cases now provided for in Article 10 of the Merger Regulation, which is explained particularly by reference to the quantitative studies that need to be undertaken (Dittert 2004, pp. 149ff.; Drauz 2002, pp. 392f.), would appear to support this view. All in all, the evidence points to a permanently increased administrative burden which, in

[24] It is also conceivable at least in principle that the national competition authorities would want to inspect the data files and calculations, too, in connection with their involvement in the Advisory Committee according to Art. 19 ECMR.

the sense of the error cost approach, results in higher administrative costs and thus detracts from the economic welfare benefit to society.

2.2 De facto diminished legal certainty

At the start of the reform discussion the Commission cited the increase in legal certainty as a central benefit of the new approach. It was repeatedly argued that (only) through the greater application of economic concepts could the decision-making be made more transparent and thus more predictable. According to Drauz (2002, p. 392), for instance, the goal is "to make the theoretical framework underlying our economic assessment of mergers clear and transparent and thus as predictable as possible" (further references in Christiansen 2005, p. 287). This raises the subject of legal certainty which, in German (competition) law literature, has been defined as follows: "Legal certainty protects the citizen against unexpected intervention by the state (negative interest, especially predictability)" (Rittner 1969, p. 76).

That legal certainty is fundamentally beneficial can be corroborated in economic terms. Eucken (1952), for instance, demonstrated clearly, with his postulate of the constancy of economic policy, the fundamental importance of a reliable regulatory framework, with which the predictability of state actions, and thus legal certainty, are inseparably linked. Hayek (1960) can be cited, too, with his insights into the central importance of the "rule of law" for the functioning of a decentralised market economy. These theories argue accordingly in favour of general rules which effectively limit the sphere of state activity and create a sphere of individual freedom, and thus legal certainty. These traditional arguments from regulatory economics are supported by a raft of more recent empirical studies which provide evidence that discretionary state action has negative effects on economic growth (Henisz 2000, Klump/Reichel 1994; Mahoney 2001; Scully 1997). By inverse inference, this underlines the importance of legal certainty. Another comparative international study even establishes a direct positive link between (subjectively perceived) legal certainty and the level of investment and economic growth (Brunetti et al. 1998). The positive impact of decision-making certainty on corporate investment behaviour has also been demonstrated by more recent studies, in which the importance of irreversibility is a central argument (e. g. Pyndick 1991; Carruth et al. 2000).

The studies by Voigt/Schmidt (2003; 2005) are approaches which can be applied well to the concrete case of the current reform of EU merger control. In the context of merger control, legal certainty means, firstly, that the parties wishing to merge should be able to predict the reaction of the competition authority with sufficient reliability. This is desirable so as to enable firms to realise welfare-enhancing transactions while discouraging them from filing an excessive number of anti-competitive mergers. At the same time, it avoids proceedings from being abandoned or

ending in prohibitions, with attendant high sunk costs and damage to reputation (see also Neven et al. 1993, p. 152). Secondly, legal certainty has a time dimension in the sense of the time it takes to reach an administrative decision or for its judicial review.

We therefore need to examine what impact the new rules associated with the "more economic approach" have on this goal. The better transparency and greater legal certainty which the European Commission expects from the more economics-based approach implies that the (new) concepts provide a clear (or at least clearer) benchmark for the assessment of concrete merger cases. In the extreme, this would turn case decisions into simple derivations from the underlying theoretical models. However, for good reason, economics cannot be fitted into this mould. Firstly, it cannot derive clear statements about the effects of a given concentration and their appraisal and, secondly, economic concepts cannot be applied directly to practical cases. Rather, in economic competition theory there are constant divergences and a plurality of approaches (Burton 1994). One prominent example is the dispute, prevailing until (at least) into the late 1980s, between the "Harvard school" and the "Chicago school", which differed considerably not only in their theoretical and empirical foundations but also in their normative objectives (Audretsch 1988; Schmidtchen 1994). In addition, there were other, albeit less developed, approaches such as the free competition concept (Hoppmann 1988) or the Austrian market process theory (e. g. Kirzner 1997), each of which adopted a fundamentally different perspective. Even though competition economics has moved on since then, this plurality points to a universal insight which is still relevant for the present status quo. It clearly testifies to the (inevitably) "competitive character of theoretical knowledge" (Watrin 1967, p. 11) which invariably leads in practice to divergences in the recommendations given or in case appraisals.

