

# **The Interplay Between European Merger Control Law and The Liberalisation of Electricity and Gas Markets**

## **Two Volumes Volume I-II**

by

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# Table of Contents

## Volume I-II

<b>DECLARATION .....</b>	<b>VII</b>
<b>BIBLIOGRAPHY .....</b>	<b>VIII</b>
1. PRIMARY SOURCES .....	VIII
1.1 <i>Treaties</i> .....	VIII
1.2 <i>EC Secondary Legislation</i> .....	IX
1.2.1 Regulations .....	IX
1.2.2 Directives .....	XII
1.2.3 Notices .....	XII
1.2.4 Decisions.....	XVI
1.2.4.1 Antitrust Law .....	XVI
1.2.4.2 Control of Concentrations.....	XVIII
1.3 <i>ECJ Cases</i> .....	XXIV
1.3.1 Antitrust Law .....	XXIV
1.3.2 Control of Concentrations .....	XXV
1.3.3 Implied Powers.....	XXV
1.4 <i>Court of First Instance</i> .....	XXV
1.5 <i>German Primary Legislation</i> .....	XXVI
1.6 <i>Cases of the German Federal High Court</i> .....	XXVI
1.7 <i>Proceedings of the German Cartel Authorities and Regional Courts</i> .....	XXVI
1.8 <i>UK Legislation</i> .....	XXVI
1.9 <i>U.S. Legislation</i> .....	XXVII
1.10 <i>U.S. Administrative Guidelines</i> .....	XXVII
1.11 <i>Other</i> .....	XXVII
2. SECONDARY SOURCES .....	XXIX
2.1 <i>Books</i> .....	XXIX
2.2 <i>Articles</i> .....	XXXI
2.3 <i>Seminar Papers and Other Sources</i> .....	XXXIV
<b>ABBREVIATIONS .....</b>	<b>XXXVII</b>
<b>DEFINITIONS .....</b>	<b>XXXIX</b>
<b>TABLE OF ILLUSTRATIONS .....</b>	<b>XL</b>
<b>SUMMARY .....</b>	<b>XLI</b>
<b>1. INTRODUCTION .....</b>	<b>1</b>
1.1 CONCENTRATION OF UNDERTAKINGS.....	6
1.1.1 <i>Undertaking in Terms of Merger Control Law</i> .....	7
1.1.2 <i>Control</i> .....	10
1.2 CATEGORIES OF CONCENTRATIONS.....	10
<b>2. MICROECONOMIC RATIONALE OF CONCENTRATIONS .....</b>	<b>11</b>
2.1 MICROECONOMIC BENEFITS OF MERGERS .....	11
2.1.1 <i>Microeconomic Benefits of Vertical Integration</i> .....	12
2.1.2 <i>Microeconomic Benefits of Horizontal Integration</i> .....	14
2.1.3 <i>Microeconomic Beneficial Effects of Conglomerate Integration</i> .....	18
2.2 MICROECONOMIC DRAWBACKS OF MERGERS.....	19
2.2.1 <i>In-transparent Economic Status of the Partner</i> .....	19
2.2.2 <i>Merger Related Expenditure</i> .....	19

2.2.3 Managerial Dis-Economies .....	19
2.2.4 Unreasonable Focus on Integration .....	20
<b>3. MACROECONOMIC IMPLICATIONS OF MERGERS.....</b>	<b>21</b>
3.1 MACROECONOMIC BENEFITS OF CONCENTRATIONS .....	21
3.1.1 Aggregated Productive Efficiencies .....	21
3.1.2 Reduction of Macroeconomic Barriers to Exit .....	22
3.1.3 Tool to Rescue Weak Undertakings.....	22
3.1.4 Facilitator of Market Integration.....	23
3.2 DETRIMENTAL MACROECONOMIC EFFECTS OF MERGERS.....	23
3.2.1 Dominance over Industrial Sectors .....	23
3.2.2 Unemployment and Regional Disparities .....	25
3.2.3 Socio-Economic Concentration of Wealth and Power .....	27
3.3 EVALUATION.....	27
3.3.1 Public Interest Theory .....	29
3.3.2 Competition Law Theory .....	29
3.3.3 Structure-Conduct-Performance Model or Consensual Approach to Liberalisation .....	30
<b>4. MERGER CONTROL UNDER ART. 66 ECSCT .....</b>	<b>32</b>
4.1 PREVENTIVE PROHIBITION OF CONCENTRATIONS ART. 66 § 1 ECSCT.....	32
4.2 ALLOWANCES UNDER ART. 66 § 2 ECSCT .....	33
4.3 FINES, DIVESTITURE, JUDICIAL REVIEW, ENFORCEMENT .....	34
4.4 CARTELS AND ABUSES OF DOMINANT POSITIONS .....	34
4.5 EVALUATION.....	35
<b>5. MERGER CONTROL UNDER ART. 82 AND 81 ECT .....</b>	<b>37</b>
5.1 EC MERGER CONTROL UNDER ART. 82 ECT.....	37
5.1.1 Undertaking .....	38
5.1.2 Relevant Market .....	38
5.1.3 Substantial Part of the Common Market and Effects Doctrine.....	40
5.1.4 Dominant Position and Collective Dominance .....	41
5.1.5 Abuse .....	47
5.1.6 Effect on Trade between Member States.....	49
5.1.7 Legal Consequences.....	50
5.1.8 Concentration .....	51
5.1.8.1 Arguments Supporting Merger Control: The Continental Can Doctrine .....	52
5.1.8.2 Application of The Continental Can Doctrine .....	54
5.1.8.3 Drawbacks of Merger Control under Art. 82 ECT .....	56
5.2 EC MERGER CONTROL UNDER ART. 81 ECT.....	59
5.2.1 Traditional View .....	59
5.2.2 New Doctrine Introduced by the BAT Judgement .....	59
5.2.3 Evaluation of The BAT Doctrine .....	63
5.2.4 Gillette Case .....	65
5.2.5 Evaluation of The Application of Art. 81 ECT to Structural Amendments of The Competitive Environment with Indications of Future Collusion .....	70
5.3 THE COMPLEX ASSESSMENT OF JOINT VENTURES UNDER ART. 82 AND 81 ECT...71	71
5.3.1 Legal Nature of JVs.....	71
5.3.2 Assessment of Joint Control within Incorporated JVs.....	74
5.3.3 Competition Law Analysis of JVs under Art. 82 and Art. 81 ECT .....	75
5.3.3.1 JVs Exclusively Assessed under Art. 82 ECT .....	76
5.3.3.1.1 Long Lasting Basis .....	76
5.3.3.1.2 Full Function .....	77
5.3.3.1.3 Concentrative JV .....	78
5.3.3.2 JVs Assessed under Art. 81 ECT .....	80
5.3.4 The Chevron Case .....	80
<b>6. CONTROL OF CONCENTRATIONS UNDER MR1989 .....</b>	<b>82</b>



6.5.3.2.11 The Minol Case.....	150
6.5.3.2.12 The Air France/Sabena Case .....	152
6.5.3.2.14 Case VIAG/Continental Can .....	153
6.5.3.2.15 Rule of Reason under Art. 2 II; I MR1989 .....	154
6.5.3.2.16 Joint Dominance under Art. 2 II; I MR1989 .....	154
6.5.3.2.17 Ancillary Restraints .....	158
6.5.4 <i>Initiation of Phase Two Decision Based on Art.6 I lit. c MR1989</i> .....	160
6.5.5 <i>Evaluation of Phase One Decisions under Art. 6 I MR1989</i> .....	161
6.6 PHASE TWO .....	163
6.6.1 <i>Procedural Aspects of Decision-making within Phase Two</i> .....	163
6.6.1.1 Requests for Information Art. 14 MR1989 .....	164
6.6.1.2 Investigations pursuant to Art. 13 MR1989.....	165
6.6.1.3 Substantive Analysis and Early Indication of The Course of Action .....	166
6.6.1.4 Unconditional Clearance Draft Decision or Statement of Objections .....	167
6.6.1.5 Access to The File.....	169
6.6.1.6 Hearings.....	170
6.6.1.7 Preliminary Draft Decision and Advisory Committee on Concentrations.....	171
6.6.1.8 Final Decision.....	172
6.6.1.9 Evaluation .....	172
6.6.2 <i>Unconditional Clearance Decision Art. 8 II 1st Sentence MR1989</i> .....	174
6.6.3 <i>Conditional Clearance Decision Art. 8 II 1-2 MR1989</i> .....	175
6.6.3.1 Formal Criteria of Conditional Clearance.....	175
6.6.3.2 Substantive Criteria of Conditional Clearance .....	177
6.6.3.2.1 Undertakings Assuring Compliance with Commitments Proposed by The Parties and Accepted by The Commission .....	177
6.6.3.2.2 Incidental Provisions Covering Ancillary Restraints .....	181
6.6.3.2.3 Excursus: Conditional Clearance and New Yardsticks for The Assessment of JVs under MR1997 .....	182
6.6.3.2.4 Implementation of Undertakings and Evaluation .....	183
6.6.4 <i>Incompatibility Decision and Implementing Orders Art. 8 III-IV MR1989</i> .....	186
6.6.5 <i>Revocation of Clearance Decisions and Subsequent Incompatibility Decision Art. 8 V-VI MR1989</i> .....	186

## **VOLUME II**

<b>ABBREVIATIONS .....</b>	<b>V</b>
----------------------------	----------

<b>TABLE OF ILLUSTRATIONS [VOLUME 1-2] .....</b>	<b>VII</b>
--	------------

<b>SUMMARY .....</b>	<b>VIII</b>
----------------------	-------------

## **7. AMENDMENTS OF THE MERGER REGULATION IN 1997 .....**

7.1 CONCENTRATION IN TERMS OF ART. 1 I; 3 I-V MR1997 .....	188
7.1.1 <i>The New Assessment of JVs under Art. 3 II; 2 IV MR1997</i> .....	189
7.1.1.1 Basic JV Definition .....	190
7.1.1.2 Full Function JVs.....	190
7.1.1.3 Classic Concentrative JVs and The Inclusion of Coordinative Ones By Means of Art. 3 II MR1997 and Art. 2 IV MR1997 .....	191
7.1.2 <i>Evaluation</i> .....	196
7.1.2.1 Legal Certainty .....	196
7.1.2.2 Simplicity and Speed.....	196
7.1.2.3 Exchange of Blanket Terms as to Jurisdiction.....	197
7.1.2.4 Ongoing Relevance of the Distinction Between Concentrative and Coordinative JVs for The Material Assessment.....	197
7.1.2.5 Reserved Right to Revoke Clearances Based on a Derogation pursuant to Art. 81 III ECT .....	197
7.1.2.6 Uncertainty as to The Assessment of Concentrative Full-Function JVs below The Thresholds .....	198

7.1.2.7 Uncertainty as to The Assessment of Co-operative Full-Function JVs below The Thresholds .....	199
7.1.2.8 Uncertainty as to The Assessment of Non-Full-Function JVs .....	199
7.1.2.9 De Facto Co-ordination of Authorities? .....	199
7.2 COMMUNITY DIMENSION.....	200
7.3 CONDITIONAL PHASE ONE CLEARANCES UNDER ART. 6 I 1 LIT. B; II 2 MR1997 ..	202
7.4 THE NEW SUBSIDIARITY OF INITIATION OF FORMAL PHASE TWO PROCEEDINGS DECISIONS PURSUANT TO ART. 2 I LIT. C MR1997 .....	203
7.5 ENFORCEMENT OF PHASE ONE COMMITMENTS .....	204
7.6 SUSPENSIVE EFFECT OF A NOTIFICATION UNDER ART. 7 MR1997.....	204
7.7 CONDITIONAL PHASE TWO CLEARANCES ART. 8 II 1-2 MR1997 .....	205
7.8 TIME LIMITS.....	206
7.9 EXCLUSIVE APPLICATION OF MR1997.....	206
7.10 IMPLEMENTING PROVISIONS .....	206

## **8. INTERPLAY BETWEEN INTERNAL MARKET POLICY, LIBERALISATION AND CONCENTRATIONS ..... 207**

8.1 TRACTEBEL/DISTRIGAZ .....	210
8.2 NESTE/IVO .....	211
8.3 EDF/LONDON ELECTRICITY .....	212
8.4 GAZ DE FRANCE/BEWAG/GASAG.....	215
8.5 EDF/SOUTH WESTERN ELECTRICITY.....	217
8.6 PREUSSEN ELEKTRA/EZH.....	220
8.7 VEBA/VIAG.....	222
8.7.1 <i>The Parties</i> .....	222
8.1.1 VEBA AG .....	223
8.1.2 VIAG AG .....	224
8.7.2 <i>Concentration</i> .....	225
8.7.3 <i>Community Dimension Art. 1 II; 5 MR1997</i> .....	225
8.7.4 <i>Dominance Test Concerning Activities of The Parties in The Electricity Sector     under Art. 2 MR1997</i> .....	226
8.7.4.1 <i>Relevant Product Market Analysis For The Electricity Sector</i> .....	226
8.7.4.1.1 <i>Functional Criteria</i> .....	227
8.7.4.1.2 <i>Brief Evaluation of The Commission's Methodology</i> .....	228
8.7.4.1.3 <i>A European Internal Electricity Market as The Relevant Geographic             Market ?</i> .....	229
8.7.4.1.4 <i>National Market as The Relevant Geographic Market ?</i> .....	231
8.7.4.1.4 <i>Temporal Criteria?</i> .....	235
8.7.4.2 <i>Assessment of The Need to Maintain Effective Competition Art. 2 I lit. a         MR1997</i> .....	236
8.7.4.2.1 <i>Present Structure of The Market for Power Generation and Wholesale via             The Transmission Grid pursuant Art. 2 I lit. a 1<sup>st</sup> Variant MR1997</i> .....	236
8.7.4.2.2 <i>Actual and Potential Competition on The Affected Markets: Art.2 I lit. a             2nd Variant MR1997</i> .....	240
8.7.4.2.3 <i>Additional Criteria Art. 2 I lit. a 3rd Variant MR1997</i> .....	241
8.7.4.3 <i>Market Position of The Undertakings Art. 2 I lit. b 1st Variant MR1997</i> .....	241
8.7.4.4 <i>Economic and Financial Strength Art. 2 I lit. b 2nd Variant MR1997</i> .....	243
8.7.4.5 <i>Alternatives Available to Consumers Art. 2 I lit. b 3rd Variant MR1997</i> .....	243
8.7.4.6 <i>Barriers To Entry Art. 2 I lit. b 4th Variant MR1997</i> .....	243
8.7.4.7 <i>Demand Trends, Interests of Consumers and Technological Development:             Art. 2 I lit. b 5th-7th Variant MR1997</i> .....	244
8.7.4.10 <i>Prognostic Evaluation</i> .....	245
8.7.5 <i>Incidental Provisions Imposed on The Parties by The Commission</i> .....	255
8.7.5.1 <i>Divestiture of Equity Stakes in VEAG, LAUBAG and Mining Privileges</i> .....	256
8.7.5.2 <i>Temporal Guarantee Regarding A Taking of Delivery of VEAG's Power By             Downstream Affiliates of VEBA/VIAG</i> .....	257
8.7.5.3 <i>Divestiture of Equity Stakes in BEWAG</i> .....	258
8.7.5.4 <i>Divestiture of Equity Stakes in VEW</i> .....	258

8.7.5.5 Divestiture of Equity Stakes in HEW .....	259
8.7.5.6 Divestiture of Equity Stakes in RHENAG .....	259
8.7.5.7 Obligation Not to Impose The T-Component on Applicants for TPA .....	260
8.7.5.8 Obligation to Transparent Billing Calculation .....	260
8.7.5.9 Obligation Regarding The Billing of Balancing Services.....	261
8.7.5.10 Obligation to Sell Reserved Interconnector Capacity to ELTRA .....	261
8.7.5.11 Condition Precedent linked to The Outcome of the German RWE/VEW .....	262
Proceedings .....	262
8.7.6 <i>Theoretical Efficacy of the Undertakings to Remedy the Situation?</i> .....	263
8.7.7 <i>Factual Efficacy of Implementation of Incidental Provisions?</i> .....	268
8.7.8 <i>Reasons behind the theoretical and factual Deficiencies of the Present System</i> <i>of Merger Control with Respect to Incidental Provisions in the Energy Sector....</i>	277
8.8 HEW/VATTENFALL.....	282
<b>9. CONCLUSION .....</b>	<b>286</b>
<b>10. ANNEXES .....</b>	<b>291</b>
10.1 MAJOR MERGERS IN THE OIL AND GAS INDUSTRY IN 1998/1999.....	291
10.2 MAJOR MERGERS IN THE POWER SECTOR IN 1998/1999 .....	292
10.3 SIGNIFICANT INFLUENCE OF EXTERNAL BUSINESS CONSULTANTS IN OIL & GAS MERGERS AND ACQUISITIONS .....	293
10.4 IMPORTANCE OF CONSULTANTS FOR POWER MERGERS.....	294
10.5 PRODUCT MARKET DEFINITION PURSUANT TO ART. 2 MR1989 .....	295
10.6 STRUCTURE OF THE GERMAN ELECTRICITY SUPPLY INDUSTRY PRIOR TO THE LIBERALISATION AND THE VEBA/VIAG AND RWE/VEW MERGERS .....	296
10.6.1 <i>Three Fold Structure of The German Electricity Undertakings prior to 1998....</i>	296
10.6.2 <i>Capital Links between German Integrated Electricity Companies (1994) .....</i>	297
10.6.3 <i>Installed Power Capacity of The Combined Electricity Companies in MW in</i> <i>1994.....</i>	297
10.6.4 <i>Fuel Sources of Installed Capacity and Electricity Generation in 1992 .....</i>	298
10.6.5 <i>Transmission, Distribution and Supply Grid Operators in 1994.....</i>	299

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**Signed:**

**Date:** ...../...../01

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Commission Explanatory Memorandum Treatment of Ancillary Restraints under The Merger Regulation, pdf.file downloadable from:  
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Draft Commission Notice on Commitments Submitted to The Commission under Regulation 4064/89/EEC and under Commission Regulation 447/98/EC, pdf.file downloadable from:

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## Abbreviations

EC	European Community.
ECJ	European Court of Justice.
ECSC	Treaty Establishing the European Coal and Steel Community.
ECT	Treaty Establishing the European Economic Community, as Amended by the Treaty of Amsterdam.
GW	Giga Watt.
GWB1998	German Antitrust Act of 26 August 1998.
HHI	Herfindahl-Hirschmann-Index. It equals the sum of the squares of market shares of all undertakings active on a given market.
IEMD	Internal Electricity Market Directive.
IGMD	Internal Gas Market Directive.
JV	Joint Venture.
km	kilo meter.
kV	kilo Volt.
MR1989	Merger Regulation of 1989, i.e. Council Regulation 4064/89/EEC of 21 December 1989 on the Control of Concentrations between Undertakings, O.J. L 395, 30/12/89, p 1.

MR1997	Merger Regulation of 1997, i.e. Council Regulation 1310/97/EC of 30 June 1997 Amending Council Regulation 4064/89/EEC on the Control of Concentrations between Undertakings, O.J. L 180, 09/07/97, p 1.
MW	Mega Watt.
NGP	Non Governmental Organisation.
OFGEM	Office For Gas and Electricity Markets.
REG17	Regulation No 17: First Regulation Implement-
ing	
	Art. 85 and 86 of The Treaty.
SCP	Structure-Conduct-Performance Model.
TPA	Third Party Access.
TWh	Tera Watt hour.

## **Definitions**

### **Merger**

The term merger can be used twofold: Firstly, it may represent a blanket term for all categories of concentrations. Secondly, it describes a specific kind of concentration which is based on an amalgamation of undertakings so that at least one of the partners loses its legal identity (legal merger). Factual mergers arise if a single economic unit is created although the partners remain independent from the legal point of view.

## Table of Illustrations

<b><u>Table 1: Divestiture/De-Merger</u></b> .....	106
<b><u>Table 2: Application of the Concept of Intermediary Companies to Concentrations in The Energy Sector</u></b> .....	110
<b><u>Table 3: VEBA AG</u></b> .....	223
<b><u>Table 4: VIAG AG</u></b> .....	224
<b><u>Table 5: Interconnector Capacities in 1998</u></b> .....	230
<b><u>Table 6: Status Quo Ante: Electricity Generation and The Market Shares Regarding The Feeding of Power in The Transmission Grid</u></b> .....	237
<b><u>Table 7: Status Quo Ante: Concentration of The Market Owing to The Concentration of The Capacity of Electricity Generation for The Public</u></b> .....	238
<b><u>Table 8: Status Quo Ante: Concentration of The Market Owing to High Proportion of Retail Electricity Sales Depending on Verbund Utilities' Production</u></b> .....	238
<b><u>Table 9: Status Quo Ante: Transmission Network Ownership</u></b> .....	242
<b><u>Table 10: Predicted Status Quo Ex Post: Electricity Generation and The Market Shares Regarding the Feeding of Power in The Transmission Grid</u></b> .....	246
<b><u>Table 11: Predicted Status Quo Ex Post: Responsibility for Retail Electricity Sales</u></b> .....	247
<b><u>Table 12: Predicted Status Quo Ex Post: Generation Capacity</u></b> .....	249
<b><u>Table 13: Status Quo Ex Post: Structure of Power Stations</u></b> .....	249
<b><u>Table 14: Status Quo Ex Post: Joint Daughter Undertakings</u></b> .....	251
<b><u>Table 15: Predicted Status Quo Ex Post: Transmission Network Ownership</u></b> .....	252
<b><u>Table 16: Ownership Structure of LAUBAG</u></b> .....	256
<b><u>Table 17: Ownership Structure of BEWAG</u></b> .....	271
<b><u>Table 18: Status Quo Ex Ante: Ownership Structure of HEW</u></b> .....	282

## Summary

This thesis examines how European merger control law is applied to the energy sector and to which extent its application may facilitate the liberalisation of the electricity and gas industries so that only those concentrations will be cleared that honour the principles of the liberalisation directives. A brief analysis of the economic implications of concentrations is followed by an assessment of the evolution of European merger control law under Art. 66 ECSC, Art. 81 and 82 ECT, the merger control regulation of 1989 and its significant amendments of 1997. Then, the theoretical findings are contrasted to the results of recent merger proceedings in the energy sector with a focus on the VEBA/VIAG decision. Several deficiencies are established which limit the efficacy of merger control as a tool of offsetting shortcomings in the secondary EC law with regard to the liberalisation of the electricity and gas supply industry. Commitments proposed by the parties of a given concentration and accepted by the Commission as being sufficient to remedy a serious potential of dominance may only be of subsidiary relevance to the liberalisation of sectors owing to a number of analytical and practical drawbacks. One dominant drawback relates to the fact that the commitments depend always on parties' proposals and can never be imposed ex officio. Others relate to the blunt authorisations provided by the wording of Art. 6 and 8 MR1997 as to the implementation of undertakings.

With regard to acquisitions of U.K. regional electricity companies by EdF, it is elaborated that the current merger control law leaves no scope for reciprocity considerations regarding acquisitions by incumbent companies in liberalised markets even though the acquirer is a protected public undertaking. Moreover,

it is established that different decisions apply inconsistent market definitions. By means of the VEBA/VIAG and RWE/VEW cases, the question is addressed which causes are responsible for the established analytical and practical deficiencies of merger control in the energy sector. It is stated that the weaknesses of the IEMD and IGMD are partly responsible for weak undertakings which do not sufficiently remove the scope for dominance on the affected markets and which do not rule out any possibility of impediments of effective negotiated TPA and do not remove any commercial incentive of the grid subsidiaries of the vertically integrated companies as to access which discriminates between intra and extra group applicants. It is reported that another argument relates to the limited scope that the Commission has if it wants to remedy deficiencies of written primary law owing to the extraordinary nature of the implied powers doctrine based on the principle of constitutional state. Adverse political influence against competition authorities is also judged. Further, it is analysed that accidental regulation based on incidental provisions imposed on undertakings which may or not implement a concentration is by no means a consistent an non-discriminatory and predictable tool to overcome drawbacks of primary or secondary European law in a given sector owing to the democratic principle and the constitutional state doctrine. It is discussed that secondary legislation with regard to energy networks is inter alia restricted by Art. 295 ECT and provisions of national constitutions which protect property rights against dis-proportionate expropriations or re-definitions of property. Further, legal authorisations of said calibre will have to be connected to a system of state liability law. Adverse political pressures are considered. The same is true for egoistic national policies which abstain from transnational task

forces in order to settle difficulties and disputes. Furthermore, the adverse effect of different stages of the maturity of domestic markets, different consumer patterns and a potential isolation of the system is not neglected, because these conditions make it more difficult to apply consistent standards as to the appropriate market definition in order to facilitate harmonisation. The implementation of the VEBA/VIAG merger is discussed, as the former was further complicated owing to specifically evaluated circumstances which were difficult to predict. Nevertheless, the Commission is not exempted from the duty to take due care concerning potential impediments as to the realisation of parties' commitments. In contrast to the negative aspects, it can be highlighted that the Commission quickly realised flaws of the energy liberalisation project as expressed by the present form of the IEMD and IGMD. Consequently, the co-ordinative and innovative mechanisms of Florence and Madrid were created in order to boost the development of effective cross border trade - i.e. tariff systems and interconnector congestion management. It will be concluded that undertakings put forward by the parties and accepted by the Commission should be restricted to a subsidiary legal instrument, only applied if strictly necessary to overcome certain detrimental aspects of given concentrations in order to provide a hint for the legislator, to specify its legislation. Competition as a de-central distributor of risk, wealth and power will be extended to its maximum extent, if wholesale consumers benefit from lower energy prices which allow greater productivity of European products on the world markets in combination with higher environmental standards owing to modern, cost-efficient plants. A successful implementation will be described by liquid spot markets for power accompanied by tools of financial risk management like

forwards, futures and options. These will be valuable indicators of efficient liberalisation of the European electricity and gas supply industries.

## 1. Introduction

This thesis analyses how European merger control law is applied to the energy sector and to which extent its application may facilitate the liberalisation of the electricity and gas industries so that only these concentrations will be cleared that honour the principles of the liberalisation directives. After having discussed the complex micro- and macro-economic considerations which accompany any concentration of business activities, this thesis will discuss the merger control regime of the European Community [EC] so as to establish whether the merger control under either Art. 66 Treaty Establishing the European Coal and Steel Community<sup>1</sup> [ECSC], the case law under Art. 81 and 82 Treaty Establishing the European Economic Community<sup>2</sup> [EEC], as it was introduced by the Commission<sup>3</sup> and reviewed by the ECJ<sup>4</sup>, the original Merger Regulation<sup>5</sup> [MR1989] or the amended Merger Regulation of 1997<sup>6</sup> [MR1997]

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<sup>1</sup> Treaty Establishing the European Coal and Steel Community, April 18, 1951, 261 UNTS 140 (entered into force July 23, 1952); as Amended by the Treaty of Amsterdam Amending The Treaty on European Union, The Treaties Establishing the European Communities and Certain Related Acts, Oct 2, 1997, Official Journal of the European Communities 97/C/430/01 (entered into force May 1, 1999).

<sup>2</sup> Treaty Establishing the European Economic Community, March 25, 1957, 298 UNTS 11, (entered into force January 1, 1958); as Amended by the Treaty of Amsterdam Amending The Treaty on European Union, The Treaties Establishing the European Communities and Certain Related Acts, Oct 2, 1997, Official Journal of the European Communities 97/C/430/01 (entered into force May 1, 1999) (hereinafter, EEC).

<sup>3</sup> Firstly, concentrations were deemed to be excluded from the scope of Art. 81 EEC so that they could only be analysed by the criteria of Art. 82 EEC: Commission of the European Communities, Memorandum on the Concentration of Enterprises in the Common Market, EEC Competition Series, Study No.3 (1966). Such approach was supported by an argumentum e contrario to Art. 66 ECSC as the EEC does not address merger control; q.v. M. Furse, Competition Law of the UK and EC (1<sup>st</sup> ed.) (London, U.K., Blackstone Press Ltd., 1999).

<sup>4</sup> The ECJ found as early as 1973 that Art.82 EEC was a tool to monitor concentrations: q.v. ECJ Case C-6/72 *Europemballage Corp and Continental Can Co Inc v Commission*, [1973] ECR 215. However, the drawback is, that Art. 82 only regulates abusive behaviour of existing dominant undertakings. The wording and rationale does not support mergers between non dominant market players that create such a position. Later, the ECJ introduced legal uncertainty regarding the application of Art. 81 EEC with respect to minority shareholdings: q.v. ECJ Cases C-142/84 & C-156/84 *BAT and Reynolds v Commission* [1987] 4487.

<sup>5</sup> Council Regulation 4064/89/EEC of 21 December 1989 on the Control of Concentrations between Undertakings, O.J. L 395, 30/12/89, p 1, as amended by Corrigendum to Council Regulation 4064/89/EEC of 21 December 1989 on the Control of Concentrations between

facilitate the liberalisation of European electricity and gas markets. Said liberalisation was introduced by the Internal Electricity Market Directive<sup>7</sup> [IEMD], the Hydrocarbons Directive<sup>8</sup> and the Internal Gas Market Directive<sup>9</sup> [IGMD]. The paper will focus on the contestable idea that regulatory amendments - especially the introduction of third party access by means of the directives - only form a first necessary condition for attaining economic alterations whereas pro-active conduct of the marketers is the second and decisive one in order to increase the competitive performance of the European energy supply industries. This approach is justifiable as concentrations of independent undertakings play a vital role in the business strategies not only of European energy companies trying to cope with the new legal framework and to extend activities towards other Member States but also of new European and foreign energy investors looking forward to seizing business opportunities. The analysis is supported by a second argument which relates closely to the ambivalent nature of concentrations: A concentration may be used to increase the process of market opening and the expansion into new markets by pooling of scarce resources.

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Undertakings, O.J. L 257, 21/09/90, p 13 (hereinafter, MR1989).

<sup>6</sup> Council Regulation 1310/97/EC of 30 June 1997 Amending Council Regulation 4064/89/EEC on the Control of Concentrations between Undertakings, O.J. L 180, 09/07/97, p 1, as Amended by Corrigendum to Council Regulation 1310/97/EC of 30 June 1997 Amending Council Regulation 4064/89/EEC on the Control of Concentrations between Undertakings, O.J. L 40, 13/02/98, p 17 (entry into force 01/03/98) (hereinafter, MR1997).

<sup>7</sup> Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 Concerning Common Rules for the Internal Market in Electricity, O.J. L 027, 30/01/97, p 20 (hereinafter, IEMD).

<sup>8</sup> Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 on the Conditions for Granting and Using Authorisations for the Prospection, Exploration and Production of Hydrocarbons, O.J. L 164, 30/06/94 p 3.

<sup>9</sup> Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 Concerning Common Rules for the Internal Market in Natural Gas, O.J. L 204, 21/07/1998, p 1.

It may also be used as a retro-active means so as to create national champions, increase barriers to market entry of new competitors, enable cross-subsidisation so as to expand dominant positions on heretofore competitive up- and downstream markets. Consequently, any merger control regime has to fulfil the extremely sensitive task of enabling undertakings to generate the abovementioned pro-competitive benefits and of proportionately<sup>10</sup> limiting any opportunity to establish or strengthen dominant positions which will be easily abused later.

This paper will address the topic by means of the following methodology:

Firstly,

the economic rationale behind concentrations will be evaluated before the regulatory regime of the ECSC and EC with respect to concentrations is closely assessed beginning with Art. 66 ECSC, shifting to the case law under Art. 81-82 ECT, moving to MR1989 and the amendments of 1997 whereby problematic questions like the dominance test, the assessment of JVs, joint dominance and ancillary restraints are included. Finally, the theoretical analysis is contrasted to the factual application of the legal framework to recent concentrations in the energy sector. The examination will concentrate on the VEBA/VIAG case.

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<sup>10</sup> One may think that the reported drawbacks should be strictly prevented but the dilemma is that the pro-competitive benefits of mergers are almost certainly closely attached to their disadvantages so that only a proportionality test based on the teleology of merger control and the rationale of the provisions regarding the abuse of dominant positions will provide for a reasonable examination and decision.

Lastly, it will be concluded that the European merger control law seems to be - at least in general - an appropriate instrument to deal with concentrations in the energy sector although its rules regulating the definition and enforcement of undertakings imposed on the parties following their commitments need to be elaborated further. It will be revealed that merger control has a subsidiary function as to the implementation of market liberalisation so that it shall only provide for limited remedies unless the secondary law is improved with regard to ownership unbundling and regulated TPA. It shall not be used as an instrument which replaces proper regulation as merger control depends on incidental concentrations rather than reflecting a consistent non-discriminatory application of regulations by means of persistent authorisations.

A comprehensive analysis of the legal framework of merger control has to be based on a thorough understanding not only of the term "concentration of independent undertakings" but also of the microeconomic rationale of mergers, their beneficial and detrimental macroeconomic effects, of the technological rationale of mergers and their diverse socio-economic implications according to different ethical or philosophical preferences. These factors assist in developing a corporate strategy how to cope successfully with market liberalisation. One can either try to create a defensive oligopoly, to achieve a vertically integrated company or to prepare for relentless competition by cost-reflective restructuring and by diversification into different geographical markets.

Therefore, the competition law legislator is obliged to design rules which enable the incumbent cartel authorities to take into account both corporate needs to a significant extent and due respect to public interests as a merger or take-over bid shall not proceed if the outcome dis-proportionately detracts competition on markets for similar products or services. Products or services will be similar if they are exchangeable in regional<sup>11</sup>, temporal<sup>12</sup> and functional terms<sup>13</sup>.

This specification must be made from the perspective of the average counterpart on the market. What the average consumer deems to be exchangeable defines the relevant market<sup>14</sup>.

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<sup>11</sup> Geographical criteria like supply regions, transportation costs.

<sup>12</sup> Temporal market definition depends inter alia on shop opening hours, preferred delivery periods.

<sup>13</sup> Functional market definition groups products/services that fulfil similar specific needs of the vendees or (final) consumers.

<sup>14</sup> This finding is based on the threefold concept of relevant market power that is used for the determination of abuses of dominant positions under Art. 82 ECT and Section 19 I GWB1998: First the markets for similar products or services is defined based on regional, temporal or functional similarity from the view of the average counterpart. Then, the level of market domination is established. Thirdly, the potential abuse is analysed.

## **1.1 Concentration of Undertakings**

Consequently, the first logic step of any merger control law is the accurate definition of a concentration of undertakings. Basically, such a concentration will be available if two formerly independent undertakings in terms of competition law agree voluntarily on merging into a new entity [merger]<sup>15</sup>, if one or more persons - who control an undertaking - or one or more undertakings unilaterally take control of a formerly independent company<sup>16</sup>[take-over/acquisition] or if two independent undertakings agree on creating certain types of joint ventures<sup>17</sup> [JV]. These terms will be elaborated later<sup>18</sup>.

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<sup>15</sup> Art. 3 I lit a. MR1989 and MR1997 and Art. 4 II MR1989 and MR1997; q.v. T.A. Downes and J. Ellison, The Legal Control of Mergers in the European Communities (1st ed.) (London, U.K., Blackstone Press Limited, 1991) p 35.

<sup>16</sup> Art. 3 I lit b MR1989 and MR1997; q.v. R. Whish, Competition Law (3<sup>rd</sup> ed.) (London, U.K., Butterworths, 1993) p 664 and T.A. Downes and J. Ellison, The Legal Control of Mergers in the European Communities (1st ed.) (London, U.K., Blackstone Press Limited, 1991) p 35.

<sup>17</sup> Art. 3 II MR1989 and the amended definition in Art. 3 II MR1997.

<sup>18</sup> q.v. infra Undertaking: 1.1.1 Undertaking in Terms of Merger Control Law , Merger: 6.3.1.1 Merger; Acquisition: 6.3.1.2 Acquisition; JV under merger control law on the basis of Art. 81-82 ECT: 1.1.1 Undertaking in Terms of Merger Control Law, 5.2.2 New Doctrine Introduced by the BAT Judgement, 5.3 The Complex Assessment of Joint Ventures under Art. 82 and 81 ECT, 5.3.1 Legal nature of JVs, 5.3.2 Assessment of Joint Control within Incorporated JVs, 5.3.3 Competition Law Analysis of JVs with A View to Apply Art. 82 ECT; JV on the basis of MR1989: 6.3.1.3 Concentrative JV: Joint Control, Independence, Recession of Parents and Group Effect, 6.3.2.1.5 Turnovers of Jointly controlled Undertakings, 6.3.2.1.10 Formation of Concentrative JVs; JV on the basis of MR1997: 6.6.3.2.3 Yardsticks for The Assessment of JVs under MR1997.

### 1.1.1 Undertaking in Terms of Merger Control Law

As the notion of an "undertaking" is neither defined in Art. 3 I lit. g ECT nor Art. 81 et seq. ECT nor in the merger control provisions, the question arises how to accurately interpret this term.

For the purposes of competition law, the term undertaking has to be interpreted extremely broadly so as to include virtually every commercial activity<sup>19</sup>. This covers not only entities pursuant to company law dogmatic<sup>20</sup>, but also sole traders, public enterprises<sup>21</sup> and actions of a public body as long as these are determined by private law<sup>22</sup>.

It has to be carefully analysed whether this concept should be applied to merger control as well. The first Commission Notice on JVs gives a positive answer but it indicates a quite restrictive solution by stating that an undertaking should be defined as an organised assembly of human and substantive resources dedicated to attain a defined economic purpose on a lasting basis<sup>23</sup>. Such an approach does not clarify to what extent natural persons and institutional investors could be caught. It is suggested that the term undertaking has

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<sup>19</sup>ECJ Case C-41/90 *Höfner v Macrotron* [1991] ECR I 1979 at p 2016 paragraph 21; Commission, EEC Competition Rules, Guide for Small and Medium-Sized Enterprises, (European Documentation, 1983); I. Van Bael and J.-F. Bellis, Competition Law of the European Community (3<sup>rd</sup> ed.) (Bicester, U.K., CCH Editions Limited, 1994) p 27; q.v. for German Antitrust Law: V. Emmerich, Kartellrecht (8<sup>th</sup> ed.) (München, Germany, C.H.Beck, 1999) p 17-18.

<sup>20</sup> e.g. corporations, private (limited liability) companies, PLCs, partnerships.

<sup>21</sup> This refers to public undertakings in terms of Art. 86 I ECT, i.e. public law entities or private law entities of which the commercial activities are significantly controlled by public bodies for instance by means of ownership; q.v. I. Van Bael and J.-F. Bellis, Competition Law of the European Community (3<sup>rd</sup> ed.) (Bicester, U.K., CCH Editions Limited, 1994) p 27.

<sup>22</sup> It includes the central state, regional states, other independent public bodies and state owned enterprises as long as these engage in private activities like negotiating contracts; q.v. V. Emmerich, Kartellrecht (8<sup>th</sup> ed.) (München, Germany, C.H.Beck, 1999) p 22. e.g. awarding contracts for the completion of infrastructure projects to private companies. Additionally, several federal states could merge their public procurement activities so as to ensure better conditions.

<sup>23</sup> Commission Notice Regarding The Concentrative and Cooperative Operations under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations Between Undertakings, O.J. C 203, 14/08/1990 p 10 at paragraph 8.

to be interpreted even more extensive for the scope of merger control<sup>24</sup> so that - apart from traditional commercial activities - the conduct of influential institutional investors like pension funds or significant private shareholders shall be covered as well<sup>25</sup>.

Owing to two arguments, this suggestion is indeed justifiable: Firstly, the extensive interpretation is supported by the close connection between the terms "persons" and "undertakings" within the wording of Art. 3 I lit. b 1<sup>st</sup> and 2<sup>nd</sup> Variant MR1989.

Secondly, the teleology of merger control backs the concept: All the listed entities can have a decisive impact in terms of Art. 3 I MR1997 on the behaviour of groups of undertakings which may only be formally independent legal personalities.

Additionally, a JV has to be regarded as an undertaking for the purposes of European merger control law<sup>26</sup>. However, if it is to be regarded as a concentration, it will have to satisfy additional conditions: Firstly, it was necessary that the JV autonomously performed its tasks on a long lasting basis<sup>27</sup>. Secondly, it was necessary that the JV was not exposed to competition by either of the mothers and that the mother undertakings ceased to compete against each other in its scope<sup>28</sup>. Such JVs are called Concentrative JVs. If these included ancillary restraints, the MR1989 will be applicable but the substantive criteria

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<sup>24</sup>q.v. for German Antitrust Law: BGHZ 74,359, 364 *Brost und Funke v WAZ*; V. Emmerich, *Kartellrecht* (8<sup>th</sup> ed.) (München, Germany, C.H.Beck, 1999) p 270-271.

<sup>25</sup>e.g. German merger control: White Paper Regarding the Antitrust Act, Federal Parliament Gazette [Bundestagsdrucksache] 8/2136 and 8/3690; V. Emmerich *Kartellrecht* (8<sup>th</sup> ed.) (München, Germany, C.H.Beck, 1999) p 271.

<sup>26</sup> Commission Notice Regarding The Concentrative and Cooperative Operations under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations Between Undertakings, O.J. C 203, 14/08/1990 p 10 at paragraph 8.

<sup>27</sup> Art. 3 II 2nd Sentence MR1989.

may be taken from Art. 81 ECT<sup>29</sup>. Other types of JVs, i.e. concentrative ones involving non-ancillary or non-separable competitive restraints of major importance, concentrative ones below the turnover thresholds, or co-operative ones were only governed by Art. 81 ECT<sup>30</sup>. Nowadays, it is - apart from the turnover thresholds<sup>31</sup> - solely relevant whether an organisational structure is established that is able to fulfil functions of autonomous entities on a long-lasting basis<sup>32</sup>. However, various other hybrid structures are imaginable as undertakings for instance may separate significant parts of their operations and sell them to another undertaking which either incorporates the assets or forms a dependent subsidiary with or without adding parts of its own<sup>33</sup>. For the purpose of this paper, the term merger is sometimes used in a broad sense, i.e. as a blanket term including the abovementioned phenomena. This approach is supported by the fact, that - despite contrary public relation activities during merger talks - mergers in the narrow sense usually contain a significantly weaker partner who is factually forced to accept the deal by institutional shareholders' leverage or economic pressures as otherwise either a promising take-over bid by the "partner" will be issued or even more inconvenient companies may try to threaten the entity in the foreseeable

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<sup>28</sup> Art. 3 II 2nd sub-paragraph MR1989. Concentrative joint ventures were covered by the Merger Regulation if they met the criteria of turnover and geographical allocation pursuant to Art. 1 MR1989. Otherwise, Art. 81 I ECT was applicable.

<sup>29</sup> T.A. Downes and J. Ellison, The Legal Control of Mergers in the European Communities (1st ed.) (London, U.K., Blackstone Press Limited, 1991) p 149.

<sup>30</sup> T.A. Downes and J. Ellison, The Legal Control of Mergers in the European Communities (1st ed.) (London, U.K., Blackstone Press Limited, 1991) p 149.

<sup>31</sup> Art. 1 II MR1989; Art. 1 II-III MR1997.

<sup>32</sup> Art. 3 II MR1997.

<sup>33</sup> q.v. Sections 1 I No.1, 2 et seq. (merger); Sections 1 I No.2 123 et seq. (3 forms of divestiture), Sections 1 I No.3, 174 et seq. (transfer of assets), Sections 1 I 4, 190 et seq. (conversion of legal form) Change of Corporate Form Act of 28 October 1994, Federal Law Gazette 1994 I 3210 and Federal Law Gazette 1995 I 428, as amended on 22 July 1998, Federal Law Gazette 1998 I 1878).

future<sup>34</sup>.

### **1.1.2 Control**

In general, the notion of Control has to be interpreted broadly as well, so that not only a significant ownership of assets or shares is relevant but also contractual claims and obligations, as long as a decisive influence is attained<sup>35</sup>. Even negative control is deemed to be sufficient if two partners in a 50:50 JV are bound to agree on common concepts as no unilateral measure can succeed<sup>36</sup>. With respect to individuals, controlling a company and acquiring a second one, it must be stressed that the concentration will take place between both companies<sup>37</sup> and not between the shareholder and the target company because only undertakings operate on markets according to the rationale of competition law.

### **1.2 Categories of Concentrations**

One can distinguish between four different categories of mergers: Firstly, a horizontal merger is available, if the involved undertakings used to compete on markets for products or services that are exchangeable in terms of their functions, their marketing regions and times from the perspective of average

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<sup>34</sup> A merger can be the only defense against corporate predators as increased stock market value can prevent investors from taking control that are only interested in the liquidation of struggling undervalued undertakings so as make profits by selling the assets. Alternatively, an unwanted rival can be excluded. For instance, the Hypo-Vereinsbank was founded between Bayerische Vereinsbank und Bayerische Hypothekenbank in 1997 so as to defend against Deutsche Bank who had secretively begun to build up a position, q.v. The Economist, *Merger Brief - A Bavarian Botch-Up* 87 (5 August 2000). Additionally, the detrimental effects of called-off merger talks especially for the weaker part must not be neglected, including resignations of the Chief Executive Officer and bad publicity inaugurating the public chase for the next bidder; q.v. Disapproved Merger Plan between Deutsche Bank AG and Dresdner Bank AG in Spring 2000.

<sup>35</sup> Art. 3 III lit a.-b. MR1989 and MR1997. Even minority shareholdings can be covered.

<sup>36</sup> V. Emmerich, *Kartellrecht* (8<sup>th</sup> ed.) (München, Germany, C.H.Beck, 1999) p 498. Even minority shareholders can execute decisive influence by means of provisions of mandatory consent within the articles or shareholder-agreements.

<sup>37</sup> T.A. Downes and J. Ellison, *The Legal Control of Mergers in the European Communities* (1<sup>st</sup> ed.) (London, U.K., Blackstone Press Limited, 1991) p 36.

consumers<sup>38</sup>. Secondly, vertical mergers involve companies that do not compete but of which one is dedicated to up- or downstream activities with respect to relevant products or services of the other entity. Thirdly, conglomerate mergers are concluded between undertakings which neither compete on markets nor engage in related up- or downstream activities<sup>39</sup>. Lastly, hybrid mergers<sup>40</sup> involve undertakings that compete partly in relevant product markets, engage partly in up- or downstream businesses and engage partly in absolutely separate sectors.

## **2. Microeconomic Rationale of Concentrations**

It is worthwhile developing, for the sake of which benefits undertakings intend to merge and acquire companies rather than relying on own sustainable growth. Later, the probable detrimental macro-economic effects attached to mergers are scrutinised.

### **2.1 Microeconomic Benefits of Mergers**

Companies can very quickly realise a diverse range of new business opportunities and at less risk levels with respect to supply and volume risks, at least in comparison with a strategy that focuses on own growth.

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<sup>38</sup> R. Whish, Competition Law (3<sup>rd</sup> ed.) (London, U.K., Butterworths, 1993) p 665.

<sup>39</sup> V. Emmerich, Kartellrecht (8<sup>th</sup> ed.) (München, Germany, C.H.Beck, 1999) p 266-267.

<sup>40</sup> They can also be called "market combination mergers"; q.v. V. Emmerich, Kartellrecht (8<sup>th</sup> ed.) (München, Germany, C.H.Beck, 1999) p 267.

### 2.1.1 Microeconomic Benefits of Vertical Integration

A merger may create a new or expand an existing vertically integrated company so that the chain of subsequent value adding activities is enhanced<sup>41</sup> and the turnover and profits increase.

Another advantage is that the purchase of a well established supply company can be faster and less risky than creating new and relatively small and inexperienced own marketing subsidiaries or networks of possibly unreliable dealers<sup>42</sup>.

Furthermore, the vertical integration of upstream activities reduces the dependence on suppliers so that the supply risk is minimised. As the availability of commercial discoveries of natural resources is strictly limited, the degree of control over production automatically determines the supply risk of competitors who operate only in a downstream segment of the commodity chain<sup>43</sup>.

Additionally, vertical integration enables undertakings to spread the price risk over the whole supply chain so the difficult process of negotiating with distributors, wholesalers and retailers can be internalised. Vertically integrated undertakings are also entitled to introduce a company wide pricing system between the upstream and downstream branches which allocates the profits in those countries where the taxation systems are investor friendly, where the repatriation of profits is easy and the political risks are relatively low.

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<sup>41</sup> J.J. Spengler, *Vertical Integration and Antitrust Policy*, Journal of Political Economy 347-352 (1950); A. Ellis and E. Bowitz and K. Roland, *Structural Change in Europe's Gas Markets: Three Scenarios for the Development of the European Gas Market to 2020*, Energy Policy 301 (2000); R. Whish, *Competition Law* (3<sup>rd</sup> ed.) (London, U.K., Butterworths, 1993) p 666.

<sup>42</sup> R. Whish, *Competition Law* (3<sup>rd</sup> ed.) (London, U.K., Butterworths, 1993) p 666.

<sup>43</sup> A. Ellis and E. Bowitz and K. Roland, *Structural Change in Europe's Gas Markets: Three Scenarios for the Development of the European Gas Market to 2020*, Energy Policy 301 (2000).

Compared with single activity companies, vertically integrated ones benefit from reduced volume risks as well<sup>44</sup>. The overall potential of risk reduction by offsetting antagonistic risks along the supply chain<sup>45</sup> can be illustrated by the following examples:

A scarcity of a commodity increases the supply risk and the purchase price risk. Higher purchase prices lead generally to increased delivery prices so that the delivery price risk is actually reduced to the benefit of the integrated company. However, risk related to delivery volumes will increase owing to higher prices (inverse ratio).

Conversely, a bubble of a commodity reduces the supply risk and the purchase price risk and it increases risk, that the product cannot be delivered to the planned prices. However, the integrated company will benefit as the risks related to the delivery volumes has decreased owing to the low retail prices.

Thereby, a vertical integration can at least partly offset the diverse business risks.

On the other hand, the essential facilities doctrine must not be neglected which can reduce the incentives for investing in new networks as competitors may later claim a fair, transparent and non discriminatory access<sup>46</sup>.

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<sup>44</sup> e.g. An integrated Gas Company with excess gas could either store the commodity for later sales - perhaps re-injections in depleted fields - or use it as fuel gas for electricity generation.

<sup>45</sup> A. Ellis and E. Bowitz and K. Roland, *Structural Change in Europe's Gas Markets: Three Scenarios for the Development of the European Gas Market to 2020*, Energy Policy 302 (2000).

<sup>46</sup> q.v. M.A. Bergman, *The Bronner Case - A Turning Point for the Essential Facilities Doctrine* ?, ECLR 63 (2000). This incentive also exists to a lesser extent for horizontal concentrations.

Another incentive for vertical concentration is that the expanding entity is keen on obtaining valuable intellectual property rights from the undertaking that is due to be controlled in order to facilitate the operations in the up- or downstream markets<sup>47</sup>.

Merging into a vertically integrated business can realise various synergies with respect to business functions like marketing, accounting, integrated technologies, communication technology and legal services which require not identical but very similar expertise regarding different commodities and activities, too<sup>48</sup>.

However, this argument is also true for horizontal mergers.

### **2.1.2 Microeconomic Benefits of Horizontal Integration**

In a similar pattern, horizontal mergers are likely to cause beneficial effects for the businesses involved in the concentrations.

The primary and obvious advantage refers to economies of scale. This concept states that an entity can produce at lowest marginal costs and thereby with maximum economically viable output if it operates at the minimum efficient scale<sup>49</sup>. Thereby, productive efficiency is increased. Additional macroeconomic benefits arise as low marginal cost production improves the allocative efficiency so that mergers can sometimes support the general objectives of competition policy.

Unfortunately, these beneficial macroeconomic effects will be often far from real if the horizontally merged entity is able to create and to abuse a dominant position on market for regionally, temporally and functionally relevant products

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<sup>47</sup> q.v. R. Whish, Competition Law (3<sup>rd</sup> ed.) (London, U.K., Butterworths, 1993) p 666. However, this argument is also true for horizontal mergers with respect to traditional markets.

<sup>48</sup> J. Crowley and P. Spence and G. Rockefeller and R. Patrick, *European Gas & Power Analysis - The Rush to the Altar*, *Petroleum Economist* 5-6 (March 2000).

by charging of excessive prices or delivering goods to wholesalers, retailers and consumers only by using discriminatory terms or pricing. Therefore, downstream markets may be severely distorted. Vice versa, dominant purchase power can be executed in the same detrimental way. However, from the microeconomic point of view, these opportunities represent highly desirable powers because economic competition as a contention for superiority usually involves the attempt to create non transparent, separated markets with barriers to entry in order to achieve a monopoly-like situation<sup>50</sup>.

These intentions are sometimes facilitated by politicians who prefer the installation of a national champion rather than permitting international investors to gain a significant control on the domestic market by buying weak undertakings.

Once factual monopolies on regional markets are erected they may be used to achieve relevant discounts of producer prices as the volumes of contracted commodities increase and the demand forecasts become more predictable. As already mentioned with respect to vertical integration, horizontal mergers also offer significant opportunities to integrate similar research & development or marketing<sup>51</sup> functions, especially the traditionally neglected brand building in the utility sectors<sup>52</sup>.

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<sup>49</sup> F.M. Scherer and D. Ross, Industrial Market Structure and Economic Performance (3<sup>rd</sup> ed.) (Cambridge, U.S., Harvard University Publishing, 1991) p 163; R. Whish, Competition Law (3<sup>rd</sup> ed.) (London, U.K., Butterworths, 1993) p 666.

<sup>50</sup> q.v. Theory of monopolistic Competition.

<sup>51</sup> J. Crowley and P. Spence and G. Rockefeller and R. Patrick, *European Gas & Power Analysis - The Rush to the Altar*, Petroleum Economist 3 and 5 (March 2000).

<sup>52</sup> J. Crowley and P. Spence and G. Rockefeller and R. Patrick, *European Gas & Power Analysis - The Rush to the Altar*, Petroleum Economist 6 (March 2000).

This argument is also valid for comparable back-office functions for different products. Although the underlying physical phenomena of network bound industries are very different, the financial and commodity risk management tools with respect to medium and short term electricity or gas trading tend to be extremely similar. However, it must be stressed that only medium term commodity trading can be addressed by conventional tools of financial risk management, e.g. the value-at-risk model<sup>53</sup>, whereas short-term electricity or gas trading requires more sophisticated models<sup>54</sup>. The reason is that dangerous positions can not be closed in adverse market conditions unless the consumers are interruptible.

Further, these synergies make it very desirable to merge power, gas, petroleum and other network bound activities in horizontal terms<sup>55</sup>. Such integration can also lead to managerial economies<sup>56</sup> as larger businesses have the financial capabilities to re-organise existing backoffices so as to support either a greater degree of in-house expertise and to take better advantage of existing highly qualified personnel or to focus on relevant departments and close down redundant ones.

Hence, one can take advantage of technical synergies by merging horizontally as investments in new equipment are more rapidly amortised and the supervi-

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<sup>53</sup> The value at risk model establishes stop prices so as to close a position in case of adverse market movements, q.v. G. Keers, *Taking the Corporate Risk out of Power Trading*, Petroleum Economist, 5 (March 2000).

<sup>54</sup> e.g. the so called profit-at-risk model, which becomes relevant after the forward markets near the delivery date so that whether conditions, plant or network failures and other variables replace the traditional demand forecasts based on long-term models; q.v. G. Keers, *Taking the Corporate Risk out of Power Trading*, Petroleum Economist, 6-7 (March 2000).

<sup>55</sup> e.g. operation of cable-television networks, fixed telephone networks, mobile phone networks, water networks, q.v. J. Crowley and P. Spence and G. Rockefeller and R. Patrick, *European Gas & Power Analysis - The Rush to the Altar*, Petroleum Economist 6 (March 2000). Even internet broadband services belong to this category, q.v. recent activities of Enron.

<sup>56</sup> R. Whish, *Competition Law* (3<sup>rd</sup> ed.) (London, U.K., Butterworths, 1993) p 664.

sion of different kind of plants involve comparable total quality management skills<sup>57</sup>.

Horizontal cross-commodity mergers can also provide for the hedging of oil supply, price or volume risk fluctuations being partly offset by parallel gas activities<sup>58</sup>.

Lastly, it must not be neglected that the actual pace of concentration encourages further horizontal mergers as barriers to entry tend to increase significantly: The higher the average turnover of undertakings within a business sector - or even in different sectors of the domestic economy<sup>59</sup> - the more difficult it becomes for small and medium sized companies and start-ups to attract necessary project finance either from banks in form of loans or from bond markets, a stock floatation or venture capital firms.

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<sup>57</sup> e.g. programmes to increase plant efficiency, reduce maintenance and increase reliability.

<sup>58</sup> J. Crowley and P. Spence and G. Rockefeller and R. Patrick, *European Gas & Power Analysis - The Rush to the Altar*, Petroleum Economist 6 (March 2000).

<sup>59</sup> W.J. Simpson, *Canada Analysis - The Missing Link*, Petroleum Economist 19 (March 2000).