This circumstance is also true – albeit in slightly modified form – of the now dominant new industrial economics based on oligopoly models rooted in game theory (for an overview, see Bagwell/Wolinsky 2002; Jacquemin 1999; Shapiro 1989). Besides the analysis of merger incentives, other major areas of research include predatory pricing strategies, strategic entry deterrence and the conditions for stable collusion. In contrast to the earlier "schools", new industrial economics does not proceed from a basic competition policy assumption like the market power thesis of the "Harvard school" or the efficiency thesis of the "Chicago school". Rather, its common ground is the use of the same methodology and (total) economic welfare as the objective. The upshot is a wide range of theoretical studies whose conclusions are in part contradictory or are only valid for very specific assumptions. Hence, particular patterns of behaviour can in principle have both positive and negative welfare effects. On the other hand, a (more) generalised theory and the systematic empirical investigation of the concepts that would

allow the scope of validity of the individual models to be delineated, and thus the respectively relevant model to be selected, are lacking (Fisher 1989). The underlying reason for this resides in the nature of (industrial) economics knowledge, for "industrial organisation is hardly an exact science" (Schmalensee 1987, p. 42). So there is no exact economic theory of competition and there is unlikely to be one in the future either. Rather, there are good reasons for sustaining the plurality. After all, it is the resulting controversy that is the driving force behind the advances in knowledge (Burton 1994, p. 21, Watrin 1967).

However, its application in the field of competition policy raises serious problems which have implications not only for current "post-Chicago antitrust" practice in the US (Hovenkamp 2001; Kobayashi 1997) but also for the "more economic approach" in the EU. Case analysis becomes much more complex because the cases have to be analysed more strongly on an individual basis rather than drawing on general relationships in the sense of assumption criteria for instance. While new industrial economics allows more differentiated theoretical analyses, the assessment of concrete cases is often controversial (similarly Bagwell/Wolinsky 2002, p. 1886). Moreover, the econometric models are also sensitive to the underlying assumptions (Dubow et al. 2004, p. 117). An added factor in the concrete case of EU merger control is that, with the analysis of unilateral effects and the “efficiencies defense”, it is possible not only for mergers "below" the previously relevant market dominance threshold to be prohibited but also for mergers "above" it to be approved. This widens the room for discretionary decisions in the appraisal process (e. g. Bishop/Ridyard 2003; German Monopolies Commission, Nos. 222ff., Voigt/Schmidt 2003; Zimmer 2004), thus making the Commission's decisions permanently more difficult to predict.[25] Legal certainty is therefore not improved but diminished. On top of that there is the temporary effect that a change in the assessment criteria always causes uncertainty and, as a result, adjustment and learning costs for those concerned (Voigt/Schmidt 2004). Hence, the "more economic approach" is found to have negative repercussions also as far as legal certainty is concerned which also detract from the welfare benefit to society. It now needs to be examined what potentially welfare-enhancing effects it has on decision quality.

2.3 Effects on decision quality

The improvement in decision quality moved more and more to the fore in the course of the reform discussion. Supporters see enhanced "discrimination" as the decisive benefit of the "more economic approach" (e. g. Hildebrand 2005; Hofer et al. 2005; Röller 2005). This means that it

[25] This can be offset at most only partially by the continued incorporation of market dominance as an example and the publication of guidelines for the first time (e. g. Lyons 2004, p. 258f.; Monti 2004b, p. 7), even though these moves are, of course, to be welcomed.

will be possible to identify anti-competitive mergers, on the one hand, and welfare-enhancing transactions, on the other, more reliably. Reproduced below is an overview illustrating the cases which can arise.

Overview of types of error and welfare effects

<table>
<tr><td colspan="2" rowspan="2"></td><td colspan="2">Welfare effect of the merger</td></tr>
<tr><td>Negative</td><td>Positive</td></tr>
<tr><td rowspan="2">Decision by the authority</td><td>Approval</td><td>Error Type I
(direct welfare loss)</td><td>Correct decision
(direct welfare gain)</td></tr>
<tr><td>Prohibition</td><td>Correct decision
(avoidance of welfare loss)</td><td>Error Type II
(foregone welfare gain)</td></tr>
</table>

Improved decision-making quality would mean a reduction in the frequency of the two types of error which can arise – in addition to correct decisions – in the form of unjustified approvals (Error Type I, "false positive") and unjustified prohibitions (Error Type II, "false negative"). In both cases the potentially achievable level of economic welfare is not attained. In the first case this results in direct welfare losses while, in the second, potential efficiencies are not realised. The overview shows the scenarios that are possible. According to the "error cost approach" there would be an improvement in decision-making quality if the new criteria lead to a reduction of errors compared with practice before the reform.