### 2.1.3 Microeconomic Beneficial Effects of Conglomerate Integration

Finally, the controversial microeconomic benefits of conglomerate mergers are considered. One school of scholars highlights that conglomerates achieve a great deal of economic influence by means of the size of their aggregated turnover figures even if no dominant positions on markets for relevant products are available<sup>60</sup>. Especially, the power to undermine free markets by means of systematic predatory pricing<sup>61</sup> is criticised which is financed by revenues or gentle price increases in other product markets<sup>62</sup>.

The second school focuses on the concept of "relevant market power"<sup>63</sup> which is widely accepted as a yardstick to examine whether a dominant position is available<sup>64</sup>. It emphasises that corporate power shall be attributed solely to markets for specific products and services and not to aggregated turnover of different branches with small market shares. Based on this model, conglomerate mergers would not make any sense in microeconomic terms.

As a matter of fact, a combination of both concepts seems to be superior - at least for the purposes of merger control - as cross-subsidisation is an opportunity too serious to be ignored. Additionally, conglomerate mergers can be implemented in order to prevent undertakings which could well be future competitors on relevant product markets from becoming competitors in the first place. Thirdly, the aggregated size of a company and its financial status can be so impressive that potential or real competitors abstain from commencing

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<sup>60</sup> The so called deep pocket theory, q.v. R. Whish, Competition Law (3<sup>rd</sup> ed.) (London, U.K., Butterworths, 1993) p 669; V. Emmerich, Kartellrecht (8<sup>th</sup> ed.) (München, Germany, C.H.Beck, 1999) p 267.

<sup>61</sup> systematic pricing below costs, dumping.

<sup>62</sup> The strategy is called "cross subsidisation".

<sup>63</sup> A. Bork, The Antitrust Paradox, (1st ed.) (New York, U.S., Harper Collins Publishers, 1978) Chapter 12; V. Emmerich, Kartellrecht (8<sup>th</sup> ed.) (München, Germany, C.H.Beck, 1999) p 178.

<sup>64</sup> q.v. Art. 82 ECT; Section 19 I in combination with 19 II 1 No.1 1st and 2nd Variant and No.2 German Antitrust Act of 26 August 1998 [Gesetz gegen Wettbewerbsbeschränkungen], Federal Law Gazette 1998 I 2521.

serious attacks. Consequently, the said opportunities form real incentives for founding conglomerates and these mergers must be controlled, too.

## **2.2 Microeconomic Drawbacks of Mergers**

After having praised the various beneficial prospects attached to mergers, it has to be stressed that companies do often struggle to effectuate the projected benefits during the difficult implementation of the transaction.

### **2.2.1 In-transparent Economic Status of the Partner**

First of all, a profound lack of knowledge of the true economic<sup>65</sup> or financial<sup>66</sup> status of the counterpart can cause serious detriment and which - a posteriori - may explain why the counterpart did agree so happily on the merger covenants. An analogous problem can arise if the allocation of important intellectual property rights remains non-transparent<sup>67</sup>. All these shortcomings can prevent the projected economies of scale<sup>68</sup>.

### **2.2.2 Merger Related Expenditure**

Secondly the financial sacrifices needed in order to finance expensive takeover bids can cause a loss of reputation and de-valuation of credit ratings so that today's predator may easily become a future target<sup>69</sup>.

### **2.2.3 Managerial Dis-Economies**

Thirdly, severe managerial dis-economies can be caused by insufficient merger preparations and unreasonable implementation: Careful strategies are

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<sup>65</sup> e.g. BMW seriously mis-judged the marketing opportunities and currency fluctuations regarding the unsuccessful integration of Rover although the technical and the productivity weaknesses had been solved.

<sup>66</sup> For instance, Bayerische Vereinsbank did not know the true amount of instability of Bayerische Hypothekenbank owing to mortgages and loans in the former GDR as many debtors were insolvent: The Economist, *Merger Brief - A Bavarian Botch-Up* 87 (5 August 2000).

<sup>67</sup> For example, Volkswagen did not duly analyse the allocation of the Rolls Royce brand when bidding for the car manufacturer so that a dispute with BMW arose.

<sup>68</sup> R. Whish, Competition Law (3<sup>rd</sup> ed.) (London, U.K., Butterworths, 1993) p 671.

required to bridge different corporate cultures and leadership styles, to overcome former rivalries, to avoid the victimisation of staff of the smaller partner and to create a new corporate identity. The failure to integrate highly respected departments in the earliest stages can cause the key-personnel to leave<sup>70</sup> as redundancy is feared. Furthermore, a dispute about the divestiture of a prestigious department of the smaller partner which shall remunerate the major partner for the merger related expenditure can terminate merger talks combined with bad publicity<sup>71</sup>. Lastly, active merger strategies can encourage a short-term attitude of management that ceases to develop and address long-term corporate objectives and policies as it focuses either on merger policies or on defenses against unwanted predators<sup>72</sup>.

#### **2.2.4 Unreasonable Focus on Integration**

Unsustainable levels of concentration exemplified by an extreme degree of unification of research and development facilities have a tendency to uniform basic industrial platforms so that less flexible solutions are offered to final consumers. Thereby, undue integration of products which differ only superficially for marketing reasons<sup>73</sup> can leave consumers either unsatisfied at all or persuade them to opt for the cheapest option owing to similar basic quality standards. Even more serious is the fact that the capability to cope with erroneous developments is reduced if undertakings concentrate on a small range of core-products and services.

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<sup>69</sup> e.g. Mannesmann's credit rating was reduced after the successful bid for Orange Telecom in Summer 1999 and subsequently it did not have sufficient resources to defend against the bid of Voodafone Airtouch.

<sup>70</sup> R. Whish, Competition Law (3<sup>rd</sup> ed.) (London, U.K., Butterworths, 1993) p 670.

<sup>71</sup> e.g. Merger talks between Deutsche Bank and Dresdner Bank in Spring 2000 that were terminated by the latter party as Dresdner Bank did not agree on selling the investment banking department Dresdner Kleinwort Benson. The Dresdner CEO resigned.

<sup>72</sup> R. Whish, Competition Law (3<sup>rd</sup> ed.) (London, U.K., Butterworths, 1993) p 669.

### 3. Macroeconomic Implications of Mergers

After having discussed the relevance of mergers from the corporate point of view it is necessary to focus on the macroeconomic and public wealth related considerations regarding increased consolidation within economic sectors.

#### 3.1 Macroeconomic Benefits of Concentrations

As already mentioned, mergers can improve the overall allocative efficiency of an economy owing to widespread economies of scale and minimised marginal costs<sup>74</sup>.

##### 3.1.1 Aggregated Productive Efficiencies

The persistent threat that companies, which do not perform duly on stock exchanges<sup>75</sup>, can easily become subject of a rival's take-over bid forms an important incentive for the management to concentrate on productive efficiency so that - in aggregated terms - the international competitiveness of the domestic economy is in safeguarded<sup>76</sup>.

The important role of shareholders with respect to take-over bids or merger agreements is also vital for the ongoing macroeconomic efficacy of shareholders' control over the boards of directors pursuant to company law. Generally, diverse groups of shareholders lack the power to challenge the

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<sup>73</sup> e.g. Integration in the automobile industry leads to various different brands at different price levels although the platforms are identical (many Volkswagen-Seat-Skoda-Audi models).

<sup>74</sup> R. Whish, *Competition Law* (3<sup>rd</sup> ed.) (London, U.K., Butterworths, 1993) p 666.

<sup>75</sup> e.g. the listing is close to the value of the assets, q.v. The Economist, *Merger Brief Building a New Boeing*, 84 (12 August 2000).

<sup>76</sup> R. Whish, *Competition Law* (3<sup>rd</sup> ed.) (London, U.K., Butterworths, 1993) p 666.

arguments of the management on annual meetings. However, the prospect of concentration is likely to unite the shareholders and reinstate their power<sup>77</sup>. In this case, only a board backed by confident stakeholders may find the necessary support. Therefore, merger waves force the undertakings to concentrate on shareholders' values so that corporate efficiencies and in aggregated terms - macroeconomic efficiency is achieved.

### **3.1.2 Reduction of Macroeconomic Barriers to Exit**

Another macroeconomic beneficial effect of mergers is related to the incentives for new or experienced entrepreneurs to set up and engage in new businesses.

This incentive depends crucially on the factor that once the business is well established the owner can achieve an enormous revenue by either selling the independent company to another one or by reducing his percentage of shares so as to give up management control. If competition authorities impeded the profitable sale of companies to major partners to an undue extent, the incentive to found a business would diminish<sup>78</sup>. Therefore, mergers are an important tool to avoid barriers to exit markets.

### **3.1.3 Tool to Rescue Weak Undertakings**

Additionally, a concentration provides weak companies with an important means to evade insolvency by means of pooling scarce resources<sup>79</sup> which is crucial in recessive periods of the business cycle. This justification is called the failing firm defense.

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<sup>77</sup> R. Whish, Competition Law (3<sup>rd</sup> ed.) (London, U.K., Butterworths, 1993) p 667.

<sup>78</sup> R. Whish, Competition Law (3<sup>rd</sup> ed.) (London, U.K., Butterworths, 1993) p 667.

<sup>79</sup> This reflect the general idea of managerial economies and economies of scale.

### **3.1.4 Facilitator of Market Integration**

Finally, mergers may strengthen the creation of a single and transparent European market<sup>80</sup> for energy as only relatively large entities can create the economies of scale required to engage in large infrastructure investments, to bargain with powerful producers on equal footing or to overcome the remaining obstacles to significant cross-border trade of electricity or gas. Integration leads to a larger size of markets for relevant products or services so that economies of scale are promoted by increased demand of consumers.

However, it must not be neglected, that the creation of a transparent internal market can be circumvented by means of those mergers that intend to create national champions until the existing barriers to cross-border trade are reduced: Undertakings, both horizontally and vertically integrated and with cross commodity activities have the power to exclude any effective foreign competition.

## **3.2 Detrimental Macroeconomic Effects of Mergers**

The ambiguous nature of mergers with respect to microeconomic effects is also reflected on the macroeconomic level.

### **3.2.1 Dominance over Industrial Sectors**

In order to assess the potential of a horizontal concentration to dominate relevant product or service markets, the Herfindahl-Hirschmann-Index [HHI] is applied by North American antitrust authorities<sup>81</sup>. Its methodology is as follows:

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<sup>80</sup> R. Whish, *Competition Law* (3<sup>rd</sup> ed.) (London, U.K., Butterworths, 1993) p 668.

<sup>81</sup> Department of Justice, *Department of Justice's Merger Guidelines of 1982*, 47 Fed Reg 28, 493-502 (1982), as amended by *Department of Justice Merger Guidelines of 1992*, 57 Fed Reg 41, 552 (1992).

The existing market shares of the entities in question are squared and added in a first step. A HHI near 0 represents an atomistic market and a result of 10,000 a monopoly. A concentration is generally presumed to be contrary to competition law if the post concentration HHI exceeds 1800 and the individual index of the largest entity involved is increased by at least 100 points<sup>82</sup>. However, a qualitative analysis of market structures can overcome the legal presumption. Likely arguments are eases of barriers, natural heterogeneity of products, strong international competitors, efficiencies and the failing firm defence<sup>83</sup>.

Contrarily, a concentration will be deemed to be legal if the post concentration HHI is below 1000 points. On a moderately concentrated market with a post concentration HHI between 1000 and 1800, the concentration will be deemed to be legal if the individual increase of the largest partner is below 100. A detailed examination will follow in case of individual results exceeding 100 points. As a matter of fact, legal uncertainty remains if the HHI exceeds 1800 points and a very powerful entity merges with an extremely small partner<sup>84</sup>.

Both horizontal and vertical mergers can offer various opportunities to create and abuse dominant positions. As a matter of fact, an exhaustive analysis of the macroeconomic detrimental effects of market power related conduct of

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<sup>82</sup> Section 1.51 Department of Justice, *Department of Justice's Merger Guidelines of 1982*, 47 Fed Reg 28, 493-502 (1982), as amended by *Department of Justice Merger Guidelines of 1992*, 57 Fed Reg 41, 552 (1992). Additionally, if the individual undertaking's increases of the HHI between 50 and 100 will cause a detailed examination whereas increases are below 50, will lead to a clearance decision.

<sup>83</sup> Sections 2.2., 3.0, 4.0, 5.0 Department of Justice, *Department of Justice's Merger Guidelines of 1982*, 47 Fed Reg 28, 493-502 (1982), as amended by *Department of Justice Merger Guidelines of 1992*, 57 Fed Reg 41, 552 (1992).

<sup>84</sup> e.g. Undertaking A with a market share of 45% (HHI 2025) merges with Undertaking B with a share of 1%. (HHI 1). The merged entity has an HHI of 2026 but the large entity is barely affected by the increase of 1 point.

dominant undertakings is beyond the scope of this paper as such a conduct includes phenomena as diverse as the following:

- discrimination in terms of prices or conditions,
- discrimination with regard to marketing channels,
- discrimination concerning access to resources,
- refusal of access to essential facilities like networks,
- systematic dumping,
- requests of dominant downstream marketers that the upstream company shall bear parts of the costs regarding brand-building and marketing.

However, it can be summarised that any kind of concrete behaviour, of which the efficacy - and thus the detrimental effect on competitors or consumers - depends primarily on dominant market power of the merged entity, must be outlawed pursuant Art. 82 ECT. If one translates this doctrine into the abstract categories of merger control, every concentration that vests the merged entity with the abstract power to obtain a dominant position on markets for relevant products in geographic, temporal or functional terms and to abuse this position must be interdicted. As abstract potentials prevail, it is irrelevant whether the converging parties of a merger case promise to abstain from specific abusive conduct or not.

### **3.2.2 Unemployment and Regional Disparities**

Additionally, mergers have an undisputed potential of raising unemployment rates as the realisation of synergies is related closely to closure of branches or departments that cannot be sold. Furthermore, closure plans usually ignore

externalities like the overall economic wealth of the region where the engagement is reduced<sup>85</sup>.

As a matter of fact, one can more adequately address these implications by political means that are superior to the introduction of public interest considerations into the scope of competition law. Not only federal but also regional governments and municipalities are capable and responsible to internalise public unemployment and regional economic wealth considerations with respect to undertakings in a more sophisticated way. For instance, differentiated tax regimes<sup>86</sup>, pro-active regulatory policies with regard to land planning law and environmental standards, investments in education and infrastructure and development programmes and business parks can provide the incentives for undertakings that are necessary not to abandon activities in remote, rural areas<sup>87</sup> without putting the efficacy of competition law at risk.

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<sup>85</sup> R. Whish, Competition Law (3<sup>rd</sup> ed.) (London, U.K., Butterworths, 1993) p 670.

<sup>86</sup> e.g. higher depreciation rates.

<sup>87</sup> q.v. Discussion about infrastructure, education in South-West England (Devon, Cornwall) and its Objective One Status in terms of EC funds: *The Economist*, *Devon and Cornwall - California Dreaming*, 32 (5 August 2000).

### 3.2.3 Socio-Economic Concentration of Wealth and Power

The most serious implication of mergers relates to the fact that increased domination on markets reduces the de-centralised allocation of wealth and power within the society<sup>88</sup> so that the democratic institutions are put at risk if an economic crisis occurs<sup>89</sup>. Powerful trusts do not necessarily have to rely on ordinary forms of lobbying or business associations when they influence legislation, administration and judiciary.

Additionally, reciprocity with respect to concentrations<sup>90</sup> is a major concern for public wealth as it will be highly questionable if investors who benefit from public ownership or barely contestable factual monopolies take over foreign companies<sup>91</sup>. Consequently, the IGMD explicitly entitles Member States to derogate from the IGMD in order to enforce reciprocity<sup>92</sup>.

### 3.3 Evaluation

Due to the plethora of arguments related to economic concentration it is extremely difficult to formulate any general assessment. This is especially true for the microeconomic considerations which clearly fall into the responsibility of the highest levels of corporate management.

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<sup>88</sup> V. Emmerich, *Kartellrecht* (8<sup>th</sup> ed.) (München, Germany, C.H.Beck, 1999) p 3.

<sup>89</sup> This is especially important for concentrations in the sectors close to sovereignty or public opinion like energy, telecommunications, press, radio, television and internet. Consequently these sectors are usually covered by specific regulators which supervise specific competition law provisions.

<sup>90</sup> R. Whish, *Competition Law* (3<sup>rd</sup> ed.) (London, U.K., Butterworths, 1993) p 671.

<sup>91</sup> e.g. EdF acquired the Regional Electricity Companies London Electricity and Southwestern in the UK and a share in Energiewerke Baden-Württemberg whereas no foreign company can participate in the 100% government owned EdF, q.v. H. Avati, *European Gas & Power Analysis - The tardy French*, 16 (Petroleum Economist (March 2000)). e.g. Ruhrgas: On the one hand, it delays the association agreement on negotiated third party access to their transmission network in Germany and claims that the Energy Industry Act of 24 April 1998 and the Antitrust Act of 26 August 1998 were sufficient to implement the IGMD. On the other hand, it expands into various up- and downstream activities in Europe so as to create a vertically and horizontally integrated undertaking within an oligopolistic energy market. q.v. V. Baum, *Germany Analysis - Market Participants will define the Rules*, Petroleum Economist, 8 (April 2000).

<sup>92</sup> Art. 19 IGMD.

Although one can criticise the secrecy of merger talks in terms of leadership as they sometimes exclude even board members and ignore the interests of staff, such conduct is justified for the sake of quick success. However, the widespread involvement of external business consultants<sup>93</sup> is questionable because conflicts of interests regarding different clients' business secrets are very probable: First of all, the leading consultancy firms consist of highly specialised teams for specific industries which often work for various clients. Secondly, they are often linked with accountants and due Chinese Walls are not as consistent as desirable.

From the technological point of view, concentrations can partly be welcomed as especially JVs indeed foster research with shared development risks<sup>94</sup>

As a matter of fact, especially the abovementioned socio-economic arguments related to de-centralised wealth allocation shall prevent any kind of laissez-faire attitude towards mergers however one prefers to evaluate the abovementioned considerations between micro- or macroeconomic beneficial and detrimental effects. According to this finding, two options are feasible:

One can either favour an interventionist's approach that intends to serve industrial policy goals that are defined by the current government's prerogatives or one can give priority to considerations strictly based on antitrust law pursuant to either the HHI or the examination of dominated positions on relevant product markets under Art. 2 I lit a-b; II-III MR1989<sup>95</sup>.

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<sup>93</sup> The importance of consultants is highlighted by D. Townsend, *Mergers & Acquisitions - Leading the Merger Pack*, Petroleum Economist 33 (March 2000).

<sup>94</sup> Joint Ventures cause complex considerations with respect to the application of EC competition law: Depending on turnover thresholds, turnover allocation, autonomous full integration structures or merely dependent structures, solely the Merger Regulation, the procedure of the Merger Regulation and substantially Art. 81 or solely Art. 81 et seq. ECT may apply.

<sup>95</sup> V. Emmerich, *Kartellrecht* (8<sup>th</sup> ed.) (München, Germany, C.H.Beck, 1999) p 477-478.

### 3.3.1 Public Interest Theory

The public interest approach is backed by the Preamble and Art. 1 III of the draft merger regulation<sup>96</sup> which would have enabled the Commission to declare the regulation inapplicable in order to attain "priority" objectives of the EC<sup>97</sup>. Additionally, a small passage in the wording of Art. 2 I lit. b MR1989 takes industrial policy into account because the Commission is inter alia entitled to consider the benefits of a concentration regarding the development of technological or economic progress.

It is also praised by scholars<sup>98</sup> and supported by government officials and Commission officials<sup>99</sup> in the aftermath of the De Havilland Decision<sup>100</sup>.

### 3.3.2 Competition Law Theory

Conversely and in favour of a narrow interpretation of the teleology of merger control, it must be noted that Art. 2 I lit b MR1989 itself limits the value of industrial policy considerations as the attainment of economic progress must be linked with beneficial effects for consumers and must not contain obstacles to competition.

Furthermore, the narrow approach, focusing on competition law considerations, is superior as it reflects the intentions of the legislator very closely: The

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<sup>96</sup> Draft Merger Control Regulation, Proposal for a Regulation (EEC) of the Council on the Control of Concentrations between Undertakings, O.J. C 92, 20/07/73 p 1; as amended on 12/02/82 O.J. C 36, 12/02/82 p 3; as amended on 23 February 1984, O.J. C 51 23/02/84 p 8; as amended on 17 December 1986, O.J. C 324, 17/12/86 p 5.

<sup>97</sup> The legal function of Art. 1 III of the Draft as a justification for derogations from the scope is highlighted by T.A., Downes and D.S. MacDougall, *Significantly Impeding Effective Competition: Substantive Appraisal under the Merger Regulation*, unpublished CEPMLP Paper, p 12 (1993); Brussels Offices at Avenue de la Joyeuse Entrée 1, *Merger Control in the EEC* (1<sup>st</sup> ed.) (Deventer, Netherlands, Kluwer Law and Taxation Publishers, 1988), p 281.

<sup>98</sup> B.J. Rodger and A. MacCulloch, *Competition Law and Policy in the EC and UK* (1<sup>st</sup> ed.) (London, U.K., Cavendish Publishing Limited, 1999) p 3.

<sup>99</sup> Criticism by the then Industry Commissioner Mr Bangemann, by the French Transport Minister M. Quiles and his Italian Colleague Mr. Benini; q.v. L. Hawkes, *The EC Merger Control Regulation: Not an Industrial Policy Instrument: the De Havilland Decision* ECLR 34 (1992).

<sup>100</sup> Commission Decision 91/619/EEC of 2 October 1991 in Case IV/M.053, O.J. L 334 5/12/91 p 42 (*Aérospatiale SNI Alenia and Aeritalia e Selenia SpA*). The companies operated a JV (ATR) and were interested in purchasing the then Canadian Boeing affiliate De Havilland.

relevance of industrial policy which once justified a derogation from the whole draft was reduced intentionally to a single criterion competing against 14 other aspects that are of concern within the interpretation of Art. 2 I lit b MR1989.

Subsequently, the first theory is weakened by the experience that pro-active government involvement in strategic matters of industrial re-organisation is likely to set unrealistic and over-ambitious targets and leads to in-efficient structures so that a strict competition policy assessment of mergers is the superior solution.

### **3.3.3 Structure-Conduct-Performance Model or Consensual Approach to Liberalisation**

A final aspect of the evaluation of mergers leads to the finding, that it can be established that the role of mergers and therefore the intentions of the actors very much depend on the business culture. If businesses follow the liberal doctrines of Anglo-Saxon capitalism, the Structure-Conduct-Performance<sup>101</sup> Model [SCP] is an accurate means to predict the new characteristics of business organisation:

As a result of amendments of the regulatory framework it is extremely likely that the conduct of businesses will rapidly adapt and take maximum advantage of new opportunities. The performance of businesses is likely to reach its optimum on the basis of the legal regimes.

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<sup>101</sup> J.S. Bain, Barriers to New Competition: Their Character and Consequences in Manufacturing Industries (1<sup>st</sup> ed.) (Cambridge, U.S., Harvard University Press, 1956); A. Ellis and E. Bowitz and K. Roland, *Structural Change in Europe's Gas Markets: Three Scenarios for the Development of the European Gas Market to 2020*, Energy Policy 299 (2000).

Contrarily, it might be wrong to focus on regulatory amendments with respect to societies, which are in favour of gradual change and consensus-based methodologies regarding regulatory reforms. In such a culture, regulation alone will not trigger the desired efficiency gains<sup>102</sup>. This idea can be exemplified not only by the controversy regarding the third party access [TPA] regimes of the IEMD<sup>103</sup> and the IGMD<sup>104</sup> which have been negotiated since the beginning of the 1990s before they were finally adopted in 1996 and 1998. It is also reflected in the weak unbundling provisions<sup>105</sup>, the derogations for take-or-pay contracts<sup>106</sup> and stranded investments<sup>107</sup> and finally the efficacy of the implementation by the Member States<sup>108</sup>.

The latter societies will prefer relatively weak negotiated TPA or single buyer procedures which are additionally weakened by time consuming, non-transparent negotiations of concession agreements between the competitors<sup>109</sup> rather than straightforward solutions like regulated TPA.

These prerogatives are reflected by the objectives of mergers in these countries: Acquisitions will generally be carried out, to erect new or defend existing

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<sup>102</sup> A. Ellis and E. Bowitz and K. Roland, *Structural Change in Europe's Gas Markets: Three Scenarios for the Development of the European Gas Market to 2020*, Energy Policy 299 (2000).

<sup>103</sup> Art. 16, 17 I-V IEMD.

<sup>104</sup> Art. 14-16 IGMD.

<sup>105</sup> Art. 7 VI IEMD, Art. 13 II-III IGMD: The IGMD only calls for separated accounts that have to be published annually whereas the IEMD demands legal or at least management unbundling.

<sup>106</sup> Art. 17 in conjunction with Art. 25 I; III GMD.

<sup>107</sup> Art. 24 IEMD.

<sup>108</sup> e.g. Germany introduces TPA to electricity transmission and distribution networks pursuant to Art. 6 EnWG1998 but tries to implement the IGMD by a vague provision in Section 19 IV No.4 GWB1998.

<sup>109</sup> e.g. Germany: The first associations' agreement for negotiated TPA was inefficient owing to transaction and distance related pricing whereas the second one - despite of introducing access based postage stamp pricing - insists on two separate trading zones; q.v. K.Pritsche, *Germany - Gas and Electricity Third-Party Access*, IELTR N-12 (2000). The Gas association's agreement regarding TPA is still under consideration; q.v. V. Baum, *Germany Analysis - Market Participants will define the Rules*, Petroleum Economist, 8 (April 2000).

dominant positions and to raise barriers to market entry so that oligopolistic structures shall prevail in the long-term.

#### **4. Merger Control under Art. 66 ECSC**

Art. 66 ECSC provides for a comprehensive system of transnational control of concentrations and forms an important precedent not only for the attempts to apply Art. 82 and 81 EC to concentrations but also for the adoption of a community wide merger control law which shall prevent market distortions by means of two strategies: universal provisions and unified enforcement by the supranational Commission<sup>110</sup>.

##### **4.1 Preventive Prohibition of Concentrations Art. 66 § 1 ECSC**

According to Art. 66 § 1 ECSC, any undertaking under the jurisdiction of the Commission - i.e. an undertaking in terms of competition law which is active in the coal and steel sector as specified in Art. 80, 81 and Annex I ECSC - is generally prevented from implementing any concentration unless an allowance decision is issued.

However, the Commission has the power to exempt specific concentrations from the scope of merger control pursuant to Art. 66 § 3 ECSC. Such a general derogation is issued as a Regulation. The substantive criteria of Art. 66 § 3 ECSC require that no concern is caused in terms of market structure or barriers to entry markets pursuant to Art. 66 § 2 ECSC.

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<sup>110</sup> The Wording of the ECSC still refers to the "High Authority" but the organs were merged to the Commission of the European Communities owing to Art. 9 Treaty Merging the Executives of the three Communities, 8 April 1965, Entry into Force 1 July 1967. Additionally, the Commission issued a Notice in order to synchronise certain procedural aspects of merger control under the ECSC and the Merger Regulation: Commission Notice Concerning Alignment of Procedures for Processing Mergers under the ECSC and EC Treaties, O.J. C 66, 02/03/1998; pdf.file, downloadable from <http://europa.eu.int/comm/competition/mergers/legislation/mergin98.html>.

Regarding the scope of Art. 66 § 1 ECSC, it is sufficient that at least one of the undertakings concerned has to be active in the coal and steel sector<sup>111</sup>.

The territorial scope is defined by Art. 79 I ECSC.

The concept of supranational control of concentrations is limited by the fact that the Commission is bound to hear the Council if the former is interested in adopting a Regulation in order to specify the criteria for the assessment of concentrations under Art. 66 § 1 ECSC.

#### **4.2 Allowances under Art. 66 § 2 ECSC**

Art. 66 § 2 ECSC forms the legal basis for an allowance decision. Furthermore, the Commission is empowered to impose undertakings on the companies concerned. Therefore, the legal validity of the clearance decision is based on the fulfilment of the conditions attached to it<sup>112</sup>.

Its first part lists substantive criteria related to market structure<sup>113</sup>. It can be stated that these are similar to the compatibility criteria of Art. 2 I lit. a MR1997. Whereas the 2nd part of Art. 66 § 2 ECSC deals with barriers to entry a market by means of inter alia very favourable access to either resources or markets. Therefore, the Commission is bound to reduce the scope of discriminations when it issues decisions under Art. 66 § 2. This concept of appraising discriminations with a view of establishing a level playing field for competitors is similar to Art. 2 I lit. b MR1989.

Finally, Art. 66 § 4 ECSC enables the Commission to require additional information by means of a Regulation. Compared with Art. 11 MR1989, it has to

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<sup>111</sup> Art. 66 § 1 ECSC.

<sup>112</sup> Alternatively, obligations could be imposed so that the non fulfilment does not affect the validity but enables the authorities to enforce them and to revoke the decision as a measure of last resort.

<sup>113</sup> control of production and allocation of goods, capability of impeding effective competition.

be summarised that this procedure is quite slow because it involves a mandatory hearing of the Council.

#### **4.3 Fines, Divestiture, Judicial Review, Enforcement**

First of all, Art. 66 § 5 1st Sentence provides for a legal basis to impose fines on undertakings which failed to apply for an allowance even if the concentration achieves the substantive criteria<sup>114</sup>. In case of non fulfilment or of concentrations failing to meet the substantive criteria of Art. 66 § 2, the Commission issues an incompatibility decision under Art. 66 § 5 2nd Sentence. The former is accompanied by undertakings either to divest undertakings, assets or joint control or to honour other obligations which are suitable and necessary to restore efficient competition on the relevant markets<sup>115</sup>.

The next part of Art. 66 § 5 deals with the available judicial review, whereas the 10th Sentence allows the Commission to implement its decisions after due time limits have been ignored by the addressees. This includes inter alia the administration of assets earned by means of the illegal concentration and the administration by means of trustees. For this purpose, the Commission has the power to issue necessary guidelines to the Member States so as to ensure close co-operation.

#### **4.4 Cartels and Abuses of Dominant Positions**

The merger control law is accompanied by provisions related to cartels (Art. 65 §§ 1-5 ECSC) and abuses of dominant positions (Art. 66 § 7 ECSC) which are broadly similar to Art. 81 and 82 ECT.

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<sup>114</sup> Art. 66 § 6 ECSC contains detailed provisions as to the amount.

<sup>115</sup> It is remarkable that no discretion is granted whether to impose additional undertakings or not so that the Commission is only empowered to choose the appropriate condition.

However, some inconsistencies exist because the regulatory powers of the Commission are far more comprehensive. These include the ability to set prices and general trading terms if a dominant undertaking fails to implement a recommendation<sup>116</sup>. As a matter of last resort, the Commission can introduce production quotas<sup>117</sup>, request allocation quotas<sup>118</sup> and impose fines<sup>119</sup>.

#### **4.5 Evaluation**

This highly specific centralised framework is justified as the ECSC Treaty pools sovereignty in a specific economic sector that can be distinguished easily from the economy and economic policy as a whole. Furthermore, due to its former strategic relevance, the sector was of utter importance for the peace building in Europe in the aftermath of the 2<sup>nd</sup> world war. Therefore, transnational elements were introduced backed by strong political support.

Contrarily, the ECT does not include specific provisions regarding concentrations and decades of negotiations were required before the Merger Control Regulation was implemented<sup>120</sup> on the bases of Art. 87 and especially Art. 308 ECT<sup>121</sup>. This period of lengthy discussions is understandable not only on the basis of domestic policies that focused on national responses to global crises since the beginnings of the 1970s - for instance the oil crises - but also because of the fact that the proposed rules would apply to the economy as a whole. Therefore, various domestic policies - even those for which economic implications are usually of minor concern - are restricted to an extent that is

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<sup>116</sup> Art. 66 § 7 ECSC Treaty.

<sup>117</sup> Art. 66 § 7; Art. 58 ECSC Treaty.

<sup>118</sup> Art. 66 § 7; Art. 59 ECSC Treaty.

<sup>119</sup> Art. 66 § 7; Art. 43 ECSC Treaty.

<sup>120</sup> q.v. Draft Merger Control Regulation, Proposal for a Regulation (EEC) of the Council on the Control of Concentrations between Undertakings, O.J. C 92, 20/07/73 p 1; as amended on 12/02/82 O.J. C 36, 12/02/82 p 3; as amended on 23 February 1984, O.J. C 51 23/02/84 p 8; as amended on 17 December 1986, O.J. C 324, 17/12/86 p 5.

<sup>121</sup> Introduction of the MR1989 prior to the first recital.

often not exactly foreseeable to the negotiating parties. This lead to various opposition. Thus, several negotiators were made to demand a broad industrial policy approach towards concentrations so as not to rely on market structure criteria pursuant to the genuine rationale of competition law<sup>122</sup>.

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<sup>122</sup> q.v. supra 3.3; 3.3.1-3.3.3 .

## 5. Merger Control under Art. 82 and 81 ECT

As a consequence of the fact, that neither a specific merger control law was incorporated into the ECT nor the proposals for a merger control regulation were timely adopted, the Commission - subject to the Review of the ECJ - had to rely solely on Art. 82 and 81 ECT. It was disputed whether these provisions could be used for a control of the structure of undertakings operating on relevant product markets even if the wording and immediate rationale of these provisions indicate that they are only a legal basis for a classical behavioural control of the conduct of independent undertakings and not a regulatory instrument which enables the Commission to ban certain structural concentrations between formerly independent competitors.

### 5.1 EC Merger Control under Art. 82 ECT

Supported by a Memorandum of the Commission of 1966<sup>123</sup>, it was established in the Continental Can Judgement which followed a Commission decision that Art. 82 ECT should be applied to concentrations<sup>124</sup>. The significance of this interpretation can not be properly judged without a careful analysis of the scope and teleology of Art. 82 ECT. In general, an inconsistency with this provision is available if at least one undertaking holds a dominant position<sup>125</sup> on a relevant product market within the common market or its relevant parts which is abused so that trade between Member States is affected.

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<sup>123</sup> Commission of the European Communities, Le Problème de la Concentration dans le Marché Commun, (1966), Etudes CEE, Série Concurrence, No. 3.

<sup>124</sup> ECJ Case C-6/72 *Europemballage Corp and Continental Can Co Inc v Commission* [1973] ECR 215.

<sup>125</sup> The term dominant position will be discussed later, at 6.1.4.

### 5.1.1 Undertaking

For the purposes of Art. 82 ECT, the term undertaking has to be interpreted in the manner that has been already established<sup>126</sup>.

### 5.1.2 Relevant Market

A relevant market denotes the range of products or services which ordinary consumers<sup>127</sup> deem to be exchangeable in geographical, temporal (time of concluding agreements, delivery times) and functional terms. Additionally, a mere limited extent of substitutability is not regarded as sufficient<sup>128</sup>.

Geography distinguishes regional markets as the location of supply or demand determines transportation and insurance costs so that - subject to the ratio of product value and transportation costs - the intensity of competition falls significantly with growing distance.

Functional substitutability is available if a consumer can switch easily to like products (or a producer can switch easily to another consumer) which can be used to attain the same economic purposes at similar expenses.

Consequently, cross-elasticity of demand and supply substitutability are generally important tool to define and distinguish markets<sup>129</sup>.

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<sup>126</sup> supra at 1.1.1 Undertaking in Terms of Merger Control Law.

<sup>127</sup> I. Van Bael and J.-F. Bellis, Competition Law of the European Community (3<sup>rd</sup> ed.) (Bicester, U.K., CCH Editions Limited, 1994) p 70.

<sup>128</sup> ECJ Case C-6/72 *Europemballage Corp and Continental Can Co Inc v Commission* [1973] ECR 215 at p 247; ECJ Case C-322/81 *Nederlandse Banden Industrie Michelin v Commission* [1983] ECR 3461, at p 3508.

<sup>129</sup> A high level of cross elasticity of demand is available if a small increase in the price of product (A) makes a significant number of consumers shift to product (B). Supply Substitutability ends where a produce needs major investments in order to compete in neighbouring markets; e.g. the market for packages of fresh milk differs from UHT milk cartons owing to the expensive processes to sterilise the cartons which are covered by intellectual property rights: q.v. Commission Decision 88/501/EEC of 26 July 1988 Relating to A Proceeding under Articles 85 and 86 of The EEC Treaty, O.J. L 272 04/10/1988 p 27 (*Tetra Pak I and Liquipak*).

However, regarding different consumer groups, it is well established that a significant proportion of captive consumers, i.e. those who lack the ability to switch to more expensive goods, facilitates the definition of a separate market even if more powerful consumers would include a broader range of products as substitutable<sup>130</sup>.

It remains a sensitive issue that the case law indicates that indeed a very high level of conformity is actually needed to establish similarity<sup>131</sup>. By means of narrow definitions of interchangeability, small separate markets are established in which a dominant position can be easily established. However, the Commission's approach in favour of a narrow market definition is justified, as an over-specific analysis of markets structures is preferable to a broad approach which would introduce even higher elements of discretion to the interpretation of Art. 82 ECT. Additionally, market structures and consumer preferences tend to shift over time so that high levels of similarity over a short period of time are adequate yardsticks for the assessment<sup>132</sup>.

Finally, it has to be underlined, that the case law binds the notion of dominance to relevant product markets which indicates that the cross-subsidising powers of conglomerate undertakings which hold minor shares of large numbers of markets are neglected<sup>133</sup>.

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<sup>130</sup> ECJ Case C-27/76 *United Brands Company & Anor v Commission* [1978] ECR 207, at p 273.

<sup>131</sup> e.g. separate markets for different bulk vitamins: ECJ Case C-85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461 at p 514.

<sup>132</sup> q.v. Commission Decision 92/163/EEC of 24 July Relating to a Proceeding Pursuant to Article 86 of The EEC Treaty, O. J. L 072, 18/03/1992 p 1 (*Tetra Pak II*) paragraphs 17, 49 and 93.

<sup>133</sup> q.v. ECJ Case C-6/72 *Europemballage Corp and Continental Can Co Inc v Commission* [1973] ECR 215 at p 247; Commission Decision 85/609/EEC Relating to A Proceeding under Art. 86 of the EEC Treaty, O.J. L 374 31/12/1985 p 1 (*ECS v AKZO*).

### 5.1.3 Substantial Part of the Common Market and Effects Doctrine

Finally, the relevant market must be at least a substantial part of the common market. This criterion depends generally on the number of marketers which means that the marketers engage in activities on either the world market, the community wide market, national markets of medium sized Member States, regional cross-border markets<sup>134</sup> or significant parts of domestic markets of large Members. However, the wording of Art. 82 ECT should prevent anyone from including domestic of small Member States<sup>135</sup>.

It must not be neglected that this criterion is also extremely relevant to the extraterritorial application of EC competition law. According to the effects doctrine, it is sufficient for the application that the allegedly violating behaviour has a direct, immediate, substantial and foreseeable effect on relevant markets within the common market<sup>136</sup>. This aspect is relevant to concentrations in the energy industry although normally at least the acquirer or the target will already have significant business interests in the EU.

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<sup>134</sup>ECJ Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others v Commission* [1975] ECR 1663 at p 1977.

<sup>135</sup> Advocate General Warner was of the opinion that Luxembourg was a substantial part of the common market: ECJ Case C-77/77 *Benzine en Petroleum Handelsmaatschappij BV and Others v Commission* [1978] ECR 1513 at p 1537.

<sup>136</sup> Commission Decision, O.J. L 195, 1969 p 11 (*Re Aniline Dyes Cartel*) at p 16; V. Emerich, *Kartellrecht* (8<sup>th</sup> ed.) (München, Germany, C.H.Beck, 1999) p 399.

#### 5.1.4 Dominant Position and Collective Dominance

A dominant position on the specified market is available if an undertaking may prevent the establishment or maintenance of effective competition by holding the power to behave independently from its competitors to a significant extent<sup>137</sup> so that the behavioural freedom of competitors is extremely limited. Although one could argue that the efficacy of competition and the ability to behave independently form two separate criteria, it is preferable to regard these phenomena as mere two aspects of the same criterion<sup>138</sup> owing to their relation of close causality. Thereby, competition can no longer allocate goods and services in the most efficient manner. This concept is exemplified if an undertaking is able to significantly increase prices or worsen conditions without facing any reductions in demand. Additionally, competitors may abstain from counter-measures as they fear not to cope with retaliations. According to the case law the following methodology is used in order to analyse alleged dominant positions:

Firstly, a pure analysis of market shares is deemed to be sufficient to enable undertakings to behave independently as long as the market shares exceed certain thresholds<sup>139</sup>. The threshold seems to be a market share of 50% as the

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<sup>137</sup> ECJ Case C-27/76 *United Brands Company & Anor v Commission* [1978] ECR 207 at p 277; ECJ C-85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461 at p 520; ECJ Case C-322/81 *Nederlandse Banden Industrie Michelin v Commission* [1983] ECR 3461, at p 3503; ECJ Case C-311/84 *Centre Belge d'études de marché - Télémarketing (CBEM) v SA Compagnie Luxembourgeoise de télédiffusion and Information Publicité Benelux (IPB)* [1985] ECR 3261 at p 3275.

<sup>138</sup> V. Emmerich, *Kartellrecht* (8<sup>th</sup> ed.) (München, Germany, C.H.Beck, 1999) p 451.

<sup>139</sup> ECJ Case C-85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461 at p 527: Market Shares regarding the supply of bulk vitamins of either 93%, 84%, 75% or 65% are suitable values;

ECJ Case C-322/81 *Nederlandse Banden Industrie Michelin v Commission* [1983] ECR 3461, at p 3509: Market share of 57%.

ECJ Case C-66/86 *Akzo Chemie BV v Commission* [1991] ECR I 3359 paragraph 60: Market share of 50%.

ECJ used additional criteria in order to analyse the alleged dominance of company having a market share of 45%<sup>140</sup>.

Secondly, the analysis is based upon both market share and structural criteria based on a gap of power between the allegedly dominant entity and its closest competitors. The case law relies primarily on a remarkable difference between the market shares of the leading entity and its (minor) competitors<sup>141</sup>. However, several supplementary criteria are imaginable: *inter alia*

- a high degree of vertical integration of the allegedly dominant firm<sup>142</sup>,
- technological advances<sup>143</sup>,
- maturity of the market<sup>144</sup> so that new consumers can only be reached to the detriment of competitors, maintenance of costly

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<sup>140</sup> ECJ Case C-27/76 *United Brands Company & Anor v Commission* [1978] ECR 207 at p 282.

<sup>141</sup> Dominance is negated if a market share of 20 and 30 % is challenged by major competitors and imports: Commission Decision 90/363/EEC of 26 June Relating to A Proceeding pursuant to Art. 86 of The EEC-Treaty O.J. L 179 12/07/1990 p 41 (*Metaleurop SA*); conversely, large gaps to the allegedly dominant firm underline the finding of dominance: q.v. ECJ Case 322/81 *Nederlandse Banden Industrie Michelin v Commission* [1983] ECR 3461, at p 3509; ECJ Case C-85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461 at p 529; Commission Decision 92/163/EEC of 24 July Relating to a Proceeding Pursuant to Article 86 of The EEC Treaty, O. J. L 072, 18/03/1992 p 1 (*Tetra Pak II*): Tetra Pak held 55% of the market for non-aseptic milk cartons whereas its competitors only accounted for 27%; Commission Decision 88/589/EEC of 4 November 1988 Relating to A Proceeding under Art. 86 of The EEC Treaty, O.J. L 317 24/11/1988 p 47 (*London European v Sabena*): Sabena maintained a computerised booking system that was used by the vast majority of Belgian travel agencies and airlines.

<sup>142</sup> ECJ Case C-27/76 *United Brands Company & Anor v Commission* [1978] ECR 207 at p 278; Commission Decision 91/299/EEC of 19 December 1990 Relating to A Proceeding under Art. 86 of The Treaty, O.J. L 152 15/06/1991 p 21 p (*Soda-Ash v Solvay*); Commission Decision 88/138/EEC of 22 December 1987 Relating to A Proceeding under Art. 86 of The EEC Treaty, O.J. L 65 11/03/1988 p 19 (*Eurofix-Bauco v Hilti*); Court of First Instance Case T-30/89 *Hilti v Commission* [1991] ECR II 1439; ECJ Case 53/92 P *Hilti v Commission* [1994] ECR I 667.

<sup>143</sup> ECJ Case C-27/76 *United Brands Company & Anor v Commission* [1978] ECR 207 at p 279; ECJ Case C-85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461 at p 524; ECJ Case C-322/81 *Nederlandse Banden Industrie Michelin v Commission* [1983] ECR 3461, at p 3511.

<sup>144</sup> Commission Decision 88/138/EEC of 22 December 1987 Relating to A Proceeding under Art. 86 of The EEC Treaty, O.J. L 65 11/03/1988 p 19 (*Eurofix-Bauco v Hilti*); Court of First Instance Case T-30/89 *Hilti v Commission* [1991] ECR II 1439; ECJ Case 53/92 P *Hilti v Commission* [1994] ECR I 667.

(sales-)networks<sup>145</sup>,

- strict quality controls
- brand reputation<sup>146</sup>
- lack of potential competitors<sup>147</sup>
- product range
- consumers who are in favour of domestic products

Additionally, these criteria are also exemplified by Section 19 II GWB1998<sup>148</sup>. It has to be stressed that these terms have to be carefully interpreted and applied to every case due to their vagueness as otherwise minor competitive edges would be included.

Thirdly, a market share below a certain threshold is used as a negative criterion which generally excludes in itself any dominance<sup>149</sup>.

Fourthly, the notion of dependence is introduced so as to constitute dominance. Basically, this concept recalls the idea of captive consumers that is applied to define narrow relevant markets. For instance, energy undertakings

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<sup>145</sup> ECJ Case C-85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461 at p 524; ECJ Case C-66/86 *Akzo Chemie BV v Commission* [1991] ECR I 3359 paragraph 60; Commission Decision 91/299/EEC of 19 December 1990 Relating to A Proceeding under Art. 86 of The Treaty, O.J. L 152 15/06/1991 p 21 p (*Soda-Ash v Solvay*).

<sup>146</sup> q.v. Commission Decision 87/500/EEC of 29 July 1987 Relating to a Proceeding under Art. 86 of the EEC Treaty, O.J. L 286 9/10/1987 p 36 (*BBI v Boosey & Hawkes*): It deals with the bass brand.

<sup>147</sup> ECJ Case C-27/76 *United Brands Company & Anor v Commission* [1978] ECR 207, at p 284; ECJ Case C-85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461 at p 524; ECJ Case C-66/86 *Ahmed Saeed Flugreisen & Anor v Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.* [1989] ECR I 803.

<sup>148</sup> Section 19 IV GWB1998 includes distinctions regarding financial power, superior access either to up- and downstream markets, concentrations, control of barriers to entry or exit, ability to amend products (technological leadership), cross-elasticity of demand and supply substitutability: Antitrust Act of 26 August 1998 [Gesetz gegen Wettbewerbsbeschränkungen], Federal Law Gazette 1998 I 2521, as Amended on 22 December 1999, Federal Law Gazette 1999 I 2626.

<sup>149</sup> ECJ Case C-210/81 *Demo Studio Schmidt v Commission* [1983] ECR 3045 at p 3065: A market share of 1%. Commission Decision 85/78/EEC of 12 December 1984 Relating to A Proceeding under Art. 85 of the EEC Treaty, O.J. L 35 07/02/1985 p 54 (*Mecaniver v PPG*): A concentration which raises the market share from 4 to 11% is insignificant in itself; ECJ Case C-26/76 *Metro SB-Großmärkte GmbH & Co. KG v Commission* [1977] ECR 1875 at p 1902: Saba's market shares of either 5-10 %, 6-7% were irrelevant.

can become dominant undertakings in terms of extraordinary supply crises so that all consumers become dependent or captive if they can not reasonably switch to alternative fuels.

This concept is very familiar to the essential facilities doctrine which makes it an offence against Art. 82 ECT if the owner of an essential facility (resources, gas or electricity networks, ports) that cannot be reasonably duplicated in economic terms by competitors on legal or factual grounds abstain either from supplying services/goods in long-term relations<sup>150</sup>, from serving new consumers or from offering access to networks although now due reason is presented which implies that an obligation to enter into negotiations based on objective, transparent and non-discriminatory criteria applies.

Three specific disputes can be found regarding the dominant positions of which the last one is of major relevance for the scope of the control of concentrations:

The first controversy refers to the question whether dominance shall be restricted to undertakings which operate successfully in the market concerned. Such a hypothesis was denied<sup>151</sup>. The second dispute deals with the question if a retained market share despite of powerful market entrants indicates dominance per se or not<sup>152</sup>. The third controversy questions whether a collective dominance doctrine can be established under Art. 82 ECT. The collective dominance concept is interesting in analytic terms as oligopolistic structures are a hybrid structure between mere cartels in terms of Art. 81 ECT and com-

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<sup>150</sup> In terms of supply crises, a pro rata delivery is required. However, it is beyond the scope of this paper to analyse the introduction of this doctrine - which is based on American antitrust cases - to EC competition law. This is especially true for the latest potentially restrictive developments pursuant to the Bronner Judgement.

<sup>151</sup> ECJ Case C-27/76 *United Brands Company & Anor v Commission* [1978] ECR 207, at p 284.

pletely structural concentrations in terms of Art. 1 I; 3 I lit a or b; 3 II MR1997 so that a detailed analysis of in this thesis is justified. This is especially true if one considers the important role that this concept is playing in the concentration *VEBA/VIAG* which will be assessed later.

The Commission argued for a long time in favour of this concept<sup>153</sup>. A collective dominant position on a relevant market is available if a small group of undertakings co-operates so as to remove internal competition and so as to introduce joint external activities. Thirdly, it is required that the group which externally acts as one entity does not leave any scope for effective competition of external undertakings. The rationale is that an oligopoly poses an additional threat to the viability of competition which can not be properly addressed by a sole application of Art. 81 ECT. Additionally, due to the co-operative nature and the lack of entities receding from the relevant market, it is not feasible to interpret the situation as a concentration.

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<sup>152</sup> A per se rule was denied by the ECJ in ECJ Case C-85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461 at p 522.

<sup>153</sup> Commission Decision 73/109/EEC of 2 January 1973 Relating to Proceedings under Art. 85 and 86 of the EEC Treaty, O.J. L 140 26/05/1973 p 17 (*Suiker Unie and Centrale Suiker Maatschappij*); Collective Dominance in the Dutch Sugar Industry; q.v. arguments regarding a group of oil suppliers in The Netherlands: Commission Decision 77/327/EEC of 19 April 1977 Relating to a Proceeding under Art. 82 of the EEC Treaty, O.J. L 117 09/05/1977 p 1 (*ABG/Oil Companies Operating in The Netherlands*); q.v. arguments of the Commission in the *Alsatel* Case: ECJ Case C-247/86 *Alsatel v SA Novasam* [1988] ECR 5987 at p 5994; q.v. Commission Decision 89/93/EEC of 7 December 1988 Relating to A Proceeding under Art. 85 and 86 of The EEC Treaty, O.J. L 33 04/02/1989 p 44 (*Flat Glass*); Commission Decision 92/262/EEC of 1 April 1992 Relating to A Proceeding pursuant to Art. 85 and 86 of The EEC Treaty, O.J. L 134 18/05/1992 p 1 (*French-West African Shipowners' Committees*); Commission Decision 93/82/EEC of 23 December 1992 Relating to A Proceeding Pursuant to Articles 85 (IV/32.448 and IV/32.450: *Cewal, Cowac and Ukwai*) and 86 (IV/32.448 and IV/32.450: *Cewal*) of The EEC Treaty, O.J. L 34 10/02/1993 p. 20; q.v. the expressive definition of oligopolistic groups in Section 19 II 2 and 1 GWB1998.

Whereas the ECJ initially disapproved the collective dominance doctrine<sup>154</sup>, the Court of First Instance accepted the doctrine at least in theory. However, the tribunal invalidated it in practical terms with the argument that facts which support the prohibition of a cartel agreement under Art. 81 ECT can not be used twice so as to construct an additional inconsistency with Art. 82 ECT as a result of collective dominance<sup>155</sup>. In a recent appeal against a Commission decision<sup>156</sup> first the tribunal<sup>157</sup> and later the ECJ<sup>158</sup> honoured the doctrine more or less as it was applied by the Commission. The Commission found that a liner conference in terms of Art. 1 III lit b Regulation 4056/86/EEC<sup>159</sup> which includes services between Congo and the North Sea had violated Art. 81 I ECT, as the anti-competitive agreements were not justified under Art. 81 III ECT because they exceeded the scope of the related block exemption<sup>160</sup>. Furthermore, it was held that the agreement interfered with Art. 82 ECT as the addressees implemented the practise "fighting ships"<sup>161</sup> and imposed a 100% loyalty obli-

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<sup>154</sup> ECJ Case C-85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461 paragraph 39; ECJ Case C-247/86 *Alsatel v SA Novasam* [1988] ECR 5987.

<sup>155</sup> Court of First Instance Joined Cases T-68/89, T-77/89 and T-78/89 *Società Italiana Vetro & Ors v Commission* [1992] ECR II-1403 ('Italian Flat Glass').

<sup>156</sup> Commission Decision 93/82/EEC of 23 December 1992 Relating to A Proceeding pursuant to Articles 85 (IV/32.448 and IV/32.450: *Cewal, Cowac and Ukwal*) and 86 (IV/32.448 and IV/32.450: *Cewal*) of The EEC Treaty, O.J. L 34 10/02/1993 p. 20 (*Cewal, Cowac and Ukwal*) at p 31: The Commission stated that conference agreements between shipping companies.

<sup>157</sup> Court of First Instance Joined Cases T-24/93 to T-26/93 and T-28/93 *Compagnie Maritime Belge Transports and Others v Commission* [1996] ECR II-1201.

<sup>158</sup> ECJ Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports SA, Compagnie Maritime Belge SA and Dafra-Lines A/S v Commission*, judgement of 16 March 2000.

<sup>159</sup> A liner conference in terms of this regulation is an agreement by which several shipping companies co-ordinate the operation of services between ports of which at least one is located within the EC; q.v. Art. 1 III lit b and 1 II Council Regulation 4056/86/EEC Laying down Detailed Rules for the Application of Articles 85 and 86 of the Treaty to maritime transport, O.J. L 378, 31/12/1986 p 4,

[http://europa.eu.int/comm/competition/antitrust/legislation/405686\\_en.html](http://europa.eu.int/comm/competition/antitrust/legislation/405686_en.html).

<sup>160</sup> said regulation: Council Regulation 4056/86/EEC Laying down Detailed Rules for the Application of Articles 85 and 86 of the Treaty to maritime transport, O.J. L 378, 31/12/1986 p 4, [http://europa.eu.int/comm/competition/antitrust/legislation/405686\\_en.html](http://europa.eu.int/comm/competition/antitrust/legislation/405686_en.html).

<sup>161</sup> Fighting ships denotes a conference's practise to threaten independent competitors by means of lowering freight rates especially in those periods close to the departure of ships of independent companies; q.v. ECJ Joined Cases C-395/96 P and C-396/96 P paragraph 5.

gation on the service users in contravention of Art. 5 II Regulation 4056/86/EEC and that the conference could not justify this conduct with the defence of mandatory compliance with government orders as the infringements were a consequence of freely determined behaviour and not imposed by the host government<sup>162</sup>.

### 5.1.5 Abuse

An abuse of the dominant position is available if a measure on own initiative causes an additional limitation of the behavioural freedom of either consumers or remaining competitors on the relevant market<sup>163</sup>. This assessment shall be exclusively based on objective criteria without any need to establish culpability<sup>164</sup>. According to the rationale of Art. 82 ECT a measure is included only if market dominance is a necessary condition for a successful implementation of the strategy: in other words, a hypothetical non dominant entity pursuing a comparable action to the disadvantage of target undertakings would be affected by outstanding detrimental effects<sup>165</sup>.

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<sup>162</sup> The conference entered into an agreement with the former government giving it exclusive rights to operate liner services between certain ports. However, according to the facts the conference tried to persuade the government to enforce these clauses against competitors rather than being forced by governmental officials to exclude competitors; q.v. ECJ Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports SA, Compagnie Maritime Belge SA and Dafra-Lines A/S v Commission*, judgement of 16 March 2000; paragraph 80-83.

<sup>163</sup> q.v. ECJ Case C-85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461 at p 541; R. Streinz, *Europarecht* (4<sup>th</sup> ed.) (Heidelberg, Germany, C.F.Müller, 1999) marginal note 829.

<sup>164</sup> ECJ Case C-6/72 *Europemballage Corp and Continental Can Co Inc v Commission*, [1973] ECR 215 at p 244.

<sup>165</sup> q.v. regarding the interpretation of abuses of dominant positions in Section 19 GWB1998: V. Emmerich, *Kartellrecht* (8<sup>th</sup> ed.) (München, Germany, C.H.Beck, 1999) p 198.