This was claimed explicitly to be an argument for incorporating unilateral effects in EU merger control. The intention was to eliminate a systematic source of error in the old market dominance test (e. g. Röller/Strom 2005, No. 8; Vickers 2004). There had been a gap in respect of certain welfare-reducing mergers in heterogeneous oligopolistic markets "below" the market dominance threshold. This resulted in Type I errors in the sense of the "error cost approach". The existence of such a gap is indicated in the first place by the fact that the appraisal of unilateral effects is one of the most important developments in "post-Chicago antitrust" practice in the US (e. g. Hovenkamp 2001, p. 332). Moreover, studies for the EU would appear to bear out their relevance to some extent (Baxter/Dethmers 2005, Neven/Röller 2002).

Evidence in the form of a significant number of concrete cases where the Commission has falsely approved mergers is lacking. However, the only case cited in this connection is the

Airtours and FirstChoice merger[26], which the Commission prohibited in 1999 and where the decision was reversed in 2002 by the Court of First Instance (German Monopolies Commission 2005, Nos. 219-221; Motta 2000). The fact that the Commission already examined unilateral price effects before the reform, and thereby also resorted to econometric methods, primarily in bidding markets (Hofer et al. 2005; Käseberg 2005; Völcker 2004, pp. 397-401) at least qualifies the dimension of the alleged gap. Here, Philips/Agilent[27] and the GE/Instrumentarium and Oracle/PeopleSoft cases mentioned earlier relate explicitly to (narrow) oligopolistic markets. Even though this list does not claim to be exhaustive, it does put the argument of the systematic occurrence of "false positives" before the reform into better perspective. The cases cited demonstrate, at least by way of example, that the Commission took account of the special competitive effects of mergers on differentiated oligopolistic markets and was familiar with the econometric instruments for analysing them.

As to the coordinated effects, no reduction of errors is likely simply for the reason that the relative criteria are closely aligned to the concept of collective market dominance from the Airtours decision under the old Merger Regulation. Here, there is more a risk of not being able to prohibit anti-competitive mergers in view of the exacting requirements regarding evidence (German Federal Cartel Office 2004, p. 4; Vickers 2004, pp. 458f.). In the sense of the "error cost approach" this would lead to errors of the first type.[28] Experience from the Sony/Bertelsmann Music Group case[29] is an example that confirms this (Eberl 2004). In this case, the Commission found a whole number of factors favourable to collusion in the relevant market for recorded sound media such as stability of the customer base, contracting demand, multi-market contacts and structural links between the leading market players. However, the analysis of various time series did not produce supportable evidence of concerted behaviour. The merger therefore had to be approved unconditionally even though there were major reservations in view of the experience from the music industry (e. g. Thompson 2004).

Like the inclusion of unilateral effects, the introduction of the "efficiencies defense" is a reaction to the criticism of the old Merger Regulation. It was claimed that efficiencies had been falsely used as an argument against the merging parties and that welfare-enhancing mergers had therefore been prevented (so-called "efficiency offense", e. g. Padilla 2004). In the sense of the

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[26] Case IV/M.1524 - Airtours/First Choice, in: Official Journal L 93, 13/04/2000, pp. 1 -33.

[27] Case No COMP/M.2256 - Philips/Agilent Health Care Solutions, in: Official Journal C 292, 18/10/2001, pp. 1-10.

[28] However, it should be added that – in contrast to unilateral price increases – action can be taken against post-merger collusive behaviour in certain circumstances by recourse to Art. 81 or 82 of the EC Treaty, so the negative effects can at least be corrected ex post facto.

[29] Case No COMP/M.3333 - Sony/BMG, in: Official Journal L 62, 09/03/2005, pp. 30-33.

"error cost approach" these would be Type II errors. However, the empirical evidence for this claim is fairly weak. In their econometric study Neven/Röller (2002) detect only a few Type II errors. There is no reference either to concrete cases apart from the General Electric/Honeywell merger and this case is questionable. The prohibition was recently upheld by the Court of First Instance, which would appear to argue against a false decision by the Commission.[30] Experience with the "efficiencies defense" in the US also suggests that this new rule has little relevance in practice. So far there has been no publicly available evidence of an approval decision based on efficiencies (Colley 2004, pp. 342f.). All in all, no significant reduction of errors is therefore to be expected either from the introduction of the "efficiencies defense" in EU merger control. Moreover, the concrete conditions are so strictly formulated in the Guidelines that they cannot be fulfilled in practice (Schwalbe 2005).