A measure is freely determined if either statutes nor administrative orders directly oblige the entity to implement an abusive conduct or if tight legislation does not leave any room for non abusive conduct<sup>166</sup>. The Court made clear that it is not sufficient to exclude the attribution of behaviour in terms of Art. 82 if a dominant entity persuades the authorities to enforce the exclusivity of a license to the detriment of potential/actual competitors<sup>167</sup>.

According to the catalogue of Art. 82,2 ECT, several types of abuses can be distinguished: Firstly, Art. 82, 2 lit. a ECT excludes pricing systems or general trading terms which cause undue harm to consumers/suppliers<sup>168</sup>. Due to its vagueness, further interpretation is needed to clarify the scope of this provision: For instance, systematic pricing below costs can be covered whereas sometimes it is additionally required that the undertaking intends to exclude a specific competitor. Other practices like fighting ships or mandatory 100% loyalty clauses have been already scrutinised<sup>169</sup>. Finally, public procurement authorities are likely to fulfil the example if they take discretionary decisions in a manner that favours bids of undertakings with certain political objectives.

Art. 82, 2 lit. b ECT relates to practices with disadvantageous effects to the market structure and consumers without targeting a specific competitor<sup>170</sup>. The provision focuses on actions and investments that are intended to close down

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<sup>166</sup> ECJ Case C-359/95 P *Commission v Ladbroke Racing Ltd.*, judgement of 11 Nov 1997, paragraphs 21 and 33; ECJ Case C-41/83 *Italy v Commission* [1985] ECR 873, paragraphs 18 to 20; ECJ Case C-202/88 *France v Commission* [1991] ECR I-1223, paragraph 55; ECJ Case C-18/88 *GB-Inno-BM* [1991] ECR I-5941, paragraph 20); ECJ Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others v Commission* [1975] ECR 1663, paragraphs 36 to 72, and more particularly paragraphs 65, 66, 71 and 72).

<sup>167</sup> ECJ Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports SA, Compagnie Maritime Belge SA and Dafra-Lines A/S v Commission*, judgement of 16 March 2000; paragraphs 80-83.

<sup>168</sup> Art. 82, 2 lit a ECT. This provision is very similar to Section 19 IV No.1 GWB1998.

<sup>169</sup> q.v. the reported practise of "fighting ships" (supra).

<sup>170</sup> Emmerich, *Kartellrecht* (8<sup>th</sup> ed.) (München, Germany, C.H.Beck, 1999) p 219. This provision is subject to Section 19 I GWB1998 as no specific example in Section 19 IV is available.

a product market. Firstly, a dominant entity may remove well a established cheap product from the market in order to boost demand for the expensive successor although a strong demand for the old one remains<sup>171</sup>. Secondly, a dominant player undertakes an investment in order to acquire the last remaining competitor. Thereby, the scope of Art. 82 ECT can be extended to a control concentrations<sup>172</sup>.

Art. 82,2 lit c ECT deals with discriminatory trading terms and pricing systems whereas Art. 82,2 lit d. ECT considers agreements in which dominant undertakings combine the offer of the principal product with additional products that are not normally traded together so as to exploit the dependence of captive consumers<sup>173</sup>.

#### **5.1.6 Effect on Trade between Member States**

If the measure is suitable to have an effect on trade between Member States

Art. 82 ECT is applicable. The wording "between" supports that either exports to other members or imports from Member States are required. However, the economic rationale indicates, that even Member States' trade with third countries is included. In all other cases, only domestic provisions apply. It is controversial whether the rule of reason is relevant to Art. 82 ECT as well<sup>174</sup>. The impact of the effects doctrine has already been introduced<sup>175</sup>.

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<sup>171</sup> e.g. a software company removes old software or increases the price in order to increase demand for the new (but not necessarily more reliable) version.

<sup>172</sup> Emmerich, Kartellrecht (8<sup>th</sup> ed.) (München, Germany, C.H.Beck, 1999) p 219.

<sup>173</sup> The former situation is reflected by Section 19 IV No. 2 - 3 GWB1998 whereas the latter is covered by Section 19 IV No.1 GWB1998.

<sup>174</sup> q.v. R. Streinz, Europarecht (4<sup>th</sup> ed.) (Heidelberg, Germany, C.F.Müller, 1999) marginal note 829.

<sup>175</sup> effects doctrine: supra at 5.1.3 Substantial Part of the Common Market and Effects Doctrine.

### 5.1.7 Legal Consequences

Based on the direct applicability of Art. 82 ECT<sup>176</sup>, the result of an infringement is that the conduct is legally invalid. This simplified result is obtained by means of the following complex methodology.

Although contested, it is still favourable to interpret EC Law as public international law<sup>177</sup>. The ECJ is of the opinion that EC law is of a specific nature "sui generis" with a rank superior to national law. However, it is superior to regard it as ordinary public international law: Primary EC law is still adopted by means of treaties in terms of public international law. As secondary law depends originally on a legal basis in primary law, it is highly persuasive to state secondary norms share the same legal nature. This opinion also permits to solve constitutional problems in those Member States of which the constitution requires treaties to be implemented to national law by primary legislation. Such a transformation bill must be consistent with the national constitution so that the constitution reserves the power to dominate EC law in areas which are very sensitive in terms of sovereignty or civil rights.

Additionally, it is disputed how public international law shall become effective within the national legal framework. According to the superior so-called modified transformation theory, international law is transformed to national law by means of national primary or secondary legislation which repeats the contents of international norms. If the international legal provision is revoked, the transformational statutes automatically become invalid, too. This result is achieved

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<sup>176</sup> Although controversial, it is favourable to interpret EC Law as public international law. The implementation of public international law is again disputed. According to the superior modified transformation theory, international law is transformed to national law by means of national provisions with identical contents. However, only so-called "self-executing" or "directly applicable" provisions can be transformed.

<sup>177</sup> R. Streinz, Europarecht (4<sup>th</sup> ed.) (Heidelberg, Germany, C.F.Müller, 1999) marginal note 108 and 113.

if one deems that the implementation law was enacted on the pre-condition of the international norm's efficacy.

However, the reported process is only relevant if the international norm fulfils the so-called "self-executing" or "direct applicability" criteria. Shortly, the provision must have a clear wording without various complex exemptions, has to intend to serve private interests of individuals rather than mere public interests, must be accompanied by efficient judicial review and the relevant case must be within the scope of the norm.

Based on Art. 9 II 2<sup>nd</sup> Variant Regulation No 17 [REG17]<sup>178</sup>, the Commission has the (non-exclusive) power to issue a decision which states that a conduct violates against Art. 82 ECT.

### **5.1.8 Concentration**

After having introduced the logic behind the general pre-requisites for the application of Art. 82 ECT, it will be evaluated if a broad interpretation is indeed viable that examines concentrations pursuant to this provision. If so, it will be discussed which major drawbacks are related to such a methodology.

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<sup>178</sup> Regulation No 17: First Regulation Implementing Art. 85 and 86 of The Treaty, O.J. 013, 21/02/1962, p 204; as Amended by Regulation No 59 of The Council Amending Certain Provisions of Regulation No 17, O.J. 058, 10/07/1962, p 1655; as Amended by Regulation No 118/63/EEC of The Council of 5 November 1963 Amending Regulation No 17, O.J. 162, 07/11/1963, p 2696; as Completed by Regulation 2822/71/EEC of The Council of 20 December 1971 Supplementing The Provisions of Regulation No 17 Implementing Articles 85 and 86 of The Treaty, O.J. L 285, 29/12/1971, p 49; as Incorporated by Agreement on The European Economic Area - Protocol 37 Containing The List Provided for in Article 101, O.J. L 1, 03/01/1994, p 206; as Implemented by Commission Regulation 3385/94/EC of 21 December on The Form, Content and other Details of Applications and Notifications Provided for in Council Regulation No 17, O.J. L 377, 31/12/1994, p 28; as Amended by Council Regulation No 1216/1999/EC of 10 June 1999 Amending Regulation No 17: First Regulation Implementing Art. 81 and 82 of The Treaty, O.J. L 148, 15/06/1999 p 5.

### **5.1.8.1 Arguments Supporting Merger Control: The Continental Can Doctrine**

In the Continental Can Judgement<sup>179</sup>, the assessment of concentrations by means of Art. 82 ECT was considered and justified in legal terms by several arguments: Firstly, the catalogue of violations listed in Art. 82,2 lit a-d ECT was deemed to have an explanatory nature but not an exhaustive one<sup>180</sup>. This is underlined by the wording "in particular" in the chapeau of Art. 82,2 ECT. Therefore, a extensive interpretation is facilitated.

Secondly, it was argued that the catalogue does not only cover measures directly to the detriment of competitors or either consumers or suppliers on the market, but also activities which impede the activities of said groups in an indirect manner<sup>181</sup>. This finding is supported by Art. 82,2 lit. c ECT as the mentioned specific trading terms do not in itself fulfil the example. Contrarily, the idea of abuse in this variant is based on the indirect argument that other traders received better covenants in comparable transactions of the past accompanied by the fact that no due reason for these discriminatory practices can be established. This reasoning can be extracted from Art. 82,2 lit. d ECT as well. As not a concentration as such poses any direct threats to consumers/competitors, it has an indirect effect on market structure, too: Solely, its later implementation and the combined entity's behaviour cause direct harm to competitors or trading partners.

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<sup>179</sup> ECJ Case C-6/72 *Europemballage Corp and Continental Can Co Inc v Commission*, [1973] ECR 215.

<sup>180</sup> ECJ Case C-6/72 *Europemballage Corp and Continental Can Co Inc v Commission*, [1973] ECR 215 at p 245.

<sup>181</sup> ECJ Case C-6/72 *Europemballage Corp and Continental Can Co Inc v Commission*, [1973] ECR 215 at p 245.

Thirdly, it is feasible to rely on Art. 3 lit. g ECT. This general provision can serve as a legal means for both the Commission and the ECJ in order to oversee new business developments that cause either entirely new risks to the common market or at least deepen existing risks which were regarded as hardly relevant during time of adoption of the more specific provisions of primary law, i.e. Art. 81 et seq. ECT.

Finally, the teleological interpretation of Art. 3 lit. g ECT backs the extensive interpretation of Art. 81 et seq. ECT because the neo-classical trade theory supports the idea of transnational merger control regimes. A supranational market can not develop trade and to the fullest extent by taking advantage of comparative advantages if severe distortions remain in place regardless of the relevant competition policy area of concern. Therefore, transnational competition policy would be out of balance if it was restricted to classic antitrust or state aids problems whereas the liberalisation of closed sectors in terms of Art. 86 ECT or potentially dangerous concentrations would be ignored. Finally, a level supranational market requires a modern transnational competition law which addresses merger control.

Although the Continental Can decision of the Commission was overturned by the ECJ on ground of lack of evidence, the court accepted Art. 82 ECT as a genuine legal basis for the control of concentrations.

### 5.1.8.2 Application of The Continental Can Doctrine

The Continental Can Doctrine was later applied by the Commission to inaugurate a plethora of preliminary proceedings which can be separated in two different variants.

A predominant group of cases is characterised by the fact that the Commission refused to take a formal decision which would have been based on Art. 9 II REG17; 82 ECT<sup>182</sup>. At first, an ex officio request for information was issued on the basis of Art. 11 I REG17. After having analysed the documents which were delivered, the Commission refused to initiate formal proceedings.

However, in the second minor group of cases the Commission opened not only preliminary proceedings but also official ones which were closed by means of formal decisions:

In the Tetra Pak I decision<sup>183</sup>, it was established - according to the general criteria of Art. 82 ECT<sup>184</sup> - that said company held a dominant position on the relevant market for non-aseptic milk cartons. Additionally, it was stated that an abuse of this dominant position was available pursuant to Art. 82,1 ECT when Tetra Pak acquired a small competitor - the Liquipak Group. This finding was a result of two arguments. Firstly, Liquipak held intellectual property rights regarding new sterilising procedures of major commercial relevance for the sector. Secondly, Tetra Pak was granted an exclusive license by Liquipak regard-

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<sup>182</sup> e.g. Commission, 18<sup>th</sup> Report on Competition Policy (1988) Point 80 (*Irish Distillers Group*), Point 81 (*British Airways and British Caledonian*), Point 88 (*Klöckner Stahl, Krupp Stahl and Thyssen Stahl*); Commission 19<sup>th</sup> Report on Competition Policy (1989) Point 64 (*TWIL and Bridon*), Point 65.

*Ibercombe and Outokumpu*), Point 66 (*Plessey-Gec and Siemens*), Point 67 (*Rhone-Polenc and Monsanto*), Point 68 (*Consolidated Gold Fields and Minorco*), Point 69 (*Carnaud-Metal box Pechiney American Can*), Point 70 (*Stena and Houlder Offshore*); Commission 20<sup>th</sup> Report on Competition Policy (1990) Point 116 (*Air France and Air Inter Uta*), Point 118 (*Eurocar and Interrent*), Point 119 (*Enasa*).

<sup>183</sup> Commission Decision 88/501/EEC of 26 July 1988 Relating to A Proceeding under Articles 85 and 86 of The EEC Treaty, O.J. L 272 04/10/1988 p 27 (*Tetra Pak I and Liquipak*).

<sup>184</sup> q.v. supra at 5.1.1 to 5.1.6 .

ing the procedures simultaneous with the acquisition. Thereby, the acquirer could erect extraordinarily high barriers to market entry. The Commission restricted its finding of inconsistency with Art. 82 ECT to the exclusivity clause so that Tetra Pak was only ordered to abstain from the exclusivity clause of the license.

Later, the Commission scrutinised a merger of Preussag and Panarroya and initiated formal proceedings under REG17 in order to analyse a potential violation of Art. 82 ECT<sup>185</sup>. Although the decision states in paragraph 17 that none of the participants initially held a dominant position - so that the original Continental Can doctrine would exclude further investigations, a complete assessment of Art. 82 ECT as to the formation of prices on the relevant markets was undertaken in paragraph 18-19.

One could regard this methodology as a late victory of an extensive teleological interpretation of Art. 82 ECT as opposed to the prevailing narrow approach that was based on a static interpretation: The provision's wording "abuse ... of a dominant position" had been traditionally interpreted as the abuse of an existing dominance on the market in question.

However, another opinion does not attribute such a significant shift of paradigms to the *Metaleurop* decision with two quite persuasive arguments. On the one hand, the new approach was taken after MR1989 had been adopted and shortly before it entered into force so that the Commission could take advantage of the principles of the new Regulation<sup>186</sup>. On the other hand, such a late amendment of the principles of interpretation could be based on a very spe-

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<sup>185</sup> Commission Decision 90/363/EEC of 26 June 1990 Relating to A Proceeding pursuant to Art. 86 of the EEC-Treaty O.J. L 179 12/07/1990 p 41 (*Metaleurop SA*): A negative clearance was granted according to Art. 2 REG17.

cific argument: that the Commission was interested in tackling those concentrations which intended to circumvent the new MR1989 in the latest moment. Clearly, this kind of supporting argument could never be generalised so as to re-write the criteria for a control of concentrations under Art. 82 ECT.

Therefore, it is advisable to conclude that - wherever there is scope for a residual application of Art. 82 ECT with respect to the control of concentrations - the traditional Continental Can doctrine is still completely effective so as to govern any concentration with a Community dimension that can not be addressed under either MR1989 or MR1997.

### **5.1.8.3 Drawbacks of Merger Control under Art. 82 ECT**

It was quickly established that Art. 82 ECT was quite an unsatisfactory means in order to control concentrations of undertakings.

As it has been elaborated above, it was repeated pursuant to the wording "abuse ... of a dominant position" of Art. 82 ECT that only those concentrations could be addressed in which at least one undertaking already held a dominant position. Thus, mergers between non dominant players which create dominant entities can not be tackled.

Accordingly, an intelligent dominant player interested in a further acquisition could take advantage of such an incomplete control of concentrations.

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<sup>186</sup> I. Van Bael and J.-F. Bellis, Competition Law of the European Community (3<sup>rd</sup> ed.) (Bicester, U.K., CCH Editions Limited, 1994) p 365.

Firstly, measures could be implemented which superficially divest those business interests of the dominant entity which are responsible for the potential judgement of dominance. Later, the parent could acquire both the group of divested entities and the original target. Such a strategy to circumvent merger control under Art. 82 ECT was facilitated by the fact that no clear definition existed as to the definitions of undertakings concerned in case of highly complex groups of undertakings<sup>187</sup>.

However, this result is highly inconsistent with the rationale of merger control provisions. Unfortunately, neither an extensive teleological interpretation of Art. 82 ECT was chosen nor an analogy approach was taken so as to avoid discontentment in the Member States.

Additionally, the nullity sanction of Art. 82,1 ECT is difficult to implement after a concentration is already implemented<sup>188</sup>. This disadvantageous effect is even extended owing to the fact that Art. 82 ECT does not provide for an obligation of prior notification of concentrations: Art. 9 REG17 is limited to practices possibly within the scope of Art. 81 ECT.

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<sup>187</sup> This situation changed when the Commission issued notices explaining these undertakings which take part in a concentration: q.v. Commission Notice on the Notion of Undertakings Concerned under Council Regulation 4046/89/EEC of 21 December 1989 on the Control of Concentrations between Undertakings, O.J. C 385, 31/12/1994 p 12; Commission Notice on the Concept of Undertakings Concerned under Council Regulation 4046/89/EEC on the Control of Concentrations between Undertakings, O.J. C 66, 02/03/1998 p 10.

<sup>188</sup> I. Van Bael and J.-F. Bellis, Competition Law of the European Community (3<sup>rd</sup> ed.) (Bicester, U.K., CCH Editions Limited, 1994) p 364.

Furthermore, a merger control proceedings based on Art. 9 II REG17, 82 ECT would be extremely detrimental to commercial interests of the undertakings involved. The reason is twofold. Firstly, practical experience with antitrust proceedings under REG17 indicates that proceedings tend to be of excessive duration. This is extremely disadvantageous as the outstanding commercial value of the transactions which will implement a concentrations is not compatible with time consuming investigations.

Secondly, accelerated decision making is the best means to prevent the publication of sensitive commercial data so as to keep the high level of commercial secrecy<sup>189</sup> which is desired.

Hence, one needs to avoid significant disruptions on the equity markets due to long term phases without any trade in the shares of the undertakings concerned.

Consequently, only a specific legal framework can establish both legal certainty and the protection of undertakings.

Finally, legal uncertainty regarding the application of either Art. 81 or 82 ECT to certain concentrations could serve as a serious drawback to the efficacy of merger control under Art. 82 ECT. This argument will be scrutinised within the next paragraph.

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<sup>189</sup> Parallel to MR1989, a practise is quite common in which lawyers act as agents of anonymous clients so as to discuss legal issues with Commission officials regarding the need to notify a "hypothetical case". The identity is revealed if the negotiations establish a need to notify the concentration.

## **5.2 EC Merger Control under Art. 81 ECT**

As a consequence of the mentioned Commission memorandum of 1966 it was conventional wisdom that a dichotomy existed between Art. 81 and 82 ECT with respect to concentrations. This view was disapproved, later.

### **5.2.1 Traditional View**

According to the old dogmatic, measures which influence competition by means of alterations of the structures of undertakings - especially share deals<sup>190</sup> - were exclusively governed by Art. 82 ECT. Therefore, a sales agreement by which a non dominant vendee establishes a majority participation, an influential minority shareholding or a cross-shareholding were never addressed under Art. 81 ECT even if a dominant position was created.

Contrarily, Art. 81 ECT was exclusively applicable to agreements between independent undertakings.

The hypothesis was also backed by a logic conclusion pursuant to the Continental Can decision which did not take Art. 81 ECT into closer consideration. The predominant objective of this clear-cut separation is obvious: It is bound to provide legal certainty.

### **5.2.2 New Doctrine Introduced by the BAT Judgement**

However, it was rapidly revealed that reality is too complex too justify a clear-cut dichotomy. For instance, the implementation of hybrid structures is extremely probable: One can take advantage of structural alterations involving non dominant players so as to exclude Art. 82 ECT in substantial terms and to formally preclude an analysis of Art. 81 ECT although the structural operation intends to implement parallel agreements which will reduce competition between the undertakings involved.

This may be illustrated not only by certain types of JVs<sup>191</sup> but also by significant minority shareholdings and cross-shareholdings as these phenomena can provide for both: a long term structural amendment of the competitive situation by means of alterations of the undertakings' structures and a forum to discuss adapted behaviour or a platform to execute power over the target in order to implement concerted practices<sup>192</sup>.

Consequently, the dogmatic dichotomy between Art. 82 and 81 ECT was overturned by the ECJ in the BAT judgement<sup>193</sup>. This judgement formulated several new principles based on the following facts:

The cigarette producer Philip Morris was interested in a sales agreement with the undertaking Rembrandt - the then exclusive owner of Rothmans International. According to the covenants of the agreement, Philip Morris was due to purchase a significant minority interest - 24.9 % - in Rothmans. As none of the undertakings concerned initially held a dominant position, an application of Art. 82 ECT was not feasible in accordance with the Continental Can doctrine<sup>194</sup>. The Commission backed the traditional view and was of the opinion that a "per se" rule existed so as to prevent the application of Art. 81 ECT<sup>195</sup> on the grounds of a lack of an agreement or practises that intend to or cause a prevention, reduction or distortion of competition on a relevant product market

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<sup>190</sup> Commission, 14<sup>th</sup> Report on Competition Policy (1984) point 99.

<sup>191</sup> q.v. the early Reports on Competition Policy as far as it relates to JVs Commission - e.g. 6<sup>th</sup> Report on Competition Policy (1976) point 55 - and the early case law as far as it relates to JVs which will be discussed later - e.g. Commission Decision 75/95/EEC of 20 December 1974 Relating to Proceedings under Art. 85 of the EEC Treaty O.J. L 38, 12/02/1975 p 14 (IV/26.872 - SHV/Chevron).

<sup>192</sup> e.g. shareholder rights; rights arising from contracts related to company law issues like the right to appoint members of the board of directors or supervisory board members, rights as to the day to day management, specific majority rules, pre-emptory rights so as to expand current (minority) shareholdings in the future.

<sup>193</sup> ECJ Cases C-142/84 & C-156/84 *BAT and Reynolds v Commission* [1987] 4487.

<sup>194</sup> q.v. supra at 5.1.8.1 Arguments Supporting Merger Control: The Continental Can Doctrine.

<sup>195</sup> Commission, 14<sup>th</sup> Report on Competition Policy (1984) point 99.

within a significant part of the common market if a structural measure is implemented.

Contrarily, the undertakings BAT and Reynolds which applied for a prohibition of said agreement were of the opinion that Art. 81 ECT should be considered<sup>196</sup>.

Clearly, the basic criteria of Art. 81 ECT are met as two undertakings in terms of competition law are available which conclude a sales agreement which allegedly provides an additional platform for disguised implementation of concerted practises.

However, it is central whether such agreement intends or causes said anti-competitive effects on the relevant product markets and whether these phenomena can be separately analysed if they are attached to structural incidents like share deals: One could argue that any type of factual restrictions of competition accompanying a concentration are "ancillary restraints" and that these should be ignored if the concentration in itself is not inconsistent with Art. 82 ECT. However, it seems to be superior to have a restrictive understanding. Ancillary restraints should be those measures which are attached to a concentration, designed to facilitate the concentration and of minor economic relevance compared with the concentration.

Another criticism could take advantage of the idea that the Commission could tackle the alleged concerted practises in separate proceedings in the future.

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<sup>196</sup> ECJ Cases C-142/84 & C-156/84 *BAT and Reynolds v Commission* [1987] 4487, at p 4509.

However, this is not a persuasive idea, as the deal establishing the minority shareholding provides the basic cause and institutional framework for facilitated and secretive concerted practices. Hence, it would be difficult to monitor the practices. Furthermore, it would contravene the notion of legal certainty if the share deal is ignored but the genuine enforcement of the deal, i.e. the execution of shareholders' rights or contractual rights would be prohibited<sup>197</sup>.

The applicants argued that the vendee would be able to determine the future competitive behaviour of the target Rothmans International in factual terms. This control would expand to an extent which is similar to powers of majority owners. Even minority shareholders can quite easily obtain sensitive commercial data so as to reveal competitive advantages of the target. Additionally, a significant minority interest can be easily extended into a majority control owing to long-term strategies between the shareholders who may co-ordinate their actions and establish pre-emptive rights.

The ECJ accepted the legal validity of those arguments at least in theory and concluded that structural incidents like share deals which transfer minority shareholdings are inconsistent with Art. 81 ECT if the case concerned sufficiently indicates that the shareholder's rights are used to determine the competitive behaviour of the "target" on the markets in question<sup>198</sup>.

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<sup>197</sup> Such an approach would interfere with the need of a consistent and easy enforcement of shareholder rights which is essential to operate corporations.

<sup>198</sup> ECJ Cases C-142/84 & C-156/84 *BAT and Reynolds v Commission* [1987] 4487, at p 4577.

Alternatively, one could argue that this broad interpretation of Art. 81 ECT is needed so as to close those gaps that the restrictive interpretation of Art. 82 ECT has caused and that the economic value of minority shareholdings which are used as instruments to persistently affect the target company's conduct is nearly equivalent to the value of majority ownership of the target in legal terms as a result of mergers or acquisitions.

Nevertheless, the ECJ concluded that the specific circumstances did not give enough evidence to establish any kind of the alleged strategy. The acquirer of minority control Philip Morris neither obtained commercial control as Rembrandt remained the majority shareholder nor was any stringent prospect available that enabled Philip Morris to obtain additional shares in the near future.

### **5.2.3 Evaluation of The BAT Doctrine**

The BAT doctrine certainly removes the loopholes which the dichotomy approach inevitably creates. It is also beneficial that the doctrine is restricted so as not to cover mere theoretical options to enter into collusions between acquirers and targets as specific evidence for future co-ordination is required<sup>199</sup>.

However, two major drawbacks are caused: Firstly, it remains unclear how broad or restrictive the intensity of future co-ordination should be defined which is necessary to conclude that a concerted practise in terms of Art. 81

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<sup>199</sup> However, the Commission accepts that the acquisition of 35% equity of the leading competitor causes by Danish Fur Sales (DPA) is self-sufficient to apply Art. 81 ECT. The reason is obvious as Hudson's Bay had challenged the restrictive practices of DPA in Denmark previously q.v. Commission Decision IP (88) 810 of 15 December 1988 (*Danish Fur Sales and Hudson's Bay*) and Commission Decision 88/587/EEC of 28 October 1988 Relating to A Proceeding pursuant to Article 85 of the EEC Treaty, O.J. L 316, 23/11/1988 p 43 (*IV/B-2/31.424, Hudson's Bay-Dansk Pelsdyravlerforening*).

ECT is available between either the acquirer and the target or between the acquirer and the seller.

Furthermore, it was disputed whether the argument dealing with future collusions between the acquirer and the seller could be self-sufficient to justify an application of Art. 81 ECT. If this was upheld, Art. 81 ECT would serve as a genuine instrument of control of institutionalised concentrations between sellers and buyers of shares as the target, i.e. object of decision making, has no influence on the outcome.

If one focuses on potential collusions between the acquirer and the target, Art. 81 ECT would remain a provision to control the behaviour between a restricted but still at least partly self-determinative target and the vendee.

One could argue that these considerations have lost any relevance since MR1989 entered into force of MR1989. However, Art. 81 and 82 ECT remain nevertheless important for various reasons: Firstly, significant groups of cases are not within the scope of MR1989 owing to the high turnover thresholds. Secondly, a pre-requisite for the validity of secondary EC Law is that it is enacted without interference with the legal bases located in primary law. Therefore, secondary merger control law would go beyond its legal basis (Art. 83 ECT and 308 ECT) if it tried to narrow down well established principles regarding the application of Art. 81-82. This approach is also backed by the term "to give effect to the principles set out in Art. 81 and 82" pursuant to Art. 83 I ECT: as any provisions narrowing the scope of Art. 81 ECT exceed a mere implementation of principles.

#### 5.2.4 Gillette Case

The Gillette Decision<sup>200</sup> offers the second opportunity to discuss the complex application of Art. 81 (and 82) ECT to share deals and related agreements which intend to influence the behaviour of the target.

Prior to the evaluation of legal findings, the facts will be briefly reported. Initially, the Gillette Company holds a strong position on the relevant product market for wet shaving products<sup>201</sup> of which the geographic area includes the EC despite of minor differences as to consumer preferences<sup>202</sup>. Its only significant competitor is the "Wilkinson Sword" business which was once operated by Swedish Match AB<sup>203</sup>. Swedish Match was acquired by Stora Kopparbergs Bergslags AB<sup>204</sup> in 1988. In February 1988, Eemland Holdings NV was founded which includes inter alia managers of the Wilkinson business and Gillette U.K. Ltd.<sup>205</sup>.

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<sup>200</sup> Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O.J. L 116 12/05/1993 p 21 (*Cases No IV/33.440 Warner-Lambert/Gillette and Others and No IV/33.486 BIC/Gillette and Others*).

<sup>201</sup> It consists of traditional double-edged razors, system razors and disposable razors but excludes dry razors and other means: q.v. Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O.J. L 116 12/05/1993 p 21 (*Cases No IV/33.440 Warner-Lambert/Gillette and Others and No IV/33.486 BIC/Gillette and Others*) at paragraph 5-6.

<sup>202</sup> Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O.J. L 116 12/05/1993 p 21 (*Cases No IV/33.440 Warner-Lambert/Gillette and Others and No IV/33.486 BIC/Gillette and Others*) paragraph 7 - 8.

<sup>203</sup> Swedish Match was a consumer products group offering toiletries, matches and lighters.

<sup>204</sup> Stora focused on forest products, diversified by creating a consumer product division which contained the activities of Swedish Match.

<sup>205</sup> Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O.J. L 116 12/05/1993 p 21 (*Cases No IV/33.440 Warner-Lambert/Gillette and Others and No IV/33.486 BIC/Gillette and Others*) paragraph 4 (ii), (iv) and 12.

The sole purpose of Eemland was to acquire Stora's consumer products division and to resell the Wilkinson business - except the EC operations - to Gillette in December 1989<sup>206</sup> so that Eemland can be described as a shell company. As the U.S. antitrust authorities intervened, Eemland was obliged to retain the U.S. activities of Wilkinson<sup>207</sup>. At the same time, Gillette was interested in acquiring a minority loan stock, which reflects an equity interest of 22% in Eemland, that can be converted into ordinary shares in certain circumstances<sup>208</sup>. The proposed agreement regarding the acquisition of a minority interest sought to evade the application of European competition law by means of several features: Firstly, a board representation of Gillette was outlawed. Secondly, not only a right of presence of Gillette in shareholders' meetings but also voting rights were excluded<sup>209</sup>. Thirdly, Chinese Walls<sup>210</sup> were due to be erected so as to avoid any disclosure of sensitive information regarding the EC and US activities of Eemland.

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<sup>206</sup> Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O.J. L 116 12/05/1993 p 21 (*Cases No IV/33.440 Warner-Lambert/Gillette and Others and No IV/33.486 BIC/Gillette and Others*) paragraph 10 and 18 .

<sup>207</sup> Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O.J. L 116 12/05/1993 p 21 (*Cases No IV/33.440 Warner-Lambert/Gillette and Others and No IV/33.486 BIC/Gillette and Others*) paragraph 11; I. Van Bael and J.-F. Bellis, Competition Law of the European Community (3<sup>rd</sup> ed.) (Bicester, U.K., CCH Editions Limited, 1994) p 369 footnote 28.

<sup>208</sup> Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O.J. L 116 12/05/1993 p 21 (*Cases No IV/33.440 Warner-Lambert/Gillette and Others and No IV/33.486 BIC/Gillette and Others*) paragraph 13

<sup>209</sup> Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O.J. L 116 12/05/1993 p 21 (*Cases No IV/33.440 Warner-Lambert/Gillette and Others and No IV/33.486 BIC/Gillette and Others*) paragraph 13-14.

<sup>210</sup> q.v. Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O.J. L 116 12/05/1993 p 21 (*Cases No IV/33.440 Warner-Lambert/Gillette and Others and No IV/33.486 BIC/Gillette and Others*) paragraph 14.

However, these restrictions were largely circumvented owing to pre-emptive rights<sup>211</sup> and said conversion rights attributed to Gillette. Additionally, it has to be stressed that Gillette was as a major creditor of Eemland. Hence, the loan stock received interest payments which reflect the dividends of a hypothetical ordinary equity interest<sup>212</sup>.

Finally, Gillette concluded three agreements with Eemland. The first one obliged Eemland to supply products to Gillette which could be marketed by Gillette under the Wilkinson brand on the markets outside the U.S. and the EC up to 1992<sup>213</sup>. The second one provided prevented Gillette from marketing its Non-US and Non-EC Wilkinson operations within the U.S. and EC markets whereas Eemland was prohibited to supply Wilkinson products outside said regions<sup>214</sup>. As a consequence of the second one, a trade mark separation agreement was concluded<sup>215</sup>.

With respect to Art. 82 ECT, the Commission established that Gillette's position on the market for wet shaving products was dominant according to market shares in terms of volume and value<sup>216</sup>. The dominance is underlined by the

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<sup>211</sup> Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O.J. L 116 12/05/1993 p 21 (*Cases No IV/33.440 Warner-Lambert/Gillette and Others and No IV/33.486 BIC/Gillette and Others*) paragraph 16.

<sup>212</sup> q.v. Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O.J. L 116 12/05/1993 p 21 (*Cases No IV/33.440 Warner-Lambert/Gillette and Others and No IV/33.486 BIC/Gillette and Others*) paragraph 14.

<sup>213</sup> Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O.J. L 116 12/05/1993 p 21 (*Cases No IV/33.440 Warner-Lambert/Gillette and Others and No IV/33.486 BIC/Gillette and Others*) paragraph 17 and 34.

<sup>214</sup> Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O.J. L 116 12/05/1993 p 21 (*Cases No IV/33.440 Warner-Lambert/Gillette and Others and No IV/33.486 BIC/Gillette and Others*) paragraph 18 and 34.

<sup>215</sup> Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O.J. L 116 12/05/1993 p 21 (*Cases No IV/33.440 Warner-Lambert/Gillette and Others and No IV/33.486 BIC/Gillette and Others*) paragraph 18 and 35.

<sup>216</sup> Gillette focused on high value products: 59% by volume and 70% by value: q.v. Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85

nature of a mature market with high barriers to entry<sup>217</sup>. The loan stock participation in the only significant competitor was deemed to be an abuse as the competitive structure of the market is limited to an additional extent<sup>218</sup>. This judgement is additionally backed by the significant loans granted to the newly established company Eemland without sufficient resources to develop new products so that Eemland has to concentrate on medium range products<sup>219</sup>. Another element is contributed by the fact that pre-emptive rights prevent the remaining competitors BIC SA or Warner-Lambert from investing in Eemland at an economically viable price<sup>220</sup>. Finally, Gillette is obliged to divest its loan capital and to sell its loans to a third party pursuant to Art. 3 REG17<sup>221</sup>. Regarding Art. 81 ECT, the Commission applied the BAT doctrine<sup>222</sup> and found that the equity participation in Eemland (share deal) was accompanied by several ancillary agreements between the acquirer and the target which were indeed capable of violating Art. 81 I ECT<sup>223</sup> without being justifiable under Art.

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and 86 of the EEC Treaty O.J. L 116 12/05/1993 p 21 (*Cases No IV/33.440 Warner-Lambert/Gillette and Others and No IV/33.486 BIC/Gillette and Others*) paragraph 8 and 22.

<sup>217</sup> Significant economies of scale have to be reached until viable operations are feasible because of high investments for further improvements of the products, q.v. Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O.J. L 116 12/05/1993 p 21 (*Cases No IV/33.440 Warner-Lambert/Gillette and Others and No IV/33.486 BIC/Gillette and Others*) paragraph 9.

<sup>218</sup> Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O.J. L 116 12/05/1993 p 21 (*Cases No IV/33.440 Warner-Lambert/Gillette and Others and No IV/33.486 BIC/Gillette and Others*) paragraph 23 and Art. 1.

<sup>219</sup> Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O.J. L 116 12/05/1993 p 21 (*Cases No IV/33.440 Warner-Lambert/Gillette and Others and No IV/33.486 BIC/Gillette and Others*) paragraph 25, 26, 30, 31.

<sup>220</sup> In case of low prices, Gillette would execute the pre-emptive rights.

<sup>221</sup> Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O.J. L 116 12/05/1993 p 21 (*Cases No IV/33.440 Warner-Lambert/Gillette and Others and No IV/33.486 BIC/Gillette and Others*) paragraph 42 and Art. 4.

<sup>222</sup> supra at 5.2.2 New Doctrine Introduced by the BAT Judgement.

<sup>223</sup> Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O.J. L 116 12/05/1993 p 21 (*Cases No IV/33.440 Warner-Lambert/Gillette and Others and No IV/33.486 BIC/Gillette and Others*) Art. 2.

81 III ECT<sup>224</sup>. The reason is that these agreements provided an ideal platform for the limitation of effective competition between said undertakings.

Firstly, the trademark separation agreement formed an agreement between two "independent" undertakings. Clearly, the contract intends and causes a reduction of competition between the participants as far as the Wilkinson Brand is concerned because Eemland has an important interest to satisfy its largest single consumer. The geographic separation of marketing regions is an obvious violation of Art. 81 I lit b and c ECT. Finally, the geographic separation of trade mark Wilkinson leads to the result that both parties need to cooperate in order to prevent detriment to the brand as long as consistent products are manufactured<sup>225</sup>.

A derogation from Art. 81 I ECT pursuant to Art. 81 III ECT was rejected, as none of the explicit criteria for derogations were met and it was found that the weak partner Eemland needed the opportunity at least to expand its operations to areas close to the EC<sup>226</sup>.

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<sup>224</sup> Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O.J. L 116 12/05/1993 p 21 (*Cases No IV/33.440 Warner-Lambert/Gillette and Others and No IV/33.486 BIC/Gillette and Others*) Art. 3.

<sup>225</sup> Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O.J. L 116 12/05/1993 p 21 (*Cases No IV/33.440 Warner-Lambert/Gillette and Others and No IV/33.486 BIC/Gillette and Others*) paragraph 35

<sup>226</sup> Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O.J. L 116 12/05/1993 p 21 (*Cases No IV/33.440 Warner-Lambert/Gillette and Others and No IV/33.486 BIC/Gillette and Others*) paragraph 43 and Art. 5.

### **5.2.5 Evaluation of The Application of Art. 81 ECT to Structural Amendments of The Competitive Environment with Indications of Future Collusion**

Apart from the revealed dogmatic complexities that accompany the application of Art. 81 ECT to structural amendments of the competitive environment<sup>227</sup>, which provide for ancillary agreements that restrain competition, procedural drawbacks are available. As these are very similar to those drawbacks the implementation of Art. 82 ECT faces with respect to concentrations, a repetition is redundant<sup>228</sup>. Especially, the limited duration of potential derogations pursuant to Art. 8 I REG17 is absolutely inadequate for ancillary restraints because it is hardly feasible to revoke the basic structural amendments after a couple of years in order to recover the former competitive situation<sup>229</sup>. Finally, a rapid process including a prior notification procedure is missing.

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<sup>227</sup> i.e. share deals and JVs.

<sup>228</sup> These restrictions were discussed supra, at 5.1.8.3 Drawbacks of Merger Control under Art. 82 ECT.

<sup>229</sup> Thereby, the nullity sanction of Art. 81 ECT is questionable if a violation of Art. 81 by ancillary restraints is discovered after a couple of years.

### **5.3 The Complex Assessment of Joint Ventures under Art. 82 and 81 ECT**

An assessment of the control of concentrations under Art. 82 and 81 ECT would be highly incomplete if the impact on the competitive environment on relevant markets was ignored which is caused by the formation and implementation of JVs. A JV is per se a hybrid structure because - on the one hand - its formation incorporates elements of a structural concentration of undertakings in terms of the Continental Can doctrine under Art. 82 ECT<sup>230</sup>, whereas - on the other hand - the element of joint control can provide for a platform for co-operation between the parents or between a parent and the JV on a scale that exceeds the economic relevance of the JV business by far so that Art. 81 ECT can sometimes be the more appropriate legal means to control "partial concentrations"<sup>231</sup>.

#### **5.3.1 Legal Nature of JVs**

A JV can be defined as a platform of co-operation between at least two undertakings in terms of competition law with the immediate and primary objective to pool or exchange resources so that this definition excludes commercial co-operations of which the primary goal relates to agency, distributorship, franchising or licensing agreements concerning intellectual property rights<sup>232</sup>. As it is beyond the scope of the paper to include an exhaustive analysis of the immediate objectives and legal issues accompanying the creation and successful operation of a JV, only a brief overview is given.

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<sup>230</sup> i.e. the measures creating and implementing the JV which are based on company law. Those shall be analysed under Art. 82 pursuant to the Commission; q.v. Commission of the European Communities, Memorandum on the Concentration of Enterprises in the Common Market, EEC Competition Series, Study No.3 (1966).

<sup>231</sup> q.v. I. Van Bael and J.-F. Bellis, Competition Law of the European Community (3<sup>rd</sup> ed.) (Bicester, U.K., CCH Editions Limited, 1994) p 366.

<sup>232</sup> Kling, E. and B. Adkins, *Joint Ventures in The European Community*, in Joint Ventures in Europe (J. Ellison and E. Kling, eds., London, U.K., 1997) p 2-3.

Attached to the immediate objectives, a JV shall pursue mediate common objectives<sup>233</sup>, as defined by the parties, by sharing of control, responsibilities, expenditure and risks between the partners. Naturally, a JV competes against diverse business solutions, i.e. the formation of a 100% owned subsidiary, the abovementioned licensing of activities to an independent entity, franchising, a complete divestiture of the activities in question or an acquisition of businesses in order to obtain exclusive control.

With Respect to the attainment of profits, profit oriented and research & development JVs can be separated<sup>234</sup>.

According to the institutional framework on which the co-operation is based, one can distinguish between contractual JVs, partnership JVs and incorporated JVs.

A contractual JV is founded by means of an agreement solely based on general contract law. According to U.K. law, it is deemed that the rules governing partnerships are not applicable to contractual JVs<sup>235</sup>. However, a civil law jurisdiction may provide for provisions stating that either a civil law partnership or a more sophisticated form of an association becomes available automatically if parties agree on pursuing common objects in a co-ordinated manner<sup>236</sup>. If one analyses the U.K. dogmatic, it has to be stressed that a contractual JV is not only extremely flexible as the parties can - in general - freely determine which covenants they agree on but also demanding because they have to

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<sup>233</sup> e.g. research & development, exploration of natural resources, exploitation of resources, production or manufacturing, marketing, property development, staff development, etc. .

<sup>234</sup> Allen & Overy, *Joint Ventures Key Legal Issues* (1997) 1.

<sup>235</sup> Allen & Overy, *Joint Ventures Key Legal Issues* (1997) 1 and 5.

<sup>236</sup> A civil law partnership is originally based on the "societas" in terms of Roman Law. According to German Law, it is governed by Sections 705 et seq., 145 et seq. BGB. It requires that the parties intend to achieve common objectives by means of co-ordinated actions.

create a detailed legal framework unless one would argue that an analogous application of statutes governing partnerships was feasible.

The second type, the partnership JV, is created on the basis of the U.K. Partnership Act of 1890. In general, a partnership has no legal personality distinct from the parties<sup>237</sup> and the parties will be liable to potential losses without any limitation<sup>238</sup>. The liability will be joint and several, i.e. third parties can select the partner whom they ask for a complete satisfaction of the claim. After having honoured the external obligation, the partner can request internal compensation by fellow partners according to the partnership agreement.

Compared to contractual JVs, this construction is also very flexible, tax transparent and does not involve any duties to publish commercial data. However, the process to introduce new partners or to leave the partnership is burdensome.

Finally, an incorporated JV is available if the partners decide on forming a corporation, i.e. a separate legal entity which is either organised as a private limited company or a public limited company<sup>239</sup>.

An incorporated solution is superior if significant businesses and resources shall be transferred to the JV on a long lasting basis because company law provides the most appropriate means to resolve disputes between either the shareholders (parents) or the parents and the management of the JV. Another advantage relates to the more transparent accounting, employment laws and the fact, that the parent undertakings are no longer legally bound to cover losses of the JV. However, the latter benefit will be partially void if potential

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<sup>237</sup> Allen & Overy, *Joint Ventures Key Legal Issues* (1997) 3.

<sup>238</sup> However, limited liability partnerships are common in the U.S.; q.v. Allen & Overy, *Joint Ventures Key Legal Issues* (1997) 4.

<sup>239</sup> Corporations are based on the "universitas" according to Roman Law.

creditors of the JV request additional guarantees issued by the parents. By the same token, the risk of adverse publicity may economically coerce the parents to honour the JV's obligations.

### **5.3.2 Assessment of Joint Control within Incorporated JVs**

With respect to incorporated JVs, control<sup>240</sup> may be established by statutory rights, contractual rights or other means<sup>241</sup>. Joint control is available if a deliberate long term co-ordination between at least two shareholders is a necessary pre-requisite for the successful attainment of the corporate objectives<sup>242</sup>. Hence, two shareholders must execute a decisive influence on the strategic decisions of the business which is deemed to be available if important decisions can be blocked<sup>243</sup>. Out of a great variety of options, the appropriate mechanisms have to be selected carefully for each single project in order to combine co-operation with efficient decision making so that the risk of stand-still in case of disputes is minimised: e.g. inter alia specific rights granted to minority shareholders regarding the unanimous consent, qualified majority votes or concerning rights to appoint members of the board of directors or the supervisory board, management rights, veto rights, preferential shares etc.. In order to evaluate whether a structure is indeed governed by joint control as opposed to exclusive control, it is important to stress that a cumulative assessment of the abovementioned factors is indispensable so that a single cri-

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<sup>240</sup> The concept of control is later governed by Art. 3 III MR1989.

<sup>241</sup> q.v. the later Commission Notice Regarding The Concentrative and Cooperative Operations under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations Between Undertakings, O.J. C 203, 14/08/1990 p 10 paragraph 10.

<sup>242</sup> q.v. the forthcoming Notices: Commission Notice Regarding the Concentrative and Cooperative Operations under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings O.J. C 203 14/08/1990 p 10, paragraph 11; Commission Notice on The Distinction between Concentrative and Cooperative Joint Ventures under Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. C 385, 31/12/1994, p 10, paragraph 10-11.

terion approach is disapproved. In pursuing this analysis, the Commission concentrates on the actual power distribution within the entity so that the formal, legal power allocation, as indicated by shareholdings is less relevant<sup>244</sup>.

These abovementioned factors of control can be either implemented in the articles of association or within a specific shareholders' agreement from the very beginning. Alternatively, joint control can be established later<sup>245</sup>.

### **5.3.3 Competition Law Analysis of JVs under Art. 82 and Art. 81 ECT**

The basic rationale of an assessment of JVs under Art. 81 and 82 ECT is that the parties must not use structural transactions as an elegant means of circumventing ordinary cartels that would be assessed under Art. 81 ECT beyond any doubt. Such an incentive is provided by the Continental Can doctrine, as Art. 82 ECT is not efficient to structural deals if no party initially holds a dominant position.

Therefore, the Commission invented several criteria which limited the application of structural merger control rules with respect to joint ventures and which maintained the scope of Art. 81 ECT.

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<sup>243</sup> Kling, E. and B. Adkins, *Joint Ventures in The European Community*, in *Joint Ventures in Europe* (J. Ellison and E. Kling, eds., London, U.K., 1997) p 7.

<sup>244</sup> Commission Decision 77/781/EEC of 23 November 1977 Relating to Proceedings under Art. 85 of The EEC Treaty, O.J. L 327 20/12/1977 p 26 (*GEC-Weir Sodium Circulators*); I. Van Bael and J.-F. Bellis, *Competition Law of the European Community* (3<sup>rd</sup> ed.) (Bicester, U.K., CCH Editions Limited, 1994) p 397. This view is upheld for the assessment of JVs under MR1989.

<sup>245</sup> Commission Notice Regarding the Concentrative and Cooperative Operations under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings O.J. C 203 14/08/1990 p 10, paragraph 11. For instance a company may decide to transform a 100% subsidiary into a new entity which will be controlled with a partner. Additionally, two minority shareholders of a company - holding together > 50% - may decide to deliberately act together in order to govern the company so that a JV is initiated.

A JV would be deemed to be a concentration and therefore beyond the scope of Art. 81 ECT only if it was a full function concentrative JV operating on a long lasting basis. Such a JV was only caught by Art. 82 ECT in combination with the Continental Can doctrine. All other JVs would be covered by both provisions, i.e. Art. 81 and 82 ECT.

#### **5.3.3.1 JVs Exclusively Assessed under Art. 82 ECT**

In order to be exclusively assessed under Art. 82 ECT, a JV must be inter alia regarded as a concentration within the meaning of the Continental Can doctrine.

At least one of the parent undertakings has to hold a dominant position on a relevant product market within a significant part of the common market which has to be abused by means of the creation of the JV that forms a concentration

##### *5.3.3.1.1 Long Lasting Basis*

With respect to JVs, a concentration was deemed to be available if the JV inter alia pursues long term economic objectives as only those can alter the competitive structure on the market for a significant period<sup>246</sup>. Therefore, short time JVs (mainly contractual ones) are out of the scope of Art. 82 ECT.

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<sup>246</sup> q.v. Kling, E. and B. Adkins, *Joint Ventures in The European Community*, in Joint Ventures in Europe (J. Ellison and E. Kling, eds., London, U.K., 1997) p 1.

#### 5.3.3.1.2 Full Function

Secondly, it is argued, that the JV - should it be regarded as a concentration - must be able to perform the objectives of an independent economic entity autonomously<sup>247</sup> after the initial start-up period has passed<sup>248</sup>. This idea of a full- function JV is persuasive, as a concentration of undertakings only takes place if the alleged concentrated entity operates as a true market player: Such a player has managerial and financial resources to act independently, i.e. it sells not only to parents but also to third parties, purchases not only from the parents but also from third parties, carries out research, produces and markets based on own responsibility. Again, the reason is that only an undertaking with the ability to improve its products is an entity with a long-lasting effect on the competition structure of the market. Contrarily, a research & development JV which only serves the interests of the parents without external deals is not a concentration.

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<sup>247</sup> Commission, 17<sup>th</sup> Report on Competition Policy (1987) *point 69 (Montedison and Hercules)*.

<sup>248</sup> Kling, E. and B. Adkins, *Joint Ventures in The European Community*, in Joint Ventures in Europe (J. Ellison and E. Kling, eds., London, U.K., 1997) p 8.

#### 5.3.3.1.3 Concentrative JV

Thirdly, a JV was only regarded as a concentration, if it fulfils the criteria of a "concentrative JV". A concentrative operation will be available if two negative criteria are met. First of all, the JV must not be used as a platform for co-operation between either both parents or a parent and the JV. This criterion would be deemed to be fulfilled if both undertakings receded not only from the relevant market on which the JV was operating but also from the related up- and downstream markets<sup>249</sup>. This restriction to the definition of a JV as a concentration is justifiable on the grounds that a JV, competing fiercely against the parents, does not form a concentration of commercial power on the markets in question as the market power is weakened and the choice for consumers actually widens. This result is backed by the prevailing concept of dominance in terms of Art. 82 ECT:

Market Power is solely attributed to the concrete influence on specific markets and not to general financial powers due to turnover thresholds or owing to the aggregated sums of small shares on diverse markets<sup>250</sup>.

The second negative condition for a concentrative JV depends on the fact that the parents must not use the JV as a platform for co-ordination of their behaviour on third markets on which they compete against each other without any

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<sup>249</sup> Commission, 6<sup>th</sup> Report on Competition Policy (1976) point 55. However, later it is carefully established that a concentration may be available even if not both parents recede: Commission Notice Regarding the Concentrative and Cooperative Operations under Council Regulation 4064/89/EEC of 21 December 1989 on the Control of Concentrations between Undertakings, O.J. C 203 14/08/1990 p 10 point 20-23. This approach is clarified, later so that it is sufficient if at least one parent undertaking recedes whereas the remaining entity must be an industrial leader. Later, the industrial leadership restriction was withdrawn. Then, both entities could remain active competitors on the market as long as no collusion between a party and the JV was available. In the latest stage, cooperative full function JVs are regarded as a concentration q.v. infra at 7.1.3 Inclusion of Classical Concentrative JVs and Coordinative Ones By Means of Art. 3 II MR1997 and Art. 2 IV MR1997.

<sup>250</sup> the so-called conglomerates.

reference to the markets affected by the JV<sup>251</sup>. If this negative sub-criterion for a concentrative JV is not met, the JV will be coordinative and will generate a so-called "group-effect" or "spill-over effect".

The negative criterion excluding JVs with a group-effect relates to the rationale that the amendment of the competitive structure on a market due to a concentration based on a JV is of secondary importance if the primary and disguised target of the procedure is a commercial co-operation on other markets with higher economic relevance. In such cases, the procedure should be assessed under Art. 81 ECT.

A JV fulfilling all the abovementioned pre-requisites was regarded as a concentration and was analysed under Art. 82 ECT and in general not under Art. 81 ECT if one ignores ancillary restraints.

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<sup>251</sup> Commission, 6<sup>th</sup> Report on Competition Policy (1976) point 55.

### 5.3.3.2 JVs Assessed under Art. 81 ECT

The remaining types of JVs should be organised as it follows:

- full-function concentrative JVs on a temporary basis
- full-function co-operative JVs on a lasting basis
- full-function co-operative JVs on a temporary basis
- non full function JVs on a lasting or temporary basis.

All these types of JVs were assessed under Art. 81 ECT. It is preferable to assess co-operative JVs under Art. 81 ECT as the co-ordination between their parents is the primary aspect of their creation so that they intend to circumvent a mere cartel by means of a structural operation.

### 5.3.4 The Chevron Case

The abovementioned principles are exemplified by the Chevron Case<sup>252</sup>. Chevron Oil Europe, Inc. and Steenkolen-Handelsvereniging NV formed a subsidiary called Calpam NV which fulfils the criteria of an incorporated JV with joint control pursuant to equal ownership<sup>253</sup>.

The concentrative nature of the project was backed by the following arguments: Calpam is designed as a long lasting entity being vested with the rights to distribute petroleum products from Chevron and SHV for 50 years<sup>254</sup>. Secondly, it has the resources necessary to operate independently on the markets in order to sell the products to consumers because the present distribution activities of the parents are transferred<sup>255</sup>. Hence, both mothers abstain from

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<sup>252</sup> Commission Decision 75/95/EEC of 20 December 1974 Relating to Proceedings under Art. 85 of the EEC Treaty O.J. L 38, 12/02/1975 p 14 (*IV/26.872 - SHV/Chevron*).

<sup>253</sup> Commission Decision 75/95/EEC of 20 December 1974 Relating to Proceedings under Art. 85 of the EEC Treaty O.J. L 38, 12/02/1975 p 14 (*IV/26.872 - SHV/Chevron*) paragraph I.

<sup>254</sup> Commission Decision 75/95/EEC of 20 December 1974 Relating to Proceedings under Art. 85 of the EEC Treaty O.J. L 38, 12/02/1975 p 14 (*IV/26.872 - SHV/Chevron*) paragraph I.

<sup>255</sup> e.g. plants, equipment; q.v. Commission Decision 75/95/EEC of 20 December 1974 Relating to Proceedings under Art. 85 of the EEC Treaty O.J. L 38, 12/02/1975 p 14 (*IV/26.872 - SHV/Chevron*) paragraph I.

competing with the JV or with each others on the relevant markets on a long lasting basis as - according to the general agreement - Calpam is solely responsible to market petroleum related products in the BeNeLux countries and Germany<sup>256</sup> and both parent companies ceased to compete on the relevant markets for a duration of 50 years without having obtained prior consent<sup>257</sup>.

Fourthly, a group effect is unlikely, as SHV has no significant petroleum interests apart from those vested to the JV and exploration rights in the North Sea<sup>258</sup>, which are irrelevant as no indication is given that SHV will sell them to Chevron or the JV under special conditions, whereas Chevron has no coal operations in the area of interest.

Consequently, the JV is regarded as concentrative so that Art. 81 ECT is not applicable<sup>259</sup>. Due to the lack of dominance, a violation of Art. 82 ECT was of no concern<sup>260</sup>.

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<sup>256</sup> Commission Decision 75/95/EEC of 20 December 1974 Relating to Proceedings under Art. 85 of the EEC Treaty O.J. L 38, 12/02/1975 p 14 (*IV/26.872 - SHV/Chevron*) paragraph II.

<sup>257</sup> Commission Decision 75/95/EEC of 20 December 1974 Relating to Proceedings under Art. 85 of the EEC Treaty O.J. L 38, 12/02/1975 p 14 (*IV/26.872 - SHV/Chevron*) paragraph I and II.

<sup>258</sup> Commission Decision 75/95/EEC of 20 December 1974 Relating to Proceedings under Art. 85 of the EEC Treaty O.J. L 38, 12/02/1975 p 14 (*IV/26.872 - SHV/Chevron*) paragraph II.

<sup>259</sup> Commission Decision 75/95/EEC of 20 December 1974 Relating to Proceedings under Art. 85 of the EEC Treaty O.J. L 38, 12/02/1975 p 14 (*IV/26.872 - SHV/Chevron*) Art. 1.

<sup>260</sup> Commission Decision 75/95/EEC of 20 December 1974 Relating to Proceedings under Art. 85 of the EEC Treaty O.J. L 38, 12/02/1975 p 14 (*IV/26.872 - SHV/Chevron*) paragraph II.

## **6. Control of Concentrations under MR1989**

After having discussed the application of Art. 81 and 82 ECT to concentrations of undertakings, it has to be analysed to what extent MR1989 improved the drawbacks that were revealed and to which extent Art. 81 and 82 ECT are still relevant. The latter question is extremely important with respect to minority shareholdings and JVs as long as these provide for an institutional platform for concerted practises between the (minority) acquirer and the target or the parent companies. Although a complete analysis of MR1989 is inadequate for this paper, it remains a valuable option to discuss at least the basic procedural and substantial provisions in order to generate a substantial basis for the assessment to which extent MR1989 overcame the drawbacks of a control of concentrations under Art. 81 and 82 ECT.

### **6.1 Legal Basis of MR1989**

According to the introduction of the Recitals and Recital 8 MR1989, the legal basis for MR1989 not only includes Art. 83 I, II lit. a-e ECT but also extends to Art. 308 ECT which nominates that the EC is granted additional competences by the Member States if the former are indispensable to implement expressive ones. Clearly, any control of concentrations beyond the scope of Art. 82 ECT pursuant to the still prevailing narrow interpretation exceeds the scope of a mere implementation provision which would be sufficiently backed by Art. 83 ECT. However, being both an exceptional norm and a potential threat to the efficacy of expressive competence definition under Art. 2 et seq. ECT, Art. 308 ECT and the MR1989 should be interpreted narrowly unless one can rely on the wording and rationale of the competences under Art. 3 lit g ECT<sup>261</sup>.

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<sup>261</sup> q.v. Recital 1 MR1989.

## **6.2 Recitals of MR1989**

An analysis of the Recitals will reveal that they are of major relevance for the basic understanding and sophisticated interpretation of MR1989.

First of all, the recitals highlight that the development of the internal market is the most important objective of MR1989<sup>262</sup> with a view to increase the competitiveness of European Industries and raise the standards of living<sup>263</sup>. These programmatic issues are backed by the theory of comparative advantage and the notion that larger markets provide for greater economies of scale. The former facilitate the amortisation of additional investments in order to sustain greater levels of specialisation and rationalisation so that goods can be marketed cheaper to the benefit of consumers.

More specific, corporate re-organisations are backed by MR1989 as long as they contribute to the internal market development<sup>264</sup>. Hence, a concentration is beneficial if it is a proportionate instrument to facilitate the creation of undertakings with sufficient resources to invest into the expansion of operations in order to compete on the common market<sup>265</sup> without causing non justifiable long-term reductions of competition<sup>266</sup>.

Recital 6 recognises the inadequacy of the prevailing application of Art. 81 and 82 ECT to concentrations<sup>267</sup>.

In order to limit the scope for jurisdictional disputes, the general rule is established that MR1989 is *lex specialis* to both Art. 81 and 82 ECT and domestic provisions as far as structural concentrations with cross-border effect are con-

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<sup>262</sup> q.v. Recitals 1 and 2 MR1989.

<sup>263</sup> Recital 4 MR1989.

<sup>264</sup> Recital 3 MR1989.

<sup>265</sup> Recital 4 MR1989.

<sup>266</sup> Recital 5 MR1989.

<sup>267</sup> The Deficiencies were discussed supra at 5.1.8.3 and 5.2.1-5.2.5.

cerned<sup>268</sup>. The latter effect will be assessed on the basis of two criteria: The first deals with the geographical scope of the relevant markets<sup>269</sup>. The second, the so-called "community dimension" criterion" asks whether revisable turnover thresholds are exceeded<sup>270</sup>. This is the case if the aggregated world-wide annual turnover of the undertakings concerned and the Community wide equivalent exceed specific figures unless each of the parties generate two thirds of their EC turnovers within one and the same Member State<sup>271</sup>.

As far as the liberalisation of public undertakings or sectors with entities vested with public service obligations is concerned, Recital 12 governs a non discriminatory approach as to the turnover calculation.

In accordance with the abovementioned general objective of MR1989 - as laid down in Recitals 1-4 - the recitals 13-15 introduce to the basic criterion for the proper evaluation of concentrations with a Community dimension: whether or not a concentration is compatible with the development of the common market. Compatibility depends on both the need either to establish or maintain effective competition and the obligation to consider the Community policies in Art. 2 ECT and Art. 158 et seq. ECT<sup>272</sup> which may well conflict with Art. 3 lit. g ECT.

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<sup>268</sup> Recital 7 and 9 MR1989.

<sup>269</sup> Recital 10 MR1989.

<sup>270</sup> Recitals 10, 11 MR1989; the review took place in 1997.

<sup>271</sup> Recital 11 MR1989; Art. 1 II MR1989/MR1997; Art. 1 III MR1997.

<sup>272</sup> social cohesion.

This complex procedure of interpretation is facilitated by Recital 14 which establishes the general rule, that the creation or enhancement of dominant positions on relevant markets as a result of a given concentration is normally inconsistent with MR1989 if it causes an impediment of effective competition in a substantial part of the common market.

Recital 15 offers further guidance, because concentrations involving undertakings with an aggregated market share below 25% are deemed not to impede effective competition in terms of Recital 14<sup>273</sup>.

The obligation of undertakings being part of a concentration to notify the former prior to its implementation is mentioned by Recital 17 which states that a concentration is generally suspended<sup>274</sup> and becomes effective only if a compatibility decision is issued whereby the predominant drawbacks of the previous merger control regime are addressed which have been discussed earlier<sup>275</sup>. Prior notification with suspensive effect avoids long lasting damage to competition before a final decision is made after due legal assessment.

Furthermore, the time frame for investigations is fixed by two means: Firstly, the period of suspension is limited<sup>276</sup> and secondly, the Commission will be legally bound to initiate formal proceedings analysing the compatibility within narrow time limits<sup>277</sup> in order to protect commercial interests.

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<sup>273</sup> However, the clause does not exclude an assessment under Art. 81 and 82 ECT pursuant to its wording.

<sup>274</sup> However, an application for a waiver is feasible if immediate implementation is necessary.

<sup>275</sup> q.v. supra at The Deficiencies were discussed supra at 5.1.8.3 and 5.2.1-5.2.5. For instance it is positive that Art. 4 REG17 is no longer relevant as only a post notification of practices or agreements in the sense of Art. 81 ECT was required whereas potential violations of Art. 82 were not subject to mandatory notification at all. Therefore, it was unsatisfactory that Art. 3 REG17 decisions were issued quite late so that the efficient restoration of the competitive structure was more difficult.

<sup>276</sup> Recital 17 MR1989.

<sup>277</sup> Recital 18 MR1989; q.v. Art. 10 MR1989.

The protection of the stakeholders<sup>278</sup> is enhanced further by means of Recital 19 which grants a public legal right to them to be heard by the Commission before a final decision is taken<sup>279</sup>. The effectiveness of this right demands that the Commission will have to consider the arguments put forward by the parties even if they are disapproved.

The following passages deal with the co-operation between the Commission and competent authorities of the Member States<sup>280</sup> exacerbated by the Commission's right to obtain necessary assistance by Member States<sup>281</sup>.

The 22<sup>nd</sup> Recital requests that MR1989 shall be enforced by means of decisions which impose fines<sup>282</sup> and periodic penalty payments<sup>283</sup> subject to review of the ECJ<sup>284</sup>.

The next recitals take the complex relation between a control of concentrations and a control of cartels into consideration. This subject has already been discussed regarding the old merger control law entirely based on Art. 82 and 81 ECT. Firstly, the basic rationale of merger control law is repeated, i.e. that the subject only deals with measures which are probable to cause a long lasting amendment of competition on a relevant market by means of structural amendments of undertakings concerned<sup>285</sup>. Thereby, short term or perpetually dependent JVs are excluded. This idea was discussed earlier<sup>286</sup>.

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<sup>278</sup> member of the management board, the supervisory board, employee's representatives of the undertakings concerned and third parties with legitimate interests.

<sup>279</sup> q.v. Art. 18 MR1989.

<sup>280</sup> Recital 20 and Art. 12 MR1989.

<sup>281</sup> Recital 21 and Art. 19 MR1989.

<sup>282</sup> Art. 14 MR1989.

<sup>283</sup> Art. 15 MR1989.

<sup>284</sup> This jurisdiction is based on the authorisation pursuant to Art. 229 ECT.

<sup>285</sup> Recital 23 MR1989.

<sup>286</sup> supra at 5.3.3 Competition Law Analysis of JVs under Art. 82 and 81 ECT and subsections.

Secondly, operations are precluded of which the primary objective is related to behavioural restrictions of the parties that remain independent entities<sup>287</sup>. This provision allows to remove both co-operative JVs and minority shareholdings if their primary target relates to form a platform for discussions regarding behavioural restrictions between the acquirer and the (partly dependent) formally independent target. These incidents will be solely covered by Art. 81 and 82 ECT in combination with REG17. The underlying rationale was elaborated earlier<sup>288</sup>. The following Recitals clarify the appropriate definition of a concentration. Firstly, the acquisition of a target undertaking by at least two parties agreeing on joint control is said to be within the scope of MR1989<sup>289</sup>. The reason is that this conduct represents a concentrative JV which was discussed above<sup>290</sup>. Secondly, it is underlined that MR1989 stays to be applicable if the parties of a future concentration accept certain restrictions regarding their future competitive behaviour provided that these obligations are not only directly related to but also indispensable for the effectuation of the concentration<sup>291</sup>. This means that said undertakings may be described as ancillary restraints which have minor economic relevance compared with the structural amendments. This concept tries assuring the one-stop shop principle so as to remove the need to initiate additional proceedings under REG17 in order to implement Art. 81 ECT.

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<sup>287</sup> Recital 23 MR1989.

<sup>288</sup> *supra* at 5.3.3 Competition Law Analysis of JVs under Art. 82 and 81 ECT and subsections.

<sup>289</sup> Recital 24 MR1989.

<sup>290</sup> *supra* at 6.3.2.1.10 Formation of Concentrative JVs.

<sup>291</sup> Recital 25 MR1989.

However, this provision hardly offers any guidance as to the interpretation how to distinguish duly between separable restraints which indeed require an additional REG17 procedure and said ancillary restraints.

The next group of Recitals governs the principle that MR1989 is exclusively implemented by the transnational Commission. Parallel to Art. 9 III REG17, the 26<sup>th</sup> recital grants the exclusive competence to apply MR1989 to the Commission. Accordingly, the next recital prevents the Member States from applying domestic laws to concentrations within the scope of MR1989<sup>292</sup> unless an expressive authorisation or a defined situation arises in which the Commission fails to implement MR1989 and a specific domestic detriment to competition is likely without other promising remedies under MR1989 being available. Furthermore, Member States are free to regulate concentrations if they pursue policies which are not addressed by the MR1989 in particular without being inconsistent with primary EC law in general<sup>293</sup>. Subsequently, Member States are empowered to request that the Commission initiates proceedings under MR1989 in a given case although it is without the scope of MR1989 if the case is likely to have a specific impact on competition within the applicant's territory<sup>294</sup>.

Finally, the Commission receives the mandate to monitor the implementation of concentrations with an effect on the common market in non-member countries and to obtain a mandate for negotiations<sup>295</sup> and it is quoted that employees' rights are not derogated<sup>296</sup>.

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<sup>292</sup> Recital 27 MR1989.

<sup>293</sup> q.v. Recital 28 MR1989; for instance, one can imagine concentrations close to national security particularly in the military supply industries.

<sup>294</sup> Recital 29 MR1989.

<sup>295</sup> Recital 30 MR1989.

<sup>296</sup> Recital 31 MR1989.

### **6.3 Scope for Merger Control pursuant to Art. 1; 3; 22 MR1989**

In accordance with Art. 1 I MR1989, the regulation is generally applicable if a concentration takes place in terms of Art. 3 I-V MR1989 providing that it has a Community dimension in the sense of Art. 1 II-III MR1989. However, the scope may be either extended by Art. 1 I in combination 22 III-V MR1989<sup>297</sup> or restricted by additional provisions, i.e. Art. 19; 9; 21 III MR1989 or Art. 81, 82, 89 ECT, which modify the one-stop shop principle as laid down in Art. 21 I and II MR1989.

#### **6.3.1 Concentration under MR1989**

A concentration will be available in case of three different structures pursuant to Art. 3 I-V MR1989:

##### **6.3.1.1 Merger**

Firstly, a merger will be available pursuant to Art.3 I lit. a MR1989 in combination with the 2<sup>nd</sup> Section of the Concentration Notice of 1994<sup>298</sup> if at least two partners engage in a legal or a factual merger. The former is established if two formerly independent undertakings in terms of competition law agree on being integrated completely<sup>299</sup>: A new entity may be founded and both partners

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<sup>297</sup> Art. 22 MR1989 is *lex specialis* pursuant to the wording of Art. 1 MR1989 "notwithstanding".

<sup>298</sup> Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 385, 31/12/1994, p 5.

<sup>299</sup> Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 385, 31/12/1994, p 5 at point 6 1st sentence.

cease to exist as different legal entities<sup>300</sup>. Contrarily, one party may retain its legal personality and simply incorporate the assets of the second one<sup>301</sup>.

A factual merger is available if the partners engage in commercial activities which de facto create a single economic entity on a relevant market despite both partners retain their legal identities<sup>302</sup>. Normally but not necessarily, mergers are distinct from acquisitions by the higher relevance of self determination of the partners involved<sup>303</sup>. The shareholders of the target will be compensated by cash offers or share exchange programs. According to the case law, a merger is a rare incident compared with the plethora of acquisitions<sup>304</sup>.

### 6.3.1.2 Acquisition

Secondly, an acquisition<sup>305</sup> will be available pursuant to Art. 3 I; III-V MR1989 if either an entrepreneur in terms of Art. 3 I lit a MR1989 or an undertaking in terms of Art. 3 I lit. b MR1989 acquires direct or indirect control over another entity in terms of Art. 3 II; III; IV lit. a-b MR1989<sup>306</sup>. In contrast to the former case law, a more sophisticated assessment of control by statutory, contractual or other means was undertaken on the basis of Art. 3 III MR1989. A person is

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<sup>300</sup> q.v. Commission Decision, Case IV/M18, 1990 (*Groupe AG/Amev*): Two holding companies decide to transfer relevant assets to two new daughter undertakings each depending on its mother. Then, each holding company obtains shares of the daughter undertaking belonging to the other holding. Thirdly, both subsidiaries' assets were pooled. However, it may be difficult to distinguish such a transaction from a JV. q.v. Commission Decision Case IV/M69, 1991 (*Kyowa/Saitama*).

<sup>301</sup> Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 385, 31/12/1994, p 5 at point 6 2nd sentence.

<sup>302</sup> Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 385, 31/12/1994, p 5 at point 7.

<sup>303</sup> The reluctance of important branches within one of the parties may well cause a breakdown of negotiations even if major shareholders initiated the merger talks: q.v. Negotiations between Deutsche Bank AG and Dresdner Bank AG in spring 2000 inaugurated by the influential shareholder Allianz AG. Opposition of the successful investment business Dresdner Kleinwort Benson resulted in a breakdown.

<sup>304</sup> I. Van Bael and J.-F. Bellis, Competition Law of the European Community (3<sup>rd</sup> ed.) (Bicester, U.K., CCH Editions Limited, 1994) p 391.

<sup>305</sup> Instead of acquisition the term hostile takeover may be used.

<sup>306</sup> q.v. R. Whish, Competition Law (3<sup>rd</sup> ed.) (London, U.K., Butterworths, 1993) p 664.

a public body, a private entity or an individual entrepreneur which/who controls an undertaking in terms of Art. 3 III MR1989 by statutory, contractual or other means, i.e. by having the ability to execute a decisive influence on strategic decisions<sup>307</sup>. The ability to influence the conduct is sufficient to generate control as no actual determination is required according to the wording of Art. 3 III MR1989<sup>308</sup> and clarified by two Commission notices<sup>309</sup>. The notion of decisive influence refers to strategic decisions. The relevant Commission Notice and the case law reveal, which mechanisms may provide for control: Legal Rights owing to shareholdings or assets<sup>310</sup>, contractual rights<sup>311</sup> or other means like a crucial dependence on long term supply agreements or network access<sup>312</sup>. Moreover, the wording "in particular by" within Art. 3 III MR1989 indicates that the list is of non exhaustive, explanatory character.

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<sup>307</sup> The link between decisive influence and strategic decisions is highlighted with regard to joint control in a notice: Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 385, 31/12/1994, p 5 point 22; The succeeding Notice expressively defines the notion of a person in terms of Art. 3 MR1997: Commission Notice on The Concept of Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 66, 02/03/1998, p 5, at paragraph 8.

<sup>308</sup> "confer the possibility of exercising decisive influence".

<sup>309</sup> Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 385, 31/12/1994, p 5 at point 9 paragraph 2; Commission Notice on The Concept of Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 66, 02/03/1998, p 5, at paragraph 9 2nd subparagraph.

<sup>310</sup> q.v. Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 385, 31/12/1994, p 5 at point 9 paragraph 1; e.g. Cases regarding asset deals inter alia include: Commission Decision, Case IV/M129, 1991 (*Digital/Philips*); Commission Decision, Case IV/M235, 1992 (*Elf Aquitaine/Thyssen/Minol*); Commission Decision, Case IV/M354, 1993 (*Cynamid/Shell*).

<sup>311</sup> e.g. Purchasing of securities, assets, contractual rights (e.g. right to appoint members of the board of directors, supervisory board, right to appoint and influence managers).

<sup>312</sup> Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 385, 31/12/1994, p 5 at point 9 paragraph 1.

Legal rights like those attributed to majority shareholdings of ordinary shares will confer legal control if they actually transfer the majority of voting rights and are not circumvented by specific contractual rights of other stakeholders<sup>313</sup>. Legal Rights attributed to minority shareholdings will cause control if they are accompanied by other statutory rights, contractual rights or facilitated by de facto elements<sup>314</sup>, e.g. owing to a high degree of diversification of investors<sup>315</sup> or based on long term supply agreements reaching predominant economic influence<sup>316</sup>.

The verb "to acquire" within Art. 3 I MR1989 indicates that a shift of external influence is a mandatory feature and that measures providing for internal restructuring can be generally ignored<sup>317</sup>.

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<sup>313</sup> Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 385, 31/12/1994, p 5 at point 9 paragraph 13-14; q.v. also with respect to MR1997: Commission Notice on The Concept of Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 66, 02/03/1998, p 5, at paragraph 13.

<sup>314</sup> Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 385, 31/12/1994, p 5 at point 14 paragraph 1 (legal rights), 2 (contractual rights) 3 (de facto control); q.v. also with respect to MR1997: Commission Notice on The Concept of Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 66, 02/03/1998, p 5, at point 14 sub-paragraph 1-3.

<sup>315</sup> e.g. Commission Decision, Case IV/M25, 1990 (*Arjomari-Prioux/Wiggins Teape Appleton plc*): A shareholding of 39% was sufficient because the remaining shares were held by more than 100,000 shareholders so that a co-ordinated opposition policy is highly unlikely.

<sup>316</sup> e.g. Commission Decision, Case IV/M258, 1992 (*CCIE/GTE*); Commission Decision, Case IV/M697, 1996 (*Lockheed Martin Corporation/Loral Corporation*); q.v. Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 385, 31/12/1994, p 5 at point 9 paragraph 1; Commission Notice on The Concept of Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 66, 02/03/1998, p 5, at point 9 paragraph 1.

<sup>317</sup> Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 385, 31/12/1994, p 5 at point 8 paragraph 3. However, specific rules apply to public undertakings: A concentration will arise if such undertakings are acquired by another one owned by the same public body if the undertakings operated on different markets, i.e. are not members of the "same economic unit" q.v. id point 8 paragraph 4.

### **6.3.1.3 Concentrative JVs under MR1989**

Finally, the creation of a full function JV of a concentrative nature is regarded as a concentration pursuant to Art. 3 II 2 MR1989 whereas Art. 3 II 1 MR1989 expresses that co-ordinative JVs were excluded from the scope of the regulation.

In order to avoid any repetitions, the analysis of JVs under MR1989 will focus on those aspects of JV interpretation in EC merger control law that differ from the approach taken with respect to Art. 81 and 82 ECT. The evolution of standards is accompanied by the first Commission Notice on concentrative and co-operative operations<sup>318</sup> which was amended in 1994<sup>319</sup> according to dynamic shifts of interpretation as to the recession of parents from the relevant market of the JV.

#### *6.3.1.3.1 Distinction between Operations Involving Inseparable or Separable Structural and Coordinative Aspects*

The introduction of the first Commission notice on JVs stresses that operations which cause long lasting amendments of the competitive situation by means of structural alterations of the undertakings concerned will be excluded from the scope of MR1989 if they are combined with any behavioural restrictions - that are not covered by the ancillary restrictions doctrine - between the parent undertakings unless the structural and behavioural aspects are sepa-

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<sup>318</sup> Commission Notice Regarding the Concentrative and Cooperative Operations under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 203 14/08/1990, p 10.

<sup>319</sup> Commission Notice on The Distinction between Concentrative and Cooperative Joint Ventures under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 385 31/12/1994 p 1. The need for future review was indicated in Commission Notice Regarding the Concentrative and Cooperative Operations under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 203 14/08/1990, p 10 point 4.

able<sup>320</sup>. Provided that this doctrine outlaws the application of MR1989, a case will have to be solved by means of Art. 82, 81 ECT in substantial and REG17 in procedural terms<sup>321</sup>.

If structural operations - e.g. inter alia the formation of a JV - are severable from a collusion, the structural aspects are assessed under the merger control proceedings<sup>322</sup>. The potential collusion of the parents will be addressed within the same proceedings if it is covered by the ancillary restrictions doctrine<sup>323</sup>. Contrarily, a non-ancillary, severable collusion will be assessed in a separate administrative procedure under Art. 81 ECT in combination with REG17<sup>324</sup>.

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<sup>320</sup> Commission Notice Regarding the Concentrative and Cooperative Operations under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 203 14/08/1990, p10 at point 1 paragraph 2, point 3.

<sup>321</sup> Commission Notice Regarding the Concentrative and Cooperative Operations under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 203 14/08/1990, p 10 at paragraph 1 2nd sub-paragraph. The relevant principles were discussed supra at 5.3.3 Competition Law Analysis of JVs under Art. 82 and 81 ECT and sub-sections.

<sup>322</sup> Commission Notice Regarding the Concentrative and Cooperative Operations under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 203 14/08/1990, p 10 at paragraph 1, 3rd sub-paragraph.

<sup>323</sup> Commission Notice Regarding the Concentrative and Cooperative Operations under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 203 14/08/1990, p 10 at paragraph 1, arg e contrario to 3rd sub-paragraph.

<sup>324</sup> Commission Notice Regarding the Concentrative and Cooperative Operations under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 203 14/08/1990, p 10 at paragraph 1, 3rd sub-paragraph.

#### 6.3.1.3.2 Joint Control

In contrast to the former case law, a more sophisticated assessment of joint control by statutory, contractual or other means was undertaken on the basis of Art. 3 III MR1989 and the relevant Commission Notice<sup>325</sup>. Similar to sole control, the mechanism providing for joint control may be based on legal or contractual rights or other factual means<sup>326</sup>. The joint element of control is available if the co-operation of at least two stakeholders is necessary in order to execute a decisive influence on the venture and if this co-operation is not merely accidental but a part of a deliberate long term common commercial policy<sup>327</sup>.

The abstract concept of joint control was further developed by the Commission in its notice and several cases: For instance, the Commission specified that a reciprocal blocking vote was generally self sufficient to generate joint control<sup>328</sup>. Provided that an absolute majority-minority structure is available - for instance a 60:40 ratio of ordinary shares or voting rights -, a shareholders'

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<sup>325</sup> q.v. Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentration between Undertakings, O.J. C 385, 31/12/1994, p 5 points 18-38. Additionally, the term was discussed above: 6.3.1.2 Acquisition; q.v. also for MR1997 Commission Notice on The Concept of Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 66, 02/03/1998, p 5.

<sup>326</sup> Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentration between Undertakings, O.J. C 385, 31/12/1994, p 5 point 18; q.v. also for MR1997 Commission Notice on The Concept of Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 66, 02/03/1998, p 5 point 18.

<sup>327</sup> Additionally, Joint Control is always accompanied by the possibility of deadlock situations in case of differences between the partners: q.v. Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentration between Undertakings, O.J. C 385, 31/12/1994, p 5 points 18-19; q.v. also for MR1997 Commission Notice on The Concept of Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 66, 02/03/1998, p 5 point 19.

<sup>328</sup> i.e. 50:50 relation of shareholders; q.v. Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentration between Undertakings, O.J. C 385, 31/12/1994, p 5 point 20; q.v. also for MR1997 Commission Notice on The Concept of Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 66, 02/03/1998, p 5 point 20.

agreement granting specific contractual rights to the minority shareholders are suitable vehicles to establish joint control<sup>329</sup>. This idea is exemplified by the Gambogi/Cogei case in which a structure with a share ratio of 51:49 and without a shareholders' agreement was not regarded as a JV<sup>330</sup>. Moreover, the *Dräger/IBM/HMP* Case illustrates that a mandatory unanimity clause in a 30:30:40 ownership structure attributes to joint control<sup>331</sup>. Comparable to sole control, the quoted rights must refer to strategic decision-making<sup>332</sup>. Contrarily, exclusive powers of decision-making, which only affect the day-to-day running, are negligible<sup>333</sup>.

A similar rationale applies to relative majority shareholdings that are not accompanied by specific contractual rights countering the ownership structure: sole control if other shareholdings are diversified and joint control if at least another minority shareholder deliberately co-operates with the largest share-

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<sup>329</sup> e.g. veto rights, board representation, specific bodies with specific quora for strategic decisionmaking and the former powers must be distinguished from the statutory rights of each minority shareholder against certain decisions of the majority shareholders: Commission Notice Regarding the Concentrative and Cooperative Operations under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 203 14/08/1990, p 10 points 21-23; q.v. also for MR1997: Commission Notice on The Concept of Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 66, 02/03/1998, p 5 points 21-23.

<sup>330</sup> Commission Decision, Case IV/M167, 1991 (*Gambogi/Cogei*).

<sup>331</sup> Commission Decision, Case IV/M101, 1991 (*Dräger/IBM/HMP*): mandatory unanimity decision-making.

<sup>332</sup> e.g. decisions concerning the budget, business plan, major investments, appointment of senior staff: Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentration between Undertakings, O.J. C 385, 31/12/1994, p 5 points 22-29; q.v. also for MR1997: Commission Notice on The Concept of Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 66, 02/03/1998, p 5 point 22-29.

<sup>333</sup> q.v. Commission Decision, Case IV/M160, 1992 (*Elf Atochem/Rohm & Haas*); Commission Notice Regarding the Concentrative and Cooperative Operations under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 203 14/08/1990, p 10 point 23; q.v. also for MR1997: Commission Notice on The Concept of Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 66, 02/03/1998, p 5 point 23

holder so as to achieve common objectives in the long term so that a coordinated execution of ordinary voting rights can establish joint control<sup>334</sup>.

However, temporary and shifting alliances between varying minority shareholders will neither constitute a concentration nor a JV<sup>335</sup>. Finally, the parties may set up a specific holding company - in itself an incorporated JV - that will determine how the assets in the target venture are managed based on a common policy developed by the holding company<sup>336</sup>.

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<sup>334</sup> For example an equity structure of 30:30:X<sub>1 to n</sub>; q.v. Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentration between Undertakings, O.J. C 385, 31/12/1994, p 5 point 30; q.v. also for MR1997: Commission Notice on The Concept of Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 66, 02/03/1998, p 5 point 30.

<sup>335</sup> q.v. Commission Decision, Case IV/M207, 1992 (*Eureko*): *Eureko* is a daughter undertaking of several insurance companies with comparable minority shareholdings. Generally, no qualified majority decisions were necessary and no veto rights were granted; q.v. Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentration between Undertakings, O.J. C 385, 31/12/1994, p 5 point 14; q.v. also for MR1997: Commission Notice on The Concept of Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 66, 02/03/1998, p 5 point 14.

<sup>336</sup> Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentration between Undertakings, O.J. C 385, 31/12/1994, p 5 point 31; q.v. also for MR1997: Commission Notice on The Concept of Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 66, 02/03/1998, p 5 point 31.

### 6.3.1.3.3 Criteria for Full Function JVs

Hence, the principles establishing a JV performing objectives of an independent economic unit, have been defined more precisely compared to the former case law. Thereby, three decisive criteria were established for a full function JV:

- sufficient resources regarding production<sup>337</sup>, marketing<sup>338</sup>, distribution<sup>339</sup>, finance<sup>340</sup>, management<sup>341</sup>, research<sup>342</sup>, employees<sup>343</sup>, capital<sup>344</sup>, intellectual property<sup>345</sup>, licenses and know-how
- independent access to markets<sup>346</sup>
- independent strategic decision-making<sup>347</sup>

Sufficient resources are available if the necessary managerial, personal and substantial resources, i.e. tangible assets and intangible assets like intellectual property rights, licenses and know-how, are dedicated to the JV. These criterion is justified as an entity without the infrastructure can not properly develop and implement strategies on its own. Additionally, only a permanent

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<sup>337</sup> Commission Decision, Case IV/M72, 1991 (*Sanofi/Sterling Drug*); Commission Decision, Case IV/M160, 1992 (*Elf Atochem/Rohm & Haas*); Commission Decision, Case IV/M198, 1992 (*Péchiney/Viag*): However, some facilities can remain under the control of the parent as some facilities may be used for diverse purposes.

<sup>338</sup> Commission Decision, Case IV/M180, 1991 (*Steetley/Tarmac*).

<sup>339</sup> Commission Decision, Case IV/M72, 1991 (*Sanofi/Sterling Drug*); Commission Decision, Case IV/M160, 1992 (*Elf Atochem/Rohm & Haas*); Commission Decision, Case IV/M198, 1992 (*Péchiney/Viag*).

<sup>340</sup> Commission Decision, Case IV/M102, 1991 (*TNT/Canada Post/DBP Postdienst/La Poste/PTT Post/Sweden Post*).

<sup>341</sup> Commission Decision, Case IV/M180, 1991 (*Steetley/Tarmac*).

<sup>342</sup> Commission Decision, Case IV/M72, 1991 (*Sanofi/Sterling Drug*); Commission Decision, Case IV/M160, 1992 (*Elf Atochem/Rohm & Haas*); Commission Decision, Case IV/M198, 1992 (*Péchiney/Viag*): However, some facilities can remain under the control of the parent as some facilities may be used for diverse purposes.

<sup>343</sup> Commission Decision, Case IV/M101, 1991 (*Dräger/IBM/HMP*); Commission Decision, Case IV/M72, 1991 (*Sanofi/Sterling Drug*).

<sup>344</sup> Commission Decision, Case IV/M292, 1993 (*Ericsson/Hewlett-Packard*).

<sup>345</sup> Commission Decision, Case IV/M72, 1991 (*Sanofi/Sterling Drug*); Commission Decision, Case IV/M160, 1992 (*Elf Atochem/Rohm & Haas*).

<sup>346</sup> Commission Decision, Case IV/M180, 1991 (*Steetley/Tarmac*).

<sup>347</sup> Commission Decision, Case IV/M180, 1991 (*Steetley/Tarmac*).

transfer of assets and know how provides for a long lasting amendment of the competitive situation as the threat of a re-entry of a parent is reduced.

The second aspect demands that a market access independent from the parents is a pre-requisite of a JV which is considered as a concentration of undertakings. It may be backed by Recital 23 MR1989 as long lasting amendments of the competitive situation are based on structures seeking to exploit comparative advantages by means of purchasing resources from and offering products to entities different from the parents.

The third indicator of independence relates to the fact if a JV has a minimum level of competences for strategic decision-making. It indicates the antagonism between joint control and strategic self determination of the JV. In short, the parents must limit themselves to purely financial considerations of institutional investors. If they sought strategic control over the JV business, a mere coordinative operation would be available.

#### *6.3.1.3.4 Concentrative Operations: Recession of Parents and Group Effect*

With respect to the still pending distinction between concentrations and a co-ordination, the next paragraph focuses on the question whether the interpretation under MR1989 amended the former case law. Indeed, the new cases indicate an approach quite different from the old doctrines as the criterion of the risk of co-ordination between the parties was interpreted more and more broadly so as to expand the scope of MR1989.

Analogous to the old case law, a concentration would be available, if both parents withdrew from the relevant market, neighbouring markets and related

up- and downstream sectors<sup>348</sup> backed by the fact that the probability of re-entry is extremely limited pursuant to a long lasting transfer of know-how and commercial aspects like economies of scale<sup>349</sup>. The same finding applies to JVs entering new markets.

In contrast to the old case law, a per se rule - which will deny a concentrative JV if both parents remain competitors of the JV - is no longer applicable. This finding is backed by the in depth analysis in relevant cases<sup>350</sup>. However, MR1989 would rarely apply if both parents remain in the relevant or neighbouring markets. The risk of co-ordination between each parent and the JV or between the parents was deemed to be predominant<sup>351</sup>. Additionally, the commercial value of co-ordination will be so outstanding that the structural aspects of the JV formation are generally overruled.

Thereby, the Commission considered a JV engaging in recycled glass as co-ordinative because of the maintained activities of the parents in upstream markets and the highly probable re-entry of the parents to the relevant market combined with insignificant research capability of the JV<sup>352</sup>. Exceptionally, MR1989 will apply if the parents which are still active in a relevant sector exclusively sell to the JV<sup>353</sup>.

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<sup>348</sup> Commission Notice Regarding the Concentrative and Cooperative Operations under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 203 14/08/1990, p 10 paragraph 20; q.v. Commission Decision, Case IV/M72, 1991 (*Sanofi/Sterling Drug*).

<sup>349</sup> Commission Decision, Case IV/M101, 1991 (*Dräger/IBM/HMP*).

<sup>350</sup> q.v. Commission Decision, Case IV/M58, 1991 (*Baxter/Nestlé/Salvia*).

<sup>351</sup> This is especially true, if the JV only acquires parts of the operations of the mothers that are used to penetrate the relevant market: q.v. Commission Notice Regarding the Concentrative and Cooperative Operations under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 203 14/08/1990, p 10 point 27

<sup>352</sup> Commission Decision, Case IV/M168, 1991 (*Flachglas/Vegla*).

<sup>353</sup> Commission Decision, Case IV/M206, 1992 (*Rhône-Poulenc/SNIA*).

Backed on the clause permitting the development of new doctrines in the first Commission notice on joint ventures<sup>354</sup>, the Commission derogates from the notice by means of the theory of industrial leadership. According to this concept, it JV is regarded as a concentrative operation if only one parent recedes from the relevant market on condition that the remaining partner holds the industrial leadership on the market in question<sup>355</sup>. The logic behind this finding is that competition is already dormant if a leading entity has important competitive advantages so that only one brand is successful at the present time.

Subsequently, such an undertaking remain active on the relevant market without factual detriment to competition. The second argument backing a concentration relates to the fact that the industrial leader's partner withdraws so as to avoid any scope for additional co-operation between the parents. Such a co-operation would be far more significant in economic terms than a co-ordination between the leading parent and the JV<sup>356</sup>.

Sometimes, a third argument is used to negate the effect of remaining competition between the industrial leader and the JV. A JV would be regarded as a dependent entity which would not qualify as a self determined entity which could enter into concerted practices so as to challenge a concentration in comparison with Art. 3 II MR1989. However, this argument is inconsistent with the basic definition of a full function JV which must be per se an independent

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<sup>354</sup> Commission Notice Regarding the Concentrative and Cooperative Operations under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 203 14/08/1990, p 10 paragraph 4.

<sup>355</sup> q.v. Commission Decision, Case IV/M86, 1991 (*Thomson/Pilkington*); Commission Decision, Case IV/M157, 1992 (*Air France/Sabena*).

<sup>356</sup> q.v. V. Emmerich, *Kartellrecht* (8<sup>th</sup> ed.) (München, Germany, C.H.Beck, 1999) p 497.

entity<sup>357</sup>. Another case was accepted as the remaining parent was not competing actively on the relevant market<sup>358</sup>.

Later, even the restrictive criterion that requires the remaining partner to be an industrial leader was withdrawn: An operation was regarded as a concentration even if the remaining parent was not considered as an industrial leader<sup>359</sup>.

In 1994, the new doctrine is made more transparent by the revised standards included in the new Commission notice on JVs in 1994: In brief, concentrative operations will be possible either for sure, if both parents are not active or recede completely, or at least generally probable, if a parent remains active or both parents remain active with minor activities<sup>360</sup>.

Moreover, a JV should not be exposed to the risk that a parent re-enters markets, from which it withdrew, at least in the near future<sup>361</sup>.

Finally, one has to bear in mind that the specific economic implications of the potential concentrative JV have to be considered in each case as the above-mentioned aspects lead to a mandatory, complex multi-criteria assessment. As a result of such a weighted analysis, some concentrative aspects could overrule coordinative ones and vice versa.

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<sup>357</sup> I. Van Bael and J.-F. Bellis, Competition Law of the European Community (3<sup>rd</sup> ed.) (Bicester, U.K., CCH Editions Limited, 1994) p 411.

<sup>358</sup> Commission Decision, Case IV/M86, 1991 (*Thomson/Pilkington*).

<sup>359</sup> q.v. A. Burnside, *Dance of The Veils? Reform of The EC Merger Regulation*, ECLR 373 (1996).

<sup>360</sup> Commission Notice on The Distinction between Concentrative and Cooperative Joint Ventures under Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. C 385, 31/12/1994, p 10, paragraph 18 sub-paragraph 1-2. Contrarily the 3<sup>rd</sup> sub-paragraph contains a strong indication of co-ordination, i.e. both parents maintain considerable businesses compared with the JV. The following sub-paragraphs contain medium presumptions for co-ordination.

<sup>361</sup> e.g. indefinite duration Commission Decision, Case IV/M24, 1990 (*Mitsubishi/Ucar*), Commission Decision. The more rapid the technological development the shorter this period can be without putting the concentrative nature at risk.

#### **6.3.1.4 Credit Institutions, Insurance Undertakings, Liquidators and Holdings under MR1989**

As credit, financial or insurance undertakings often act as institutional investors or have a decisive influence on other undertakings while holding assets on commission although there is no the intention to affect the target's strategic behaviour, Art. 3 V MR1989 creates specific rules so as to measure control executed by these institutions<sup>362</sup>. A comparable rationale is true for liquidators<sup>363</sup> and financial holding companies<sup>364</sup>.

#### **6.3.2 Community Dimension under MR1989**

In order to establish the exclusive jurisdiction of the Commission under Art. 21 I-II MR1989, the concentration needs to have a community dimension. The latter is available if four criteria are met pursuant to Art. 1 II; 5 II MR1989: the global turnover must exceed certain thresholds, likewise the community wide turnover, the undertakings must not fall within the two-thirds rule of Art. 1 II. Finally, no derogation from the one-stop shop principle must be applicable, i.e. the unitary jurisdiction of the Commission must not be challenged by either Art. 19; 9; 21 III; 22 III-V MR1989 or the residual application of Art. 81 and 82 ECT in combination with Art. 85 ECT.

##### **6.3.2.1 Aggregated Global Turnover**

First of all, it was necessary that the aggregated global turnover of the undertakings involved exceeded Euro 5,000 Million pursuant to Art. 1 II lit. a

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<sup>362</sup> The exemption is available if said institutions obtain securities as a part of normal activities for others' own accounts on a temporary basis with the intention of reselling in the near future. No voting rights must be used which could determine the competitive behaviour of the target, i.e. a vote is permissible if it facilitates the divestiture within one year of the acquisition. However, the Commission may grant a longer period by means of a decision under Art. 3 V lit a MR1989.

<sup>363</sup> Art. 3 V lit b MR1989.

<sup>364</sup> Art. 3 V lit c MR1989 in combination with Art. 5 III Fourth Council Directive 78/660/EEC of 25 July 1978 on The Annual Accounts of Certain Types of Companies O.J. L 222, 14/08/1978 p 11, as lastly amended by Directive 84/569/EEC O.J. L 314, 04/12/1984 p 28: Its assets are

MR1989. Art. 5 MR1989 clarifies how these turnover figures should be calculated.

#### *6.3.2.1.1 Calculation of Turnover from Ordinary Business Activities*

The basic principle states that the turnover figures resulting from ordinary business activities of the undertakings concerned<sup>365</sup> in the previous financial year shall be added pursuant to Art. 5 I 1 and 5 IV lit a MR1989<sup>366</sup>.

#### *6.3.2.1.1 Intra-Group Transactions Art. 5 I 2 MR1989*

The reported principle is primarily modified by Art. 5 I 2 MR1989 so that turnovers resulting from transactions with undertakings mentioned in Art. 5 IV MR1989 - inter alia the undertakings concerned, daughter, (grand)parent and sister undertakings - are excluded<sup>367</sup>.

#### *6.3.2.1.3 Acquisition of Parts Art. 5 II MR1989*

The second modification of the principle is a result of the *lex specialis* provision Art. 5 II MR1989. It orders that - in case of an acquisition of parts of a target undertaking - only the turnovers resulting from the sold parts have to be included unless the acquirer implements a series of partial acquisitions within two years<sup>368</sup>.

#### *6.3.2.1.4 Turnovers of Affiliated, Parent and Sister Undertakings*

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exempted if voting rights are executed solely in order to elect board members and maintain the value of investments so as not to interfere with substantial business.

<sup>365</sup> Sometimes the definition of undertakings concerned is clouded with regard to subsidiaries acquiring other undertakings. Partly, the (im)mediate parent is considered as a relevant undertaking in terms of turnover calculation: q.v. Commission Decision, Case IV/M235, 1992 (*Elf Aquitaine-Thyssen/Minol*) Partly, the subsidiary itself is a relevant undertaking in terms of turnover calculation: q.v. Commission Decision, Case IV/M99, 1991 (*Nissan/Richard Nissan*).

<sup>366</sup> Rebates, VAT and turnover related taxes have to be deducted.

<sup>367</sup> Thereby, the first third party sale of products or services is relevant. It can be either a direct sale to a consumer, via a distributor or via an agent. As subsidiaries of the undertakings concerned belong to the parties sales to them are excluded from the relevant turnover; q.v. M. Broberg, *The Geographic Allocation of Turnover under The Merger Regulation*, ECLR 104 (1997).

<sup>368</sup> Art. 5 II 2nd sentence MR1989. Such an approach is called "salami tactics"; q.v. C. Jones, *The Scope of Application of the Merger Regulation*, in International Mergers and Joint Ventures (B. Hawk, ed., Fordham University School of Law, New York, U.S., 1990) p 389.

Even more specific, Art. 5 IV lit. b-e MR1989 regulates that the relevant turnover figures also include the turnovers of those undertakings which either control the undertakings concerned or which are currently controlled by the acquirer or the target, i.e.

- (im)mediate daughter undertakings in terms of Art. 5 IV lit b MR1989,
- (im)mediate parent undertakings Art. 5 IV lit. c MR1989<sup>369</sup>,
- sister undertakings Art. 5 lit. d MR1989,
- jointly controlled daughters/parents with joint control regarding the undertakings concerned or sisters Art. 5 lit. e MR1989<sup>370</sup>.

#### *6.3.2.1.5 Turnovers of Jointly controlled Undertakings*

Fourthly, Art. 5 V 1<sup>st</sup> sentence MR1989 excludes turnover figures of undertakings in terms of Art. 5 IV lit. e MR1989 arising from intra-group transactions whereas turnovers resulting from third party sales are divided<sup>371</sup>.

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<sup>369</sup> i.e. "parent undertakings", "grandparent undertakings" etc.. The Commission is willing to discuss the accurate definition of undertakings relevant to the turnover calculation with the parties in the pre-notification stage.

<sup>370</sup> It is questioned whether the notion of control in Art. 5 IV lit a-e MR1989 is identical with the term control in Art. 3 I lit b and 3 II MR1989 or not so that decisive influence may be required. The Commission uses both approaches so as to expand its jurisdiction q.v. S. O'Keeffe, *Merger Regulation Thresholds: An Analysis of the Community-Dimension Thresholds in Regulation 4064/89*, ECLR 22 and 24 (1994).

<sup>371</sup> Art. 5 V 2<sup>nd</sup> Sentence MR1989.

### 6.3.2.1.6 Financial Institutions

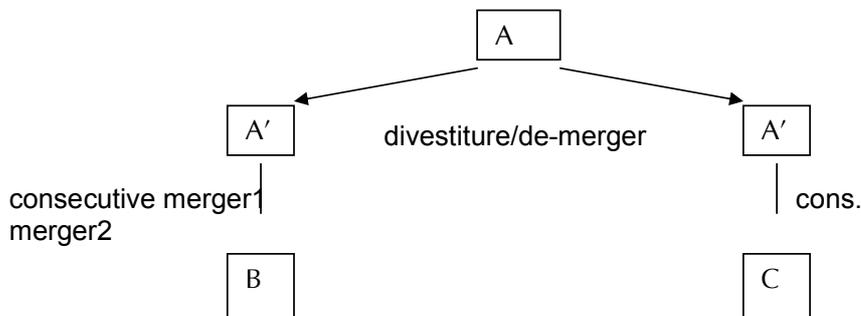
Subsequently, specific rules applied and still apply to credit and insurance undertakings<sup>372</sup>.

### 6.3.2.1.7 De-Mergers

Furthermore, the basic principle of turnover calculation<sup>373</sup> has to be specified for situations which are not addressed in the wording of MR1989 because the rationale of some cases requires specific considerations so as to establish the undertakings concerned and the appropriate turnover figures.

In case of a de-merger, one should generally regard the consecutive mergers A'-B and A"-C as separate transactions unless a third party determines how the acquirers should implement the acquisition<sup>374</sup>:

**Table 1: Divestiture/De-Merger**



<sup>372</sup> q.v. Art. 5 III MR1989

<sup>373</sup> q.v. supra at 6.3.2.1.1 *Calculation of Turnover from Ordinary Business Activities*.

<sup>374</sup> Commission Decision, Case No. IV/M197, 1991 (*Solvay-Laporte/Interox*); Commission Decision, Case No. IV/M258, 1992 (*CCIE/GTE*).

#### 6.3.2.1.8 Joint Bids

With respect to joint bids, it is superior to argue that two separate acquisitions are available if A and B bid jointly for C provided that the acquirers agree to separate the assets immediately and do not to intend to implement a common policy on the relevant markets<sup>375</sup>.

#### 6.3.2.1.9 Asset Swaps

A comparable rationale is true for asset swaps - i.e. company A sells its A' operations to B which in turn sells its B' operations to A - provided that A and B will pursue independent policies as a result of the transaction<sup>376</sup>.

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<sup>375</sup> I. Van Bael and J.-F. Bellis, Competition Law of the European Community (3<sup>rd</sup> ed.) (Bicester, U.K., CCH Editions Limited, 1994) p 379.

<sup>376</sup> I. Van Bael and J.-F. Bellis, Competition Law of the European Community (3<sup>rd</sup> ed.) (Bicester, U.K., CCH Editions Limited, 1994) p 379.

#### 6.3.2.1.10 Formation of Concentrative JVs

Relating to the formation of a concentrative JV, not only the jointly controlling parents<sup>377</sup> but also the assets of the new JV itself will attribute to the turnover calculation which is especially relevant if two parties acquire joint control in an existing undertaking that was under sole control<sup>378</sup>. Hence, it is not relevant whether the JV is formed by launching a new incorporated structure or - for instance - by joint acquisition of a target previously exclusively controlled by a minority shareholder<sup>379</sup>. However, turnovers of parents with minor stakes that do not qualify for joint control will be ignored pursuant to the above definition.

#### 6.3.2.1.11 Acquisition of Unilateral Control by a JV Partner

Contrarily, if one of the JV partners acquires sole control of the venture, a concentration between the partner and the JV with an addition of the turnovers will take place<sup>380</sup>. At first sight, this may not be logic as the partner used to control parts of the JV. However, sole control is of distinct quality so as to justify a simple addition of turnovers.

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<sup>377</sup> Their number of joint controlling partners is not relevant: q.v. Commission Decision, Case IV/M101, 1991 (*Dräger/IBM/HMP*); Commission Decision, Case IV/M293, 1993 (*Philips/Thompson/Sagem*); Commission Decision, Case IV/M176 (*Sunrise*), 1991; Commission Decision, Case IV/M102, 1991 (*TNT/Canada Post/DBP Postdienst/La Poste/PTT Post/Sweden Post*); Commission Decision, Case IV/M116/1991 (*Kelt/American Express*): 8 partners.

<sup>378</sup> q.v. for the principles of turnover calculation in case of the formation of JVs: Commission Decision, Case IV/M229, 1992 (*Thomas Cook/LTU/West LB*); Commission Decision, Case IV/M277, 1992 (*Del Monte/Royal Foods/Anglo-American*); Commission Decision, Case IV/M295, 1993 (*SITA-RPC/SCORI*).

<sup>379</sup> e.g. formation of a new JV, q.v. Commission Decision, Case IV/M12, 1991 (*Varta/Bosch*) paragraph 26; Commission Decision, Case IV/M72, 1991 (*Sanofi/Sterling Drug*); Commission Decision, Case IV/M133, 1991 (*Ericsson/Kolbe*); Commission Decision, Case IV/M236, 1992 (*Ericsson/Ascom*); sole controlling entity divests a part so as to create two joint interests, q.v. Commission Decision, Case IV/M24, 1990 (*Mitsubishi/Ucar*), Commission Decision, Case IV/M88, 1991 (*Elf/Enterprise*); exchange of partners in an existing JV, q.v. Commission Decision, Case IV/M82, 1991 (*ASKO/Jacobs/ADIA*); minor interest becomes new controlling interest, q.v. Commission Decision, Case IV/M63, 1991 (*Elf/Ertol*), Commission Decision, Case IV/M98, 1998 (*Elf/BC/Cepsa*).

<sup>380</sup> Commission Decision, Case IV/M23, 1990 (*ICI/Tioxide*).

#### 6.3.2.1.12 Intermediary Companies

The most problematic category refers to intermediary companies controlled by large parents. Intermediary undertakings could be used so as to evade the turnover thresholds of MR1989. The wording of MR1989 does not cover this category. From the teleological point of view, it is a strict necessity to add the turnover figures of parent companies to any concentration arranged by subsidiaries unless a parent has a mere institutional investor's interest (financial portfolio acquisition) rather than a strategic or industrial interest in the business sector. These considerations can be based on Recital 24 MR1989. Therefore, the Commission will calculate the turnover including the turnover of the parents of the intermediary undertaking provided that the intermediary has been specifically designed for the acquisition, has no significant operations and assets on its own<sup>381</sup>. The application of this important concept is exemplified by the subsequent table. The cases mentioned will be scrutinised later on:

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<sup>381</sup> Commission Decision, Case IV/M82, 1991 (*ASKO/Jacobs/ADIA*); Commission Decision, Case IV/M176 (*Sunrise*), 1991; Case IV/M102, 1991 (*TNT/Canada Post/DBP Postdienst/La Poste/PTT Post/Sweden Post*); Commission Decision, Case IV/M116/1991 (*Kelt/American Express*); Commission Decision, Case IV/M141/1991 (*UAP/Transatlantic/Sun/Life*); Commission Decision, Case IV/M277, 1992 (*Del Monte/Royal Foods/Anglo-American*); Commission Decision, Case IV/M216/1993 (*CEA Industrie/France Telecom/Finmeccania/SGS Thomson*); Commission Decision, Case IV/M218, 1992 (*Eucom/Digital*).

**Table 2: Application of the Concept of Intermediary Companies to Concentrations in The Energy Sector**

<b>EdF/London Electricity</b>	<ul style="list-style-type: none"> <li>▪ EdF group including ELEX (UK) Ltd</li> <li>▪ Energy group including London Electricity Holdings No.1</li> </ul>
<b>Gaz de France/BEWAG/GASAG:</b>	<ul style="list-style-type: none"> <li>▪ Gaz de France group including Gaz de France Deutschland GmbH</li> </ul>
<b>EdF/South Western</b>	<ul style="list-style-type: none"> <li>▪ EdF Group including London Electricity plc</li> <li>▪ Southern Energy, Inc. including South Western Electricity plc</li> </ul>
<b>Preussen Elektra/EZH</b>	<ul style="list-style-type: none"> <li>▪ VEBA including inter alia Preussen Elektra and various mediate daughters including inter alia VEAG (together with Bayernwerk and RWE) and Schleswig</li> <li>▪ Province of Zuid-Holland and Five Cities including EZH</li> </ul>
<b>VEBA/VIAG</b>	<ul style="list-style-type: none"> <li>▪ VEBA group including inter alia Preussen Elektra and mediate daughter undertakings</li> <li>▪ VIAG group including Bayernwerk AG and mediate subsidiaries like BEWAG (JV by Bayernwerk and Southern Energy Beteiligungsgesellschaft which is itself a subsidiary of Southern Energy, Inc.)</li> </ul>
<b>Vattenfall/HEW</b>	<ul style="list-style-type: none"> <li>▪ Vattenfall HGV Holding GbR</li> <li>▪ Vattenfall AB group including Vattenfall (Deutschland) GmbH</li> <li>▪ Freie und Hansestadt Hamburg including Hamburgische Gesellschaft für Beteiligungsverwaltung mbH and HEW AG</li> </ul>

Source: Commission Decision, Case IV/M1346, 1999 (*EdF/London Electricity*) paragraph 1,5; Commission Decision, Case IV/M1402, 1999 (*Gaz de France/BEWAG/GASAG*) paragraph I; Commission Decision, Case IV/M1606, 1999 (*EdF/South Western Electricity*) paragraph 3-4; Commission Decision, Case IV/M1659, 1999 (*Preussen Elektra/EZH*) paragraph 4; Commission decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 4-6; Commission Decision Case IV/M1842, 2000 (*Vattenfall/HEW*) paragraph 3-5.

### **6.3.2.2 Aggregated Community Wide Turnover**

The second criterion for the establishment of a Community dimension required that the undertakings involved exceeded an aggregated turnover threshold of Euro 250 Million within the EC pursuant to Art. 1 II lit. b MR1989.

The term "aggregated turnover" is again clarified by Art. 5 I 1; II 1-2; III and IV MR1989 whereas the wording of Art. 5 I 2 MR1989 indicates that a turnover will result from EC operations if the vendee of a product is located within the EC. An alternative solution would be to ask whether the products are delivered to a location within the EC as this criterion is more relevant to competition law than the place where the domicile of a person is or a company is incorpo-

rated<sup>382</sup>. As a matter of fact, both interpretations do not question the extraterritorial application of MR1989 which is introduced by this criterion<sup>383</sup>. However, it is beyond the scope of the paper to discuss the geographic allocation of sales in tangible goods in greater detail<sup>384</sup>.

With regard to services, the place of the consumer is generally relevant in accordance with the wording. This should be interpreted as the place where the consumer is provided with the service<sup>385</sup>. However, some exceptions apply<sup>386</sup>.

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<sup>382</sup> M. Broberg, *The Geographic Allocation of Turnover under The Merger Regulation*, ECLR 104 (1997).

<sup>383</sup> Any concentration involving a company with larger turnovers owing to sales to the EC is caught; q.v. S. O'Keeffe, *Merger Regulation Thresholds: An Analysis of the Community-Dimension Thresholds in Regulation 4064/89*, ECLR 22 (1994).

<sup>384</sup> For instance it is suggested to alleviate the burden by means of several assumptions: Firstly, agents in a third country will generate external turnover (ignoring potential re-imports). Secondly the direct export country is relevant (even if a second re-export in another external country is possible). Thirdly, potential re-sales to community areas are ignored. Finally, sales of goods with a view of reselling prior to delivery are treated in accordance with the place of the purchaser q.v. M. Broberg, *The Geographic Allocation of Turnover under The Merger Regulation*, ECLR 104-105 (1997). Internet sales of tangible goods are solved on the basis of the point of delivery.

<sup>385</sup> i.e. the place of residence of the consumer if the provider travels to the consumer or the residence of the provider if the consumer travels to the provider.

<sup>386</sup> With regard to transport of persons a point of sale criterion is more appropriate as there is no single place where services are provided. If telecommunications services are broadcast the residence of the consumer is relevant. With respect to mobile networks, the actual place of the consumer should be relevant so as to generate international turnovers of a network operator if a consumer uses roaming services abroad. Internet sales of intangible goods and services provided by means of downloads of music/software should be allocated by means of the place of the provider owing to the difficulties of the establishment of the consumer's location q.v. M. Broberg, *The Geographic Allocation of Turnover under The Merger Regulation*, ECLR 105-107 (1997).