The massive problems associated with the application of the "efficiencies defense" also need to be considered. In particular, there are information asymmetries in the authority's disfavour and fundamental knowledge problems (Jacquemin 1999, pp. 214ff.; Yao/Dahdouh 1993). Efficiencies can only emerge in the future and are therefore only potentials at the time of the review. It might also be that, after the merger, the firms have no incentive to realise the benefits or to pass them on to the consumer owing to reduced competitive pressure (Böge 2004, pp. 146f.). Indeed, the related empirical experience, especially with major mergers which this would normally involve, is far from convincing (e.g. Mueller 2004). From this perspective there is even a risk that application of the "efficiencies defense" would lead to Type I errors because welfare-reducing mergers might be allowed. Consequently, the economic benefit of this new pro-and-contra weighing analysis is questionable. Preferable would be a simpler rule such as an across-the-board consideration of efficiencies up to a given economics-based threshold (Schwalbe 2005). At the same time this would make for greater legal certainty and avoid considerable additional administrative cost.

All in all, the effects of the "more economic approach" on decision quality are ambivalent. The largely unchanged analysis of coordinated effects and the newly adopted "efficiencies defense", for instance, are not only unlikely to lead to a reduction of errors versus the old Merger Regulation but, in both cases, even harbour the risk of Type I errors. For the appraisal of unilateral effects, which will probably have the most practical relevance, the outcome is more positive. All the same, the gap in the old Merger Regulation which this is intended to close, and the associated reduction of Type I errors, needs to be put into much smaller perspective. At the

[30] Cases T-209/01 Honeywell v Commission and T-210/01 General Electric v Commission, 14/12/2005.

present time it is still unclear what quantitative importance the individual effects discussed will have, however. The impact of the reform on decision quality in the EU merger control process as a whole is at any rate still an open question. Moreover, any statement about the welfare effects must also take account of the previously analysed rise in administrative costs and the reduction in legal certainty. Even without quantifying these effects of the "more economic approach" there is every indication that the costs associated with the reform outweigh the benefits.

3. Institutional implications of the new approach

The critical assessment of the "more economic approach" would be incomplete without a discussion of the important implications for the institutional framework in EU merger control. However, this has been lacking (largely) in the discussion in the literature and practice to date. A number of significant insights from institutional economics can be applied to EU merger control.[31] These will be discussed below.

3.1 Consequences of the increasing involvement of economic experts

The "more economic approach" leads to increasing recourse to economic experts. For instance, in the course of the reform the European Commission created the new post of Chief Economist and his team so as to provide an institutional basis, too, for the economic expertise. In addition, it regularly engages academic (industrial) economists. An early example is the study by Ivaldi/Verboven (2001) in the Volvo/Scania case. A more recent case is the report by the newly created Economic Advisory Group on Article 82 of the EC Treaty (EAGCP 2005). Companies, on the other hand, resort especially to specialised consulting firms.[32] The GE/Instrumentarium and Oracle/PeopleSoft cases are prime examples. Members of the consulting firms also participate in the public debate through regular publications in the relevant journals. Typically, they criticise the old competition policy and elaborate on, or support, the "more economic approach".[33] This is also true of the representatives of the European Commission, especially the Chief Economist and his team.[34] This growing economic input in the merger control process is to be welcomed in principle. However, the relevant literature, especially in the US, shows that

[31] Another important aspect, which is not discussed here, is the so-called delineation of powers, in other words the demarcation of authority and responsibilities in relation to the national merger control regimes (for details see Budzinski/Christiansen 2005b).

[32] This includes, inter alia, National Economic Research Associates (NERA), Lexecon, LECG, RBB Economics, Charles River Associates (CRA), European Economic & Marketing Consultants (EE & MC).

[33] Examples are Bishop/Ridyard (2003), Coppi/Walker (2004), Hildebrand (2005) and Hofer et al. (2005).

[34] Recent examples are the articles by Drauz (2002), Röller (2005) and Röller/Strohm (2005).

this can also create problems. This needs to be taken into account if a positive contribution from the economic experts is to be guaranteed.