### **6.3.2.3 Two-Thirds Rule Art. 1 II MR1989**

Thirdly, a Community dimension is constituted by a negative criterion that must not be fulfilled according to the last part of Art. 1 II MR1989: MR1989 is inapplicable if all the relevant undertakings generate two-thirds of the EC turnover figures within one and the same single Member State<sup>387</sup>.

### **6.3.3 Modifications of The One-Stop Shop Principle: Art. 1 II; 22 III - V; 19; 9; 21 III MR1989 and The Residual Application of Art. 81 and 82 ECT**

Lastly, the Community dimension and thereby the scope for the application of MR1989 may be either extended or limited by provisions which modify the one-stop shop principle as laid down in Art. 21 I and II MR1989.

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<sup>387</sup> i.e. If undertaking V achieves 70% of turnover in Sweden and undertaking H 70% in Germany, a community dimension will be available. The application of the two-thirds rule is explained in the three Implementing Regulations: Annex I Guidance Note IV (Art. 1) of Annex I Chapeau of Section 5 of Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O.J. L 336, 31/12/1993 p. 7; Annex I Guidance Note IV (Art. 1) of Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 377, 31/12/1994 p 1 including Annex I (Form CO); Annex I Guidance Note III (Art. 1) Commission Regulation 447/98/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 061, 02/03/1998, p 1 Including Annex I (Form CO).

### 6.3.3.1 One-Stop Shop Principle

Art. 21 I MR1989 regulates that the Commission in general has an exclusive jurisdiction as to the control of abovementioned concentrations - subject to a review by the ECJ. Consequently, it is unlawful for national authorities to apply MR1989 in national merger control proceedings. The concept is completed by the prohibition of domestic authorities to initiate national merger control proceedings with a view to apply national competition laws under Art. 21 II MR1989.

Both provisions are very similar to Art. 9 I REG17<sup>388</sup> and the concept is justifiable as it prevents legal uncertainty owing to parallel lengthy transnational and national proceedings with the risk of inconsistent results<sup>389</sup>. However, several provisions within or outside MR1989<sup>390</sup> modify the principle so as to take specific interests into account to the detriment of legal certainty.

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<sup>388</sup> i.e. the sole competence to apply derogations from Art. 81 I ECT under Art. 81 III ECT.

<sup>389</sup> the so-called double jeopardy problem.

<sup>390</sup> i.e. Art. 19; 9; 21 III; 1 II in combination with Art. 22 III-V MR1989 on the one hand and Art. 81, 82, 89 ECT on the other hand.

### 6.3.3.2 Mandatory Co-operation under Art. 19 MR1989

Art. 19 MR1989 contains the most relevant limitations of the one-stop shop principle. The provision obliges the Commission not only to communicate notifications and related materials to the authorities of the Member State concerned<sup>391</sup> but also to co-operate as to the proceedings<sup>392</sup> and to consult the "Advisory Committee on Concentrations"<sup>393</sup>.

The communication of notifications and documents facilitates a close monitoring process of the factual developments on the common market by domestic authorities. Thereby, they are enabled to control the legal interpretation of the cases in the early stages of a case. As a matter of fact, these procedural rights will - a priori - influence the substantial decision making of the Commission as the latter will try to reduce the scope for conflicts to the maximum extent.

Secondly, the Commission is coerced by Art. 19 II 1 MR1989 to co-operate closely with national authorities when proceedings are carried out, especially with regard to obtaining information by means of investigations. As far as a potential referral decision under Art. 9 MR1989 is concerned, it shall provide for hearings so that national authorities can express their views and has to grant access to the file. Thereby, Art. 19 II MR1989 repeats and completes the rationale behind Art. 19 I MR1989. The Committee has no pro-active role as it is not consulted in the first phase of proceedings under Art. 6 MR1989 which is sometimes criticised<sup>394</sup>.

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<sup>391</sup> Art. 19 I MR1989.

<sup>392</sup> Art. 19 II MR1989.

<sup>393</sup> Art. 19 III-VII MR1989.

<sup>394</sup> W. Elland, *The Merger Control Regulation and its Effect on National Merger Controls and The Residual Application of Articles 85 and 86 ECT*, ECLR 25 (1991).

Contrarily, as far as the Commission intends to issue 2<sup>nd</sup> stage decisions<sup>395</sup>, impose sanctions<sup>396</sup> or use powers based on Commission legislation implementing MR1989<sup>397</sup>, the Advisory Committee<sup>398</sup> has to be briefed and consulted in a joint meeting pursuant to Art. 19 III; V MR1989. Its opinion will be attached to the draft decision<sup>399</sup> and the Commission is legally obliged to consider the arguments put forward by the Committee<sup>400</sup>. However, as the Commission is only bound to take the opinion into "utmost account" and as it is mandatory to indicate to which extent the arguments were honoured, an implicit power to derogate from the opinion must exist. Therefore, it is persuasive to argue that the Commission can overrule the opinion with due reasoning. This result is backed by the Varta-Bosch case<sup>401</sup>. Finally, the Committee's role is slightly strengthened by the fact that it may recommend a publication of its opinion which is especially relevant to dissenting positions<sup>402</sup>.

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<sup>395</sup> Art. 8 II-V MR1989.

<sup>396</sup> Art. 14, 15 MR1989.

<sup>397</sup> the legal basis for secondary Commission legislation is Art. 23 MR1989.

<sup>398</sup> established under Art. 19 IV MR1989.

<sup>399</sup> Art. 19 VI 3 MR1989.

<sup>400</sup> Art. 19 VI 4 MR1989.

<sup>401</sup> The Commission ignored the Committee's opinion in favour of an incompatibility decision; q.v. Commission Decision, Case IV/M12, 1991 (*Varta/Bosch*).

<sup>402</sup> The Commission, however, has discretion, whether or not to publish arg ex Art. 19 VII MR1989 "may recommend".

### 6.3.3.3 German Clause pursuant to Art. 9 MR1989

The clarity of the scope of transnational merger control law is weakened by the fact that Commission may refer a notified concentration - although it fulfils the abovementioned turnover thresholds and the two-thirds rule - to competent national authorities pursuant to a complex assessment pursuant to Art. 9 II 1 lit. b MR1989 - the so-called German Clause<sup>403</sup> - provided that national authorities apply on time and allege that the concentrations creates a new or strengthens an existing dominant position which causes detriment to the efficacy of competition on a relevant market that must be a distinct market<sup>404</sup>. Contrary to the former merger control law on the basis of Art. 82 and 81 ECT, it must be stressed that it is not important whether the relevant, distinct market is a significant part of the common market or not<sup>405</sup>.

If the Commission backs the allegations, the Commission may issue a discretionary decision under Art. 9 III 1 lit. a-b whether or not to refer the case Subject to the review of the ECJ. If it disapproves either the detrimental effects of the concentration or negates a separation of markets, a decision under Art. 9 III 2 MR1989 is due to be issued. A failure to act leads to the legal assumption that the case is referred<sup>406</sup>. The rationale behind the clause relates to the fear that the Commission might not spend due attention to national market structures as it traditionally focused on potential violations of Art. 81 and 82 affecting the common market generally by means of cross border transactions. However, this rationale is no longer adequate because the determination of

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<sup>403</sup> It was introduced because Germany insisted on a referral based on the unstained fear that the Commission would ignore specific domestic results of a concentration; q.v. W. Elland, *The Merger Control Regulation and its Effect on National Merger Controls and The Residual Application of Articles 85 and 86 ECT*, ECLR 20 (1991).

<sup>404</sup> Art. 9 II MR1989. A distinct market is defined in Art. 9 VII MR1989.

<sup>405</sup> q.v. the last bid of Art. 9 II MR1989.

<sup>406</sup> Art. 9 V MR1989.

purely national markets becomes less relevant with growing convergence. Therefore, the Commission interprets this clause extremely restrictive so that is hardly relevant in practical terms despite of a series of applications<sup>407</sup>. This includes a separation of the relevant markets in distinctive and international markets so that a partial referral of a concentration is justifiable<sup>408</sup>. For example, the German federal cartel office applied for a referral in the *VEBA/VIAG* case. The UK authorities did the same in the case *EdF/London Electricity* case. Both applications were rejected. Both cases will be discussed later.

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<sup>407</sup> e.g. for failed applications: Commission Decision, Case IV/M12, 1991 (*Varta/Bosch*); Commission Decision, Case IV/M165, 1991 (*Alcatel/AEG Kabel*); Commission Decision, Case IV/M222, 1992 (*Mannesmann/Hoesch*); Commission Decision, Case IV/M238, 1992 (*Siemens/Philips*).

<sup>408</sup> q.v. Commission Decision, Case IV/M180, 1991 (*Steetley/Tarmac*).

#### **6.3.3.4 Safeguard under Art. 21 III MR1989**

Art. 21 III 1 MR1989 contains a third challenge for a clear distinction of jurisdictions between the Commission and domestic authorities as the provision vests Member States with the power to control concentrations that fulfil the global and community wide turnover criteria including the two-thirds rule providing that legitimate interests beyond the scope of MR1989 are concerned and on the condition that the interests do not interfere with the general principles of EC law. The second sentence defines these interests as public security, media plurality or prudential rules regarding the control of credit and insurance undertakings<sup>409</sup>. Regarding the energy sector, the derogation related to public security is of predominant concern. However, the scope of the public security exemption is limited: As the structure of markets immediately related to national security (e.g. weapon procurement) is already exempted from EC Law by means of Art. 296 I lit b ECT, it is persuasive to argue that Art. 21 III 2 1st variant MR1989 should be applied restrictively. It should be solely relevant to markets dealing with strategic resources thus having a mediate influence on strategic industries. Thereby, the provision's meaning is co-ordinated with Art. 30 ECT as it was applied to the Campus Oil case<sup>410</sup>.

The very existence of Art. 23 III 3 MR1989 gives evidence that this list of legitimate interests is not an exhaustive one. However, additional interests are only considered as legitimate ones after they were communicated to the Commission and got an approval.

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<sup>409</sup> q.v. W. Elland, *The Merger Control Regulation and its Effect on National Merger Controls and The Residual Application of Articles 85 and 86 ECT*, ECLR 24 (1991).

<sup>410</sup> ECJ Case C-72/83 *Campus Oil Ltd and others v Minister of Industry and Energy and others* [1984] ECR 2727.

The scope for additional interests is narrowed by Art. 21 III 1 MR1989 in combination with Art. 2 I lit. a-b and Recital 13 MR1989 as the latter provisions include broad public interest aspects<sup>411</sup> beyond the scope of traditional competition policy.

As a matter of fact, the restrictive approach is backed by the rationale of an efficient transnational merger control law which demands that the term legitimate interest should be defined as narrow as possible so as to avoid contradictory yardsticks for the assessment of concentrations. This is true for both listed interests and the ones which could be accepted by means of an approval.

Thus, it was not surprising that the Commission refused to refer the Case *EdF/London Electricity* to UK authorities as merger control law is distinct from proper national industry regulation.

#### **6.3.3.5 Dutch Clause Art. 22 III-V MR1989**

Based on the fear of Member States which had not established comprehensive domestic merger control laws, Art. 22 III-V MR1989 was introduced<sup>412</sup>. The so-called Dutch Clause is *lex specialis* to Art. 1 I MR1989 based on the latter provision's wording<sup>413</sup>.

Pursuant to an application<sup>414</sup> put forward by domestic officials who think that national authorities will not be able to deal with a concentration that does not meet the turnover thresholds or the two-thirds rule, the Commission may issue a decision in order to obtain jurisdiction over the case. As the artificial applica-

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<sup>411</sup> Especially industrial policy aspects in Art. 2 I lit b "economic progress" and in Recital 13 "economic and social cohesion".

<sup>412</sup> It represents a compromise between Member States who insisted on high turnover criteria to limit the scope of MR1989 and those who insisted on low thresholds so as to expand the jurisdiction of the Commission.

<sup>413</sup> Art. 1 I MR1989: "Without prejudice to Art. 22 ..."

tion of MR1989 is limited to Art. 2 I lit a-b; 5; 6; 8, 10-20 MR1989, the proceedings will differ slightly from the ordinary ones<sup>415</sup>. It is important to stress that the (in)compatibility decision must focus on cross-border aspects and has to comply with the proportionality test<sup>416</sup>.

#### **6.3.3.6 Residual Application of Art. 81, 82 pursuant to Art. 89 ECT**

Finally, the unitary jurisdiction of the Commission under Art. 21 I-II MR1989 could be threatened if either national courts on individual requests, domestic competition authorities under Art. 84 ECT or the Commission under Art. 85 ECT insist on a residual application of Art. 81 and 82 ECT with respect to concentrations regardless whether the turnover criteria of MR1989 are fulfilled or missed.

First of all is has to be examined whether and how Art. 82 ECT is applicable to concentrations. It has been well established above, under which conditions and accompanied by which drawbacks Art. 82 ECT - enjoying direct effect - was applicable to concentrations prior to the adoption of MR1989 according to the Continental Can doctrine<sup>417</sup>. Therefore, the only question that was not addressed is if MR1989 has the legal power to exclude Art. 82 ECT for concentrations either within or outside its scope based on the attainment or failure to meet the turnover criteria<sup>418</sup>.

First of all, the Art. 21 I-II MR1989 does not intend to disapply substantive norms like Art. 81 et seq. ECT as the wording only lists procedural regula-

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<sup>414</sup> Art. 22 III MR1989.

<sup>415</sup> e.g. no prior notification requirement under Art. 4; no suspensive effect under Art. 7 MR1989; no exclusive jurisdiction under Art. 21 I-II MR1989.

<sup>416</sup> Art. 22 III and V MR1989.

<sup>417</sup> supra at 5.1.8.1 Arguments Supporting Merger Control: The Continental Can Doctrine.

<sup>418</sup> q.v. this issue was discussed for Art. 81 ECT: supra at 5.2.3.

tions<sup>419</sup> although the teleological interpretation strongly demands an exclusion of Art. 81 and 82 ECT at least regarding concentrations in terms of Art. 3 MR1989 which are consistent with the relevant thresholds<sup>420</sup>.

From the systematic point of view, MR1989 represents a *lex specialis* which normally excludes the application of general norms on concerted practices and abuses of dominant positions. However, this finding is not persuasive as it is only valid for *leges speciales* and *leges generales* sharing the same legal rank.

Indeed, the legal rank of Art. 82 ECT - belonging to primary EC law - is without any doubt higher than the one of secondary EC legislation. Thereby, MR1989 has no power to exclude Art. 82 ECT. A second thought backs this finding: MR1989 would exceed its legal basis, i.e. Art. 83 ECT and 308 ECT as secondary legislation which excludes primary law is quite the opposite of a norm that shall implement said primary law pursuant to the wording of Art. 83 I<sup>421</sup>; II lit a-b ECT. Finally, it is not persuasive to try to circumvent this idea by means of a broad interpretation of Art. 308 ECT: Art. 308 ECT would be extended beyond its due scope if it was used as a legal means for a discussed circumvention of the wording of existing treaty law.

Consequently, MR1989 is not a *lex specialis* provision to a control of concentrations under Art 82 ECT. Such control can be implemented on the basis of

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<sup>419</sup> REG17 and Council Regulation 4056/86/EEC Laying down Detailed Rules for The Application of Art 85 and 86 of The Treaty to Maritime Transport, O.J. L 378, 31/12/1986, p 4 and Council Regulation 3975/87/EEC Laying Down the Procedure for The Application of the Rules on Competition to Undertakings in the Air Transport Sector, O.J. L 374, 31/12/1987, p 1.

<sup>420</sup> q.v. W. Elland, *The Merger Control Regulation and its Effect on National Merger Controls and The Residual Application of Articles 85 and 86 ECT*, ECLR 25-26 (1991).

<sup>421</sup> The limited relevance of Art. 83 as a legal basis for MR1989 is discussed by W. Elland, *The Merger Control Regulation and its Effect on National Merger Controls and The Residual Application of Articles 85 and 86 ECT*, ECLR 28 (1991).

the Continental Can doctrine regardless whether a given concentration meets or fails to meet the turnover criteria of MR1989.

Therefore, everyone retains the right to initiate domestic courts proceedings with a view to assess any kind of concentration on the basis of Art. 82 ECT.

Alternatively, any individual may ask the Commission to assess a concentration under Art. 82 ECT. It is interesting to note that the procedural law that the Commission has to apply in order to deal with such a request will differ: The Commission is prevented from applying REG17 and certain other regulations<sup>422</sup> to concentrations which cope with the thresholds of MR1989 as a result of Art. 22 II MR1989. Therefore, the Commission has to rely on the weak and subsidiary procedure that is provided by Art. 85 ECT<sup>423</sup> if it wants to enforce Art. 82 ECT in high turnover cases.

Sometimes, it is suggested that Art. 81 and 82 ECT should be implemented in case of concentrations regardless of their turnover figures on the exclusive basis of Art. 85 ECT so that the relevance of Art. 22 II MR1989 is extended to concentration in terms of Art. 3 MR1989 even if the thresholds of Art. 1 II; 5 MR1989 are not exceeded<sup>424</sup>. Thereby, REG17 and the other procedural regulations would be ignored.

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<sup>422</sup> and other regulations, i.e. Council Regulation 4056/86/EEC Laying down Detailed Rules for The Application of Art 85 and 86 of The Treaty to Maritime Transport, O.J. L 378, 31/12/1986, p 4 and Council Regulation 3975/87/EEC Laying Down the Procedure for The Application of the Rules on Competition to Undertakings in the Air Transport Sector, O.J. L 374, 31/12/1987, p 1.

<sup>423</sup> i.e. The Commission has to examine potential violations ex officio or on request of Members pursuant to Art. 85 I 1 ECT. If an inconsistency is indeed established, it will suggest a remedy (Art. 85 I 2 ECT). Provided that the suggestion is ignored, the Commission issues a decision stating a violation (Art. 85 II 1 ECT). Moreover, the decision may vest a Members State with the power to implement measures strictly necessary to terminate the infringement (Art. 85 II 2 ECT).

<sup>424</sup> q.v. W. Elland, *The Merger Control Regulation and its Effect on National Merger Controls and The Residual Application of Articles 85 and 86 ECT*, ECLR 27 (1991).

However, an alternative idea seems persuasive: that the Commission may initiate proceedings to implement Art. 82 ECT under REG17 if a concentration in terms of Art. 3 MR1989 does not exceed the thresholds of Art. 1 II; 5 MR1989 as the meaning of Art. 22 MR1989 can not go beyond the scope of MR1989. However, this procedural dispute is less relevant as the Commission indicated that it will be reluctant to apply Art. 81-82 ECT to concentrations with minor figures<sup>425</sup>.

If the individual's application for proceedings on either procedural base is rejected by the Commission, one could raise a court proceeding on the grounds on the grounds of failure of the Commission to act pursuant to Art. 232 ECT. If proceedings are initiated but result is not adequate, the applicant could challenge the decision under Art. 230 ECT.

However, the legal remedies based on a residual application of Art. 82 ECT will often not generate satisfactory results due to the substantive restrictions of a control regime under Art. 82 ECT as it was concluded above<sup>426</sup>.

These findings - backing a substantive residual application of Art. 82 ECT to concentrations either governed by REG17 or Art. 85 ECT - are transferable to a residual application of Art. 81 ECT to concentrations as well owing to the comparable rationale as to Art. 83 and 308 ECT as the legal bases of MR1989.

The most difficult question that remains is whether and to which extent Art. 81 ECT will be indeed applicable to concentrations. As this controversial question was exhaustively discussed above<sup>427</sup>, it can be summarised that it is persua-

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<sup>425</sup> Commission, 19<sup>th</sup> Report on Competition Policy (1989) p 268 (statements in the minutes of the EC Council concerning MR1989).

<sup>426</sup> supra at 5.1.8.3 Drawbacks of Merger Control under Art. 82 ECT.

<sup>427</sup> supra at 5.2 EC Merger Control under Art. 81 ECT and sub-sections 5.2.1- 5.2.5.

sive to argue that the approach chosen by the ECJ in the BAT case is still a valuable doctrine<sup>428</sup>. Therefore, it is superior to conclude that this doctrine is still a due legal basis for dealing with concentrations under Art. 81 ECT that are used as instruments for the disguised establishment of platforms for restrictive practices between parent undertakings which remain independent.

However, it should be noted that the procedural weaknesses to control concentrations by means of either REG17 or Art. 85 ECT are so predominant that it remains highly unlikely that a valuable decision is issued on time. Additionally, it is a contestable idea to rely on national courts which can hardly apply the difficult BAT doctrine as it was established by the ECJ without frequent and time consuming preliminary hearing proceedings under Art. 234 ECT.

With regard to domestic competition authorities, it can be stated that they can not successfully apply Art. 82 or Art. 81 ECT to concentrations on the legal basis of Art. 84 ECT. The reason is that Art. 84 ECT is subsidiary to transnational proceedings based on secondary EC law pursuant to its wording. As MR1989 provides for merger control proceedings for concentrations meeting the turnover criteria and REG17 will be applicable to the remaining ones below the thresholds, no room is left for national proceedings under Art. 84 ECT.

#### **6.3.3.7 Evaluation**

Having discussed the one-stop shop principle that is based on the community dimension criteria of Art. 1 II; 5 MR1989 in combination Art. 21 I-II MR1989 and the numerous derogations under Art. 9; 19; 21 III; 22 III-V and the residual application of Art. 81 and 82 ECT, it is coercive to conclude that distinction of jurisdictions as to merger control is at least from the legal point of view not as

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<sup>428</sup> q.v. supra at 5.2.2 New Doctrine Introduced by the BAT Judgement.

clear as desirable. The situation could be remedied if a revision of the ECT included at least a provision or a chapter on merger control. Such a provision would share the same legal rank with Art. 81 and 82 ECT. Therefore it would become legitimate to regard such a provision as an exhaustive *lex specialis* which removes any loopholes for a highly complex residual application of Art. 81 and 82 ECT. Although it is mandatory from the doctrinal point of view to argue that either a national court on individual request or the ECJ - on the basis of individuals who challenge potential refusals of the Commission to initiate proceedings under Art. 81, 82 ECT, REG17 with regard to concentrations below the thresholds or under Art. 81, 82, 85 ECT regarding concentrations above the thresholds - can invoke Art. 81 and ECT at the present stage, it is too complex an option to be justifiable from the point of legal clarity.

## **6.4 Pre-Notification Stage**

The next sections will not only analyse how the parties may proceed and enter into negotiations in the pre-notification stage. Additionally, it will be reported how informal phase one proceedings are initiated and in which manner examinations are conducted by the Commission so as to prepare a decision in terms of Art. 6 I lit. a-c MR1989. Thirdly, if an initiation of formal phase two proceedings decision has been taken pursuant to Art. 6 I lit. c MR1989, it will be reported how the Commission formally examines the case so that the substantive criteria are established that govern which final decision under Art. 8 II-VI MR1989 will be issued.

### **6.4.1 Obligation to Notify a Concentration**

First of all, Art. 4 I MR1989 governs that the undertakings concerned are obliged to notify a concentration<sup>429</sup> that has a community dimension<sup>430</sup> not later than week after a concentration has been effectuated<sup>431</sup>. Art. 4 II MR1989 states that in case of mergers both partner undertakings are required to submit a joint notification. Compliance with Art. 4 MR1989 is backed by the Commission's authority to impose a fine on those undertakings which fail to comply with said obligations pursuant to Art. 11 I lit. a MR1989.

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<sup>429</sup> Art. 1 I; 3 MR1989.

<sup>430</sup> Art. 1 I-II; 5 MR1989.

<sup>431</sup> i.e. an agreement is negotiated, a public bid is announced or a controlling interest is purchased.

The details of the notification procedure are governed by an implementing regulation on the basis of Art. 23 MR1989<sup>432</sup>. The rationale of the implementing regulation is to boost legal certainty inter alia by means of prescribing that a specific number of notifications has to be submitted that have to use the standard of the so-called "Form CO"<sup>433</sup>. Thereby, procedural efficiencies are generated and a yardstick is provided as to the substance of information that is due to be revealed<sup>434</sup>.

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<sup>432</sup> The first implementing regulation was enacted in 1990 and amended in 1993. It was later repealed by the second implementing regulation in 1994 that was itself repealed in 1998 by the third implementing regulation: q.v. Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O.J. L 336, 31/12/1993 p. 7; Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 377, 31/12/1994 p 1 including Annex I (Form CO); Commission Regulation 447/98/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 061, 02/03/1998, p 1 including Annex I (Form CO).

<sup>433</sup> Recital 4 and Art. 2 Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O.J. L 336, 31/12/1993 p. 7; Recital 4 and Art. 2 Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 377, 31/12/1994 p 1 including Annex I (Form CO); Recital 4 and Art. 2 Commission Regulation 447/98/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 061, 02/03/1998, p 1 Including Annex I (Form CO).

<sup>434</sup> Recital 2 and Art. 3 Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 219, 14/08/1990 p 5 including Annex I (Form CO); Recital 2 and Art. 3 Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 377, 31/12/1994 p 1 including Annex I (Form CO); Recital 2 and Art. 3 Commission Regulation 447/98/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 061, 02/03/1998, p 1 Including Annex I (Form CO).

#### 6.4.2 Secretive Talks Regarding Draft Notifications

As it is often questionable whether a concentration with a community dimension is available, the Merger Task Force of the Commission is prepared to offer secretive guidance to representatives of anonymous parties. Submitted draft notifications will be discussed in order to determine whether a certain transaction should be notified in reality<sup>435</sup> and if so, which information has to be provided and whether an application for a dispense regarding certain highly confidential matters would be permissible. It has to be stressed that these talks may limit the amount of information that has to be provided<sup>436</sup>. This is in the interest of both the parties and the Commission. Additionally, it may be discussed whether one should apply for a comfort letter<sup>437</sup> or a formal derogation from Art. 81 I ECT based on Art. 81 III ECT and Art. 4 I REG 17<sup>438</sup>.

However, it remains questionable whether the results of a secretive discussion of the case with potential case-handlers will be of any legal value if a dispute arises in later stages in which the applicant claims that the outcome of the phase one proceedings is inconsistent with statements of officials during the pre-notifications meetings without having given due reason for the alterations. In spite of this drawback, it should be generally desirable to notify a case under Art. 4 MR1989 rather than under Art. 2 or 4 I REG17 for several reasons:

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<sup>435</sup> Recital 8 Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O.J. L 336, 31/12/1993 p. 7; Recital 8 Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 377, 31/12/1994 p 1 including Annex I (Form CO); Recital 8 Commission Regulation 447/98/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 061, 02/03/1998, p 1 Including Annex I (Form CO).

<sup>436</sup> Annex I Form CO Introduction A. The Purpose of this Form paragraph 3 of Commission Regulation 447/98/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 061, 02/03/1998, p 1 Including Annex I (Form CO).

The merger control procedures are faster, the Commission tends to expand its jurisdiction under MR1989 by means of expansive interpretation. Finally, the proceedings are likely to be closed by means of formal decisions under either Art. 6 or 8 MR1989 which are more valuable than informal comfort letters that a conduct does not interfere with Art. 81 ECT because the latter do not prevent national authorities or courts from coming to altering solutions. However, there is no procedural risk, as the Commission is obliged to treat a notification under Art. 4 I MR1989 as an application under Art. 2 or 4 REG17 if no concentration is found<sup>439</sup>.

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<sup>437</sup> Art. 2 REG17.

<sup>438</sup> The bases are Art. 4 REG17 in combination with Art. 81 III ECT.

<sup>439</sup> Art. 5 Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O.J. L 336, 31/12/1993 p. 7; Art. 5 Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 377, 31/12/1994 p 1 including Annex I (Form CO); Art. 5 Commission Regulation 447/98/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 061, 02/03/1998, p 1 Including Annex I (Form CO).

## **6.5 Phase One**

If a concentration is notified, the so-called phase one begins. In this stage multiple considerations are required which relate to the temporal suspension of the implementation, the organisation of the informal proceedings by the Merger Task Force so as to prepare decisions under Art. 6 MR1989. Additionally, the substantive prerequisites either for a non-applicability, a compatibility or an initiation of formal phase two proceedings decision under Art. 6 MR1989 will be of concern. Lastly, an evaluation will be given.

### **6.5.1 Suspension of The Concentration**

After the notification, the parties are generally prevented from implementing the concentration within the three weeks following a complete notification in accordance with Art. 7 I MR1989. The rationale behind this principal provision is that the Commission can initiate preliminary investigations and spend the necessary time on the due assessment of the facts in order to prepare a decision pursuant to Art. 6 MR1989: The quality of the Commission's assessment would be reduced and the mandatory period of Art. 10 I MR1989 would be useless if the parties either executed the notified concentration or continuously altered the concentration or created irreversible facts with intention immediately after the notification.

As Art. 7 I MR1989 is *lex generalis* to Art. 7 II-V MR1989, the Commission has the power to extend the legal suspension of Art. 7 I MR1989 by means of a decision under Art. 7 II MR1989 - so as to avoid amendments of the status quo until an incompatibility decision is taken. Contrarily, public bids overrule suspensions in terms of Art. 7 I-II MR1989 providing that the conditions of Art.

7 III MR1989 are met<sup>440</sup>. In order address extraordinary needs for immediate implementation, the Commission is empowered by the hardship clause of Art. 7 IV MR1989 to grant a discretionary derogation from Art. 7 I-III MR1989.

Finally, the legal validity of transactions circumventing the suspension depends on the outcome of the case although transactions involving securities are valid<sup>441</sup>.

### **6.5.2 Procedural Aspects of Decision-making within Phase One**

Based on MR1989 and the implementing regulation, the Commission developed a sophisticated methodology for its preliminary investigations that consists of six or seven stages:

Firstly, a public version of the notification will be published<sup>442</sup>. Secondly, mandatory liaison with Member States concerned is sought<sup>443</sup>. Thirdly, the Merger Task Force will pursue an initial screening so as to establish the concentrative nature of the case. Fourthly, the data submitted to the Commission within the notification will be examined<sup>444</sup> and - if necessary - additional pieces of information may be requested from the parties or complementary analyses are conducted<sup>445</sup>. The fifth stage involves informal hearings granted to the notifying undertakings or to third parties with a legitimate interest, e.g. consumers, suppliers, competitors. Then, a preliminary report will be composed by the officials responsible for the case. The report which will be discussed on a first meeting of Commission officials<sup>446</sup> and according to the findings a final report and a

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<sup>440</sup> However, voting rights must not be executed unless the value of the investment is at stake.

<sup>441</sup> Art. 7 V 2nd sentence MR1989.

<sup>442</sup> i.e. the notification, the names of the parties, the nature of the concentration and the economic sector according to Art. 4 III MR1989.

<sup>443</sup> Art. 19 MR1989. This provision was discussed earlier: supra at 6.3.3.2.

<sup>444</sup> e.g. by means of a market analysis or inquiries concerning competitors' opinions.

<sup>445</sup> The Commission may also ask national authorities to carry out investigations under Art. 12 MR1989.

<sup>446</sup> including the legal service of the Commission.

draft decision will be prepared subject to the approval by the second inter-services meeting<sup>447</sup>. In case of draft compatibility decisions under Art. 6 I lit. b MR1989, the Commission may decide in a seventh stage to attach undertakings so as to remove certain anti-competitive aspects of a given concentration following additional hearings of the parties and interested individuals with a legitimate interest. Even if not mentioned in the wording and highly disputed, such obligations could be based on Art. 6 I lit. b MR1989 backed by a teleological arguments and a systematic arg. a maiore ad minus as Art. 8 MR1989 expressively provides for undertakings<sup>448</sup>.

### **6.5.3 Inapplicability Decision Art. 6 I lit. a MR1989**

Having discussed the procedural aspects of decision-making in phase one, the next sub-sections deal with the substantive pre-requisites which determine whether the Commission will issue a non-applicability decision under Art. 6 I lit. a MR1989, a compatibility decision<sup>449</sup> pursuant to Art. 6 I lit. b MR1989 or an initiation of formal phase two proceedings under Art. 6 I lit. c MR1989.

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<sup>447</sup> Comment of Colin Overbury, former Head of the Merger Task Force; q.v. P. Donoghly, *The EC Merger Task Force: Interview with Colin Overbury*, *Lawyers in Europe*, 4-5 (Sep./Oct. 1991).

<sup>448</sup> This approach was highly contested. However, Art. 6 I lit. b 2nd sentence MR1997 solves the dispute sustaining the presented opinion which will be discussed infra at 7.3.

<sup>449</sup> This decision may be accompanied by undertakings. The power to add undertakings to decisions under Art. 6 I lit b MR1989 was disputed. However, Art. 6 I lit b 2nd sentence MR1997 solves the dispute by expressively granting this power to the Commission (q.v. supra).

The Commission will take a non-opposition decision as to disapply the regulation pursuant to Art. 6 I lit. a MR1989, if one concludes that the notified concentration in terms of Art. 1 I; 3 MR1989 lacks a community dimension as defined by Art. 1 II; 5 MR1989 in combination with the potential derogations from the unitary jurisdiction of the Commission, i.e. Art. 19; 9; 21 III; 22 III MR1989 on the one hand and the residual application of Art. 81 and 82 ECT that was already discussed on the other hand<sup>450</sup>.

Contrarily, phase one decisions under Art. 6 I lit. b or lit. c MR1989 are issued if a concentration is available that has a community dimension. However, both decisions are mutually exclusive as they are based on the finding that said concentration either creates or strengthens a dominant position on a relevant market in accordance with Art. 2 I-III MR1989 or not. Pursuant to a finding of dominance Art. 2 III MR1989, a decision under Art. 6 I lit. c MR1989 may be taken that initiates formal phase two proceedings: Said formal proceedings enable the Commission to take a decision under Art. 8 MR1989 after an exhaustive assessment of the case in a period of four months at most<sup>451</sup>.

The period for any of the three decisions under Art. 6 I MR1989 is usually 4 weeks according to Art. 10 I MR1989<sup>452</sup>. The decisions under the provision are notified to the parties and Member States<sup>453</sup> and are usually published<sup>454</sup>.

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<sup>450</sup> *supra*, at 6.3.3 Modifications of The One-Stop Shop Principle: Art. 1 II; 22 III-V; 19; 9; 21 III MR1989 and The Residual Application of Art. 81 and 82 ECT.

<sup>451</sup> The details are discussed later.

<sup>452</sup> However, in case of requests of Member States to refer the case to domestic authorities under the German Clause of Art. 9 MR1989, the period is six weeks according to Art. 10 I 2nd sentence MR1989

<sup>453</sup> notification under Art. 6 II MR1989.

<sup>454</sup> The publication usually takes place in the O.J. C on a voluntary basis as the law is silent insofar.

### **6.5.3 Compatibility Decision under Art. 6 I lit. b MR1989**

If the Commission finds that a concentration in terms of Art. 1 I; 3 MR1989 is available that has a community dimension thus providing for unitary exclusive jurisdiction of the Commission, it will issue a compatibility decision on the basis of Art. 6 I lit. b MR1989 provided that said concentration meets the substantive criteria of Art. 2 II; 2 I MR1989: It must neither create nor strengthen a dominant position on a relevant market within at least a significant part of the common market as a result of which competition would be significantly impeded. Art. 2 I MR1989 offers further guidance regarding the criteria on which said assessment shall depend. The analysis of dominance is broadly similar to the assessment the Commission undertakes when it examines alleged abuses of dominant positions under Art. 82 ECT<sup>455</sup>. As the relevant methodology was introduced above<sup>456</sup>, the particular focus will be on the differences between Art. 82 ECT and Art. 2 MR1989.

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<sup>455</sup> q.v. T.A., Downes and D.S. MacDougall, *Significantly Impeding Effective Competition: Substantive Appraisal under the Merger Regulation*, unpublished CEPMLP Paper, p 1 (1993).

<sup>456</sup> supra at 5.1.4 Dominant Position and Collective Dominance.

### 6.5.3.1 Definition of The Relevant Market

Parallel to Art. 82 ECT, the first step of the analysis will identify the product or service market that will be affected by the concentration. Again, three criteria are used so as to define the relevant market. The functional aspect defines a market by asking which objectives an ordinary marketer may want to attain if he orders a specific product or service. A similar product or service will be included if it is deemed to be interchangeable as to price, quality and characteristics<sup>457</sup> by an average consumer provided that exchanges do not cause major difficulties<sup>458</sup>. Such a result is called demand side substitutability. The given criteria are fulfilled if the market analysis indicates a significant value of cross-elasticity of demand<sup>459</sup>. Alternatively, it is assessed which groups of consumers are deemed to be interchangeable from the commercial perspective of an average supplier: supply side substitutability. A comparable rationale is rele-

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<sup>457</sup> However, a plethora of specific criteria is used to distinguish between markets according to product specification of which an analysis would be beyond the scope of this paper: q.v. market for original products and refurbished ones (e.g. tyres or notebook computers); q.v. ECJ, Case C-322/81, *NV Nederlandse Banden Industrie Michelin v EC Commission* [1983] ECR 3461 paragraph 37-38.

<sup>458</sup> Annex I Chapeau of Section 5 of Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O.J. L 336, 31/12/1993 p 7; Annex I Section 6 Market Definitions I. Relevant Product Markets of Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 377, 31/12/1994 p 1 including Annex I (Form CO); Annex I Section 6 Market Definitions I. Relevant Product Markets of Commission Regulation 447/98/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 061, 02/03/1998, p 1 Including Annex I (Form CO).

<sup>459</sup> q.v. Commission Decision, Case IV/M214, 1993 (*Du Pont/ICI*) paragraph 23: e.g. low substitutability indicates different markets for polypropylene and nylon carpet fibres id at paragraph 28; Commission Decision, Case IV/M68, 1991 (*Tetra Pak/Alfa Laval*): Different markets for either aseptic or non aseptic milk cartons; Commission Decision, Case IV/M190, 1992 (*Nestlé/Perrier*): different markets for sparkling water bottled at source and soft drinks owing to clear price differences.

vant to the accurate definition of both the geographic scope<sup>460</sup> and temporal definition of the market.

Compared with the case law regarding Art. 82 ECT, it is mandatory for the parties to notify and for the Commission to consider affected markets within the common market which include up- and downstream markets. However, the definitions of affected markets were amended: The first implementation regulation would require to take horizontal markets and related up- or downstream markets into account if the individual or combined market shares exceeded 10%<sup>461</sup>. The second and third implementation regulation fix an horizontal threshold of 15% and vertical ones of 25%<sup>462</sup>.

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<sup>460</sup> Annex I Chapeau of Section 5 of Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O.J. L 336, 31/12/1993 p. 7; Annex I Section 6 Market Definitions II Relevant Geographic Market Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 377, 31/12/1994 p 1 including Annex I (Form CO); Section 6 Market Definitions II Relevant Geographic Market Commission Regulation 447/98/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 061, 02/03/1998, p 1 Including Annex I (Form CO). However, a closer assessment of geographic limitations of a market is beyond the scope of the analysis (e.g. regional consumer preferences, buy national preferences, entry barriers, different market stages regarding expansion, maturity, consolidation etc).

<sup>461</sup> Annex I Chapeau of Section 5 of Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O.J. L 336, 31/12/1993 p. 7.

<sup>462</sup> Annex I Section 6 Market Definitions III Affected Markets lit. a-b Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 377, 31/12/1994 p 1 including Annex I (Form CO); Annex I Section 6 Market Definitions III Affected Markets lit. a-b Commission Regulation 447/98/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 061, 02/03/1998, p 1 Including Annex I (Form CO).

Another inconsistency with the old case law relates to the finding that it is mandatory that the Commission assesses barriers to entry<sup>463</sup>. Again, the finding is true that the more specific the objectives considered are the narrower the market definition will be and the easier a dominant position will be established<sup>464</sup>.

However, due to the mandatory tight temporal framework within phase one, the Merger Task Force is often prevented from entering into a thorough relevant market analysis based on abovementioned economic criteria<sup>465</sup>. As a matter of fact, a compatibility decision without detailed market analysis is only justifiable on the grounds of speedy implementation in a case in which accuracy is of minor relevance as even the most narrow interpretation will not sustain a finding of dominance. Contrary to the old case law, it is established that an ex ante analysis is more relevant whereas present or past market structures are less important.

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<sup>463</sup> Annex I Section 6.4 of Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O.J. L 336, 31/12/1993 p. 7; Annex I Section 8 General Conditions in Affected Markets Market Entry 8.6 - 8.8 Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 377, 31/12/1994 p 1 including Annex I (Form CO); Annex I Section 8 General Conditions in Affected Markets Market Entry 8.7-8.9 Commission Regulation 447/98/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 061, 02/03/1998, p 1 Including Annex I (Form CO).

<sup>464</sup> q.v. the highly detailed market definition regarding markets for civil turboprop aircraft: Commission Decision, Case IV/M237, 1993 (*DASA/Fokker*) and Commission Decision, Case IV/M53, 1991 (*Aérospatiale-Alenia/de Havilland*) paragraph 8.

<sup>465</sup> q.v. J.B. Alonso, *Market Definition in The Community's Merger Control Policy*, ECLR 196 (1994).

Therefore, it is questioned whether a domestic market is likely to be fully integrated into a true community wide market for the products in question in the near future which depends crucially not only on a mere legal liberalisation of public sectors but on its factual implementation<sup>466</sup>.

### **6.5.3.2 Assessment of Dominance in terms of Art. 2 II MR1989**

The second step of the analysis under Art. 2 II MR1989 will reveal whether a dominant position on the relevant market is either created or enhanced. In principal, the notion of dominance is similar to Art. 82 ECT.

#### *6.5.3.2.1 Elements of Dominance in Art. 2 MR1989 Differing from The Notion of Dominance Relevant to Art. 82 ECT*

However, a relevant inconsistency between Art. 2 MR1989 and Art. 82 ECT has to be underlined: An interference with Art. 82 ECT is not solely based on the element of dominance: It is only the abuse of a dominant position that is unlawful. It is the dependence of Art. 82 ECT on two main criteria which makes it sustainable to broadly interpret the notion of dominance<sup>467</sup> because a narrow interpretation of the abuse is feasible so as to duly limit the provision's scope. Contrarily, as dominance is the predominant criterion within Art. 2 II MR1989, the term should be more narrowly interpreted.

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<sup>466</sup> e.g. A community wide market was rejected in the following cases for the near future Commission Decision, Case IV/M63, 1991 (*Elf/Ertoil*); Commission Decision, Case IV/M111, 1991 (*BP/Petromed*); Commission Decision, Case IV/M126, 1992 (*Accor/ Wagon-Lits*); Commission Decision, Case IV/M222, 1992 (*Mannesmann/Hoesch*).

<sup>467</sup> e.g. Dominance in terms of Art. 82 ECT is accepted with respect to market shares above 41 %: q.v. ECJ Case C-27/76 *United Brands Company & Anor v Commission* [1978] ECR 207, at p 282.

According to the relevant case law, this is indeed the solution in practice. This approach is backed by the very limited importance of the clause "as a result of which effective competition would be significantly impeded". This sentence does not introduce an independent second aspect of the examination but only reiterates the general consequences attached to every finding of dominance. However, the clause will have its own significance if the Commission is of the opinion that a dominant position is due to be equalised by market developments in the foreseeable future<sup>468</sup>. In this case, an extremely high market share can be deprived from its power to indicate future dominance.

#### *6.5.3.2.2 The Need to Maintain Effective Competition Art. 2 I lit. a MR1989*

Luckily, the assessment of missing dominance under Art. 2 II MR1989 is facilitated by Art. 2 I MR1989 that provides for two important factors on which the finding of creation or enhancement of dominance on a relevant market may be based:

- the need to maintain or develop effective competition pursuant to Art. 2 I lit. a MR1989 and
- the market position of the undertakings concerned accompanied by additional criteria under Art. 2 I lit. b MR1989.

The first criterion, stating the efficacy of competition at a predominant position within Art. 2 MR1989 can be contrasted against merger control systems with

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<sup>468</sup> The residual relevance includes cases involving rapidly expanding markets. In these markets, the Commission is ready to accept temporal dominant positions if it is likely that they will not last on the grounds that effective competition is only impeded by means of long term developments; q.v. Commission Decision Commission Decision, Case IV/M53, 1991 (*Aéropostale-Alenia/de Havilland*) paragraph 8 paragraph 53 and 60.

the broad task of considering the public interest in general<sup>469</sup>. The criterion depends inter alia<sup>470</sup> on the following sub-factors:

- structure of the market concerned<sup>471</sup>
- actual competition from enterprises located either within or outside the EC<sup>472</sup>
- potential competition from said sources<sup>473</sup>

The first sub-factor clarifying the need to develop competition on a relevant market refers not only to aspects of horizontal<sup>474</sup> but also to aspects of vertical<sup>475</sup>, and to a less extent, aspects of conglomerate competition. The first implementing regulation of MR1989 stated that conglomerate considerations were less relevant owing to the formal subsidiarity of Section 5.11 of Annex I Regulation 2367/90/EEC and the minimum market share that was increased

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<sup>469</sup> e.g. Section 84 of the UK Fair Trading Act of 1973.

<sup>470</sup> arg. ex Art. 2 I lit a MR1989: "among other things".

<sup>471</sup> Art. 2 I lit. a 1st Variant MR1989.

<sup>472</sup> Art. 2 I lit. a 2nd Variant MR1989.

<sup>473</sup> Art. 2 I lit. a 3rd Variant MR1989.

<sup>474</sup> Once, a market was horizontally affected if at least two undertakings concerned operate on that relevant market and achieve a combined market share of at least 10%; q.v. Annex I Section 5 Affected Markets lit. a of Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O.J. L 336, 31/12/1993 p. 7. Then, the definition was altered to 15%: Annex I Section 6 III Affected Markets Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 377, 31/12/1994 p 1 including Annex I (Form CO).

<sup>475</sup> Once, a market was vertically affected if one of the undertakings concerned operates on a related up- or downstream market and has a minimum market share of 10%; q.v. Annex I Section 5 Affected Markets lit. b of Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O.J. L 336, 31/12/1993 p. 7. Then, the definition was altered to 25%: Annex I Section 6 III Affected Markets Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 377, 31/12/1994 p 1 including Annex I (Form CO).

compared with horizontal or vertical concentrations<sup>476</sup>. The economic reasons were explained above<sup>477</sup>.

However, the second and third implementing regulations provide for a further reduction of conglomerate aspects as these were removed from the relevant markets sections to the less important chapter of general matters<sup>478</sup>.

The second sub-factor deals with actual horizontal competitors. Normally, a large difference between the market shares of the allegedly dominant concentration and the largest horizontal competitor is a significant indicator to measure the power distribution<sup>479</sup>. However, under extraordinary circumstances, the case law takes other criteria into account as the ability to prevent the maintenance of effective competition on a relevant market and to behave independently from competitors to a significant extent may be counterbalanced by a remaining competitor which may be powerful despite of its small market shares at presence<sup>480</sup>. For instance, the small competitor may control impor-

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<sup>476</sup> A conglomerate aspect is available if neither horizontal nor vertical relations exist between the product markets exist ("in the absence of ...") and if an undertaking concerned holds a market share of at least 25% on that relevant product market; q.v. Annex I Section 5 Affected Markets 5.11 of Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O.J. L 336, 31/12/1993 p. 7.

<sup>477</sup> Arguments allegedly supporting minor relevance of conglomerates: supra at 2.1.3; 5.1.2.

<sup>478</sup> i.e. the relevant "Section 6 Market Definitions" does no longer deal with the subject. Conglomerate Aspects are dealt with under Section 9 "General Matters Market - Data on Conglomerate Aspects": q.v. Annex I Section 6 Market Definitions III Affected Markets and Annex I Section 9 General Matters Market Data on Conglomerate Aspects 9.1-9.2 of Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 377, 31/12/1994 p 1 including Annex I (Form CO); q.v. Annex I Section 6 Market Definitions III Affected Markets and Annex I Section 9 General Matters Market Data on Conglomerate Aspects 9.1-9.2 of Commission Regulation 447/98/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 061, 02/03/1998, p 1 Including Annex I (Form CO).

<sup>479</sup> e.g. Commission Decision, Case IV/M126, 1992 (*Accor/ Wagon-Lits*) paragraph 25: Market share of 89% whereas the largest competitor only holds 18% (difference of 71 percentage points); A combined market share of 44 % establishes dominance if the largest competitors consist of SMEs without significant resources: Commission Decision, Case IV/M12, 1991 (*Varta/Bosch*) paragraph 32 and 58.

<sup>480</sup> Commission Decision, Case IV/M42, 1991 (*Alcatel/Telettra*) at paragraph 40.

tant transmission or distribution networks so that he could easily expand its consumer base rapidly if desired so that the present dominant service provider has every incentive to offer reasonable services.

Alternatively, the small competitor may be an extremely powerful global player like AT&T or Ericsson in conglomerate terms so that even a concentration leading to a market share of 81% or 83% is cleared<sup>481</sup>. Additionally, available spare capacity or high technology products by minor competitors will undermine the difference of market shares providing that said products have a competitive advantage.

The third sub-factor clarifying the need to develop effective competition on an affected market in terms of Art. 2 I lit. a MR1989 reflects the influence of potential competitors, i.e. companies operating either on upstream, on downstream or unrelated markets which threaten to enter the relevant product markets on which the concentration will be implemented. Compared to the analysis of actual competitors, the same considerations will basically apply to potential ones. However, the relevance of arguments relating to potential competitors will depend on the likelihood of rapid market entry and the financial resources so as to seriously attack the allegedly dominant firms which implement a concentration.

Additionally, the significant legal barriers<sup>482</sup> to enter the relevant markets will affect the examination. This is also true for factual<sup>483</sup> barriers.

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<sup>481</sup> e.g. Commission Decision, Case IV/M42, 1991 (*Alcatel/Telettra*) at paragraph 40.

<sup>482</sup> legal monopolies: q.v. the energy judgements of the ECJ of 1997; licensing requirements if the license is awarded under discriminatory terms: Commission Decision, Case IV/M126, 1992 (*Accor/ Wagon-Lits*) paragraph 25); technical standards that may have well disguised discriminatory effects, obligations to appoint high numbers of staff so as only major operations

#### 6.5.3.2.3 Market Position of the Undertakings Concerned

The market position of the undertakings concerned criterion pursuant to Art. 2 I lit. b 1<sup>st</sup> Variant MR1989 has to be primarily evaluated by means of market shares on the relevant and affected markets. This finding is systematically backed by the fact that the criterion is listed at the beginning of Art. 2 I lit b MR1989. Compared to the old case law, a quantitative assessment of market shares is usually not longer sufficient to conclude the microeconomic assessment of the undertakings concerned. Consequently, additional qualitative criteria are included pursuant to Art. 2 I lit b 2<sup>nd</sup> to 8<sup>th</sup> Variant MR1989.

Beginning with the quantitative examination of market shares, it should be stressed that the market share analysis is only twofold in opposition against the threefold structure governing the finding of dominance in Art. 82 ECT: Basically, the approach towards exorbitant market shares is different. Although these may represent present dominance and are accordingly a powerful indicator of future dominance, they will never be self-sufficient to establish such a finding for the future owing to the primary ex ante nature of merger control<sup>484</sup>.

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will become viable; intellectual property rights preventing a market entry: Commission Decision, Case IV/M68, 1991 (*Tetra Pak/Alfa Laval*) at paragraph 42.

<sup>483</sup> technological barriers; strong national purchase preferences; economies of scale barriers related to network bound industries in the utility sectors of oil, gas, power, water; significant spare capacities in the market; low technology products so that technological advances leading to competitive advantages are not likely; maturity of the market making increases of demand unlikely: Commission Decision, Case IV/M53, 1991 (*Aérospatiale-Alenia/de Havilland*) paragraph 8.

<sup>484</sup> Commission Decision, Case IV/M222, 1992 (*Mannesmann/Hoesch*).

The contrary approach is underlined by the different rationale of Art. 2 MR1989 and Art. 82 ECT as proceedings under the latter provision are normally investigations focusing on an ex post investigation. Moreover, the new concept allows to address expanding markets or rapidly changing markets of transition immediately after privatisation measures: those would not be properly judged if one applied a simple examination of present market shares<sup>485</sup>. Similarly, the perspective of declining market shares must not be ignored when assessing concentrations<sup>486</sup>.

The remainder of cases without extraordinary market shares, i.e. those well below 50% which nevertheless exceed 25% of combined market power will be solved by means of a mixed criteria analysis. These principles are exemplified by numerous cases in which market shares between 43% and 90% were deemed not to violate Art. 2 MR1989<sup>487</sup>. Moreover, a combined market share below 25% will be self-sufficient for a negative assessment of dominance pursuant to Recital 15 MR1989.

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<sup>485</sup> q.v. Commission Decision, Case IV/M57, 1991 (*Digital/Kienzle*) at paragraph 20.

<sup>486</sup> q.v. Commission Decision, Case IV/M235, 1992 (*Elf Aquitaine/Thyssen/Minol*). The former state monopolist Minol was predicted to lose its strong position. The Case is discussed infra: 6.5.3.2.11 The Minol Case.

<sup>487</sup> e.g. an aggregated market share of 90% for non-aseptic milk cartons was not persuasive owing to strong competitors: Commission Decision, Case IV/M68, 1991 (*Tetra Pak/Alfa Laval*) at paragraph 38-39; e.g. aggregated market share of 76% for petroleum distribution in Eastern Germany in 1991: Commission Decision, Case IV/M235, 1992 (*Elf Aquitaine/Thyssen/Minol*); combined market share of 100% from London Gatwick to Lyon and 98.6% London Gatwick-Paris: Commission Decision, Case IV/M259, 1992 (*British Airways/TAT*).

#### *6.5.3.2.4 Economic And Financial Power of The Undertakings Concerned*

The qualitative assessment of the market power of the undertakings concerned begins with the 2<sup>nd</sup> Variant of Art. 2 I lit. b MR1989. However, the analysis of economic and financial power of the parties is similar to the approach taken with regard to Art. 82 ECT and will consider the probable effects of conglomerate concentrations as well so it is justifiable not to elaborate the details.

#### *6.5.3.2.5 Alternatives for Consumers or Suppliers*

The third variant of Art. 2 I lit. b MR1989 deals inter alia with the situation that potential dominance is circumvented if consumers have access to alternative products from different markets. Said products must not be complete substitutes in terms of the relevant market definition. In this case they would belong to the relevant product market that can logically never provide for alternative products. Contrarily, said alternative products must belong to different markets and must satisfy some interests of the consumers of a product from the relevant market so that he may switch to such a product.

A comparable rationale is true from the perspective of suppliers which may switch from consumers on the relevant product market to alternative consumers in order to satisfy some of the commercial targets they pursue when they enter the relevant market.

Clearly, availability of alternative products or consumers will limit the scope for a finding of dominance as the market power of the concentration is reduced. This finding is sustained by the case law: The Commission argued in *Accor/Wagon-Lits* that smaller Companies for motorway catering services are not regarded as being in the same market like the merged entity. However, even if this was the case, the Commission argued that alternative small suppliers (for

instance located close to highways) would limit the behavioural freedom of the new entity<sup>488</sup>. A similar argument is used with respect to neighbouring markets for yarn that prevent the merged entity from behaving independently<sup>489</sup>.

#### *6.5.3.2.6 Access to Supplies and Markets*

The fourth aspect of Art. 2 I lit. b MR1989 introduces the concept that a finding of dominance is facilitated if the relevant undertakings are able to expand to related up- or downstream markets so that the access of competitors of the relevant undertakings to upstream or downstream markets or of consumers or suppliers to said markets is limited. The basic idea is that the more probable an expansion by a concentration to supply markets or to downstream markets is, the smaller the scope becomes for independent behaviour of undertakings competing either on the relevant markets or operating on related up- or downstream which focus on a single level of the supply chain.

However, superior market power of a given concentration on a relevant market power that has the financial and technological means to expand to downstream markets can nevertheless be equalised if the merged entities have an important interest to serve few large consumers who consume an important ratio of the total production. Competing against the powerful undertakings on downstream markets may cause commercial threats to the relevant undertakings which may well be greater than the likely opportunities. In accordance with this argument, a concentration of wholesale suppliers is less dangerous if it faces a monopolistic wholesale consumer or an oligopoly<sup>490</sup>. However, it should be pointed out that it will be problematic in the long run if existing concentrations on the demand side are used as a justification to back additional

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<sup>488</sup> Commission Decision, Case IV/M126, 1992 (*Accor/ Wagon-Lits*) paragraph 25.

concentrations on the supply side<sup>491</sup>. Clearly, this arguments is even more true if one plans to liberalise a business sector: It would be detrimental to justify concentrations between the future market players on the grounds of existing concentrations owing to public undertakings up to now vested with services in the general economic interest. Contrarily, it is superior to privatise and divest the latter structures at the same time. In this case, no new private market entrant can argue that additional concentration is needed to equalise overwhelming power on the demand side. Therefore, it is crucial not only to privatise undertakings formerly incorporated under public law but also to divest them so as to create several competing entities<sup>492</sup>.

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<sup>489</sup> Commission, Case IV/M113, 1991 (*Courtaulds/SNIA*).

<sup>490</sup> q.v. Commission Decision, Case IV/M42, 1991 (*Alcatel/Telettra*) at paragraph 38.

<sup>491</sup> The same logic applies vice versa if one justifies future concentration of the demand side with existing concentration of the supply side.

<sup>492</sup> This is an important lesson from the privatisation of British Gas Corporation in 1986 so that the privatised British Gas Plc could maintain a private monopoly for several years until liberalisation and unbundling took place.

#### 6.5.3.2.7 *Barriers to Entry*

The fifth sub-criterion of Art. 2 I lit. b MR1989 deals with the legal or factual barriers to entry markets that could be broadened by means of a concentration.

The more significant legal or factual barriers to entry the relevant market are, the easier a finding of dominance will be established. It has to be stressed that barriers are often related to technological edges which cause microeconomic benefits often protected by intellectual property rights. Hence, enormous financial resources, which are needed to compete on the market owing to enormous economies of scale, might distinguish a concentration from its competitors<sup>493</sup>. As a logical consequence, the technological leader will always focus on high margin products whereas weaker competitors have to concentrate on low margin product groups<sup>494</sup>.

#### 6.5.3.2.8 *Demand Trends*

As to demand trends under Art. 2 I lit. b 6<sup>th</sup> Variant MR1989, it has to be noticed that a concentration is less relevant to emerging market with expanding demand and a high ratio of technological developments whereas a finding of dominance is facilitated on a mature market which is characterised by constant or even declining demand in terms of value and quantity. The latter finding is true for the German electricity market in Europe in accordance with the VEBA/VIAG decision that is due to be assessed, later.

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<sup>493</sup> I. Van Bael and J.-F. Bellis, Competition Law of the European Community (3<sup>rd</sup> ed.) (Bicester, U.K., CCH Editions Limited, 1994) p 464.

<sup>494</sup> q.v. This was true for the global market for personal computer central processing units. Intel was the technological leader for a decade and used to focus on high value chips whereas the competitor AMD struggled. Intel used to lower prices for chips when AMD managed to manufacture a product with similar characteristics. Recently, AMD generated CPUs exceeding Intel's best models. q.v. Commission Decision, Case IV/M68, 1991 (*Tetra Pak/Alfa Laval*) at paragraph 39.

#### 6.5.3.2.9 *Interests of Intermediary and Final Consumers*

The 7<sup>th</sup> variant of Art. 2 I lit. b MR1989 expands the 3<sup>rd</sup> variant so as to specifically take the interests of intermediary and final consumer of the products or services into account, which are provided by undertakings active on the relevant market. Again, the larger the ability and willingness is to switch to alternative offers of comparable quality and price, the more limited will be the market power of the concentration.

#### 6.5.3.2.10 *Technical and Economic Progress*

From the very beginning, several opinions existed whether and to which extent a concentration may be justified on the grounds that it can improve technical and economic progress to the proportionate benefit of consumers in terms of Art. 2 I lit. b 8<sup>th</sup> Variant MR1989. In practice, The case law does not indicate, that market developments and industrial policy arguments were of any major importance so as to justify a concentration which is not justifiable on grounds based on classical competition law analysis<sup>495</sup>. This is backed by the systematic evaluation of Art. 2 I lit. b 8th Variant MR1989 because the variants do not form an independent exemption like Art. 81 III ECT. Contrarily, the variant only represents one out of eight factors that determine a complex but nevertheless single consideration of compatibility.

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<sup>495</sup> especially the De Havilland Decision: Commission Decision, Case IV/M53, 1991 (*Aérospatiale-Alenia/de Havilland*) paragraph 8; q.v. L. Hawkes, *The EC Merger Control Regulation: Not an Industrial Policy Instrument: the De Havilland Decision* ECLR 35 (1992); T.A., Downes and D.S. MacDougall, *Significantly Impeding Effective Competition: Substantive Appraisal under the Merger Regulation*, unpublished CEPMLP Paper, p 14 (1993).

#### 6.5.3.2.11 *The Minol Case*

If one combines the logic of the third and the fourth criterion of Art. 2 I lit. b MR1989, it will be easily established that it is a strong indicator of dominance if a concentration of undertakings not only prevents final consumers from alternative supplies and wholesale suppliers from alternative retailers (intermediate consumers) but also competitors from expanding to upstream activities as the merged entity will obtain significant control over up-stream operations. Such influence will impede the efficacy of competition on related up- or downstream markets<sup>496</sup>. Additionally, the undertakings concerned will sooner or later be provided with the opportunity acquire the weakened up- or downstream companies on very favourable conditions<sup>497</sup>.

The importance of these considerations is exemplified by the *Minol Case*<sup>498</sup>. The concentration allegedly threatened to dominate the network for petroleum distribution and storage.

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<sup>496</sup> the so-called foreclosure effect.

<sup>497</sup> The analysis of vertical aspects was provided by Annex I Section 5 Affected Markets Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O.J. L 336, 31/12/1993 p. 7. Since then, it was dealt with by Annex I Section 6 III Affected Markets lit. b in the 2nd and third implementing Regulation; q.v. Annex I Section 6 III Affected Markets lit. b Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 377, 31/12/1994 p 1 including Annex I (Form CO); q.v. Annex I Section 6 III Affected Markets lit. b Commission Regulation 447/98/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 061, 02/03/1998, p 1 Including Annex I (Form CO).

<sup>498</sup> Commission Decision, Case IV/M235, 1992 (*Elf Aquitaine/Thyssen/Minol*).

The German privatisation Agency Treuhandanstalt<sup>499</sup> sought to sell the Mineralölhandel AG (MINOL) to Elf Mineralöl GmbH<sup>500</sup> (98%) and Thyssen Handel Berlin GmbH (2%) on the condition that the acquirers sets up a company Leuna 2000<sup>501</sup> which invests DM 4.5 billion so as to erect a new refinery and to operate the existing one until the new one enters into operation<sup>502</sup>. Additionally, Leuna 2000 would acquire a 52.5% stake in Mineralölverbundleitung GmbH which operates the petroleum pipeline and storage facilities in Eastern Germany. The Commission quickly establishes a concentration with a Community dimension and denies the creation of a dominant position on the relevant market for petroleum distribution<sup>503</sup> on the grounds that the acquirers' current position on the sub-markets in Western Germany does not exceed 10% on whereas the then high market share of Minol - 896 out of 1340 petrol stations - was predicted to decrease rapidly pursuant to new powerful competitors, restitution claims regarding fully owned petrol stations, short term termination clauses regarding filling station joint ventures. As far as refinery capacity is concerned, the Commission did not oppose the transaction after the Treuhandanstalt promised to monitor whether Leuna 2000 would enter into quid pro quo agreements even when dealing with affiliated companies so as to limit the commercial scope of the Treuhandanstalt's offer to bear losses of the refinery businesses.

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<sup>499</sup> The Treuhandanstalt held not only the assets of state-owned undertakings created under public law in the former GDR but also the shares of such companies after they had been transferred to private or public limited liability companies. It acted as a trustee of the federal state with a view to privatise the undertakings, reorganise them to facilitate privatisation and to administer the remaining assets.

<sup>500</sup> Elf Mineralöl GmbH is a German subsidiary of Société National Elf Aquitaine (SNEA).

<sup>501</sup> The share capital is split as follows: 2/3 Elf Mineralöl GmbH; 1/3 Thyssen Handel Berlin.

<sup>502</sup> Commission Decision, Case IV/M235, 1992 (*Elf Aquitaine/Thyssen/Minol*).

<sup>503</sup> As state above, the Commission is reluctant to avoid stringent market definition unless this is crucial for the evaluation of the concentration: q.v. Commission Decision, Case IV/M235, 1992 (*Elf Aquitaine/Thyssen/Minol*).paragraph 10, 11, 14.

With regard to the storage capacity, Minol has a predominant capacity of 504,900m<sup>3</sup> compared with 240,000m<sup>3</sup> of competitors. This finding is underlined by the then bad road network so that petroleum stations depended crucially on access to a depot in a distance not exceeding 150 km. The Commission required the informal undertaking that the acquirer sends a legally binding offer to competitors regarding the access to Minol's storage capacity on prudential terms

based on a cost + margin pricing methodology. After Elf complied with the undertaking the concentration was declared compatible under Art. 6 I lit. b MR1989.

#### *6.5.3.2.12 The Air France/Sabena Case*

Secondly, the Air France/Sabena case will provide for another example of anti-competitive aspects of vertical market power if a concentration threatens to exclude competitors from a relevant owing to superior vertical access to airport facilities, take-off slots and landing slots on the airport of Brussels regarding certain destinations<sup>504</sup>. Firstly, the Commission is of the opinion that the operation caused SABENA to become a concentrative JV between the Belgian State and Air France as far as SABENA's aerial transport business is concerned<sup>505</sup>. As a remedy against abovementioned threats, the Commission obliged the parties to grant access to said facilities and to limit the future number of slots held by the concentration as a pre-requisite for issuing a compatibility decision pursuant to Art. 6 I lit. b MR1989.

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<sup>504</sup> e.g. market share of the concentration will be 100% between Brussels - Lyon; Brussels - Paris; Brussels-Nice: Commission Decision, Case IV/M157, 1992 (*Air France/Sabena*) paragraph 12-14; exclusion of other sectors: paragraph 29.

<sup>505</sup> Commission Decision, Case IV/M157, 1992 (*Air France/Sabena*) paragraph 12-14; exclusion of other sectors: paragraph 22.

#### 6.5.3.2.14 Case VIAG/Continental Can

Thirdly, the case *VIAG/Continental Can* underlines the significance of opportunities of a concentration to prevent competitors from accessing supply markets. VIAG, already controlling a leading producer of aluminium, acquired companies active on the markets for packaging of beverages<sup>506</sup>. The Commission established that no single market for beverages is available which would include glass, cans or plastic. Contrarily, it found specified markets for beer, soft drinks depending on the packaging materials owing to different consumer preferences, varying packaging technologies and cost diversities<sup>507</sup>. It was analysed whether the control over a leading aluminium producer combined with control over companies manufacturing metal packaging materials would prevent competing packaging undertakings from access to aluminium supplies. However, the foreclosure effect was deemed to be negligible as aluminium packaging only forms 30% of the market for metal packaging of beverages as tinsplate packaging is a substitute to aluminium<sup>508</sup>. Additionally, 40% of aluminium is supplied by independent suppliers not being vertically integrated<sup>509</sup>.

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<sup>506</sup> Commission Decision, Case IV/M157, 1992 (*Air France/Sabena*) paragraph 12-14; exclusion of other sectors: paragraph 41.

<sup>507</sup> Commission Decision, Case IV/M81, 1991 (*VIAG/Continental Can*) paragraph 10 - 14.

<sup>508</sup> Commission Decision, Case IV/M81, 1991 (*VIAG/Continental Can*) paragraph 43.

<sup>509</sup> Commission Decision, Case IV/M81, 1991 (*VIAG/Continental Can*) paragraph 51.

#### 6.5.3.2.15 Rule of Reason under Art. 2 II; I MR1989

In addition to the wording of Art. 2 I lit. b MR1989, three issues require due attention for the finding of dominance: the scope for a rule of reason, the notion of collective dominance and ancillary restraints.

Firstly, it should be briefly noted that the Commission applies - according to the case law - a rule of reason to Art. 2 I MR1989 that is similar to the construction under Art. 81 ECT<sup>510</sup>. For instance, a concentration will be declared compatible if the acquirer's market share is not likely to increase significantly owing to the concentration<sup>511</sup>.

#### 6.5.3.2.16 Joint Dominance under Art. 2 II; I MR1989

The second unwritten issue refers to a controversy whether the establishment of joint dominance - i.e. market power attributed to a small group of independent competitors that co-ordinate their external conduct in the long term by means of a quick adaptation of the other entity's behaviour so as to imitate a single entity and remove internal competition within the group - should be regarded as a creation of dominant position under Art. 2 MR1989 or not<sup>512</sup>. Collective Dominance differs from concerted practices in terms of Art. 81 ECT as an oligopolistic concentration does not require a formal, explicit legally or morally binding consent between the entities involved:

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<sup>510</sup> The complex rationale of the rule of reason and its controversial subordinated rules it was developed under Section 1 of the Sherman Act is discussed by O. Black, *Per Se Rules and Rules of Reason: What Are They*, ECLR 145 (1997).

<sup>511</sup> Commission Decision, Case IV/M68, 1991 (*Tetra Pak/Alfa Laval*).

<sup>512</sup> q.v. D. Ridyard, *Joint Dominance and The Oligopoly Blind Spot under The EC Merger Regulation*, ECLR 161 (1992); A. Winckler and M. Hansen, *Collective Dominance under The EC Merger Control Regulation*, CMLR 787 (1993); D. Ridyard, *Economic Analysis of Single Firm and Oligopolistic Dominance under The European Merger Regulation*, ECLR 255 (1994).

Unilateral reaction to the other entity's action, which is governed by the principles of game theory, is sufficient<sup>513</sup>.

The first opinion disapplies MR1989 to situations of collective dominance based on a narrow interpretation of the wording of Art. 2 MR1989<sup>514</sup>, a narrow interpretation of Art. 83 ECT as a legal basis for secondary law that merely implements Art. 81-82 ECT and an argumentum e contrario as only Art. 82 ECT supports abuses of dominant positions by "more" undertakings. Moreover, the courts used to ignore arguments based on collective dominance in cases dealing with Art. 81-82 ECT and stated that a concerted practise can generally not be used twice so that a potential violation of Art. 81 ECT will generally not sustain an additional violation of Art. 82 ECT under the aspect of collective dominance<sup>515</sup>. This opinion was honoured by initial decisions of the Commission which ignored the doctrine of joint dominance<sup>516</sup>.

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<sup>513</sup> J.B. Alonso, *Economic Assessment of Oligopolies under The Community Merger Control Regulation*, ECLR 3 (1993); D. Ridyard, *Economic Analysis of Single Firm and Oligopolistic Dominance under The European Merger Regulation*, ECLR 259 (1994); Joint Dominance is facilitated if the market is major, transparency is great, high concentration is available, high barriers to entry and exit are available so that a repeated, stable game of familiar partners is likely in which provocations are answered with efficient retaliations leading to a zero sum game.

<sup>514</sup> Amendments of the drafts of MR1989 suggest that aspects collective dominance known from US and German Law were discussed. The fact that the topic is not expressively addressed in the wording can therefore be interpreted as an intentional silence of the law. This would rule out a broad interpretation of Art. 2 MR1989; q.v. A. Winckler and M. Hansen, *Collective Dominance under The EC Merger Control Regulation*, CMLR 805 (1993).

<sup>515</sup> ECJ Case C-85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461 paragraph 39; ECJ Case C-247/86 *Alsatel v SA Novasam* [1988] ECR 5987; Court of First Instance Joined Cases T-68/89, T-77/89 and T-78/89 *Società Italiana Vetro & Ors v Commission* [1992] ECR II-1403 (Italian Flat Glass Judgement); This has been already discussed with respect to Art. 81-82 ECT: supra at 5.1.4 Dominant Position and Collective Dominance.

<sup>516</sup> Commission Decision, Case IV/M4, 1990 (*Renault/Volvo*). The merger was cleared as the concentration will neither dominate Mercedes nor Iveco. However, the HHI would increase to 2998 points and the scope for collusion between Renault/Volvo and the competitors is immense; Commission Decision, Case IV/M98, 1991 (*Elf/BC/CEPSA*); Commission Decision, Case IV/M12, 1991 (*Varta/Bosch*).

Contrarily, a later decision refused to decide on the issue<sup>517</sup>.

According to a 2<sup>nd</sup> opinion an inclusion of collective dominance to Art. 2 MR1989 is indeed sustainable.

Firstly, the recent case law of the Tribunal regarding Art. 81 and 82 ECT indicates that joint dominance is a suitable instrument to invoke Art. 82 ECT in case of proven economic links between the parties<sup>518</sup>. Secondly, the recent case law of the Commission considers aspects of joint dominance<sup>519</sup>.

Even though the wording of Art. 2 MR1989 does not clearly address the subject, a broad approach of unilateral and collective dominance is backed by the legal basis of MR1989 as it includes Art. 308 ECT.

Additionally, it is highly persuasive to argue, that the prognostic elements of merger control justify a new approach that differs from the old findings related to Art. 81-82 ECT<sup>520</sup>.

Consequently, it is argued that the concept of joint dominance can be incorporated in the meaning of dominance in terms of Art. 2 MR1989 and the doctrine was applied to merger control with the argument that broad interpretation is

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<sup>517</sup> Commission Decision, Case IV/M165, 1991 (*Alcatel/AEG Kabel*): The German authorities requested a referral under Art. 9 II MR1989 so as to apply the domestic assumption of collective dominance under the Antitrust Act of 1990. However, the Commission refused and cleared the concentration and it did not decide whether Art. 2 MR1989 should be interpreted broadly so as to include joint dominance.

<sup>518</sup> Commission Decision 89/93/EEC of 7 December 1988 Relating to A Proceeding under Art. 85 and 86 of The EEC Treaty, O.J. L 33 04/02/1989 p 44 (*Flat Glass*); Court of First Instance Joined Cases T-68/89, T-77/89 and T-78/89 *Società Italiana Vetro & Ors v Commission* [1992] ECR II-1403 (Italian Flat Glass Judgement). However, the Tribunal overruled the Commission decision on factual grounds as the economic links were not proved.

<sup>519</sup> Commission Decision, Case IV/M190, 1992 (*Nestlé/Perrier*): Collective dominance is found as the acquirer Nestlé and BSN would hold 82.3% of the market for source bottled ground waters in terms of value if Perrier SA was acquired; Commission Decision, Case IV/M202, 1992 (*Thorn EMI/Virgin Music*): Aspects of collective dominance were assessed but rejected.

<sup>520</sup> e.g. Considerations of market shares - extremely relevant to abuses under Art. 82 ECT - should not be decisive for the purpose of Merger Control and a new case law is predicted q.v. Sir L. Brittan, *The Law and Policy of Merger Control in the EEC*, EL Rev 354 (1990); q.v. A. Winckler and M. Hansen, *Collective Dominance under The EC Merger Control Regulation*, CMLR 806 (1993).

needed as the detrimental effects of joint dominance are often identical to those of single firm dominance<sup>521</sup>.

In fact, a concentration of two companies - A and B - on a mature market with few active competitors - C and D - will create a platform for future collusion between the concentration (A+B), C or D even though the concentration (A+B) may be not powerful enough to unilaterally dominate the market in terms of Art. 2 MR1989<sup>522</sup>.

The doctrine is not only backed on the grounds of consistent decision-making as the Commission used the concept to approach to the comparable issue under Art. 82 ECT but also the wording of various domestic antitrust laws mention this phenomenon<sup>523</sup>. The concept will be reviewed again with respect to the case *VEBA/VIAG*.

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<sup>521</sup> Commission Decision, Case IV/M190, 1992 (*Nestlé/Perrier*), O.J. L 356, 1992, p 1 paragraphs 112-114; Opinion of the Advisory Committee on Concentrations, O.J. C 319, 1992, p 3.

<sup>522</sup> This is exemplified by the fact that commercial decisions (e.g. pricing) inevitably become interdependent if few companies penetrate the market and a "tacit collusion" will occur; q.v. F.M. Scherer and D. Ross, *Industrial Market Structure and Economic Performance* (3<sup>rd</sup> ed.) (Cambridge, U.S., Harvard University Publishing, 1991) p 226.

<sup>523</sup> e.g. Commission Press Release of 22 July 1992, IP (92) 617. e.g. for Germany: Section 19 GWB1998.

#### 6.5.3.2.17 Ancillary Restraints

The third issue - mentioned by Recital 25 and Art. 8 II 3rd Sentence MR1989 and not expressly governed by Art. 2 of MR1989 - relates to the so-called ancillary restraints. Firstly, the term will be defined, then the procedural aspects are considered before the substantive criteria for the assessment are discussed.

A restraint will be available if the undertakings concerned agree on behavioural restrictions which intent or cause a reduction or distortion of competition on a relevant market. Such a restraint will be ancillary, if it is directly related to the concentrations and if its enforcement is deemed to be necessary for a successful implementation of the concentration. This term of direct relation is specified in a Commission notice<sup>524</sup>: In short, the restriction is directly related if it is of minor economic relevance compared with the concentration<sup>525</sup> and if the concentration is the original reason to agree on the concerted practices. Secondly, the necessity criterion asks whether the practices are consistent with a complete proportionality test<sup>526</sup>. Consequently, a restraint should be of limited duration as unlimited ones are rarely justifiable<sup>527</sup>.

In procedural terms, it must be stressed that ancillary restrictions are exempted from the need to initiate formal proceedings under REG17 so that no application for an informal comfort letter<sup>528</sup> or a derogation under Art. 81 III

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<sup>524</sup> Commission Notice Regarding Restrictions Ancillary to Concentrations, O.J. C 203, 14/08/1990, p 5; q.v. Proposed Commission Notice on Restrictions Directly Related and Necessary to Concentrations; pdf.file downloadable from: [http://europa.eu.int/comm/competition/mergers/legislation/draft\\_notices/](http://europa.eu.int/comm/competition/mergers/legislation/draft_notices/); e.g. non competition clauses between the target's parent and the acquirer.

<sup>525</sup> Section II 4 Commission Notice Regarding Restrictions Ancillary to Concentrations, O.J. C 203, 14/08/1990 p 5.

<sup>526</sup> q.v. Section II.5 Commission Notice Regarding Restrictions Ancillary to Concentrations, O.J. C 203, 14/08/1990 p 5.

<sup>527</sup> q.v. Commission Decision, Case No. IV/M197, 1991 (*Solvay-Laporte/Interox*).

<sup>528</sup> i.e. an informal statement that the Commission does not find that the mentioned conduct is within the scope of Art. 81 I ECT.

ECT is required. This finding is a result of Recital 25, Art. 8 II 3rd Sentence MR1989 considered together with Art. 22 II MR1989.

However, the wording of MR1989 does not expressively define the substantive criteria which will govern whether ancillary restraints will be lawful or not.

The Commission strictly pursued the opinion that the criteria of Art. 81 I and III ECT are not relevant to merger control proceedings<sup>529</sup>. This leads to the result, that the dominance test of Art. 2 I-III MR1989 provides for the appropriate yardstick: The restraint is one of the factors determining whether to block a decision or to issue a conditional clearance.

Alternatively, one could argue that the Merger task force should examine ancillary restraints during the merger control proceedings to the end whether the reported behavioural restrictions are inconsistent Art. 81 I ECT and - if so - whether they are justifiable under Art. 81 III ECT and to attach undertakings in case of an interference so as to assure compliance with Art. 81 I or III ECT<sup>530</sup>.

The first approach avoids contradictory interpretations of Art. 81 ECT by different groups of casehandlers in the Commission.

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<sup>529</sup> "Under the Regulation [i.e. MR1989] such restrictions must be assessed in relation to the concentration, whatever their treatment might be under Articles 85 and 86 if they were to be considered in isolation or in a different economic context": paragraph I.2 of Commission Notice Regarding Restrictions Ancillary to Concentrations, O.J. C 203, 14/08/1990 p 5; q.v. paragraphs III.A.6 and III.B.3 ; q.v. Proposed Commission Notice on Restrictions Directly Related and Necessary to Concentrations; pdf.file downloadable from: [http://europa.eu.int/comm/competition/mergers/legislation/draft\\_notices/](http://europa.eu.int/comm/competition/mergers/legislation/draft_notices/) paragraph I.2; q.v. Commission Explanatory Memorandum Treatment of Ancillary Restraints under The Merger Regulation, pdf.file downloadable from [http://europa.eu.int/comm/competition/mergers/legislation/draft\\_notices/](http://europa.eu.int/comm/competition/mergers/legislation/draft_notices/) paragraph 4; q.v. also Ahlborn and V. Turner, *Expanding Success? Reform of The E.C. Merger Regulation*, ECLR 259 (1998): The inconsistency of the assessment of ancillary restraints and of cooperative aspects of coordinative JVs under MR1997 is criticised by Ahlborn and V. Turner, *Expanding Success? Reform of The E.C. Merger Regulation*, ECLR 258-259 (1998).

<sup>530</sup> This approach is similar to the treatment of coordinative JVs under MR1997 pursuant to Art. 82 IV MR1997 as exemplified by Draft Commission Notice on Commitments Submitted to The Commission under Regulation 4064/89/EEC and under Commission Regulation 447/98/EC at paragraph 15; pdf.file downloadable from: [http://europa.eu.int/comm/competition/mergers/legislation/draft\\_notices/](http://europa.eu.int/comm/competition/mergers/legislation/draft_notices/) .

The second opinion overlooks that Art. 8 II MR1989 does not vest the Commission with the right to unilaterally impose self invented undertakings that could enforce Art. 81 ECT. Therefore, the approach taken by the Commission with regard to the yardstick of the assessment of ancillary restraints is generally sustainable. However, the substantive criteria of Art. 81 I and III ECT will be clearly applicable if the Commission has to assess coordinative aspects of coordinative JVs under Art. 2 IV MR1997, i.e. a collusion between each parent and the JV or between the parents, which is discussed later<sup>531</sup>.

#### **6.5.4 Initiation of Phase Two Decision Based on Art.6 I lit. c MR1989**

If the Commission finds that a concentration within its jurisdiction is likely to be incompatible with common market pursuant to Art. 6 I lit. c MR1989 in combination with Art. 2 III MR1989, a decision will be taken that initiates phase two proceedings. In order to establish the necessary finding of dominance, Art. 2 III MR1989 refers - from a contrary point of view - to the substantive criteria of Art. 2 I MR1989. The former criteria have already been discussed in the context of a decision based on Art. 6 I lit. b MR1989 so that a further assessment is redundant. In procedural terms, the initiation of phase two proceedings decision may be accompanied by a prolongation of the suspension under Art. 7 II MR1989. The wording of MR1989 does not provide for a publication of an initiation decision to third parties but one could argue that a number of publications may generate customary law. Alternatively, it is persuasive to argue that a regular publication of initiation decisions in the Official Journal creates a

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<sup>531</sup> q.v. Art. 2 IV; 3 II and 8 III MR1997; Draft Commission Notice on Commitments Submitted to The Commission under Regulation 4064/89/EEC and under Commission Regulation 447/98/EC Paragraph 15; pdf.file downloadable from: [http://europa.eu.int/comm/competition/mergers/legislation/draft\\_notices/](http://europa.eu.int/comm/competition/mergers/legislation/draft_notices/).

consistent lawful practise from which the Commission can only derogate with due reason as otherwise the principle of non discrimination would be violated.

#### **6.5.5 Evaluation of Phase One Decisions under Art. 6 I MR1989**

The importance of decisions under Art. 6 I MR1989 following informal phase one proceedings must not be underestimated. The vast majority of cases is unconditionally declared compatible with the common market, a less significant number is declared compatible on conditions and only a small proportion is referred to formal phase two proceedings in which it will be highly probable to obtain a conditional clearance, sometimes an unconditional one and in extremely rare circumstances a prohibition will be issued<sup>532</sup>.

This result indicates the need to establish whether the Commission's powers to interpret indefinite vague blanket terms within the law - especially as to the finding of a concentration, the community dimension, the market definition, the finding of dominance - and to take advantage of provisions vesting it with discretionary powers are used in a way that boosts legal certainty. Additionally, if principles of predictability are ignored, the question of efficient judicial review arises.

Although most of the blanket terms are clarified by flexible but strictly teleological interpretation, the analysis shows an inconsistent approach to certain definition for example the inconsistent approach towards collective dominance under Art. 2 MR1989. However, it would not be fair to blame the Commission alone as the Courts are partly responsible due to their differentiated analyses under Art. 81 and 82 ECT. This may have persuaded certain acquirers to push forward with concentrations which were designed to circumvent a single firm

dominance by means of minor divestitures under the expectation that the Commission would fail to solve the issue properly.

From the perspective of undertakings interested in implementing a concentration it is important to note that a concentration may be justified not only by means of an extremely broad definition of the relevant product market but also by means of focusing on qualitative factors in Art. 2 I lit. b MR1989 which may overrule the strict solution based on quantitative market share analysis.

However, a final assessment is not feasible, as the question has to be discussed in the next sections how the secretive negotiations between the parties and the Commission should be assessed after the Commission revealed that it intends to issue a statement of objections and the parties suggested concessions and restrictions safeguarding the transaction.

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<sup>532</sup> q.v. An evaluation of the legal basis of the merger cases sustains this finding. The legal bases are published on the merger section of DG competition's website.

## **6.6 Phase Two**

If the Commission establishes serious concern as to the incompatibility of a given concentration, it will initiate formal proceedings in order to scrutinise the case in greater detail. This section concentrates on the procedural aspects of decision-making in phase two before the substantive requirements are discussed for a compatibility decision<sup>533</sup> eventually accompanied by undertakings<sup>534</sup>. Alternatively, a prohibition decision is taken. An order may be attached to the latter which will demand that assets will be divested or joint control abandoned if the unlawful concentration is already implemented<sup>535</sup>. In this context, the provisions will be evaluated which enable the Commission to revoke a positive decision in terms of Art. 8 II MR1989 pursuant to Art. 8 V-VI MR1989. A critical assessment of the procedural and substantial aspects of phase two is incorporated as well.

### **6.6.1 Procedural Aspects of Decision-making within Phase Two**

If the Commission takes a decision to initiate formal proceedings on the basis of Art. 6 I lit. c MR1989, it will apply a methodology with multiple stages that is broadly similar to the one that is relevant to phase one proceedings.

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<sup>533</sup> Art. 8 II 1st sentence MR1989.

<sup>534</sup> Art. 8 II 2nd sentence MR1989.

<sup>535</sup> Art. 8 II-IV MR1989.

### **6.6.1.1 Requests for Information Art. 14 MR1989**

Firstly, the Commission may ask certain addressees<sup>536</sup> to submit pieces of information necessary for the due completion of the analysis. Due to the vagueness of the term "necessary information", the Commission will have considerable discretion as to the definition what data may be requested. These powers of interpretation are limited by two factors: Firstly, the Commission has to submit copies to domestic authorities<sup>537</sup>. Secondly, the Commission has to state the legal basis and the purpose of any request accompanied by a reference to the potential sanctions for non compliance<sup>538</sup>. According to systematic analysis of Art. 11 I and V MR1989, the initial request is an informal act accompanied with a temporal framework for compliance. However, a formal decision may be issued if the addressee fails to comply with the request to full extent<sup>539</sup>. As any delay resulting from addressees ignoring the requests should not undermine the efficacy of the proceedings, the Commission is entitled to extend the proceedings pursuant to Art. 10 IV MR1989.

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<sup>536</sup> The correct addressees are Member States' governments, domestic authorities, natural person acting as entrepreneurs in terms of Art. 3 I lit b; undertakings (i.e. parties, group undertakings and third undertakings), associations of undertakings pursuant to Art. 11 I MR1989.

<sup>537</sup> The authorities of a Member State have to be informed under Art. 11 II MR1989 if the addressee of the request is resident in that State (or has its corporate seat there). Regarding corporate seats, it is disputed whether the location of incorporation is relevant or the place where the factual business activities are concentrated.

<sup>538</sup> Art. 14 III MR1989.

<sup>539</sup> Art. 14 V MR1989.

### **6.6.1.2 Investigations pursuant to Art. 13 MR1989**

Additionally, the Commission will be empowered by Art. 13 I MR1989 to initiate certain investigations<sup>540</sup> into undertakings and associations provided that they are necessary. According to the proportionality principle, such an investigation will be indispensable if a mere request of information under Art. 11 MR1989 is not deemed to be efficient. It could be disputed whether an ex ante or an ex post analysis would be more appropriate if the conduct of the Commission was to be reviewed. Art. 13 II MR1989 lays down how the Commission shall indicate the investigative powers of an official<sup>541</sup> to the addressees and deals with the liaison with domestic cartel authorities<sup>542</sup>. If the less formal investigations under Art. 13 I-II MR1989 are not effective, the Commission may issue a formal decision that orders an investigations pursuant to Art. 13 III MR1989 to which the abovementioned and additional safeguards apply<sup>543</sup>.

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<sup>540</sup> Art. 13 I MR1989: right to an examination of business records, right to a request for copies, right to oral explanations, right to the entering of premises

<sup>541</sup> The official has to provide a written statement that introduces the subject, the purpose and the potential penalties to the addressee pursuant to Art. 13 II 1st Sentence MR1989.

<sup>542</sup> Art. 13 II MR1989: The Member State must be informed well in advance.

<sup>543</sup> The decision has to define the subject, the purpose of the investigation, the date of investigations, the penalty and the right to judicial review (Art. 13 III MR1989). National Authorities have to be informed and heard (Art. 13 IV MR1989). The Commission can ask domestic authorities to enforce compliance with the former's orders (Art. 13 V-VI MR1989).

### **6.6.1.3 Substantive Analysis and Early Indication of The Course of Action**

After having completed the collection of facts, the emphasis shifts to the economic and legal assessment of the case pursuant to the criteria of Art. 2 I-III MR1989. This has already been discussed with respect to compatibility decisions in phase one.

If the complex analysis is completed, the officials in charge will indicate to the parties whether they intend to argue in favour of an unconditional clearance in terms of Art. 8 II 1st Sentence MR1989. In that case, it is announced that a draft decision regarding unconditional clearance will be prepared. Contrarily, if the Commission takes a critical approach to the concentration, it will communicate to the parties that it considers to issue a statement of objections on the basis of the relevant implementing regulation<sup>544</sup>. Said statement of objections will precede either a conditional clearance or an incompatibility decision.

The rationale behind this indication is that an early revelation of the Commission's intention to impose restrictions or to block the concentration provides the parties with a crucial opportunity of discussing alterations of the concentration and to submit these proposals to the Commission on time as they have the right to make themselves heard<sup>545</sup>. As a result of promised alterations, the Commission might remove undertakings, ease their scope or transform a plan of prohibition into an intention to grant a conditional clearance.

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<sup>544</sup> Art. 12 II Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O.J. L 336, 31/12/1993 p. 7; Art. 13 II Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 377, 31/12/1994 p 1 including Annex I (Form CO); Art. 13 II Commission Regulation 447/98/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 061, 02/03/1998, p 1 Including Annex I (Form CO).

#### **6.6.1.4 Unconditional Clearance Draft Decision or Statement of Objections**

Provided that the Commission undertook a favourable analysis of the concentration in the previous stage, a draft clearance decision is released and submitted to the advisory committee on concentrations which will be discussed in the next sections<sup>546</sup>.

However, if the Commission intends to conditionally clear or block the concentration, it will have to honour several procedural steps before a draft decision can be formulated: Firstly, the Commission will enact the statement of objections as it was predicted in the previous stage. The latter statement has four functions: Firstly, it indicates that the Commission plans either to grant a conditional clearance by imposing restrictions pursuant to the 2<sup>nd</sup> phrase of Art. 8 II MR1989 or to declare the concentration incompatible under Art. 8 III MR1989<sup>547</sup>. Secondly, it limits the scope of the proceedings insofar as it exhaustively defines these aspects of the concentration which sustain a finding of incompatibility from the Commission's point of view<sup>548</sup>.

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<sup>545</sup> q.v. This right is granted at any time up to the consultation of the Advisory Committee on Concentrations pursuant to Art. 18 I MR1989.

<sup>546</sup> q.v. infra at 6.6.1.7 .

<sup>547</sup> q.v. Art. 12 I Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O.J. L 336, 31/12/1993 p. 7; q.v. Art. 13 I Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 377, 31/12/1994 p 1 including Annex I (Form CO); Art. 13 I Commission Regulation 447/98/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 061, 02/03/1998, p 1 Including Annex I (Form CO).

<sup>548</sup> Art. 18 III MR1989.

Thirdly, it forms the framework for the parties' written observations<sup>549</sup> and for later discussions during the mandatory hearings that precede any decision based on Art. 8 II 2nd Sentence or Art. 8 III MR1989<sup>550</sup>.

Finally, the statement of objectives will fix a period within the parties must submit their written commentaries<sup>551</sup>.

Clearly, the threat to impose conditions or to block the merger forms a formidable incentive for the parties to propose alterations of the concentration so as to increase the element of market conformity and to decrease the scope for dominance.

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<sup>549</sup> q.v. Art. 12 IV Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O.J. L 336, 31/12/1993 p. 7; q.v. Art. 13 IV Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 377, 31/12/1994 p 1 including Annex I (Form CO); q.v. Art. 13 IV Commission Regulation 447/98/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 061, 02/03/1998, p 1 Including Annex I (Form CO).

<sup>550</sup> q.v. Art. 12 I Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O.J. L 336, 31/12/1993 p. 7; q.v. Art. 18 MR1989; q.v. Art. 13 I Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 377, 31/12/1994 p 1 including Annex I (Form CO); q.v. Art. 13 I Commission Regulation 447/98/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 061, 02/03/1998, p 1 Including Annex I (Form CO).

<sup>551</sup> Art. 12 II and IV Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O.J. L 336, 31/12/1993 p. 7; q.v. Art. 18 MR1989; Art. 13 II and IV Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 377, 31/12/1994 p 1 including Annex I (Form CO); q.v. Art. 13 II and IV Commission Regulation 447/98/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 061, 02/03/1998, p 1 Including Annex I (Form CO).

Said proposals will be discussed during the hearings with a view to establish whether they are sufficient to remove the stated concerns of the Commission. To that end, a consecutive series of proposals that increasingly limit the market power of the concentration may be necessary. However, the Commission is not restricted to a passive role: It may also issue a communication that proposes alterations which will remove the concerns<sup>552</sup>.

#### **6.6.1.5 Access to The File**

If the parties receive the abovementioned statement of objections, they can apply for access to the file under Art. 12 III/13 III of the relevant implementing regulation in order to prepare their written observations under the fourth paragraph<sup>553</sup> which will facilitate substantive discussions during the later stage of hearings.

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<sup>552</sup> I. Van Bael and J.-F. Bellis, Competition Law of the European Community (3<sup>rd</sup> ed.) (Bicester, U.K., CCH Editions Limited, 1994) p 504.

<sup>553</sup> Art. 12 III and IV Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O.J. L 336, 31/12/1993 p. 7; Art. 13 III and IV Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 377, 31/12/1994 p 1 including Annex I (Form CO); Art. 13 III and IV Commission Regulation 447/98/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 061, 02/03/1998, p 1 Including Annex I (Form CO).

### 6.6.1.6 Hearings

The next stage of the phase two proceedings involves hearings under Art. 18 MR1989. The rationale of this provision is to provide the parties with an opportunity of communicating their views to the Commission if the Commission intends to release a decision that contravenes the parties' commercial interests<sup>554</sup>. The Commission is obliged to take the arguments put forward into consideration as Art. 18 III MR1989 coerces the Commission not to base any negative finding on arguments which were not presented to the parties in advance. This provision would be useless if the Commission was entitled to ignore the observations made by the parties.

As far as ordinary phase two proceedings are concerned, Art. 18 MR1989 is applied after the parties submitted their observations concerning a statement of objections given by the Commission. In general, Art. 13 I of the implementing regulation clarifies that parties will be only heard if they request an oral hearing and show significant interest<sup>555</sup>.

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<sup>554</sup> i.e. Art. 18 MR1989 requires mandatory hearings prior to decisions regarding extensions of suspensions (Art. 7 II; 7 IV MR1989), conditional clearances (Art. 8 II 2nd sub-paragraph MR1989), prohibitions (Art 8 III MR1989), divestitures and cessation of joint control (Art. 8 IV MR1989), revocations (Art.8 V MR1989); sanctions (Art. 14 and 15 MR1989).

<sup>555</sup> However, in case of decisions regarding sanctions, it is not necessary to show such interest: Art. 13 I Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O.J. L 336, 31/12/1993 p. 7; Art. 14 III Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 377, 31/12/1994 p 1 including Annex I (Form CO); Art. 14 III Commission Regulation 447/98/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 061, 02/03/1998, p 1 Including Annex I (Form CO).

Hearings are held by a specific hearing officer and they are not public<sup>556</sup>. Additionally, third parties may be heard<sup>557</sup>. After the hearing, the Commission formulates its draft decision which will be submitted to the Advisory Committee on Concentrations.

#### **6.6.1.7 Preliminary Draft Decision and Advisory Committee on Concentrations**

The next stage deals with the consultation of the Advisory Committee on Concentrations. After the Committee received a preliminary draft decision - either pursuant to short proceedings owing to an initial positive view of the Commission or pursuant to the procedures following a statement of objections - the Advisory Committee on Concentrations will discuss the case in a joint meeting at the invitation of the Commission<sup>558</sup>. The committee consists of representatives of national cartel authorities and comments on the draft decision and may ask for a publication<sup>559</sup>.

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<sup>556</sup> q.v. Art. 14 I and IV Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O.J. L 336, 31/12/1993 p. 7; Art. 15 I and IV Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 377, 31/12/1994 p 1 including Annex I (Form CO); Art. 15 I and IV Commission Regulation 447/98/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 061, 02/03/1998, p 1 Including Annex I (Form CO). According to FT, the Hearing Officer Temple-Lang recently resigned owing to conflicts regarding a greater impact of hearing on the substantial evaluation of the case. However, the details are beyond the scope of this paper.

<sup>557</sup> Art. 15 Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O.J. L 336, 31/12/1993 p. 7; Art. 16 Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 377, 31/12/1994 p 1 including Annex I (Form CO); Art. 16 Commission Regulation 447/98/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 061, 02/03/1998, p 1 Including Annex I (Form CO).

<sup>558</sup> Art. 18 V MR1989. The Commission also chairs the meeting.

<sup>559</sup> However, the Commission has discretion whether to publish the opinion or not arg ex Art. 19 VII 2nd Sentence MR1989: "may".

#### **6.6.1.8 Final Decision**

Prior to developing the final draft decision, the Commission has to take the committee's opinion into "utmost account" but the vague meaning of this blanket term and the wording of the 2<sup>nd</sup> Sentence of Art. 19 VI MR1989 clearly indicate, that the Commission is vested with discretionary powers to derogate from the opinion as long as it gives due reasons. Finally, the Commissioners will decide on the case by absolute majority vote<sup>560</sup>. The decision will be valid after its publication<sup>561</sup>.

#### **6.6.1.9 Evaluation**

As a summary of the procedural aspects of phase two, one could state that the law is hardly transparent or consistent as the initial implementing regulation was not only amended in 1993, but also repealed in 1994 by its successor. The successor was repealed in 1998 by the third regulation and there is still an ongoing discussion regarding the revision of the guidance notices accompanying the Form CO of the third implementing regulation.

However, this first sight analysis is not persuasive as the key features of implementation regarding phase two proceedings were either not altered or merely clarified<sup>562</sup>.

It has to be stressed how great the focus on the parties' proposals and initiatives is and how important the parties' right to be heard prior to each procedural step are. The provisions go far beyond a mere mandatory hearing in which a commented statement of objections may be discussed: First of all, the parties are informed at an early stage about any legal assessment potentially

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<sup>560</sup> The proceedings depends on the consent at the level of the Commissioner's chefs de cabinet. If consent is available, no detailed discussion is necessary.

<sup>561</sup> q.v. Art. 20 I; 8 II-V MR1989.

<sup>562</sup> However, it was reported that conglomerate aspects are less relevant to notifications according to the present form CO.

contrary to their commercial interests. Secondly, the parties can play a proactive role by means of inventing of new options and by proposing these amendments of the concentration to the Commission which will give a quick response so as to explain the likely legal effect of an hypothetical realisation of the proposition. Thirdly, it is important that the Commission is prevented from introducing new counter-arguments in its later draft decision without having provided the parties with the opportunity of making observations. Moreover, the Commission must consider the presented arguments in its reasoning. Finally, it would be disproportional to insist on public hearings as the legitimate interest in confidentiality overwhelms the public interest as long as the final decisions are published and explain the reasoning and give appropriate details.

### **6.6.2 Unconditional Clearance Decision Art. 8 II 1st Sentence MR1989**

Having already discussed the procedural aspects of decision-making in phase two in the previous section and taking into account that the substantive criteria for an unconditional clearance decision in terms of Art. 8 II 1<sup>st</sup> Sentence MR1989 do hardly involve additional substantive aspects compared to those criteria that were already discussed in respect to the unconditional compatibility decision within phase one<sup>563</sup>, it is feasible to shorten the substantive analysis: Firstly, it is simply relevant that the concentration is modified in a manner that removes the probability of market dominance so that compatibility is available. Secondly, the case must be distinct from Art. 8 II 2<sup>nd</sup> sub-paragraph MR1989, i.e. the Commission must not be obliged to attach undertakings so as to safeguard the compatibility of the concentration<sup>564</sup>.

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<sup>563</sup> Art. 6 I lit. b MR1989.

<sup>564</sup> The discretion that the Commission enjoys under Art. 8 II 2nd subparagraph as to the attachment of undertakings will be reduced to zero if an undertaking is the only remedy to defend the market against a concentration of considerable significance that may ignore the alterations proposed during the phase two proceedings.

### **6.6.3 Conditional Clearance Decision Art. 8 II 1-2 MR1989**

This section will address both the formal and substantive prerequisites for a conditional clearance decision under Art. 8 II 1-2 MR1989.

#### **6.6.3.1 Formal Criteria of Conditional Clearance**

In accordance with the previous sections, it is justifiable not to repeat the procedural aspects of decision-making in phase two in general but to focus on the specific issues of negotiating alterations of the concentration which will lead to undertakings later. The predominant procedural finding related to Art. 8 II 2<sup>nd</sup> sub-paragraph MR1989 is that the Commission has not the legal power to propose an alteration of the concentration plan, precisely define the alteration ex officio and to impose said alteration on the parties as a part of its conditional clearance decision<sup>565</sup>. De lege lata, this thesis is backed by the literal analysis of the section. It may also be supported by teleological arguments: The merger task force has neither the personal capacity nor the managerial expertise nor the due time to invent appropriate options which may efficiently remove anti-competitive aspects without unduly limiting the commercial interests involved in the transactions. Given the size, economic power and managerial competence of the acquirers participating in concentration with a community dimension, it can be superior if only the parties themselves are empowered to prepare different sets of alterations and propose the less harmful alteration at first. Contrarily, public pressure could be reduced by ex officio undertakings.

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<sup>565</sup> q.v. Art. 8 II 2nd sub paragraph MR1989; also Art. 6 I lit. b 2nd sub paragraph MR1997 and Art. 6 II 2nd sub paragraph MR1997; q.v. Draft Commission Notice on Commitments Submitted to The Commission under Regulation 4064/89/EEC and under Commission Regulation 447/98/EC Paragraph 16-17; pdf.file downloadable from: [http://europa.eu.int/comm/competition/mergers/legislation/draft\\_notices/](http://europa.eu.int/comm/competition/mergers/legislation/draft_notices/).

Consequently, it depends on the parties to suggest amendments of the concentration<sup>566</sup> in order to address the criticisms communicated by the Commission to the parties. Since the second implementing regulation was enacted, the proposals for amendments must be submitted not later than three months after the initiation of proceedings<sup>567</sup>. Clearly, the parties should develop the abovementioned sets of diverse options well in advance so as to proceed quickly with "salami tactics": The alteration causing the least detrimental commercial effect should be suggested at the beginning. In case of ongoing concerns of the Commission officials, the 2<sup>nd</sup> best option can be quickly presented up to the least best solution that would be acceptable for the parties<sup>568</sup>. This approach is backed by the opinion of the Commission that subsequent restructuring proposals are subject to the same time limit of three months<sup>569</sup>. One could question whether such a stringent interpretation is necessary to safeguard the interest of the Commission to react to the proposal. However, the requirement is insofar sustainable from the parties' point of view, as a

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<sup>566</sup> The alterations must refer to assets involved in the original concentration plan according to the restrictive wording of Art. 8 II 2 MR1989. However, Art. 8 II 2 MR1997 is more flexible; q.v. infra 7.7 Conditional Phase Two Clearances Art. 8 II 1-2 MR1997.

<sup>567</sup> Whereas the first implementing regulation is silent on this matter, the second and third regulations address the topic: Art. 18 I of the second one addresses the topic: Art. 18 I Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 377, 31/12/1994 p 1 including Annex I (Form CO); Art. 18 II Commission Regulation 447/98/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 061, 02/03/1998, p 1 Including Annex I (Form CO).

<sup>568</sup> This procedure can be described as a poker game in which the parties are always the dealer; q.v. Overbury, C., *Politics or Policy? The Demystification of EC Merger Control*, *Annual Proceedings of the Fordham Corporate Law Institute*, International Antitrust Law & Policy, 557 (1993).

<sup>569</sup> The Commission states that even additional proposals are subject to the tight schedule and that it might grant derogations only under extraordinary circumstances: Paragraph 36 Draft Commission Notice on Commitments Submitted to The Commission under Regulation 4064/89/EEC and under Commission Regulation 447/98/EC Paragraph 16-17; pdf.file downloadable from: [http://europa.eu.int/comm/competition/mergers/legislation/draft\\_notices/](http://europa.eu.int/comm/competition/mergers/legislation/draft_notices/). The purpose of the time limit securing sufficient time for reactions is expressed in an introductory note on 1994 measures on the merger regulation published in Merger Control Law in the European Union: <http://europa.eu.int/comm/dg04/lawmerg/en/intrir94.htm> .

dense series of consecutive proposals is extremely likely to put quickly increasing pressure on the Commission to clear the concentration.

### **6.6.3.2 Substantive Criteria of Conditional Clearance**

The following section will focus on the substantive criteria for a conditional clearance decision under Art. 8 II 1st-2nd subparagraph MR1989.

#### *6.6.3.2.1 Undertakings Assuring Compliance with Commitments Proposed by The Parties and Accepted by The Commission*

The Commission will be entitled to attach an undertaking - i.e. a condition<sup>570</sup> or an obligation<sup>571</sup> - to the compatibility decision only if the incidental provision chosen aims to assure that the parties honour their specific commitments. As mentioned above with regard to the Proceedings<sup>572</sup>, those commitments were voluntarily made during the negotiations with the Commission, which had accepted the parties' proposals for alterations of the concentration as sufficient to remove the creation or enhancement of a dominant position.

Consequently, the Commission is not allowed to invent new conditions or obligations in order to address newly established negative aspects of the concentration not previously discussed with the parties. However, as long as the Commission limits itself to incidental provisions pursuing to enforce the commitments that were proposed by the parties, the Commission enjoys discretion as to define the appropriate undertakings: According to the legal principle of constitutional state that can be applied to transnational organisations as well

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<sup>570</sup> A condition is an incidental provision, i.e. a provision which has a complementary function, specifying the intentions of the main provision and attached to it. Failure to comply with a condition causes the main provision either not to become valid (suspensive condition) or to lose its validity (condition subsequent). However, there is no legal obligation for the addressees to comply with a condition as opposed to an obligation.

<sup>571</sup> An obligation denotes an incidental provision that requests the addressees to comply. In case of non compliance the Authorities may coerce the parties to honour the obligation. Alternatively, the Authorities can fix a date for the implementation of the undertaking. Failure to comply will enable the Administration to revoke the basic administrative order.

<sup>572</sup> q.v. 6.6.3.1 Formal Criteria of Conditional Clearance.

on the basis of the effet utile doctrine, each discretionary decision has to honour specific standards. The most relevant standard consists of the proportionality principle. Thereby, the Commission has to define undertakings, that pursue objectives consistent with the law. Secondly, the provision must be suitable to speedily enforce the commitment<sup>573</sup> on a long lasting basis<sup>574</sup> in order to avoid present and future structural dominance<sup>575</sup>. Thirdly, the undertakings must comply with the necessity test in the broad sense, i.e. the Commission must not impose a certain restriction if an alternative exists that addresses the competition problem in manner less detrimental to the parties without being far less effective. Finally, any undertaking attached must not harm antagonistic interests of third parties to an extent that exceeds the beneficial legal value of the incidental provision in terms of competition law<sup>576</sup>.

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<sup>573</sup> The Commission stresses that any incidental provision chosen must facilitate a rapid solution of the negative aspects of a given concentrations: q.v. Draft Commission Notice on Commitments Submitted to The Commission under Regulation 4064/89/EEC and under Commission Regulation 447/98/EC Paragraph 37; pdf.file downloadable from: [http://europa.eu.int/comm/competition/mergers/legislation/draft\\_notices/](http://europa.eu.int/comm/competition/mergers/legislation/draft_notices/).

<sup>574</sup> The Commission underlines that the given incidental provision must remove the negative aspects of a given concentration on a lasting basis: q.v. Draft Commission Notice on Commitments Submitted to The Commission under Regulation 4064/89/EEC and under Commission Regulation 447/98/EC Paragraph 10; pdf.file downloadable from: [http://europa.eu.int/comm/competition/mergers/legislation/draft\\_notices/](http://europa.eu.int/comm/competition/mergers/legislation/draft_notices/).

<sup>575</sup> e.g. It is not sufficient if the parties promise not to abuse their dominant position or if the proposed divestiture would create another dominant player: q.v. Draft Commission Notice on Commitments Submitted to The Commission under Regulation 4064/89/EEC and under Commission Regulation 447/98/EC Paragraph 10, 12; pdf.file downloadable from: [http://europa.eu.int/comm/competition/mergers/legislation/draft\\_notices/](http://europa.eu.int/comm/competition/mergers/legislation/draft_notices/).

<sup>576</sup> the so-called principle of necessity in the narrow sense.

Based on these considerations, the Commission emphasises that two groups of undertakings should be distinguished:

The primary and preferential group of incidental provisions consists of undertakings that intend to remove the negative aspects of a given concentration by means of restoring the status quo ante on the relevant market, i.e. the situation prior to the concentration<sup>577</sup>. These measures imposed are designed to reduce the ability of the concentration to execute market power in the near future. For instance, structural amendments which will reduce the market share of the companies concerned:

- divestiture of subsidiaries acting on the relevant markets, especially the activities of the target company on these markets<sup>578</sup>
- divestiture of equity stakes<sup>579</sup>
- separation of businesses that are not legally independent at present
- sale of key-intellectual property rights and technology (<-> licensing).

Thereby, an opportunity is generated that a new competitor with sufficient market power as to balance the concentration will successfully operate on said markets on a lasting basis. More specific, the parties have to propose interim programmes which are designed to safeguard the commercial values

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<sup>577</sup> Draft Commission Notice on Commitments Submitted to The Commission under Regulation 4064/89/EEC and under Commission Regulation 447/98/EC Paragraph 7-8; pdf.file downloadable from: [http://europa.eu.int/comm/competition/mergers/legislation/draft\\_notices/](http://europa.eu.int/comm/competition/mergers/legislation/draft_notices/).

<sup>578</sup> q.v. Draft Commission Notice on Commitments Submitted to The Commission under Regulation 4064/89/EEC and under Commission Regulation 447/98/EC Paragraph 21; pdf.file downloadable from: [http://europa.eu.int/comm/competition/mergers/legislation/draft\\_notices/](http://europa.eu.int/comm/competition/mergers/legislation/draft_notices/).

<sup>579</sup> e.g. The Commission required that a third party, the purchaser of the merging parties Alcatel and Telettra sells its shareholdings in these entities so as to remove any incentive to purchase solely from the future concentration and to impede new competitors: Commission Decision, Case IV/M42, 1991 (*Alcatel/Telettra*) at paragraph 54-55; e.g. Varta was required to sell its stake in the entity which would be the strongest competitor after the concentration was implemented: Commission Decision, Case IV/M12, 1991 (*Varta/Bosch*) paragraph 30-32; e.g. Nestlé had to sell several brands: Commission Decision, Case IV/M190, 1992 (*Nestlé/Perrier*).

of the assets that are due to be transferred<sup>580</sup>. Additionally, the Commission has to approve the vendee of the assets in question. The purchaser must neither be too weak to become an active competitor nor too strong so as to obviously create another threat of market dominance<sup>581</sup>. For instance, the Commission required in the Case *Nestlé/Perrier*, that the purchaser should become a third force on the market and that the companies implementing the concentrative JV should not attempt to acquire the entity that is due to be created out of the divested assets within period of ten years<sup>582</sup>.

The second and less preferential group of undertakings consists of measures that intend to promote competition from third parties on the relevant market without demanding that the assets of the companies concerned are sold or transferred<sup>583</sup>.

This group of provisions is considered if a divestiture of assets would not be an effective means of countering market dominance owing to specific nature of the assets that are responsible for the incompatibility with the common market.

Consequently, measures within the second group intend to remedy the detrimental aspects attributed to the market power by means of limiting the signifi-

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<sup>580</sup> This programmes must assure tangible assets, managerial capacities, credit lines: Draft Commission Notice on Commitments Submitted to The Commission under Regulation 4064/89/EEC and under Commission Regulation 447/98/EC Paragraph 41; pdf.file downloadable from: [http://europa.eu.int/comm/competition/mergers/legislation/draft\\_notices/](http://europa.eu.int/comm/competition/mergers/legislation/draft_notices/).