Firstly, it needs to be borne in mind that the growing involvement of experts upgrades the role of the firms in collecting and evaluating empirical data and thus strengthens the influence they can have on this information. This is even explicitly provided for in the case of the “efficiencies defense”, with the reversal of the burden of proof. In the analysis of unilateral and coordinated effects, too, the tendency points clearly in the same direction. The merger control process in the EU is thus converging with the US system, where the authorities always have to go through the court to prohibit a merger. The authority is then no longer (only) the impartial investigator, which is a characteristic of the so-called "inquisitorial system" customary in the EU. Rather, its role is comparable to that of a party in the so-called "adversarial system" in the US, where the sides are both equally responsible for gathering and submitting evidence and for reviewing the material submitted by the other party. The discussion in the general economic analysis of law concerning (optimal) trial procedure and proof-taking (e. g. Dewatripont/Tirole 1999; Palumbo 2001) provides a point of departure for analysing the implications that this gives rise to. It raises a number of interesting insights which can only be touched on briefly here. An argument in favour the "inquisitorial system", for instance, is that it avoids possibilities for manipulation by the parties and the duplication of resources. The advantage of the "adversarial system", on the other hand, is that there is a stronger incentive for the parties to conduct their own fact-finding.

Secondly, economic expertise faces the fundamental problem that economics is an "inexact" science. The analysis of a concrete merger can lead to different results depending on the model and the data used. This has an important consequence: "Economists cannot testify with the confidence of experts on ballistics or fingerprints - or at least they should not" (Schmalensee 1987, p. 42). Some of the resulting implications have already been debated at length in the discussion in the US because the involvement of expert witnesses in the antitrust process has been customary practice for some time. The statutory basis is the Federal Rules of Evidence, on which there are a number of court decisions and extensive literature (e. g. Hovenkamp 2002; Weller 1997). Moreover, there are economic analyses which have pointed not only to the associated problems but also to possible solutions (e. g. Mandel 1999; Posner 1999; Stigler 1982). One issue discussed is especially the possibility for firms to seek out experts who will give evidence in their favour (so-called "forum shopping"; Shuman et al. 1991). In the extreme case, there is the risk of experts acting as so-called "hired guns" or "jukebox experts" who say exactly what their clients want to hear ("lip service"

testimony). It can also lead to a "battle of experts" which, in the end result, only neutralises each side's testimonies and consumes resources without helping the decision-making process. However, it was also found that these risks can be counteracted – at least in part – by other factors. Reputational effects are one example. Especially for more prominent (industrial) economists the work as expert witness is a repeated game in analytical respects, so they have an interest in building a reputation as a competent expert.[35] They are also bound by their history of academic publications and cannot therefore make completely arbitrary statements. Moreover, there is partial consensus, at least in methodological respects, on generally accepted standards with which the quality of rival expert testimonies can be appraised. Another important criterion is the quality of the data used, especially their verifiability.

These insights have received little consideration to date in the discussion about EU merger control. In the literature this is touched on only briefly, if at all. The Chief Economist Röller, for instance, has merely commented that problems can arise if the resources for conducting expert quantitative studies are asymmetrically distributed (2005, p. 20). Gerber (2004) raises a deeper issue by referring to the problem that, in the three cases in 2002 in which it reversed the Commission's decisions, the Court of First Instance de facto assumed the role of economic expert itself, replacing the Commission's appraisal with its own economic interpretation of the cases. This raises the question especially of the division of powers between the two institutions. The diverse other implications which the growing involvement of economic experts in the merger control process raises have not been considered in the discussion to date, which suggests too narrow a perception of the ramifications of a more economics-based approach.

3.2 Political interventions and rent-seeking

EU merger control has harboured a fundamental institutional flaw ever since it was introduced. With the European Commission, responsibility for final decision-making lies with a primarily political body whose members are particularly exposed to influence from firms and from (governments of) the EU member states (e. g. Kartte 1992). On the one hand, firms can deliberately seek to influence antitrust proceedings at the expense of their competitors (Baumol/Ordover 1985). One possibility is the prevention of mergers between competitors which would have led to competition-relevant efficiency benefits being realised. This constitutes a form of rent-seeking which, if successful, results in Type II errors in the sense of the "error cost approach". On the other hand, political influence can be exerted, especially by national