<sup>581</sup> Draft Commission Notice on Commitments Submitted to The Commission under Regulation 4064/89/EEC and under Commission Regulation 447/98/EC Paragraph 47; pdf.file downloadable from: [http://europa.eu.int/comm/competition/mergers/legislation/draft\\_notices/](http://europa.eu.int/comm/competition/mergers/legislation/draft_notices/).

<sup>582</sup> Commission Decision, Case IV/M190, 1992 (*Nestlé/Perrier*).

<sup>583</sup> i.e. the detrimental consequences attributed to high market shares are countered.

cance of certain business assets<sup>584</sup>. The following examples clarify the concept:

- an obligation that a mandatory licensing regimes for key-intellectual property rights in inaugurated on non discriminatory terms
- behavioural provisions assuring fair, transparent and non discriminatory access to essential facilities<sup>585</sup>
- a mandatory termination of exclusive long term supply agreements or service contracts<sup>586</sup>

Thereby, barriers to entry on the relevant product markets are removed or limited. Finally, it can be summarised that the draft notice on commitments reflect a highly sophisticated approach of the Commission to clarify the substantive pre-requisites for the imposition of conditions and obligations on the parties. The notice reveals the differentiated rank of undertakings limiting the market share of the concentration and those subsidiary undertakings merely facilitating market entry.

#### *6.6.3.2.2 Incidental Provisions Covering Ancillary Restraints*

In addition to Art. 8 II 2<sup>nd</sup> Sentence MR1989, it has to be underlined, that the 3<sup>rd</sup> sentence MR1989 empowers the Commission to address ancillary restraints in its decision imposing undertakings on the parties according to the

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<sup>584</sup> Draft Commission Notice on Commitments Submitted to The Commission under Regulation 4064/89/EEC and under Commission Regulation 447/98/EC Paragraph 7 and 9; pdf.file downloadable from: [http://europa.eu.int/comm/competition/mergers/legislation/draft\\_notices/](http://europa.eu.int/comm/competition/mergers/legislation/draft_notices/).

<sup>585</sup> It is beyond the scope of this paper to discuss the doctrine of essential facilities in greater detail. It includes assets of which the duplication is either not feasible in legal or economic terms or not economically viable so that it would contravene to Art. 82 ECT if no access was granted. e.g. ports, pipelines, airport slots, railroad networks, telecommunications networks, sport stadiums etc.; q.v. Draft Commission Notice on Commitments Submitted to The Commission under Regulation 4064/89/EEC and under Commission Regulation 447/98/EC Paragraph 24; pdf.file downloadable from: [http://europa.eu.int/comm/competition/mergers/legislation/draft\\_notices/](http://europa.eu.int/comm/competition/mergers/legislation/draft_notices/).

parties' voluntary proposals. As it was concluded above<sup>587</sup>, it is superior to regard Art. 2 I-III MR1989 as the appropriate exclusive yardstick for this analysis.

#### 6.6.3.2.3 *Excursus: Conditional Clearance and New Yardsticks for The Assessment of JVs under MR1997*

In contrast to the abovementioned general rules for the substantive assessment of conditional clearances under Art. 8 II MR189 in combination with Art. 2 I-III MR1989, a more specific solution is applicable for JVs under MR1997: As far as a concentrative JV is concerned, Art. 8 II 1<sup>st</sup> Sentence MR1997 makes clear that this operation should be generally assessed under the substantive criteria of Art. 2 I-II MR1997 and ancillary restraints are addressed pursuant to Art. 8 II 3 MR1997, too.

As far as co-operative JVs<sup>588</sup> are concerned, Art. 8 II 1 MR1997 makes clear that these operations should be generally assessed under the substantive criteria of Art. 2 I-III MR1997 as well, e.g. the aspects of JV formation and the power of the JV on the market. However, to the extent that the JV provides for a platform of co-ordination either between each parent and the JV or between the parents, Art. 8 II 1 MR1997 makes clear that these aspects shall be assessed by means of the criteria of Art. 81 I and III ECT rather than on the base of Art. 2 I-III MR1997<sup>589</sup>.

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<sup>586</sup> Draft Commission Notice on Commitments Submitted to The Commission under Regulation 4064/89/EEC and under Commission Regulation 447/98/EC Paragraph 23; pdf.file downloadable from: [http://europa.eu.int/comm/competition/mergers/legislation/draft\\_notices/](http://europa.eu.int/comm/competition/mergers/legislation/draft_notices/).

<sup>587</sup> supra at 6.5.3.2.17 Ancillary Restraints.

<sup>588</sup> Cooperative JVs are included by means of Art. 3 II MR1997 and Art. 2 IV MR1997. The implications are discussed below.

<sup>589</sup> q.v. The wording of Art. 2 IV MR1997 is indicative: "to the extent that the creation of a joint venture constituting a concentration pursuant to "Art. 3 II MR1997". Additionally Art. 8 II 1 and III MR1997; q.v. C. Ahlborn and V. Turner, *Expanding Success? Reform of The E.C. Merger Regulation*, ECLR 252 and 257 (1998).

Finally, the Commission will have to consider a release of undertakings under Art. 8 II 3<sup>rd</sup> Sentence MR1997, if coordinative aspects interfere with Art. 81 I ECT without being justifiable under Art. 81 III ECT. Said undertakings must assure either compliance of the operations with Art. 81 I ECT or at least with Art. 81 III ECT. Clearly, the appropriate yardstick for such an analysis must be Art. 2 I-III MR1997. This view is elaborated by the Commission in its draft notice on commitments<sup>590</sup>. The rationale behind the new concept is discussed later on.

#### *6.6.3.2.4 Implementation of Undertakings and Evaluation*

The final sub-section addresses the question which methodology the Commission applies in order to safeguard the implementation of the undertakings imposed on the parties of a given concentration.

The solutions offered by the wording of MR1989 are poor: Failure to comply with either a condition precedent or a subsequent one will prevent the Commission's decision from entering into force. This result may not be desirable as it is difficult - if not impossible - to restore the status quo ante after the non compliance of the parties is once established.

Secondly, the Commission has no legal means at present to use methods of administrative enforcement law in order to coerce the parties to implement an obligation attached to its decision. It remains a theoretical question whether the Commission could invoke Art. 23 MR1989 in order to amend the implementing regulation so that it could provide for rules of administrative enforcement of orders based on MR1989.

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<sup>590</sup> Draft Commission Notice on Commitments Submitted to The Commission under Regulation 4064/89/EEC and under Commission Regulation 447/98/EC Paragraph 15; pdf.file downloadable from: [http://europa.eu.int/comm/competition/mergers/legislation/draft\\_notices/](http://europa.eu.int/comm/competition/mergers/legislation/draft_notices/).

Thirdly, Art. 8 V-VI MR1989 will empower the Commission to revoke its unconditional clearance decision, if the former is based on incorrect information based on parties' responsibilities or deceit, or to revoke its conditional clearance if the parties fail to comply with the obligations<sup>591</sup>. This remedy is weak on two grounds: It is not only rarely feasible to efficiently restore the status quo ante after the reasons are established that would justify a revocations, but it is also rarely consistent with the proportionality principle to revoke a decision if the incorrect information or the breaches of obligations extend only to minor aspects of the transaction. In such a case the Commission would be obliged not to revoke the entire decision. De lege ferenda, such a situation could be partly remedied by altering Art. 8 V MR1989 so that it allows a partial revocation of the decision.

However, one could argue that the Commission's powers are well designed even in the presented situation as it may impose fines or periodic penalty payments for non compliance with undertakings<sup>592</sup>.

This view is not persuasive, because it is well worthy to imagine a situation of a minor breach of obligations in which a revocation under Art. 8 VI MR1989 is not proportionate and in which a monetary sanction under Art. 14-15 MR1989 would not be deemed to be sufficient as a structural sanction is indispensable. In fact, the Commission invented a strategy as to partly solve the complex problem of implementing undertakings: During the discussion whether a certain amendment of the transaction is sufficient to remove the concerns of dominance the Commission may indicate that the proposal would be indeed acceptable if the parties additionally proposed to install a trustee that will

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<sup>591</sup> The deadlines of Art. 10 MR1989 are not applicable owing to Art. 8 VI MR1989.

monitor the implementation of the proposed amendments<sup>593</sup>. Then, the Commission will accept the package of commitments and is empowered to issue undertakings governing the speedy and long lasting implementation of commitments including the duties of an installed trustee. Failure of the parties to honour the obligations will empower the trustee to take control of the business and to implement the commitments.

The Commission points out that the trustee should be an investment bank guaranteeing significant managerial competence as to the monitoring. Moreover, it should work in general on an irrevocable basis and is paid by the parties<sup>594</sup>.

De lege lata, this approach is the best solution available. However, it would be superior to introduce a provision that authorises the Commission to impose subsequent obligations on the parties if they fail to address the commitments. This is even more true, as the basic conditions can well change significantly in the period between the conditional clearance decision and the implementation of the concentration accompanied by a failure to address certain obligations.

A final question remains unsolved regarding the jurisdiction of the departments of the Commission: Should the Merger task force be competent to regulate the behaviour between undertakings which implement a concentration provided that behavioural restrictions occurred that were not foreseeable at the moment in which the conditional clearance decision was taken or shall the antitrust departments be competent in these cases? For the sake of sim-

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<sup>592</sup> Fines under Art. 14 II lit. a 2nd Variant MR1989; 8 II 2nd sub paragraph MR1989 and periodic payments under Art. 15 II lit. a 2nd Variant MR1989; 8 II 2nd sub paragraph MR1989.

<sup>593</sup> q.v. Draft Commission Notice on Commitments Submitted to The Commission under Regulation 4064/89/EEC and under Commission Regulation 447/98/EC Paragraph 37; pdf.file downloadable from: [http://europa.eu.int/comm/competition/mergers/legislation/draft\\_notices/](http://europa.eu.int/comm/competition/mergers/legislation/draft_notices/).

plicity and consistent decision making, the general distribution of competence should prevail so that the antitrust departments will be competent.

#### **6.6.4 Incompatibility Decision and Implementing Orders Art. 8 III-IV MR1989**

An incompatibility Decision is taken pursuant to Art. 8 III MR1989 if the results of the phase two proceedings give evidence that the concentration contravenes Art. 2 III MR1989 in combination with Art. 2 I MR1989. As the prerequisites of the latter provisions were already discussed<sup>595</sup>, a further elaboration is redundant.

In addition to the blocking decision under Art. 8 III MR1989, a divestiture decision pursuant to Art. 8 IV might be issued if the parties implemented the illegal concentration in either the pre-notification stage, in phase one, two or even later<sup>596</sup>.

#### **6.6.5 Revocation of Clearance Decisions and Subsequent Incompatibility Decision Art. 8 V-VI MR1989**

After having established that an unconditional clearance decision was awarded on the basis of fraud or incorrect information attributable to the parties or having established a failure to honour obligations, the Commission can revoke its decisions under Art. 8 II 1<sup>st</sup>-2<sup>nd</sup> paragraph MR1989 pursuant to Art.

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<sup>594</sup> Draft Commission Notice on Commitments Submitted to The Commission under Regulation 4064/89/EEC and under Commission Regulation 447/98/EC Paragraph 43-46; pdf.file downloadable from: [http://europa.eu.int/comm/competition/mergers/legislation/draft\\_notices/](http://europa.eu.int/comm/competition/mergers/legislation/draft_notices/).

<sup>595</sup> q.v. the assessment of compatibility decisions (Art. 6 I lit. b MR1989) and of initiation decisions (Art. 6 I lit. c).

<sup>596</sup> e.g. divestiture of assets, cessation of joint control

8 V MR1989. This provision has already been discussed with regard to the enforcement of undertakings<sup>597</sup>.

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<sup>597</sup> q.v. supra at 6.6.3.2.4 *Implementation of Undertakings and Evaluation*.

# **The Interplay Between European Merger Control Law and The Liberalisation of Electricity and Gas Markets**

## **Two Volumes Volume II**

by

Henning Matthiesen

A Thesis submitted to the Centre for Energy, Petroleum and Mineral Law and  
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# Table of Contents

## Volume II

<b>ABBREVIATIONS</b> .....	<b>V</b>
<b>TABLE OF ILLUSTRATIONS [VOLUME 1-2]</b> .....	<b>VII</b>
<b>SUMMARY</b> .....	<b>VIII</b>
<b>7. AMENDMENTS OF THE MERGER REGULATION IN 1997</b> .....	<b>187</b>
7.1 CONCENTRATION IN TERMS OF ART. 1 I; 3 I-V MR1997.....	188
7.1.1 <i>The New Assessment of JVs under Art. 3 II; 2 IV MR1997</i> .....	189
7.1.1.1 Basic JV Definition.....	190
7.1.1.2 Full Function JVs.....	190
7.1.1.3 Classic Concentrative JVs and The Inclusion of Coordinative Ones By Means of Art. 3 II MR1997 and Art. 2 IV MR1997.....	191
7.1.2 <i>Evaluation</i> .....	196
7.1.2.1 Legal Certainty.....	196
7.1.2.2 Simplicity and Speed.....	196
7.1.2.3 Exchange of Blanket Terms as to Jurisdiction.....	197
7.1.2.4 Ongoing Relevance of the Distinction Between Concentrative and Coordinative JVs for The Material Assessment.....	197
7.1.2.5 Reserved Right to Revoke Clearances Based on a Derogation pursuant to Art. 81 III ECT.....	197
7.1.2.6 Uncertainty as to The Assessment of Concentrative Full-Function JVs below The Thresholds.....	198
7.1.2.7 Uncertainty as to The Assessment of Co-operative Full-Function JVs below The Thresholds.....	199
7.1.2.8 Uncertainty as to The Assessment of Non-Full-Function JVs.....	199
7.1.2.9 De Facto Co-ordination of Authorities?.....	199
7.2 COMMUNITY DIMENSION.....	200
7.3 CONDITIONAL PHASE ONE CLEARANCES UNDER ART. 6 I 1 LIT. B; II 2 MR1997 ..	202
7.4 THE NEW SUBSIDIARITY OF INITIATION OF FORMAL PHASE TWO PROCEEDINGS DECISIONS PURSUANT TO ART. 2 I LIT. C MR1997.....	203
7.5 ENFORCEMENT OF PHASE ONE COMMITMENTS.....	204
7.6 SUSPENSIVE EFFECT OF A NOTIFICATION UNDER ART. 7 MR1997.....	204
7.7 CONDITIONAL PHASE TWO CLEARANCES ART. 8 II 1-2 MR1997.....	205
7.8 TIME LIMITS.....	206
7.9 EXCLUSIVE APPLICATION OF MR1997.....	206
7.10 IMPLEMENTING PROVISIONS.....	206
<b>8. INTERPLAY BETWEEN INTERNAL MARKET POLICY, LIBERALISATION AND CONCENTRATIONS</b> .....	<b>207</b>
8.1 TRACTEBEL/DISTRIGAZ.....	210
8.2 NESTE/IVO.....	211
8.3 EDF/LONDON ELECTRICITY.....	212
8.4 GAZ DE FRANCE/BEWAG/GASAG.....	215
8.5 EDF/SOUTH WESTERN ELECTRICITY.....	217
8.6 PREUSSEN ELEKTRA/EZH.....	220
8.7 VEBA/VIAG.....	222

8.7.1 <i>The Parties</i> .....	222
8.1.1 VEBA AG .....	223
8.1.2 VIAG AG .....	224
8.7.2 <i>Concentration</i> .....	225
8.7.3 <i>Community Dimension Art. 1 II; 5 MR1997</i> .....	225
8.7.4 <i>Dominance Test Concerning Activities of The Parties in The Electricity Sector under Art. 2 MR1997</i> .....	226
8.7.4.1 <i>Relevant Product Market Analysis For The Electricity Sector</i> .....	226
8.7.4.1.1 <i>Functional Criteria</i> .....	227
8.7.4.1.2 <i>Brief Evaluation of The Commission's Methodology</i> .....	228
8.7.4.1.3 <i>A European Internal Electricity Market as The Relevant Geographic Market ?</i> .....	229
8.7.4.1.4 <i>National Market as The Relevant Geographic Market ?</i> .....	231
8.7.4.1.4 <i>Temporal Criteria?</i> .....	235
8.7.4.2 <i>Assessment of The Need to Maintain Effective Competition Art. 2 I lit. a MR1997</i> .....	236
8.7.4.2.1 <i>Present Structure of The Market for Power Generation and Wholesale via The Transmission Grid pursuant Art. 2 I lit. a 1<sup>st</sup> Variant MR1997</i> .....	236
8.7.4.2.2 <i>Actual and Potential Competition on The Affected Markets: Art.2 I lit. a 2nd Variant MR1997</i> .....	240
8.7.4.2.3 <i>Additional Criteria Art. 2 I lit. a 3rd Variant MR1997</i> .....	241
8.7.4.3 <i>Market Position of The Undertakings Art. 2 I lit. b 1st Variant MR1997</i> .....	241
8.7.4.4 <i>Economic and Financial Strength Art. 2 I lit. b 2nd Variant MR1997</i> .....	243
8.7.4.5 <i>Alternatives Available to Consumers Art. 2 I lit. b 3rd Variant MR1997</i> .....	243
8.7.4.6 <i>Barriers To Entry Art. 2 I lit. b 4th Variant MR1997</i> .....	243
8.7.4.7 <i>Demand Trends, Interests of Consumers and Technological Development: Art. 2 I lit. b 5th-7th Variant MR1997</i> .....	244
8.7.4.10 <i>Prognostic Evaluation</i> .....	245
8.7.5 <i>Incidental Provisions Imposed on The Parties by The Commission</i> .....	255
8.7.5.1 <i>Divestiture of Equity Stakes in VEAG, LAUBAG and Mining Privileges</i> .....	256
8.7.5.2 <i>Temporal Guarantee Regarding A Taking of Delivery of VEAG's Power By Downstream Affiliates of VEBA/VIAG</i> .....	257
8.7.5.3 <i>Divestiture of Equity Stakes in BEWAG</i> .....	258
8.7.5.4 <i>Divestiture of Equity Stakes in VEW</i> .....	258
8.7.5.5 <i>Divestiture of Equity Stakes in HEW</i> .....	259
8.7.5.6 <i>Divestiture of Equity Stakes in RHENAG</i> .....	259
8.7.5.7 <i>Obligation Not to Impose The T-Component on Applicants for TPA</i> .....	260
8.7.5.8 <i>Obligation to Transparent Billing Calculation</i> .....	260
8.7.5.9 <i>Obligation Regarding The Billing of Balancing Services</i> .....	261
8.7.5.10 <i>Obligation to Sell Reserved Interconnector Capacity to ELTRA</i> .....	261
8.7.5.11 <i>Condition Precedent linked to The Outcome of the German RWE/VEW Proceedings</i> .....	262
8.7.6 <i>Theoretical Efficacy of the Undertakings to Remedy the Situation?</i> .....	263
8.7.7 <i>Factual Efficacy of Implementation of Incidental Provisions?</i> .....	268
8.7.8 <i>Reasons behind the theoretical and factual Deficiencies of the Present System of Merger Control with Respect to Incidental Provisions in the Energy Sector</i> .....	277
8.8 HEW/VATTENFALL .....	282
<b>9. CONCLUSION</b> .....	<b>286</b>
<b>10. ANNEXES</b> .....	<b>291</b>
10.1 MAJOR MERGERS IN THE OIL AND GAS INDUSTRY IN 1998/1999 .....	291
10.2 MAJOR MERGERS IN THE POWER SECTOR IN 1998/1999 .....	292
10.3 SIGNIFICANT INFLUENCE OF EXTERNAL BUSINESS CONSULTANTS IN OIL & GAS MERGERS AND ACQUISITIONS .....	293
10.4 IMPORTANCE OF CONSULTANTS FOR POWER MERGERS .....	294
10.5 PRODUCT MARKET DEFINITION PURSUANT TO ART. 2 MR1989 .....	295
10.6 STRUCTURE OF THE GERMAN ELECTRICITY SUPPLY INDUSTRY PRIOR TO THE LIBERALISATION AND THE VEBA/VIAG AND RWE/VEW MERGERS .....	296

10.6.1 Three Fold Structure of The German Electricity Undertakings prior to 1998.....	296
10.6.2 Capital Links between German Integrated Electricity Companies (1994) .....	297
10.6.3 Installed Power Capacity of The Combined Electricity Companies in MW in 1994.....	297
10.6.4 Fuel Sources of Installed Capacity and Electricity Generation in 1992 .....	298
10.6.5 Transmission, Distribution and Supply Grid Operators in 1994.....	299

## Abbreviations

EC	European Community.
ECJ	European Court of Justice.
ECSC	Treaty Establishing the European Coal and
Steel	Community.
ECT	Treaty Establishing the European Economic Community, as Amended by the Treaty of Amsterdam.
GW	Giga Watt.
GWB1998	German Antitrust Act of 26 August 1998.
HHI	Herfindahl-Hirschmann-Index. It equals the sum of the squares of market shares of all undertakings active on a given market.
IEMD	Internal Electricity Market Directive.
IGMD	Internal Gas Market Directive.
JV	Joint Venture.
km	kilo meter.
kV	kilo Volt.
MR1989	Merger Regulation of 1989, i.e. Council Regulation 4064/89/EEC of 21 Decem- ber 1989 on the Control of Concentrations between Undertakings, O.J. L 395, 30/12/89, p 1.

MR1997	Merger Regulation of 1997, i.e. Council Regulation 1310/97/EC of 30 June 1997 Amending Council Regulation 4064/89/EEC on the Control of Concentrations between Undertakings, O.J. L 180, 09/07/97, p 1.
MW	Mega Watt.
NGP	Non Governmental Organisation.
OFGEM	Office For Gas and Electricity Markets.
REG17	Regulation No 17: First Regulation Implementing Art. 85 and 86 of The Treaty.
SCP	Structure-Conduct-Performance Model.
TPA	Third Party Access.
TWh	Tera Watt hour.

## Table of Illustrations [Volume 1-2]

<b><u>Table 1: Divestiture/De-Merger</u></b> .....	106
<b><u>Table 2: Application of the Concept of Intermediary Companies to Concentrations in The Energy Sector</u></b> .....	110
<b><u>Table 3: VEBA AG</u></b> .....	223
<b><u>Table 4: VIAG AG</u></b> .....	224
<b><u>Table 5: Interconnector Capacities in 1998</u></b> .....	230
<b><u>Table 6: Status Quo Ante: Electricity Generation and The Market Shares Regarding The Feeding of Power in The Transmission Grid</u></b> .....	237
<b><u>Table 7: Status Quo Ante: Concentration of The Market Owing to The Concentration of The Capacity of Electricity Generation for The Public</u></b> .....	238
<b><u>Table 8: Status Quo Ante: Concentration of The Market Owing to High Proportion of Retail Electricity Sales Depending on Verbund Utilities' Production</u></b> .....	238
<b><u>Table 9: Status Quo Ante: Transmission Network Ownership</u></b> .....	242
<b><u>Table 10: Predicted Status Quo Ex Post: Electricity Generation and The Market Shares Regarding the Feeding of Power in The Transmission Grid</u></b> .....	246
<b><u>Table 11: Predicted Status Quo Ex Post: Responsibility for Retail Electricity Sales</u></b> .....	247
<b><u>Table 12: Predicted Status Quo Ex Post: Generation Capacity</u></b> .....	249
<b><u>Table 13: Status Quo Ex Post: Structure of Power Stations</u></b> .....	249
<b><u>Table 14: Status Quo Ex Post: Joint Daughter Undertakings</u></b> .....	251
<b><u>Table 15: Predicted Status Quo Ex Post: Transmission Network Ownership</u></b> .....	252
<b><u>Table 16: Ownership Structure of LAUBAG</u></b> .....	256
<b><u>Table 17: Ownership Structure of BEWAG</u></b> .....	271
<b><u>Table 18: Status Quo Ex Ante: Ownership Structure of HEW</u></b> .....	282

## Summary

This thesis examines how European merger control law is applied to the energy sector and to which extent its application may facilitate the liberalisation of the electricity and gas industries so that only those concentrations will be cleared that honour the principles of the liberalisation directives. A brief analysis of the economic implications of concentrations is followed by an assessment of the evolution of European merger control law under Art. 66 ECSC, Art. 81 and 82 ECT, the merger control regulation of 1989 and its significant amendments of 1997. Then, the theoretical findings are contrasted to the results of recent merger proceedings in the energy sector with a focus on the VEBA/VIAG decision. Several deficiencies are established which limit the efficacy of merger control as a tool of offsetting shortcomings in the secondary EC law with regard to the liberalisation of the electricity and gas supply industry. Commitments proposed by the parties of a given concentration and accepted by the Commission as being sufficient to remedy a serious potential of dominance may only be of subsidiary relevance to the liberalisation of sectors owing to a number of analytical and practical drawbacks. One dominant drawback relates to the fact that the commitments depend always on parties' proposals and can never be imposed ex officio. Others relate to the blunt authorisations provided by the wording of Art. 6 and 8 MR1997 as to the implementation of undertakings.

With regard to acquisitions of U.K. regional electricity companies by EdF, it is elaborated that the current merger control law leaves no scope for reciprocity considerations regarding acquisitions by incumbent companies in liberalised markets even though the acquirer is a protected public undertaking. Moreover,

it is established that different decisions apply inconsistent market definitions. By means of the VEBA/VIAG and RWE/VEW cases, the question is addressed which causes are responsible for the established analytical and practical deficiencies of merger control in the energy sector. It is stated that the weaknesses of the IEMD and IGMD are partly responsible for weak undertakings which do not sufficiently remove the scope for dominance on the affected markets and which do not rule out any possibility of impediments of effective negotiated TPA and do not remove any commercial incentive of the grid subsidiaries of the vertically integrated companies as to access which discriminates between intra and extra group applicants. It is reported that another argument relates to the limited scope that the Commission has if it wants to remedy deficiencies of written primary law owing to the extraordinary nature of the implied powers doctrine based on the principle of constitutional state. Adverse political influence against competition authorities is also judged. Further, it is analysed that accidental regulation based on incidental provisions imposed on undertakings which may or not implement a concentration is by no means a consistent an non-discriminatory and predictable tool to overcome drawbacks of primary or secondary European law in a given sector owing to the democratic principle and the constitutional state doctrine. It is discussed that secondary legislation with regard to energy networks is inter alia restricted by Art. 295 ECT and provisions of national constitutions which protect property rights against dis-proportionate expropriations or re-definitions of property. Further, legal authorisations of said calibre will have to be connected to a system of state liability law. Adverse political pressures are considered. The same is true for egoistic national policies which abstain from transnational task

forces in order to settle difficulties and disputes. Furthermore, the adverse effect of different stages of the maturity of domestic markets, different consumer patterns and a potential isolation of the system is not neglected, because these conditions make it more difficult to apply consistent standards as to the appropriate market definition in order to facilitate harmonisation. The implementation of the VEBA/VIAG merger is discussed, as the former was further complicated owing to specifically evaluated circumstances which were difficult to predict. Nevertheless, the Commission is not exempted from the duty to take due care concerning potential impediments as to the realisation of parties' commitments. In contrast to the negative aspects, it can be highlighted that the Commission quickly realised flaws of the energy liberalisation project as expressed by the present form of the IEMD and IGMD. Consequently, the co-ordinative and innovative mechanisms of Florence and Madrid were created in order to boost the development of effective cross border trade - i.e. tariff systems and interconnector congestion management. It will be concluded that undertakings put forward by the parties and accepted by the Commission should be restricted to a subsidiary legal instrument, only applied if strictly necessary to overcome certain detrimental aspects of given concentrations in order to provide a hint for the legislator, to specify its legislation. Competition as a de-central distributor of risk, wealth and power will be extended to its maximum extent, if wholesale consumers benefit from lower energy prices which allow greater productivity of European products on the world markets in combination with higher environmental standards owing to modern, cost-efficient plants. A successful implementation will be described by liquid spot markets for power accompanied by tools of financial risk management like

forwards, futures and options. These will be valuable indicators of efficient liberalisation of the European electricity and gas supply industries.

## **7. Amendments of the Merger Regulation in 1997**

The following chapter discusses the amendments of EC merger control law which were introduced in 1997. The most significant alterations relate to

- the notion of a concentration as far as the reform of the assessment of JVs is concerned,
- the community dimension of a concentration pursuant to Art. 1 III MR1997,
- the phase one compatibility decision addressing ancillary restraints under Art. 6 I lit. b 2<sup>nd</sup> Sentence MR1997,
- the new subsidiarity of initiation of phase two decisions under Art. 6 I lit. c MR1997 to the new provision Art. 6 II MR1997,
- the expressly regulated conditional clearance decision in phase one under Art. 6 II MR1997,
- the enforcement of undertakings attached to conditional clearances in phase one pursuant to Art. 6 II-IV MR1997,
- modifications of the suspensive effect of concentrations according to Art. 7 MR1997,
- the amendments of Art. 8 II and III MR1997,
- the new time limits for phase one proceedings as a result of proposals for commitments pursuant to Art. 10 I 2 MR1997,
- the general exclusion of REG17 under Art. 22 MR1997 and
- the Commission's power to issue implementing provisions under Art. 23 MR1997.

However, the paper will not address issues modifying the turnover calculation<sup>598</sup>, referrals to Member States<sup>599</sup>, the submission of commitments to domestic authorities<sup>600</sup> and the entry into force of this regulation by virtue of accession<sup>601</sup>.

### **7.1 Concentration in terms of Art. 1 I; 3 I-V MR1997**

The first sub section will evaluate to what extent the definition of a concentration differs between MR1989 and MR1997. The principal criteria of Art. 1 I in combination with Art. 3 I and III-V MR1989 are maintained. Especially, the relevant Commission notice on concentrations of 1998<sup>602</sup> differs hardly from its predecessor of 1994<sup>603</sup>. As these subjects haven been elaborated above, it is preferential now to focus on the differences which relate to the treatment of JVs in accordance with Art. 3 II MR1997 and in combination with Art. 2 IV MR1997.

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<sup>598</sup> e.g. A new criterion was introduced which replaces the turnover criterion in case of mergers of financial institutions pursuant to Art. 5 III MR1997 and amendments under Art. 5 IV MR1997. It is explained by C. Ahlborn and V. Turner, *Expanding Success? Reform of The E.C. Merger Regulation*, ECLR 251 (1998).

<sup>599</sup> Art. 9 MR1997.

<sup>600</sup> Art. 19 I 2 MR1997.

<sup>601</sup> Art. 25 III MR1997.

<sup>602</sup> Commission Notice on The Concept of Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 66, 02/03/1998, p 5.

<sup>603</sup> Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 385, 31/12/1994, p 5.

### **7.1.1 The New Assessment of JVs under Art. 3 II; 2 IV MR1997**

With regard to the assessment of JVs under MR1997, it is important to note that Art. 3 II MR1997 broadens the scope of JVs which may be regarded as a concentrative operation compared with Art. 3 II MR1989 and the relevant JV notices of the Commission of 1990 and 1994. As far as coordinative JVs are concerned, it is remarkable that Art. 2 IV MR1997 provides for a specific two-fold yardstick for the substantive analysis.

Finally, it has to be stressed, that the subsequent sections will concentrate on those aspects of the evaluation of JVs which derogate from the principles that were laid down above with respect to the assessment of JVs pursuant to merger control under either Art. 81-82 ECT<sup>604</sup> or Art. 3 II MR1989<sup>605</sup> whereby undue repetitions are avoided.

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<sup>604</sup> q.v. supra at 1.1.1 Undertaking in Terms of Merger Control Law, 5.2.2 New Doctrine Introduced by the BAT Judgement, 5.3 The Complex Assessment of Joint Ventures under Art. 82 and 81 ECT, 5.3.1 Legal nature of JVs, 5.3.2 Assessment of Joint Control within Incorporated JVs, 5.3.3 Competition Law Analysis of JVs with A View to Apply Art. 82 ECT.

<sup>605</sup> q.v. supra at: 6.3.1.3 Concentrative JV: Joint Control, Independence, Recession of Parents and Group Effect, 6.3.2.1.5 Turnovers of Jointly controlled Undertakings, 6.3.2.1.10 Formation of Concentrative JVs.

#### **7.1.1.1 Basic JV Definition**

First of all, the legal and economic criteria contributing to the definition of any kind of a JV, i.e. the pooling of scarce resources and the sharing of control, capital, responsibilities and expenditure, were maintained. Equally, the term of the acquisition of joint control is upheld pursuant to Art. 3 I; III-V MR1997.

Especially and as far as the term of joint control is concerned, the relevant Commission notice on Full-Function JVs of 1998 largely refers to the Commission notice on the concept of a concentration of 1998<sup>606</sup> which is again largely identical with its predecessor of 1994<sup>607</sup>.

#### **7.1.1.2 Full Function JVs**

Secondly, the basic meaning of a full function JV which is able and designed to perform objectives of an independent economic entity on a lasting basis was upheld although the significance of this argument increased substantially increased because the following restrictive criterion relating to the concentrative nature of the operation were at first weakened and then abandoned.

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<sup>606</sup> q.v. Commission Notice on The Concept of Full-Function Joint Ventures under Council Regulation 4064/89/EEC on The Control of Concentration between Undertakings, O.J. C 66, 02/03/1998, p 1: Paragraph 10 refers to Paragraphs 18-39 of the Commission Notice on The Concept of Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 66, 02/03/1998, p 5. Therefore, the assessment of sole control and joint control under MR1989 is still relevant and the references in the relevant sections above also include quotations of 3rd Commission Notice on Joint Ventures.

<sup>607</sup> q.v. on the one hand Commission Notice on The Concept of Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 66, 02/03/1998, p 5 paragraphs 18-39 and on the other hand Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 385, 31/12/1994, p 5 paragraphs 18-39.

### 7.1.1.3 Classic Concentrative JVs and The Inclusion of Coordinative Ones By Means of Art. 3 II MR1997 and Art. 2 IV MR1997

Prior to the entry into force of MR1989, it was well established that it was a prerequisite of a structural concentration in terms of Art. 82 ECT that both parents must recede from the relevant market of the JV on a lasting basis<sup>608</sup> so as to remove any potential for collusion either between each parent and the JV or between the parents - the so called group effect<sup>609</sup>.

Since the entry into force of MR1989, it this view was initially backed by the wording of the first Commission notice on joint ventures<sup>610</sup>. However, this Notice was not designated to preclude a new doctrine according to the expected case law<sup>611</sup>. In fact, the merger task force's practice derogated from the quoted notice very quickly. The decisions indicate that an operation can be regarded as a concentrative JV even if one parent remains active on the relevant market of the JV provided that this parent was an industrial leader on that market<sup>612</sup>. The argument was that industrial leaders are by definition not exposed to intense competition so that a JV may be an operation that even has a pro-active function for competition rather than a restrictive one. Behavioural restrictions between the parents and the JVs would be justifiable if they met the criteria of the Ancillary Restraints Notice<sup>613</sup>.

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<sup>608</sup> Commission, 6<sup>th</sup> Report on Competition Policy (1976) point 55; q.v. supra at 5.3.3 Competition Law Analysis of JVs with A View to Apply Art. 82 ECT.

<sup>609</sup> Commission, 6<sup>th</sup> Report on Competition Policy (1976) point 55; q.v. supra at 5.3.3 Competition Law Analysis of JVs with A View to Apply Art. 82 ECT.

<sup>610</sup> q.v. Commission Notice Regarding The Concentrative and Cooperative Operations under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations Between Undertakings, O.J. C 203, 14/08/1990 p 10 paragraph 22.

<sup>611</sup> Commission Notice Regarding the Concentrative and Cooperative Operations under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O.J. C 203 14/08/1990, p 10 paragraph 4.

<sup>612</sup> q.v. Commission Decision, Case IV/M86, 1991 (*Thomson/Pilkington*); Commission Decision, Case IV/M157, 1992 (*Air France/Sabena*).

<sup>613</sup> Commission Notice Regarding Restrictions Ancillary to Concentrations, O.J. C 203, 14/08/1990, p 5; q.v. supra at 6.5.3.2.17 Ancillary Restraints.

Subsequently, the approach to concentrative operations taken by the Merger Task Force derogated further from the abovementioned notice: From then, an operation was regarded as a concentration even if the remaining parent was not considered as an industrial leader<sup>614</sup>. In 1994, the new doctrine was made more transparent as the revised standards were incorporated to the second Commission notice on the subject in 1994<sup>615</sup>: In brief, an operation will be interpreted as concentrative for sure, if both parents are not active or recede completely. A concentration will be probable at least in general, if a parent remains active or both parents remain active with minor activities<sup>616</sup>.

Additionally, it is established that both parents may retain activities on the relevant product market of the JVs as long as behavioural restrictions between each parent and the JV are covered by the ancillary restraints doctrine.

However, this approach seems to underrepresent the potential for collusions between the parents that is provided by the JV as a platform of agreeing on mutual policies and that was addressed by means of Art. 81 ECT under the BAT doctrine of the ECJ.

Art. 3 II MR1997 represents the latest stage of this development of extension of the scope of merger control proceedings to JVs. From the entry into force of MR1997 on, all full function JVs are regarded as concentrative operations. However, it would be wrong to argue that a distinction between co-operative

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<sup>614</sup> q.v. A. Burnside, *Dance of The Veils? Reform of The EC Merger Regulation*, ECLR 373 (1996).

<sup>615</sup> Commission Notice on The Distinction between Concentrative and Cooperative Joint Ventures under Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. C 385, 31/12/1994, p 10, paragraph 18 sub-paragraph 1-2.

<sup>616</sup> Commission Notice on The Distinction between Concentrative and Cooperative Joint Ventures under Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. C 385, 31/12/1994, p 10, paragraph 18 sub-paragraph 1-2. Contrarily the 3rd sub-paragraph contains a strong indication of co-ordination, i.e. both parents maintain considerable businesses compared with the JV. The following sub-paragraphs contain medium pre-

and concentrative JVs is no longer relevant. The only unitisation relates to the jurisdiction and the competence of the Merger Task Force which no longer depend on classic concentrative JVs. The substantive assessment of a concentrative JV will be made on the basis of Art. 2 I-III MR1997 either in phase one or phase two decisions. Said assessment will include potential ancillary restraints and was discussed above with respect to MR1989. If non severable coordinative aspects of equal or major economic importance are available, the whole operation will be assessed under REG17.

In contrast to classic concentrative JV, the structural aspects of a co-operative JV are assessed in both phases on the basis of Art. 2 I-III MR1997, i.e. the formation of the JV and its impact on the relevant product market.

As far as the co-operative aspects are concerned like collusions between each parent and the JV or between the parents, a co-operative JV will be assessed by means of Art. 2 IV MR1997 in combination with Art. 81 I and III ECT<sup>617</sup>: The competent merger task force will assess the compatibility of a given coordinative aspect by means of the procedural provisions of MR1997, but the substantive analysis of the compatibility will insofar not depend on the basis of Art. 2 I-III MR1997. Contrarily, the assessment will be founded on Art. 81 I and III ECT to which Art. 2 IV MR1997 refers. Consequently, the first step is to establish the co-operative nature of a full function JV. Secondly, the concentrative aspects are assessed under Art. 2 I-III MR1997. Thirdly, each coordinative aspect is assessed whether it interferes with Art. 81 ECT or not.

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sumptions for co-ordination; q.v. C. Ahlborn and V. Turner, *Expanding Success? Reform of The E.C. Merger Regulation*, ECLR 252-253 (1998).

<sup>617</sup> q.v. also C. Ahlborn and V. Turner, *Expanding Success? Reform of The E.C. Merger Regulation*, ECLR 249 and 252 (1998); Commission Notice on The Concept of Full-Function Joint Ventures under Council Regulation 4064/89/EEC on The Control of Concentration between Undertakings, O.J. C 66, 02/03/1998, p 1 paragraph 15.

This will depend on the individual case as no on per se rule exists that every coordinative JVs automatically fulfils the criteria of a cartel or concerted practise in terms of Art. 81 I ECT<sup>618</sup>. A coordinative aspect not within the scope of Art. 81 I ECT will be cleared. If one has established an interference with Art. 81 I ECT, one needs to solve whether the co-operative JV fulfils the substantive prerequisites of an individual or block exemption under Art. 81 III ECT. If the result is positive, the JV will be insofar unconditionally cleared pursuant to 6 I lit. b 1 MR1997 or Art. 8 II 1 MR1997. Contrarily, a negative outcome will make the Commission release a statement of objections. It will be up to the parties to propose modifications designed to make the operation compatible with Art. 81 I ECT (or at least justifiable under Art. 81 III ECT)<sup>619</sup>. Having accepted the proposals as sufficient, the Commission will conditionally clear the coordinative JV based on Art. 6 II MR1997 in phase one or Art. 8 II MR1997 in phase two.

Art. 2 IV 2 MR1997 offers further guidance which elements will be most relevant for the assessment whether the JV is compatibility with Art. 81 I ECT or not: The Commission must assess whether and - if so - to which extent the parties remain competitors on the relevant market of the JV and if the undertakings are provided with the power to significantly restrict competition on the relevant market or affected neighbouring, up- or downstream markets. As a result of the wording "in particular"<sup>620</sup>, additional considerations are applicable which may either expand or reduce the anti-competitive aspects mentioned in

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<sup>618</sup> q.v. V. Emmerich, Kartellrecht (8<sup>th</sup> ed.) (München, Germany, C.H.Beck, 1999) p 503. As Art. 81 I ECT was discussed above, a closer assessment of the provision is not necessary.

<sup>619</sup> q.v. Draft Commission Notice on Commitments Submitted to The Commission under Regulation 4064/89/EEC and under Commission Regulation 447/98/EC at paragraph 15; pdf.file downloadable from: [http://europa.eu.int/comm/competition/mergers/legislation/draft\\_notices/](http://europa.eu.int/comm/competition/mergers/legislation/draft_notices/);

the explanatory catalogue of Art. 2 IV 2 MR1997. In the assessment of Art. 81 III ECT, the focus will be on the final criterion that asks whether the concerted practices enable the participants to prevent effective competition on a significant part of the relevant market<sup>621</sup>. From the procedural point of view, the merger task force will invite a casehandler from the department dealing with antitrust proceedings under Art. 81 ECT if a full-function JVs is likely to have co-operative aspects. If these allegations are indeed verified, the merger task force will refer the whole test of common market compatibility of a given concentration to the antitrust section which will assess not only the coordinative aspects under Art. 2 IV MR1997/Art. 81 ECT but also the dominance criterion regarding concentrative aspects<sup>622</sup>.

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q.v. C. Ahlborn and V. Turner, *Expanding Success? Reform of The E.C. Merger Regulation*, ECLR 255 (1998).

<sup>620</sup> q.v. chapeau of Art. 2 IV 2 MR1997.

<sup>621</sup> Additionally, the second justification may be of interest. In case of a collusion between the each parent and a JV operating on distinct markets the question arises to which extent it is justifiable by means of Art. 81 III 2nd criterion to impose costs on consumers in market one to the benefit of those in market two: the "welfare-transfer" problem; q.v. C. Ahlborn and V. Turner, *Expanding Success? Reform of The E.C. Merger Regulation*, ECLR 258 (1998).

<sup>622</sup> q.v. C. Ahlborn and V. Turner, *Expanding Success? Reform of The E.C. Merger Regulation*, ECLR 252 (1998).

### **7.1.2 Evaluation**

Finally, it shall be interrogated if the extension of concentrative operations to co-operative JVs is sustainable or if it causes new difficulties which overwhelm the former problems regarding the proper distinction of concentrative or co-ordinative ventures.

#### **7.1.2.1 Legal Certainty**

Clearly, every Joint Venture is a hybrid phenomenon that combines structural elements of formation with behavioural aspects of joint control and pooling of resources so as to minimise risks and capital invest. For the sake of consistent interpretation of the law, it is desirable that the merger task force is enabled to treat classic concentrative and coordinative operations under the same set of procedural rules.

#### **7.1.2.2 Simplicity and Speed**

Moreover, it is a great simplification for the parties who no longer need to worry whether to notify the operation as a concentration by means of Form CO on the basis of Art. 4 MR1989, to apply for a comfort letter stating the non interference with Art. 81 I ECT/Art. 4 REG17 or to seek a formal decision on derogation from Art. 81 I ECT on the basis of Art. 81 III ECT and Art. 9 REG17. As a matter of fact, the parties will also benefit that coordinative JVs are assessed under the more sophisticated procedural framework of MR1997 rather than relying on the burdensome and lengthy REG17 procedures. However, this idea leads to the critical question why to shift an ambivalent structure if one could simply improve the procedural provisions of REG17<sup>623</sup>.

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<sup>623</sup> A reform of REG 17 will be adopted, soon. This criticism is discussed by C. Ahlborn and V. Turner, *Expanding Success? Reform of The E.C. Merger Regulation*, ECLR 261 (1998).

### **7.1.2.3 Exchange of Blanket Terms as to Jurisdiction**

However, the positive aspects are partly offset as one vague term is omitted on the costs of boosting the relevance of another one: The blanket term of full function operations will become more relevant as it is the only restrictive aspect that remains applicable.

### **7.1.2.4 Ongoing Relevance of the Distinction Between Concentrative and Coordinative JVs for The Material Assessment**

Another major drawback of the new law refers to the fact that the classic distinction of concentrative and co-operative operations is still relevant to the substantive analysis whether a full-function JV is a classic concentrative one or a coordinative one of which the concentrative aspects are solved by the dominance assessment of Art. 2 I-III MR1997 whereas the co-operative aspects are addressed by Art. 2 IV MR1997/Art. 81 ECT as mentioned earlier.

### **7.1.2.5 Reserved Right to Revoke Clearances Based on a Derogation pursuant to Art. 81 III ECT**

As a third negative aspect, it may be criticised that the Commission reserved the right to revoke derogations from Art. 81 I ECT on the substantive basis of Art. 81 III ECT issued within merger control proceedings involving of coordinative full function JVs if the co-operative aspect is no longer justifiable under Art. 81 III 1<sup>st</sup> to 4<sup>th</sup> variant ECT<sup>624</sup>. In fact, it is questionable how the Commission can benefit from its legal power to revoke a derogation as this authority is based on Art. 8 REG17 but Art. 22 MR1997 disapplies REG17.

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<sup>624</sup> Ahlborn and V. Turner, *Expanding Success? Reform of The E.C. Merger Regulation*, ECLR 258 (1998).

#### **7.1.2.6 Uncertainty as to The Assessment of Concentrative Full-Function JVs below The Thresholds**

Additionally, a difficult question remains to be solved. It is not evident how full function JVs are assessed that are not caught by the turnover thresholds. The only evidence relates to finding, that MR1989 is neither directly applicable nor in analogy as the specification of turnover thresholds prevents anyone from arguing that the legislator negligently overlooked a case with a comparative rationale.

As far as a classic concentrative JV is concerned, the old Continental Can doctrine will be applicable to duly assess the concentration under Art. 82 ECT. It has to be stressed that both the EC organs and domestic authorities and courts

are able to apply Art. 82 ECT. As a matter of fact, domestic merger control law will deal with the case as well. This leads to the protracted question which legal system will prevail. As the old double barrier theory stating that a measure is only legal if it meets both EC and national requirements is no longer sustainable, it should be concluded that Art. 82 ECT/REG17 will generally prevail pursuant to the effet utile doctrine: Neither negative finding of EC Law nor a positive clearance may be circumvented by domestic law. One exception applies: If Art. 82 ECT is inapplicable owing to a lack of an affection of trade between member states, the domestic law is free to assess the case.

However, one could argue that the thresholds in MR1997 will also define the thresholds of a relevant affection of trade between Member States within the scope of merger control. This would free domestic laws but it is not desirable to maintain different sets of concentration rules if one wants to create a level playing field.

#### **7.1.2.7 Uncertainty as to The Assessment of Co-operative Full-Function JVs below The Thresholds**

As far as co-operative JVs are concerned, one could again apply the former merger control law established by the Continental Can doctrine as amended in the BAT doctrine. Again, the same considerations as to the legal rank of EC law and domestic statutes will apply on the basis of the effet utile concept.

However, if one honours the old dichotomy argument of the Continental Can doctrine, one will solely apply Art. 81 ECT to the whole operation. Again, the effet utile principle governs the relation between EC and national law.

#### **7.1.2.8 Uncertainty as to The Assessment of Non-Full-Function JVs**

Non full-function JVs will be assessed whether they are consistent with Art. 81 ECT pursuant to the BAT doctrine without any reference to their turnover.

#### **7.1.2.9 De Facto Co-ordination of Authorities?**

A persuasive solution to this complex question is far from evident. The best solution seems to stick to the systematic and teleological analysis of MR1997 and to discuss with domestic authorities on a case by case basis that EC authorities and national ones implement a consistent strategy as to the assessment of concentrations. The level of convergence should be at the maximum level consistent with the different sets of legal norms. The liaison provisions of Art. 19 MR1997 could provide for the organisational platform of co-ordination.

## 7.2 Community Dimension

Based on the authorisation of Art. 1 III MR1989, the turnover thresholds of Art. 1 II-III MR1989 that were discussed above<sup>625</sup>, were reviewed in 1997.

The review was accompanied by a major controversy between the Commission and the Member States. The Commission's Green Paper suggested a reduction of global turnover to Euro 2 billion and of Community wide turnover to Euro 100 million<sup>626</sup>, whereas the later Commission's proposal was less ambitious and advocated figures of Euro 3 billion and Euro 250 million respectively<sup>627</sup> and included the multiple filing mechanism as an alternative solution subsidiary to any reduction of thresholds. According to this concept, the regulation should become applicable to concentrations provided that the turnover figures exceeded Euro 2 billion and were lower than 3 billions and that the concentration was in the substantive scope of at least three national merger control systems.

The concept was criticised for its complexity and the serious question whether the wording of Art. 1 III MR1989 would back the introduction of such a régime<sup>628</sup>.

As a result of a major controversy between the Commission and the Member States, the Art. 1 I-II MR1989 were not amended and the new Art. 1 III MR1997 accompanied by a new review mechanism in Art. 1 IV-V MR1997. The new threshold will catch concentrations of an aggregated global annual turnover exceeding Euro 2,5 billion<sup>629</sup> providing that specific criteria are met

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<sup>625</sup> q.v. suprat at 6.3.2 Community Dimension under MR1989 and sub-sections.

<sup>626</sup> Commission, *Green Paper on The Review of The Merger Regulation*, Com (96) 19 final of 31 January 1996.

<sup>627</sup> Commission Press Release IP/96/628.

<sup>628</sup> q.v. A. Burnside, *Dance of The Veils? Reform of The EC Merger Regulation*, ECLR 371 (1996).

<sup>629</sup> Art. 1 III lit. a MR1997.

which assure that a concentration will not be covered unless it involves considerable cross-border aspects<sup>630</sup>. Finally, the principles of turnover calculation are maintained in general<sup>631</sup>.

Although it is the intention of Art. III MR1997 to expand the jurisdiction of the Commission and to avoid multiple notifications of concentrations pursuant to national merger control statutes<sup>632</sup>, it remains extremely questionable whether this objective can be met, as Art. 1 III MR1997 contains so many cumulative criteria. The overall effect of these preconditions is as restrictive as the high turnover thresholds of Art. 1 II MR1997.

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<sup>630</sup> q.v. Art. 1 III lit. b-d MR1997: The aggregated turnovers of least three partners exceeds Euro 100 million in at least three Member States and the individual turnover figures of at least two of said undertakings in said countries must exceed Euro 25 million. At least two parties must have a Community wide turnover higher than Euro 100 million. Finally, the two thirds is applicable.

<sup>631</sup> Turnover Calculation is still governed by Art. 5 MR1997. Alterations in specific sectors pursuant to Art. 5 III-IV MR1997 are not relevant to the paper.

<sup>632</sup> q.v. C. Ahlborn and V. Turner, *Expanding Success? Reform of The E.C. Merger Regulation*, ECLR 249 and 251 (1998). The new Art. 1 III MR1997 is elaborated further in the article on p 250.

### **7.3 Conditional Phase One Clearances under Art. 6 I 1 lit. b; II 2 MR1997**

Basically, Art. 6 MR1997 authorises the Commission to release three different types of decisions which were already discussed above: a non applicability decision pursuant to Art. 6 I lit. a MR1997, a compatibility decision under Art. 6 I lit. b MR1997 and an initiation of formal phase two proceedings decision under Art. 6 I lit. c MR1997 in case of serious concerns against the compatibility. However, the legislator took two former controversies into account: First, Art. 6 I lit. b 2 MR1997 expressively states that a compatibility decision is allowed to rule on ancillary restraints so as to copy the solution of Art. 8 II 3 MR1989. Secondly, the controversy was solved whether the Commission may or not be enabled to enact conditional clearances in phase one decisions how these have to be enforced: Under the former law it was disputed whether the Commission could rely on an analogy to Art. 8 II 2; 8 V; 14 and 15 MR1989 to accept and enforce commitments<sup>633</sup>. Alternatively, it was argued that the Commission could rely on implied powers to issue an implementing Regulation dealing with the subject<sup>634</sup>. A third approach insisted, that the Commission was able to conclude a private or public law agreement with the parties covering commitments and that the latter contract should be enforced by the ECJ under Art. 238 ECT<sup>635</sup>.

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<sup>633</sup> q.v. H. Krause, *Article 6 I lit. b EC Merger Regulation: Improving The Reliability of Commitments*, ECLR 209 (1994).

<sup>634</sup> The implied powers doctrine enables the Commission to issue a Commission Regulation that implements a Council Regulation without written authorisation on the following conditions: 1) The rules must be so detailed that it is not reasonable to ask the Council to deal with them 2) The rules must honour the teleology of the Council Regulation 3) The rules must be strictly necessary for an efficient enforcement of the Council Regulation; q.v. ECJ, Case C-8/55 *Fédéchar v High Authority* [1955-1956] ECR 292, paragraph 299 et seq..

<sup>635</sup> H. Krause, *Article 6 I lit. b EC Merger Regulation: Improving The Reliability of Commitments*, ECLR 209 (1994).

To solve the controversy, Art. 6 II 1-2; 6 III-IV MR1997 were introduced. If the Commission's necessarily broad analysis in phase is nevertheless able to reveal that a specified element will render the concentration incompatible with the common market, the Commission will issue a statement of objections and the parties may propose commitments<sup>636</sup> similarly to the established practice in phase two proceedings. Having accepted the proposals as sufficient, a clearance decision is released accompanied with undertakings assuring that the parties comply with their commitments. However, the Commission will only choose the conditional phase one decision if both the aspect of the concentration that contradicts Art. 2 I-III MR1997, the potential remedy, i.e. the commitment, and the latter's efficacy are sufficiently clear<sup>637</sup>.

#### ***7.4 The New Subsidiarity of Initiation of Formal Phase Two Proceedings Decisions pursuant to Art. 2 I lit. c MR1997***

If neither the threat to competition on relevant markets nor the potential remedies become sufficiently clear during the phase one investigations, a decision will be enacted pursuant to Art. 2 I lit. c MR1997 in order to initiate formal phase two proceedings. Supported by this reasoning and by the wording of Art. 6 I lit. c MR1997 "Without prejudice to [Art. 6] paragraph 2" which deals with conditional clearances under Art. 6 I lit. b in combination with II MR1997, Art. 2 I lit. c MR1997 is reduced to legal subsidiarity so that it became a *lex generalis* provision compared with Art. 2 I lit.b/2 II MR1997.

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<sup>636</sup> It is interesting to note that the wording of Art. 6 I lit. b; 6 II MR1997 or 8 II 2 MR1997 is broader than the equivalent of Art. 8 II 2 MR1989 so that commitments no longer need to refer to the assets involved in the original concentration plan. However, the Commission's practise was more flexible even under MR1989: q.v. Commission Decision, Case IV/M308, 1993 (*Kali+Salz/MdK/Treuhand*).

<sup>637</sup> Recital 8 MR1997.

### **7.5 Enforcement of Phase One Commitments**

The enforcement of undertakings is regulated similarly to the existing solution within Art. 8 MR1989 so that the same mechanisms and drawbacks apply. Consequently, it is in general sufficient to refer to the prior analysis<sup>638</sup>. However, one derogation applies as the Commission is not enabled to impose fines owing to the failure to comply with phase one commitments. It seems that the legislator simply forgot to add references to Art. 6 I lit. b, 6 II MR1997 in Art. 14 II and 15 II MR1997.

### **7.6 Suspensive Effect of a Notification Under Art. 7 MR1997**

In contrast to Art. 7 MR1989, a suspension of a concentration with a community dimension is no longer limited to a period of two weeks and subject of an extension decision. From now on, the suspensive effect lasts in general until the operation was declared compatible either within phase one or two unless a derogation under Art. 7 IV MR1997 is granted based on a "reasoned application". As a matter of fact, this boosts legal certainty and takes the complexities of the economic and legal assessment undertaken by the Commission into better account. For instance, EdF was granted an exemption in the case *Edf/London Electricity*, as the shares of the target were due to be auctioned.

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<sup>638</sup> q.v. supra at 6.6.3.2.4 Implementation of Undertakings and Evaluation.