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[35] On the other hand, they might, for income or career reasons, have an interest in keeping the proceedings as complex as possible (e. g. Heyes 2003).

governments, aimed at securing approval for certain mergers despite reservations about the effects on competition. Under the banner of "industrial policy", there is an interest in building "champions" for the global markets or securing special treatment for sensitive industries (Donges 1994; Krüger 1998; German Monopolies Commission 2005, Nos. 1ff.). However, by and large, there are no sound theoretical arguments to justify this. Moreover, the empirical experience is mostly negative. Consequently, approvals granted in exceptional cases for industry policy reasons are false decisions of Type I (Christiansen/Kerber 2005, pp. 15f.). Hence, in both cases, there is the risk of welfare losses, which are highly relevant to the discussion of the "more economic approach".

Indeed, especially in the first years after EU merger control was introduced, there were a number of, in competition policy respects, questionable decisions in which influence of this kind played a role. For instance, in connection with the Boeing/McDonnell Douglas case[36] it was believed that the Airbus consortium exerted influence on the Commission (Boeder/Dorman 2000). In the Kali&Salz/MdK/Treuhand case[37], on the other hand, there was massive intervention by the German government, while in the Mannesmann/Vallourec/Ilva case[38] the commissioners themselves were divided (Schmidt 1999, pp. 438ff.). A sensible institutional solution to this problem would be, in the first place, to create an independent antitrust authority at the European level which would have sole responsibility for protecting competition and could build up an appropriate reputation. However, proposals to this effect met with massive resistance and have receded more and more into the background. In the present reform discussion this fundamental institutional aspect is receiving little or no attention. Admittedly, political factors have been found to play a lesser role in recent years (Mische 2002; Pons/Sautter 2004, p. 48). But this does not suggest by any means that it is no longer an issue. Rather, there are two further points which need to be considered.

Firstly, the increased focus on economic analysis can be interpreted as an attempt on the part of the (quite numerous) supporters of a purely competition-oriented approach within the Competition Directorate General[39] to shield themselves from attempts to exert external political influence. The greater complexity of the economic argumentation de facto already before the reform has doubtlessly been a contributing factor (Levy 2003). In so far the "more economic

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[36] Case No IV/M.877 - Boeing/McDonnell Douglas, in: Official Journal L 336, 08/12/1997, pp. 16-47.

[37] Case No IV/M.308 – Kali&Salz/MdK/Treuhand, in: Official Journal L 186, 21/07/1994, pp. 38-56.

[38] Case No IV/M.315 - Mannesmann/Vallourec/Ilva, in: Official Journal L 102, 21/04/1994, pp. 15 -37.

[39] Besides the prominent commissioners Brittan, van Miert and Monti, and Directors-General such as Schaub or Lowe, this doubtlessly also includes the majority of the officials at the Directorate-General for Competition.

approach" would be a logical refinement of a strategy which was already being pursued (similarly Kolasky 2002). However, this connection can only be surmised since there is no explicit confirmation by Commission representatives to be found. All the same, ex-Commissioner Monti (2004a, b) frequently stressed that, with the reform, merger control should become more transparent and "fully compatible with economic learning". Consideration for industrial policy or other non-competitive factors would be in no way compatible. Another, more recent indication is also the appointment of Chief Economist Röller who, in his earlier publications, dealt critically with political-economic aspects of merger control (Stevenson/Filippi 2004). This aim of the "more economic approach" would be welcome. But, one should add, it is a "second best" solution. To reduce political influence there are better institutional solutions which avoid some of the problems discussed here (Baum 1982; Christiansen/Kerber 2005, pp. 15ff.). Besides the independence of the competition authority, this includes the stronger orientation of merger control to more general rules so as to reduce the room for discretionary decisions and thus the exposure to influence. This could also quash the contention that in its more recent decisions, as in the GE/Honeywell merger for instance, the European Commission is allowing itself to be influenced by an underlying anti-American sentiment – and thus again by non-competitive factors (Murray 2004, pp. 17ff.).

Secondly, the fact that political intervention has been successfully pushed back in recent years does not imply that the problem has been resolved once and for all. Rather, it has to be assumed that the inclination towards anti-competitive intervention at the political level will continue to exist, at least latently. This was clearly indicated by the (in the end unsuccessful) initiative on the part of France and Germany for a pan-European industry policy in autumn 2004 (Murray 2004, pp. 7ff.). And, while on the subject of Germany, one only needs to recall the special ministerial powers exercised in the E.ON/Ruhrgas case or the present debate over Springer-Verlag's acquisition of Pro Sieben Sat.1 (Roth/Voigtländer 2002; anon. 2005). So, for this reason, too, there is still a need to give thought to institutional safeguards to shield the EU merger control process from (industry policy-related) political influence. At the same time, the increasing orientation towards case-by-case analysis within the framework of the "more economic approach" also creates new possibilities for discretionary decisions. Given this ambiguity the incentives for firms and politicians to exert influence could be increased again (Baumol/Ordover 1985, pp. 254f.). That this aspect has gone largely unnoticed to date points once more to an overly narrow focus of the discussions on the new approach.

3.3 Concentration of functions at the European Commission

Another important criticism with regard to the institutional framework of EU merger control concerns the concentration of functions, firstly, at the Commission and, secondly, within the Commission (Lyons 2004, pp. 254f.; Voigt/Schmidt 2005, pp. 166ff.). Often, the opening of the proceedings, the investigations, the initiation of an in-depth analysis, the hearings and the preparation of the decision lie in the hands of the same case team within the Competition Directorate General. Including the panel of commissioners which takes the decision, this function, too, is concentrated at the Commission. The only external controls lie with the Court of First Instance and the European Court of Justice, to which only isolated cases are referred and which have the drawback that the proceedings take a long time. The institutional foundations for effective control (checks and balances) are therefore inadequate. This in turn detracts from the due diligence of the investigations and the quality and transparency of the decisions, as the three EU prohibitions reversed in 2002 exemplified. The relevance of such institutional factors has also been demonstrated with reference to US competition policy (Coate/Kleit 1998).

This criticism suggests the need for a separation of the functions, for the concrete implementation of which various models have already been put forward (Murray 2004, pp. 44f.; Neven et al. 1993, pp. 231ff.). Firstly, the stages from the opening of the proceedings to the hearings with the firms could be assigned to an independent institution, while the European Commission would be responsible for the final review of the case and the ultimate decision. In practice, this proposal would mean the institutional separation of the Competition Directorate General from the European Commission. Secondly, the said functions could remain within the purview of the Commission, while the final decision is transferred to an independent judge. In both cases, the concentration of the functions within the Commission would be removed. If suitably structured, this could at the same time curtail the possibilities for political influence discussed in the previous section. There are other proposals such as the separate publication of the economic analysis or analyses on the cases or the creation of an independent supervisory body on the lines of the German Monopolies Commission whose publications should assure transparency and compliance with quality standards. Neither of these is sufficient on its own but they are meaningful supplements.

Compared with this, the changes in the course of the reform so far do not go far enough (Lyons 2004, pp. 257f.; Pons/Sautter 2004, pp. 54ff.). Firstly, of late, more complex cases have been reviewed internally by Commission officers within the framework of a so-called "Peer Review Panel". The Chief Economist and his team are also involved in the decision-making process. On conceptual issues there is also a greater exchange with academic experts, for

instance within the framework of the new EAGCP Advisory Group. Secondly, the Court of First Instance has introduced a fast-track procedure which allows a more effective judicial review of the Commission's decisions. While, on the whole, these changes point in the right direction, they are only partially institutionalised and therefore still do not go far enough. The conclusion is therefore the same as on the question of political influence. The need for institutional reforms remains, and can re-emerge the next time a controversial case arises. Therefore, the "more economic approach" should be broadened in this respect, too, and consideration be given to the appropriate economics-based proposals for an improved institutional framework.

4. Summary and conclusion

A "more economic approach" in EU merger control is an aim that is to be welcomed. However, the path pursued so far by the European Commission appears too one-sided. Contrary to the original aim, it was found that, in fact, it leads to less legal certainty and increases the (administrative) burden, while the impact on decision quality is still open, to say the least. Clear deficiencies were found with regard to the institutional framework. The increasing involvement of economic experts, for instance, raises a number of problems which have not been considered to date. The same holds for the continued possibility for (industrial policy-related) political influence and rent-seeking as well as the absence of an institutional separation of the functions in the merger control process. This calls for a broader perception of an economics-based approach which systematically takes account of the effects on decision-making practice and the institutional implications as well. From this perspective the establishment of an independent competition authority and the stronger orientation of merger control to (more) general rules appear suitable courses of action. Only on this basis is the application of the new approach to broader areas of German and EC competition policy to be recommended.

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