### **7.7 Conditional Phase Two Clearances Art. 8 II 1-2 MR1997**

In general, Art. 8 MR1997 vests the Commission with powers that are similar to Art. 8 MR1989: a compatibility decision pursuant to Art. 8 II 1 MR1997, eventually accompanied by undertakings under Art. 8 II 2 MR1997 and eventually addressing ancillary restraints pursuant to Art. 8 II 3 MR1997. Contrarily, an incompatibility decision under Art. 8 III MR1997 may be taken. Art. 8 IV MR1997 dealing with divestiture of unlawfully implemented concentrations and Art. 8 V-VI MR1997 dealing with revocation of clearance decisions are not altered. Consequently, one can generally refer to the earlier discussions on these subjects.

The first alteration of existing standards relates to Art. 8 II 1 MR1997. As coordinative JVs are now included to the scope of MR1997 by means of Art. 3 II MR1997, Art. 8 II 1 MR1997 states that the latter should be evaluated on the basis of Art. 2 IV MR1997/Art. 81 I, III ECT rather than by means of Art. 2 I-III MR1997. A minor amendment of Art. 8 II 2 MR1997 highlights that the parties proposals are only eligible for a Commission's approval if they intend to make the concentration compatible with the Common market. Finally, the criteria of a blocking decision under Art. 8 III MR1997 mirror Art. 8 II 1 MR1997 insofar as the assessment of coordinative JVs will be based on Art. 2 IV MR1997 and Art. 81 ECT. However, the drawbacks related to the enforcement of commitments under MR1989 were ignored.

### **7.8 Time Limits**

Art. 10 I MR1997 makes clear that the time limit for an assessment of concentrations in phase one is extended to six weeks if commitments are submitted on time in order to prepare a conditional clearance under the new Art. 6 I lit. b; II MR1997.

### **7.9 Exclusive Application of MR1997**

Although the general principle of an exclusive application of MR1997 to all concentrations beyond the turnover thresholds and the preclusion of REG17 is maintained, the new Art. 22 MR1997 clarifies for the sake of simplicity and legal certainty following the inclusion of coordinative JVs, that REG17 will remain exclusively applicable to coordinative JV without a community dimension.

### **7.10 Implementing Provisions**

Finally, Art. 23 I 2 MR1997 regulates that the Commission is empowered to formulate secondary legislation so as to define the preconditions which have to met by commitment proposals of the parties intending to render a concentration compatible with the common market. At present, a draft notice on commitments is available<sup>639</sup>. Having concluded the assessment of the merger regimes of Art. 66 ECSC, of Art. 81-82 ECT, the original MR1989 and its review in 1997, it is feasible to assess how these concepts influence concentrations in the period of the liberalisation of energy industries.

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<sup>639</sup> Draft Commission Notice on Commitments Submitted to The Commission under Regulation 4064/89/EEC and under Commission Regulation 447/98/EC at paragraph 15; pdf.file downloadable from: [http://europa.eu.int/comm/competition/mergers/legislation/draft\\_notices/](http://europa.eu.int/comm/competition/mergers/legislation/draft_notices/).

## 8. Interplay between Internal Market Policy, Liberalisation and Concentrations

This chapter reflects the relationship between three subjects with close mutual links: At first, the internal market policy intends to create a true common market in Europe by implementing the basic freedoms; i.e. the freedom of goods<sup>640</sup>, free circulation of workers<sup>641</sup>; freedom of establishment<sup>642</sup>; freedom of services<sup>643</sup> and free circulation of capital<sup>644</sup> as summarised by Art. 2 and 3 I lit. c ECT. Clearly, this concept involves policies removing distortions to cross-border transactions in electricity and gas generation, transmission, distribution, supply and metering so that a level playing field for competition is provided.

Secondly, the transnational competition policy as introduced by Art. 3 I lit. g ECT will assist in obtaining the internal market. This refers not only to classic antitrust law under Art. 81-82 ECT, but also to merger control law and to the liberalisation of sectors which were formerly controlled by legal or factual monopolies regardless whether the state or a private entity operated as the relevant undertakings. In the era of liberalisation, Art. 86 I and II ECT deserve special attention which usually allows public undertakings in terms of Art. 86 I ECT to be granted an exemption from EC law as long as such measure is indispensable to attain services in the general economic interest that are imposed on them and provided that such a derogation is not disproportionate compared with antagonistic concerns of cross-border trade which may be of

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<sup>640</sup> Art. 23-31. ECT.

<sup>641</sup> Art. 39 et seq. ECT.

<sup>642</sup> Art. 43 et seq. ECT.

<sup>643</sup> Art. 49 et seq. ECT.

<sup>644</sup> Art. 56 et seq. ECT.

superior importance in the specific situation. The more restrictive this derogation from EC law is interpreted the more powerful becomes the liberalisation of the energy sectors: Services in the general economic interests, especially public service obligations of energy companies, must not be considered as wild cards to exclude competition. As the energy industries involve significant investments that form severe barriers to market entry of foreign competitors or energy traders, a concentration of minor market players operating on geographic markets within a single member state may be sometimes indispensable to achieve economies of scale that are necessary to enable an entity to challenge foreign markets without having to fear an effective retaliation of incumbent entities.

However, it would be highly detrimental to the liberalisation of electricity and gas markets as provided for in the IEMD, the Hydrocarbons Directive and the IGMD, if the energy undertakings solely pursued defensive concentrations so as to create even larger areas of virtually closed supply and to install collective dominance. The threat of collective dominance in the energy sector is facilitated by means of several structural elements:

- the transparency of the market (at least for industrial players),
- the high ratio of exchangeability of the product (power quality, security of supply, environmental standards),
- the focus on the price
- the low amount of cross-elasticity of demand (i.e. captive consumers)
- the maturity of the market (i.e. stable demand trends, expansion only to the detriment of other competitors)
- the already highly concentrated market with few players operating in old

closed supply areas

These factors may initially foster severe price competition but the competitors will try to establish a mode of restricting competition as extended price competition will put the turnovers of all players under pressure.

Consequently, it may be persuasive to argue that concentrations are backed if they facilitate cross-border competition unless it is intended to remove a potential foreign company that is likely to invest on the home market owing to geographic proximity<sup>645</sup>.

An important tool to assure proactive effects of a given concentration is to make the undertakings comply with conditions that require a divestiture of assets which provide for capital links to competitors or up- and downstream undertakings and which result from the era of monopolistic supply areas.

Of course, one must pay attention to the question whether the divested entities are able to become profitable and to remain stand alone competitors and whether they are bought from experienced international energy companies or by other local entities as the latter could easily achieve a future dominant position. By clearing concentrations with due effects of market opening, competition on both the regional level and the European level is generally enhanced.

Another tool of a highly ambivalent legal nature is the reciprocity concept pursuant to Art. 19 V IEMD. A member state or a private entity is entitled to reject TPA if the network owner could not provide electricity to a comparable consumer in the country of the applicant for TPA. One question was whether this concept could be extended by analogy to cross-border concentrations as well:

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<sup>645</sup> This argument could be true to prevent EdF from acquiring EnBW: q.v. FT, *EdF's Plan to Invest in EnBW* (02/10/2000), <http://www.ft.com>.

Could a member state prohibit a take-over of an incumbent firm by a foreign investor unless domestic investors are prevented from comparable transactions in the acquirer's country? These issues will be discussed in the following sub-sections.

Thirdly, the Commission and national authorities can accept incidental provisions suggested by the parties to grant negotiated TPA under conditions that are more favourable than under ordinances that govern the key-commercial terms of negotiated TPA or than under associations' agreements. This issue is discussed in the analysis of the VEBA/VIAG concentration.

The subsequent analysis of recent concentrations in the European energy sector will indicate to which extent the Commission focuses on divestitures that enhance market opening, on restraints-on control commitments<sup>646</sup>, on improved TPA and on reciprocity by means of incidental provisions.

### **8.1 Tractebel/Distrigaz**

The important aspect of this case is that the Commission concludes that no relevant market for energy products exists but distinct markets for the generation, transmission, distribution and supply of electricity or for production, transmission, distribution, supply and storage of gas<sup>647</sup>. Therefore, the parties' operations did not overlap and did not provide any scope for dominance apart from the then statutory rights of Distrigaz. Consequently, the concentration was unconditionally cleared pursuant to Art. 6 I lit. b MR1989.

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<sup>646</sup> This term is explained by H. Krause, *Article 6 I lit. b EC Merger Regulation: Improving The Reliability of Commitments*, ECLR 214 (1994).

<sup>647</sup> Commission Decision, Case IV/M493, 1994 (*Tractebel/Distrigaz*) paragraph 21-32.

## **8.2 Neste/IVO**

The Neste/IVO case is broadly similar to the concentration Tractebel/Distrigaz. The Finnish state decides to merge two public undertakings: IVO is the largest electricity generator and wholesale vendor whereas Neste controls oil, gas and chemicals businesses including Gasum that controls the domestic gas supply. The Commission reiterates that the relevant markets for electricity and gas are different. However, the Commission communicated a negative assessment as to the fact that a dominant electricity generator acquires the dominant gas supplier on the grounds that the economic relevance of natural gas as a fuel source for electricity generation is deemed to rise sharply in the future for the attainment of energy efficiency and environmental objectives. Therefore, it would be detrimental if a leading electricity generator could control the gas business so as to preventing the latter from becoming a serious competitor. The geographic scope of the market is deemed to be national as the influence of Nordpool is too insignificant that international suppliers or foreign consumers could be regarded as interchangeable. The Commission cleared the concentration on the condition that IVO does not acquire GASUM pursuant to Art. 6 I lit b 1-2 MR1997<sup>648</sup>.

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<sup>648</sup> Commission Decision, Case IV/M931, 1998 (*Neste/IVO*).

### **8.3 EdF/London Electricity**

The case EdF/London electricity provides interesting insights regarding the application of MR1997 to the energy sector as well. EdF notified a future concentration with a Community dimension as its subsidiary ELEX (UK) Ltd was interested in bidding for London Electricity Holdings No.1 Ltd that was due to be sold by its then owner Entergy Corporation in an auction<sup>649</sup>. Owing to the specific circumstances of a private auction, EdF acquired a derogation under Art. 7 IV MR1997 and bought 100% of the stock capital. The U.K. authorities tried to obtain jurisdiction over the concentration with a Community dimension by means of Art. 9 II MR1997. Despite of the limited interconnector capacity - which could justify a finding that the results of the concentration are felt unduly on a distinct market, the Commission denied to transfer the jurisdiction<sup>650</sup>. Another attempt was made so as to preclude the application of MR1997 under Art. 21 III MR1997 on the grounds that national regulation of the electricity sector would form a distinct policy area that was not covered by MR1997. However, the Commission concluded, that MR1997 and domestic electricity regulation were independent legal matters but U.K. regulatory policy was not affected regardless of the ownership of London Electricity as long as the acquirer would meet the statutory requirements of expertise and financial strength. Thereby, the application for national jurisdiction was rejected<sup>651</sup>.

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<sup>649</sup> Commission Decision, Case IV/M1346, 1999 (*EdF/London Electricity*) paragraph 1,5.

<sup>650</sup> A decision under Art. 9 III 2 MR1997: Commission Decision, Case IV/M1346, 1999 (*EdF/London Electricity*) paragraph 7.

<sup>651</sup> Commission Decision, Case IV/M1346, 1999 (*EdF/London Electricity*) paragraph 8.

The relevant market definition was differentiated between generation of electricity, access to the transmission grids, to the distribution grids and supply to consumers. Regarding the consumers, the Commission distinguishes between wholesale consumers beyond 100kw of annual consumption and small consumers<sup>652</sup>. This is justifiable as the latter are still protected by tense public price controls and as the degree of captivity is still larger as they were only recently vested with the power to switch suppliers in June 1999.

The geographic scope of the market is discussed separately for each of the product markets<sup>653</sup>. Of major concern is the market for distribution, as every regional electricity company is still the owner of the distribution grid in its former exclusive supply area. However, it is interesting to note that such a distinct analysis was not made for the affected markets within the VEBA/VIAG decision that is discussed, later. As to the supply of wholesale consumers beyond 100kW p.a., the Commission pursues a regional scope including England and Wales as well which depends on these consumers' readiness to switch suppliers. For an intermediary period, the market size as to small consumers will be reduced to London Electricity's former protected area as those will not regard other suppliers as interchangeable with London Electricity in significant numbers for the foreseeable future<sup>654</sup>. The dominance test is negative for the following reasons: Third party access to London Electricity's distribution grid is efficient, transparent and works on a non-discriminatory basis in accordance with the IEMD so that every concern is removed<sup>655</sup>. Moreover, EdF has no ability to sell electricity directly to London Electricity at excessive

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<sup>652</sup> Commission Decision, Case IV/M1346, 1999 (*EdF/London Electricity*) paragraph 14-16.

<sup>653</sup> Commission Decision, Case IV/M1346, 1999 (*EdF/London Electricity*) paragraph 18-25.

<sup>654</sup> Commission Decision, Case IV/M1346, 1999 (*EdF/London Electricity*) paragraph 25.

<sup>655</sup> Commission Decision, Case IV/M1346, 1999 (*EdF/London Electricity*) paragraph 20.

prices as it has to bid into the pool. Additionally, its generation capacity in the U.K. is small and the interconnector capacity is not significant compared with the overall consumption<sup>656</sup>. London Electricity is also prevented from concluding detrimental contracts for differences that would provide EdF with excess income to the detriment of consumers in London because said conduct would breach London Electricity's license conditions<sup>657</sup>. Furthermore, such a behaviour would be hardly economically viable in the long run.

Finally, it can be stated that the Commission does not accept any attempt to block cross-border concentrations on the grounds of a reciprocity doctrine in analogy to the IEMD. Consequently, it is not relevant that British investors cannot acquire a comparable distribution company in France as EdF is a public undertaking.

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<sup>656</sup> Commission Decision, Case IV/M1346, 1999 (*EdF/London Electricity*) paragraph 36.

<sup>657</sup> Commission Decision, Case IV/M1346, 1999 (*EdF/London Electricity*) paragraph 31-32.

#### **8.4 Gaz de France/BEWAG/GASAG**

GASAG is a supplier of natural gas in Berlin that was organised as a public undertaking under public law owned by the federal state of Berlin. When It was privatised and transformed to a public limited company, 38.16% of the shares were sold to Gaz de France Deutschland - a subsidiary of Gaz de France - whereas 24.99% were sold to BEWAG. Later, the latter companies notified that they concluded a consortium agreement so as to pool the voting rights of 63.15% attached to their shares. Thereby, the parties acquire joint control of GASAG which will become a full function joint venture. As the Commission applies a dominance test<sup>658</sup>, it implicitly treats GASAG as concentrative JV and not as a co-operative one under Art. 2 IV MR1997. The most significant features of the case relate to the fact that the Commission distinguishes between the markets of gas production, transmission, distribution and supply. GASAG distributes gas through its distribution network and sells it to final consumers<sup>659</sup>.

Moreover, GASAG is a member of a pool that sells natural gas to the electricity generator BEWAG who operates several co-generation plants for power and local district heating. Gaz de France Deutschland is only engaged in several minority shareholdings, so the only potential of dominance relates to inter fuel competition as to gas for heating and local district heating.

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<sup>658</sup> Commission Decision, Case IV/M1402, 1999 (*Gaz de France/BEWAG/GASAG*) paragraph IV.C 1) iii) and IV.C.2)iii).

<sup>659</sup> The network extends to a delivery point of the owner of the given premises. There, the gas will be consumed for central heating. Alternatively, it will delivered via a privately owned house network to the tenants so as to heat or cook. The usage of gas for cooking amounts to 2% and is therefore neglected by the Commission.

As GASAG could attempt to extend its distribution network so as to compete against BEWAG's more expensive district heat, BEWAG could use its future influence on GASAG to coerce GASAG not to expand its network. However, the Commission negated any reasonable scope for such a conduct as the existing energy mix of final consumers (28% district heating, 30% petroleum, 28% natural gas, 4% electricity, 10% hard coal) is more or less fixed because it is hardly economically viable for private owners to switch the fuel source for private heating once a building is constructed<sup>660</sup>. Finally, the concentration is declared compatible pursuant to Art. 6 I lit. b MR1997.

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<sup>660</sup> Commission Decision, Case IV/M1402 (*Gaz de France/BEWAG/GASAG*) paragraph IV.C.2)ii).

### **8.5 EdF/South Western Electricity**

The next case is a genuine successor of the above discussed concentration *EdF/London Electricity*. London Electricity plc, the regional distribution company and new subsidiary of EdF, intends to acquire control of South Western Electricity plc from its present owner Southern Energy, Inc.<sup>661</sup>. Being a regional electricity company, South Western Electricity's activities focus on distribution in its former protected supply area in South West England whereas it supplies electricity to consumers throughout England and Wales<sup>662</sup>.

The interesting feature of the case relates to the collision of electricity regulation, company law and competition law.

The valid licenses held by South Western Electricity allowed it to distribute and supply electricity in its original supply area [first tier license] and to supply electricity to eligible consumers outside the supply area [second tier license].

By means of the transaction, London electricity seeks to obtain South Western's supply business inside and outside its original supply region. However, this would contravene to the licenses granted to South Western. The situation is remedied by means of a three step strategy: Firstly, London electricity acquires the brand name, intellectual property rights and goods of South Western with regard to distribution. Secondly, a management contract is concluded, that South Western gives a mandate to London electricity to manage the former's supply businesses inside and outside the former protected area in accordance with the license requirements.

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<sup>661</sup> Commission Decision, Case IV/M1606, 1999 (*EdF/South Western Electricity*) paragraph 4. South Western, Inc. plays a crucial role in the VEBA/VIAG case with regard to the acquisition of VEAG. The complex issue will be discussed, later.

<sup>662</sup> Commission Decision, Case IV/M1606, 1999 (*EdF/South Western Electricity*).

Thirdly, EdF and London Electricity negotiated amendments of the licences with OFGEM so that South Western would be restricted to its distribution business and supply business in its distribution area. The latter would be licensed to EdF again. Additionally, London Electricity would be vested with a second tier license to serve all consumers in England and Wales. Other important license requirements were re-negotiated, too<sup>663</sup>. Finally, the management contract would be only necessary as far as London Electricity seeks to manage the supply of South Western's tariff consumers in its distribution area<sup>664</sup>.

The Commission states that these regulatory requirements do not fall within the scope of its jurisdiction. Nevertheless, the Commission regards the acquisition of South-Western's supply businesses by means of a mere management contract or by a legal transfer following the license alterations as a concentration with a Community dimension<sup>665</sup>.

As far as functional aspects of market definition are concerned, the relevant markets are basically defined in accordance with the reported findings in the case *EdF/London Electricity*<sup>666</sup>. In particular, the Commission questions whether it is still appropriate to separate a market for the supply of wholesale consumers beyond 110kV p.a. and small consumers<sup>667</sup>. However, a proper

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<sup>663</sup> e.g. London Electricity has to separate its distribution business in London from its future supply activities throughout England and Wales. Moreover, it is secured that no internal power trading takes place between EdF's generation and London Electricity's and South Western's supply business; q.v. Commission Decision, Case IV/M1606, 1999 (*EdF/South Western Electricity*) paragraph 6.

<sup>664</sup> The first tier license covers distribution in a given area and supply to tariff in that area without a possibility of splitting; q.v. Commission Decision, Case IV/M1606, 1999 (*EdF/South Western Electricity*) paragraph 47.

<sup>665</sup> Commission Decision, Case IV/M1606, 1999 (*EdF/South Western Electricity*) paragraph 8-9.

<sup>666</sup> Commission Decision, Case IV/M1606, 1999 (*EdF/South Western Electricity*) paragraph 10.

<sup>667</sup> Commission Decision, Case IV/M1606, 1999 (*EdF/South Western Electricity*) paragraph 13-14.

study of demand and supply side interchangeability indicates that those consumer groups are not identical from the view of average suppliers as to different levels of sophistication and price sensitivity and brand loyalty by means of advertisements. Contrarily, small consumers will regard the incumbent supplier as more favourable owing to established supply traditions. Therefore, the markets remain distinct which is in line with other market definitions in cases related to the energy sector<sup>668</sup>.

As far as the geographical scope of the relevant markets is concerned, it is considered that the market for the supply of small consumers is still not the market of England and Wales but the former protected supply zone. Therefore, London Electricity and South Western hold a dominant position of approximately 95% respectively. However, the dominance test is of prognostic nature and has to take into account that neither company serves a significant number of small consumers in the antagonistic area. Thereby, it is sustainable that the Commission concludes that the concentration does not measurably strengthen both dominant positions in the incumbent markets. Contrarily, the dominance will fade away in the near future owing to increasing market pressure<sup>669</sup>. The vertical aspects are dealt with in accordance to the findings in the case *EdF/London Electricity*<sup>670</sup>.

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<sup>668</sup> q.v. Commission decision, Case IV/M1673, 2000 (*VEBA/VIAG*). However, it is remarkable that the Commission did not transfer its findings of the London Electricity as to a distinct market for regional supply in the former protected area to the *Vattenfall/HEW* case.

<sup>669</sup> Commission Decision, Case IV/M1606, 1999 (*EdF/South Western Electricity*) paragraph 24-26.

<sup>670</sup> Commission Decision, Case IV/M1606, 1999 (*EdF/South Western Electricity*) paragraph 29-38.

## **8.6 Preussen Elektra/EZH**

This case deals with the acquisition of the then publicly owned Dutch generator Electriciteitsbedrijf Zuid-Holland (EZH) by VEBA's subsidiary Preussen Elektra<sup>671</sup>. Traditionally, the Dutch Electricity Generators used to co-operate in SEP so as to operate the transmission grid and to market the electricity to wholesale and retail consumers<sup>672</sup>. Their attempt to create a single vertically integrated company responsible to generate electricity, feed it in the transmission grid, operate said grid and sell electricity to wholesale consumers was prohibited by the Dutch Competition authority in 1998<sup>673</sup>. Later the grid operator TenneT - a 100% subsidiary of SEP was formed. Since its operational control is due to shift to the government<sup>674</sup>, TPA will be facilitated so that it becomes more interesting for international investors to acquire Dutch generators especially if one considers the limited interconnector capacities which preclude significant imports of power.

It is again stated that no simple relevant product market for electricity is available. Contrarily, it is found on the basis of the substitutability doctrine, that separated markets exist for generation with a view of feeding in the transmission grid, access to the transmission grid, access to the distribution grid and supply to wholesale or retail consumers<sup>675</sup>, import and export and that Preussen Elektra is active on all these markets whereas EZH is solely a generator. Given the limited interconnector capacity, the Commission considered the af-

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<sup>671</sup> Commission Decision, Case IV/M1659, 1999 (*Preussen Elektra/EZH*): According to paragraph 4, EZH was owned by the province of Zuid-Holland and 5 cities.

<sup>672</sup> The pooled sale of electricity from the transmission grid ended on 31/12/2000: q.v. Commission Decision, Case IV/M1659, 1999 (*PreussenElektra/EZH*) paragraph 10.

<sup>673</sup> Dutch Competition Authority, Case 4/45.b01, 29/01/1998 (*SEP/EPON/EPZ/EZH/UNA*).

<sup>674</sup> Commission Decision, Case IV/M1659, 1999 (*PreussenElektra/EZH*) paragraph 12.

<sup>675</sup> Commission Decision, Case IV/M1659, 1999 (*PreussenElektra/EZH*) paragraph 7-8.

affected markets in The Netherlands and Germany as being of national scope<sup>676</sup>.

The acquisition in terms of Art. 3 I lit. b MR1997 was declared compatible with the common market, especially as Preussen Elektra promised not to execute its voting rights in SEP so as to determine the policy of TenneT prior to the latter's convey to the Dutch State.

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<sup>676</sup> Commission Decision, Case IV/M1659, 1999 (*PreussenElektra/EZH*) paragraph 9.

## **8.7 VEBA/VIAG**

The next section will discuss the highly complex case *VEBA/VIAG*<sup>677</sup>. The analysis shall reveal that the Commission is willing to release a compatibility decision even if a concentration involves far reaching effects as to collective dominance provided that the parties submit and promise to comply with severe divestiture undertakings and mandatory obligations as to a system of preferential negotiated TPA in favour of applicants. The significant complexity of the case results from the concentration of RWE/VEW that was due to be assessed by the German Federal Cartel Office in parallel proceedings and conditionally cleared<sup>678</sup>. The combined outcome of both cases will have a major influence not only on the structure of the market but also to the restructuring of the VEAG company. According to the rationale of both proceedings, VEAG shall be enabled to become a new powerful competitor to E.ON and RWE. Otherwise, the concentrations shall be blocked. After a long takeover battle, it seems that this concept was fairly successful as HEW AG - backed by the Swedish state owned utility Vattenfall - will purchase VEBA's, VIAG's and RWE's direct stakes and VEW's mediate stake<sup>679</sup> in VEAG. Additionally, HEW will acquire BEWAG so as to control BEWAG's stake in VEAG, as well.

### **8.7.1 The Parties**

VEBA AG and VIAG AG jointly notified on 14 December 1999 pursuant to Art. 4 I; II 1st Variant MR1997 that they intend to merge in terms of Art. 3 I lit. a MR1997.

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<sup>677</sup> Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*).

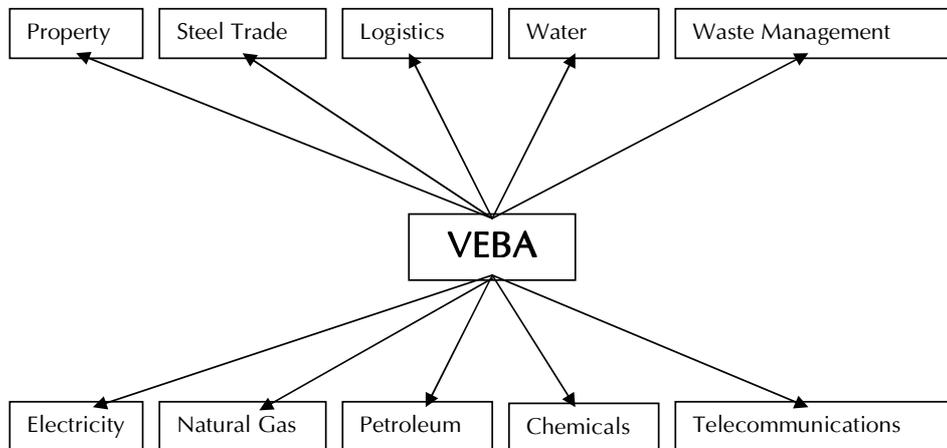
<sup>678</sup> Federal Cartel Office, Case B8-40000-U-309/99 (*RWE/VEW*), paragraph I (clearance), paragraph I lit. A-D (conditions).

<sup>679</sup> VEAG participates in 25% of the equity of EBH which holds 25% of VEAG; q.v. infra Table 13: Status Quo Ex Post: Joint Daughter Undertakings.

### 8.1.1 VEBA AG

VEBA is a group with multiple industrial activities<sup>680</sup>:

**Table 3: VEBA AG**



VEBA's power activities extend to generation, transmission, distribution and supply. The operations are concentrated in its subsidiary Preussen Elektra AG. By means of exclusive concession agreements with municipalities and demarcation contracts, either Preussen Elektra in persona or one of its subsidiaries<sup>681</sup> held in general factual monopoly regarding the generation, transmission, distribution and supply of electricity for the general public in the federal states of Schleswig-Holstein, Lower Saxony and parts of Hesse<sup>682</sup>. Preussen Elektra jointly controls VEAG AG together with RWE AG and Bayernwerk AG, so that VEAG could be regarded as a JV. VEAG was created in the aftermath of the German Unification so as to generate, transmit and distribute electricity in Eastern Germany<sup>683</sup>. Finally, Preussen Elektra holds important

<sup>680</sup> Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) at 4.

<sup>681</sup> e.g. Schleswig in Schleswig-Holstein.

<sup>682</sup> However, municipalities often controlled the supply of electricity.

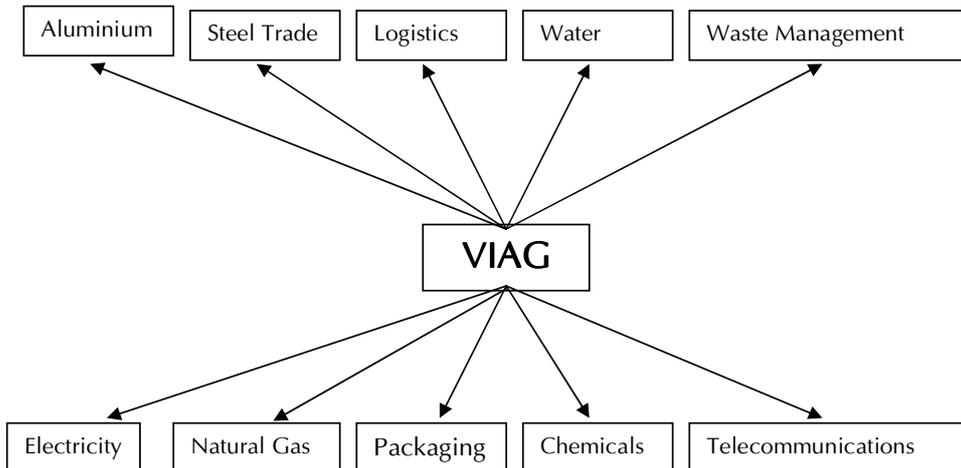
<sup>683</sup> q.v. Financial Times, *VEAG Well-Positioned to Assume Powerful Role* (09/10/2000), <http://www.ft.com>.

shareholdings in two regional distribution companies in Eastern Germany:  
e.dis and Avacon.

### 8.1.2 VIAG AG

VIAG AG is a group with industrial activities that are similar to VEBA<sup>684</sup>:

**Table 4: VIAG AG**



The power activities are concentrated in the affiliate Bayernwerk AG which is engaged in generation, transmission, distribution and supply of electricity. Bayernwerk enjoyed a factual monopoly in federal state of Bavaria that was similar to the one held by Preussen Elektra. Apart from the joint control of VEAG, Bayernwerk AG jointly controls BEWAG AG together with Southern Energy Beteiligungsgesellschaft<sup>685</sup>. Finally, VIAG controls the TEAG, a regional distribution company in Eastern Germany.

<sup>684</sup> Commission Decision, Case IV/M1673, 2000 (VEBA/VIAG) at 5.

<sup>685</sup> A subsidiary of Southern Energy, Inc. (US).

### **8.7.2 Concentration**

The Commission quickly established that the proposed concentration in terms of Art. 1 I MR1997 is a merger between VEBA and VIAG in terms of Art. 3 I lit. a MR1997. VIAG will transfer its assets to VEBA and the former will cease to exist<sup>686</sup>.

### **8.7.3 Community Dimension Art. 1 II; 5 MR1997**

Hence, the Commission examines whether the concentration has a community dimension pursuant to Art. 1 II in combination with Art. 5 MR1997. Firstly, the aggregated global annual turnover of VEBA and VIAG in 1998 is Euro 67,900 million and the community wide turnovers of VEBA is Euro 33,500 million and of VIAG Euro 18,200 million<sup>687</sup>. Although, VEBA achieves two thirds of its annual turnover in Germany, the two thirds rule is nevertheless met because it is sufficient if one partner does not obtain two thirds of its turnover within the same member state. As VIAG does not generate two thirds of its EC turnover in Germany, the community dimension is available.

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<sup>686</sup> Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 6.

<sup>687</sup> Art. 1 II lit a and b 1st Variant MR1997 are met.

#### **8.7.4 Dominance Test Concerning Activities of The Parties in The Electricity Sector under Art. 2 MR1997**

After having enacted an initiation of formal proceedings decision under Art. 6 I lit. c MR1997<sup>688</sup>, the Commission pursues a thorough analysis in order to examine the compatibility of the concentration pursuant to Art. 2 MR1997. The examination distinguishes between engagements in the electricity and the chemicals industry. For the purpose of this paper, it is justifiable not to discuss the impact of the given concentration on the relevant markets for chemicals. Furthermore, the Commission does not address other business activities of VEBA and VIAG because any reasonable potential of dominance is denied. The paper will discuss the Commission's dominance test dedicated to the electricity industries by means of a methodology that was introduced above<sup>689</sup>: Firstly, the Commission's definition of the relevant product market will be evaluated. Then, the urgency of the need to maintain effective competition will be analysed pursuant to Art. 2 I lit. a MR1997 depending on the market structure, actual competition and potential competition. Thirdly, the market position of the undertakings is assessed in combination with their economic and financial powers, alternatives available to consumers, barriers to entry, demand trends, interests of consumers and the ability to intensify technological progress provided that it is to consumers' benefit.

##### **8.7.4.1 Relevant Product Market Analysis For The Electricity Sector**

As a prerequisite of a diligent analysis of dominance under Art. 2 MR1997, the Commission has to identify the relevant product markets within the electricity

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<sup>688</sup> Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 2.

<sup>689</sup> q.v. 6.5.3 Compatibility Decision under Art. 6 I lit. b MR1989; 6.5.3.1 Definition of The Relevant Market; 6.5.3.2 Assessment of Dominance in Terms of Art. 2 II MR199, especially the sub-sections 6.5.3.2.1 to 6.5.3.2.10 and 6.5.3.2.16 .

industry. As discussed above, the Commission will define a relevant product market if products are available that are substitutable without major difficulties from the view of ordinary consumers based on functional, geographic and temporal criteria: demands side interchangeability. Alternatively, it is relevant if interchangeable groups of consumers are available from the point of view of suppliers: supply side substitutability.

#### *8.7.4.1.1 Functional Criteria*

With regard to electricity, the Commission establishes six relevant products: First of all, a market is available for the generation of electricity that is fed in the transmission grids<sup>690</sup>. Secondly, a distinct market exists for the high voltage transmission of electricity to regional distribution companies, large municipalities, power traders or large industrial consumers<sup>691</sup>. The next market refers to the medium and low voltage distribution of electricity from regional distributors to small municipalities and large consumers and from municipalities to large consumers<sup>692</sup>. Then, there is a market for the supply/metering of electricity from distributors to small individual and from municipalities to said consumers<sup>693</sup>. Moreover, a market for electricity trading is deemed to exist<sup>694</sup>. Lastly, the import and export of electricity is considered, too<sup>695</sup>. The Commission finds that all these markets are relevant to the concentration as Preussen Elektra and Bayernwerk are not only engaged in generation and transmission,

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<sup>690</sup> Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 11; Commission Decision, Case IV/M1346, 1999 (*EdF/London Electricity*); Commission Decision, Case IV/M1606, 1999 (*EdF/South Western Electricity*).

<sup>691</sup> The high voltage grids refers to the German high voltage networks of 380 kV and 220 kV; q.v. q.v. Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 14.

<sup>692</sup> This refers to the medium voltage networks of 20-110 kV and the low voltage grids below 20 kV in Germany: q.v. Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 16.

<sup>693</sup> Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 16.

<sup>694</sup> Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 11; Commission Decision, Case IV/M1557, 1999 (*EdF/Louis Dreyfus*).

import and export of electricity but are also involved in distribution and supply by means of equity stakes in regional distributors and in local undertakings. The latter are usually partly owned by municipalities<sup>696</sup>.

#### *8.7.4.1.2 Brief Evaluation of The Commission's Methodology*

The Commission suggests to apply a methodology that concentrates on the assessment of the market for the transmission of electricity: If a concentration on said market leads to additional detrimental effects on downstream markets for distribution and supply, such finding will affect the transmission market analysis<sup>697</sup>. This approach is backed by its simplicity and its comparatively rapid decision-making. However, it bears a significant risk that no duly diligent assessment of specific downstream markets is conducted. In fact, the Commission only deals with a number of downstream markets that are chosen by discretion.

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<sup>695</sup> Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 19.

<sup>696</sup> Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 15, 16-18 and 19.

<sup>697</sup> Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 19.

#### 8.7.4.1.3 A European Internal Electricity Market as The Relevant Geographic Market ?

Based on the doctrine substitutability without undue difficulties, the Commission undertakes considerable efforts to define the adequate geographic scope of the market of transmission of electricity<sup>698</sup>. The parties are of the opinion that the market for transmission of electricity already has a transnational community wide nature<sup>699</sup>. The arguments relate to the continental grid that is co-ordinated by means of the UCPTTE in general and the interconnectors between Germany and its neighbours in particular. Additionally, it is argued that the intention of Art. 3 I lit g ECT and the rationale of the IEMD require to define a European market.

Contrarily, the Commission argues in favour of a market for transmission that does not exceed the national borders<sup>700</sup>.

Clearly, the parties' allegations are in the interest of the applicants as an increasing size of a relevant market reduces the scope for any finding of dominance. However, the rationale of Art. 3 I lit. g ECT and of the IEMD is only relevant as it describes the desired future structure of an internal market but a due legal interpretation of Art. 2 MR1997 - even if it considers the near future - cannot ignore that considerable legal and factual obstacles against an internal electricity market will remain in place for a relevant period.

Moreover, the Commission's view is supported by persuasive evidence. The interconnector capacities are extremely limited compared with the electricity consumed within the national borders:

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<sup>698</sup> Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 20.

<sup>699</sup> Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 21.

<sup>700</sup> Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraphs 22-31.

**Table 5: Interconnector Capacities in 1998**

<b>Company</b>	<b>Capacity (GW)</b>	<b>country of destination</b>
VEBA	<b>5,0</b>	Netherlands, Denmark, Sweden
VIAG	<b>6,6</b>	Austria, Czech Republic
RWE	<b>13,9</b>	Netherlands, France, Luxembourg, Austria, Switzerland
VEAG	<b>7,0</b>	Denmark, Poland, Czech Republic
VEW	<b>3,2</b>	Netherlands
EnBW	<b>10,3</b>	France, Austria, Switzerland
total:	<b>46,0</b>	

source: UCPTE, 1998

The import of electricity to Germany was 38,5 TWh in 1998. This reflects a mere 8% of the total consumption<sup>701</sup>. From October 1998 to September 1998, 28TWh were imported according to an ETSO study<sup>702</sup> which equals 6% of the then overall consumption of 479 TWh. A further reduction is caused by transit power contracted on a long term basis so that the required capacities will not be available for German electricity traders. The Commission also underlines, that it is important to consider that the interconnector capacity cannot simply be added up to 46 GW because the so-called loop flows of electricity will limit the capacity to a value between 7 or 15 GW<sup>703</sup>. Additionally, the Commission points out that the small amount of effective capacity that could be available for liberalised cross-border electricity trade is further reduced owing to those capacities which are reserved for long term electricity sales agreements entered into by the owners of the interconnectors<sup>704</sup>.

<sup>701</sup> q.v. Commission Decision, Case IV/M1673, 2000 (VEBA/VIAG) paragraph 22.

<sup>702</sup> ETSO, Proposal for The Implementation of The Cross-border Tariffs for The Year 2001, 27 March 2000.

<sup>703</sup> Commission Decision, Case IV/M1673, 2000 (VEBA/VIAG) paragraph 25-27.

<sup>704</sup> Commission Decision, Case IV/M1673, 2000 (VEBA/VIAG) paragraph 27.

This argument is challenged by the parties as synchronised counter-trading would remove the need to transport physical electricity. However, the Commission sticks to its opinion because the practical experience does not indicate significant quantities of counter-trading at present<sup>705</sup>. Future developments are not considered especially as cross-border trade is impeded by the "cross-border t-component", a specific levy imposed on third party access to interconnectors in accordance with the 2<sup>nd</sup> associations' agreement<sup>706</sup>. Consequently, an average consumer of high voltage electricity transmission will not regard electricity of domestic and of foreign origin as interchangeable products. Therefore, it is superior to argue in favour of a geographic market of electricity transmission not exceeding the German market.

#### *8.7.4.1.4 National Market as The Relevant Geographic Market ?*

The present finding that no community wide market for the transmission of electricity exists does not clarify whether a genuine German market for electricity transmission exists or if several regional markets for transmission exist of which the scope could be limited to those areas in which the former de facto monopolists, i.e. the large vertically integrated companies, own the transmission grids. In contrast to a former decision, the Commission no longer argues that it is not necessary to define the geographic scope of the market as national or regional<sup>707</sup>. Now, the Commission applies the doctrine of demand side substitutability in order to address the issue. Said interchangeability will depend crucially on the present and future competition as to transmission of

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<sup>705</sup> Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 28.

<sup>706</sup> This component equals 0.25 Pf per kWh: q.v. BDI, VIK and VDEW, *2<sup>nd</sup> Associations' Agreement*, (13/12/1999) Annex 5 point 3; Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 30.

<sup>707</sup> q.v. Commission Decision, Case IV/M1720, 2000 (*Fortum/Elektrizitätswerk Wesertal*) paragraph 13.

electricity to regional distributors, large municipalities and to large individual consumers<sup>708</sup>.

Clearly, the efficiency of TPA to the transmission grid will be an important factor for this analysis accompanied by the unbundling provisions and a limited relevance of direct lines<sup>709</sup>.

The efficacy of TPA to distribution grids will be equally important as the latter is necessary in order to serve small municipalities or the large number of final consumers. Apart from primary EC law that is generally primarily applicable to the detriment of contravening national laws pursuant to the *effet utile* doctrine, the specific legal foundations of any domestic TPA regime are Art. 17-18 IEMD. The German Energy Industry Act of 1998<sup>710</sup> opted for a negotiated TPA regime. Fortunately, 100% of consumers are eligible for TPA from its entry into force. This intensifies the market opening and facilitates a finding in favour of a national market in contrast to neighbouring markets like France and Austria. However, regional markets could well be maintained for the foreseeable future if the efficacy of negotiated TPA was extremely limited compared with a hypothetical regime of regulated TPA.

In the past, the efficacy of commercially viable TPA was not secured by the first associations' agreement and it was hardly improved by the second associations' agreement<sup>711</sup>. Both agreements are not enforceable contracts. Additionally, they protect the interests of vertically integrated entities rather than

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<sup>708</sup> Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 33.

<sup>709</sup> q.v. Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 35.

<sup>710</sup> Section 6 I Energy Industry Act of 24 April 1998 [Gesetz über die Elektrizitäts- und Gasversorgung (Energiewirtschaftsgesetz - EnWG)], Federal Law Gazette 1998 I 730; as lastly Amended on 29 March 2000, Federal Law Gazette 2000 I 305.

<sup>711</sup> q.v. Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 39.

those of new market entrants<sup>712</sup>. Additionally, both agreements fail to introduce simple rules for the process of applications for TPA. Neither do they clarify the potential for refusals to TPA, which is provided by the Energy Industry Act<sup>713</sup>, nor do they boost transparency to proceedings by means of mandatory publications of key-commercial terms for TPA.

Unfortunately, the federal ministry of economics did not take advantage of its power to enact an ordinance to determine the key commercial terms of TPA contracts if the former is deemed to be necessary to facilitate secure, price-worthy, environmentally sustainable supply of power to the general public and to foster competition<sup>714</sup>.

A further difficulty relates to the cross-trading zone t-component which will have to be paid by applicants for TPA if the transaction crosses the border between the Northern and Southern trading zone without being offset by countertrading<sup>715</sup>. This surcharge of 0.25 Pf/kWh is not only unjustifiable in terms of cost-reflection as TPA does not lead to long distance flows of electricity in physical terms but also a disguised discrimination between traditional power companies and new competitors. The former companies are either operating power stations in both trading zones directly or indirectly by means of shareholdings so that they can easily avoid cross-trading-zone transactions so as to unduly evade the levy. In fact, another dis-incentive is provided by the obligation to balancing services as the remuneration exceeds the costs by far<sup>716</sup>.

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<sup>712</sup> Especially, the cross trading zone t-component is detrimental to competition.

<sup>713</sup> i.e. Section 6 III Energy Industry Act; Art. 4 Act Regarding the Electricity Reform of 1998 (protection of power generated from lignite in Eastern Germany; q.v. Art. 8 III-IV IEMD.

<sup>714</sup> Section 6 II Energy Industry Act of 24 April 1998 [Gesetz über die Elektrizitäts- und Gasversorgung (Energiewirtschaftsgesetz - EnWG)], Federal Law Gazette 1998 I 730; as lastly Amended on 29 March 2000, Federal Law Gazette 2000 I 305.

<sup>715</sup> BDI, VIK and VDEW, 2<sup>nd</sup> *Associations' Agreement*, (13/12/1999) p 6 and Annex 5 point 3.

<sup>716</sup> q.v. Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 40.

Finally, a further impediment of competition on a national scale relates to the fact, that neither ownership nor legal unbundling is mandatory but a mere management unbundling with separate accounts<sup>717</sup> so that vertically integrated entities can maintain commercial interests which provide for incentives as to the discrimination between intra- or extra-group applicants for TPA.

As a result of the arguments presented, it would be superficially sustainable if the Commission argued in favour of a regional market definition. However, such a finding would be premature as the Commission has to take other aspects into account which back a conclusion that equals a national market definition<sup>718</sup>. First of all, the limitations of the second associations' agreement can be overturned by its revision that is due in January 2002.

Secondly, it is predicted that the defensive practice of "subsidiary sales of electricity" will be terminated, soon<sup>719</sup>: A new market entrant tries to avoid the uncertainties of lengthy TPA negotiations by a very defensive approach: If the entrant sells electricity to a final consumer who is served via the network of a regional distributor, the vendor avoids TPA by purchasing the power that is needed from the regional distributor. This practice prolongs the period of market opening as the entrant's ability to offer lower prices is extremely limited.

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<sup>717</sup> Section 9 I-IV Energy Industry Act of 24 April 1998 [Gesetz über die Elektrizitäts- und Gasversorgung (Energiewirtschaftsgesetz - EnWG)], Federal Law Gazette 1998 I 730; as lastly Amended on 29 March 2000, Federal Law Gazette 2000 I 305.

<sup>718</sup> Commission Decision, Case IV/M1673, 2000 (VEBA/VIAG) paragraph 41.

<sup>719</sup> q.v. Commission Decision, Case IV/M1673, 2000 (VEBA/VIAG) paragraph 42.

Thirdly, the Commission assesses, that it is hardly feasible to invoke the lignite protection clause to outlaw TPA. Finally, the evolution of power exchanges is deemed to overcome the weaknesses of present TPA by means of standardised financial risk management tools so as to facilitate power trading<sup>720</sup>.

If one weighs the facts it is difficult to conclude that a unique German market for electricity transmission exists at present. However, the assessment under Art. 2 MR1997 is an operation essentially based on elements of prognosis. Therefore, it is indeed justifiable to regard the market as a national one for the purposes of an adequate assessment of the concentration VEBA/VIAG.

#### *8.7.4.1.4 Temporal Criteria?*

Additionally, it is well worthy to distinguish markets for electricity on the basis of the temporal difference between the time of concluding a supply contract and the future delivery of power. One could separate traditional long term supply agreements, which meet basic needs<sup>721</sup>, from new spot markets for additional needs and from markets for derivatives, i.e. forwards, futures options and swaps. Unfortunately, the Commission does ignore these temporal aspects.

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<sup>720</sup> Commission Decision, Case IV/M1673, 2000 (VEBA/VIAG) paragraph 45.

<sup>721</sup> Probably, such long term agreements could contain a subsidiary clause that they are only valid if the consumer has not contracted quantities of priority power from spot markets.

#### **8.7.4.2 Assessment of The Need to Maintain Effective Competition Art. 2 I lit. a MR1997**

The second element of the dominance test of Art. 2 MR1997 deals with the correct assessment of the need to maintain effective competition on the relevant market for feeding generated electricity in the transmission grid and the affected markets of transmission, distribution, supply of electricity and metering of its consumption. This need is established by means of sub-criteria of declining importance which relate to

- the present and future market structure,
- actual and potential competition on the affected markets
- additional criteria [arg. ex Art. 2 I lit. a MR1997 "among other things"]

It will be concluded that the market structure is already highly concentrated so that the Commission will have to give a general priority to the concern that effective competition on the affected markets must be secured.

##### *8.7.4.2.1 Present Structure of The Market for Power Generation and Wholesale via The Transmission Grid pursuant Art. 2 I lit. a 1<sup>st</sup> Variant MR1997*

With regard to the present and future structure of the market for the transmission of electricity in Germany, it must be stated that the market is highly concentrated at present. This is a result of several factors:

First of all, the number of companies who generate power, feed it in the transmission grid and sell it to either regional distributors, large municipalities or large industrial consumers is quite limited. This may be exemplified by the following table:

**Table 6: Status Quo Ante: Electricity Generation and The Market Shares Regarding The Feeding of Power in The Transmission Grid**

<b>Company</b>	<b>Generation in TWh in 1998</b>	<b>market share regarding the feeding of power in the transmission grid (%)</b>
VEBA	77.1	21.2
VIAG	44.5	12.2
BEWAG	10.3	2.8
RWE	120.4	33.1
VEW	19.8	5.44
VEAG	43.9	12.1
EnBW	35.3	9.7
HEW	12.6	3.46
total:	<b>363.9</b>	<b>100</b>

Source: Commission Decision, Case IV/M1673, 2000 (VEBA/VIAG) paragraph 49.

The market power of the transmission companies that is indicated by high market shares concentrated in eight companies is even extended by three additional elements:

The generation capacity of regional distribution companies and of municipalities is very limited so that these undertakings depend largely on the power transmitted to them on the transmission grid. This finding may be underlined by the following table:

**Table 7: Status Quo Ante: Concentration of The Market Owing to The Concentration of The Capacity of Electricity Generation for The Public**

Undertaking producing electricity for the general public (i.e. not Industrial Power Producers and DB Railway)	Installed Generation Capacity of including jointly owned power plants (GW)	Percentage of installed Capacity
VEBA	17.5	17.6%
VIAG	11.0	11.1%
BEWAG	2.9	2.9%
RWE	19.8	19.9%
VEAG	9.4	9.5%
VEW	4.2	4.2%
EnBW	7.7	7.8%
HEW	3.8	3.8%
TOTAL "Verbund Utilities"	76.3	76.8%
Regional Distribution Companies and Large Municipalities	23.1	23.2%
<b>TOTAL</b>	<b>99.4</b>	<b>100%</b>

Source: Commission Decision, Case IV/M1673, 2000 (VEBA/VIAG) paragraph 52.

The concentrated nature of the market is not only reflected by generation capacities but also by the actual amount of power that was sold by distributors or suppliers to final consumers and which was originally generated by the transmission companies. For this purpose, it is not relevant whether the power was sold to retail consumers by branches, affiliated regional distribution companies or local supply undertakings co-owned by municipalities:

**Table 8: Status Quo Ante: Concentration of The Market Owing to High Proportion of Retail Electricity Sales Depending on Verbund Utilities' Production**

Utilities	Responsibility for Retail Electricity Sales in Germany (TWh)	Equals a Percentage of Retail Sales of:
VEBA	102.3	21.4%
VIAG	59.5	12.4%
BEWAG	13.3	2.8%
RWE	151	31.5%
VEAG	attributed to its shareholders	attributed to its shareholders
VEW	43.6	9.1%
EnBW	44.3	9.3%
HEW	15.4	3.2%
TOTAL "Verbund Utilities"	429.4	89.7%
Regional Distribution Companies and Large Municipalities	49.6	10.3%
<b>TOTAL</b>	<b>479</b>	<b>100%</b>

Source: Commission Decision, Case IV/M1673, 2000 (VEBA/VIAG) paragraph 53.

Moreover, the number of regional distributors and especially that of municipalities is immense so that the market power of the vendors is expanded by an atomistic demand pattern<sup>722</sup>, at least in general.

Lastly, the vendors who sell power via the transmission grid are frequently influential (im)mediate shareholders in the (im)mediate buyers so that the former have access to confidential economic data.

The second element of concentration of the market relates to the commercial link, that the generators concluded contracts providing for emergency electricity supply to the transmission grid in case of unforeseeable difficulties<sup>723</sup>.

Thirdly, even the few influential vendors of electricity via the transmission grid are linked by direct or indirect cross-shareholdings<sup>724</sup>. Clearly, these links reduce the potential of fierce competition between the transmission companies.

In fact, the Commission considered these factors when it assessed the proposed concentration but it remains questionable whether these factors were taken into due account. The answer will be provided later as a consequence of a critical analysis of the incidental provisions attached to the decision. A negative assessment will be probable unless the parties invent options that severely limit the room for additional impediments of competition. Even this may be insufficient so that it could be better to use the concentration as a vehicle of facilitation of future competition. Incidental Provisions could try to de-

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<sup>722</sup> The scope for energy demand cartels of SME's which are exempted from the German Anti-trust Act is to insignificant to remedy this situation: q.v. Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 51, 57, 86.

<sup>723</sup> Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 48.

<sup>724</sup> e.g. VEAG was created as a generator and transmission company after the German unification. Its shareholders are the other transmission companies and it is jointly dominated by VEBA (Preussen Elektra 26.25%), VIAG (Badenwerk 22.5%) and RWE (26.225%); q.v. Annexes 10.7.2 Capital Links among German utilities. BEWAG was jointly dominated by VEBA and Southern Company, U.S. q.v. Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 55.

fine a strategy that facilitates a rapid breakdown of traditional vertical integration in the former areas of exclusive transmission and distribution operations. Furthermore, these conditions and obligations could provide for an incentive to allow VEAG to become an entity independent from its Western counterparts VEBA/VIAG, RWE/VEW and EnBW so that it may be a true competitor, soon. It will be beneficial that it is issued with modern power stations<sup>725</sup>.

#### *8.7.4.2.2 Actual and Potential Competition on The Affected Markets: Art.2 I lit. a 2nd Variant MR1997*

The tendency towards a negative assessment of the concentration owing to an extremely great need not only to maintain but also to develop effective competition on the affected markets that was indicated by the already highly concentrated market structure is even broadened by the Commission's arguments relating to actual and potential competition. The scope for actual and potential competition from external sources is seriously weakened by the limited capacity of interconnectors which was mentioned above with respect to the domestic market definition<sup>726</sup>. The same idea is true because of the barriers to entry as a result of the natural monopolies regarding the transmission and distribution networks, that are not adequately addressed by the second associations' agreement<sup>727</sup>, and of the serious financial and judicial burden to get an approval for a new power station.

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<sup>725</sup> Financial Times, *VEAG Well-Positioned to Assume Powerful Role* (09/10/2000), <http://www.ft.com>.

<sup>726</sup> Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 50.

<sup>727</sup> Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 58; q.v. BDI, VIK and VDEW, *2<sup>nd</sup> Associations' Agreement*, (13/12/1999).

#### 8.7.4.2.3 Additional Criteria Art. 2 I lit. a 3rd Variant MR1997

Based on the wording "among other things" in Art. 2 I lit. a MR1997 the aspects that were discussed above, are not of an exhaustive nature. The Commission rightfully points out that several subsidiary criteria need to be reviewed to assess the present structure of the energy sector<sup>728</sup>.

The homogeneity of the product provides for transparency of commercial operations that alleviates joint dominance of powerful undertakings rather than fierce price competition in the long run as all competitors might equally suffer from lower margins. Secondly, the stable demand trend is also a factor that limits the incentive to compete fiercely against each other. The tendency towards a limitation of competition is highlighted by the over-capacities concerning base load generation that were admitted recently. Therefore, VEBA/VIAG and RWE plan to close down several old power stations<sup>729</sup>.

#### 8.7.4.3 Market Position of The Undertakings Art. 2 I lit. b 1st Variant MR1997

If one considers the market position of the undertakings that are active on the affected markets, it is important to reiterate that the ownership of the transmission networks provide for a formidable means of preventing or slowing down the process of liberalisation. The transmission network offers the crucial ability to transmit power over long distances at minimum loss so that TPA to

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<sup>728</sup> Commission Decision, Case IV/M1673, 2000 (VEBA/VIAG) paragraph 58.

<sup>729</sup> q.v. E.on announces a closure of power stations owing to over-capacities of allegedly 10,000 MW: Financial Times Deutschland, *E.on Energie: Chef kündigt Schließung von Kraftwerken an* (04/10/2000), <http://www.ftd.de>; Later it is specified that the nuclear power station Stade will be closed in 2003 although the "atomic industry consensus" would have allowed E.on to continue to operate Stade until 2004 due to overcapacities of allegedly 4800 MW: Financial Times Deutschland, *E.on Energie: Kernkraftwerk Stade geht 2003 vom Netz* (09/10/2000), <http://www.ftd.de>. Similarly in terms of time and scope, RWE announces a closure of 5,000 MW of installed capacities including a nuclear power station and fossil fuel plants that are no longer competitive: Financial Times Deutschland, *RWE: Energieversorger nimmt Kraftwerke vom Netz* (10/10/2000), <http://www.ftd.de>; Financial Times, *RWE Announces Closures* (10/10/2000), <http://www.ft.com>.

this network is one of the bases of liberalisation. The following table indicates, how concentrated the ownership of transmission networks is:

***Table 9: Status Quo Ante: Transmission Network Ownership***

Undertaking	Ownership Concerning Transmission Networks 380/220 kV in km	Percentage of total network
<b>VEBA</b>	6,569	16%
<b>VIAG</b>	5,500	14%
<b>BEWAG</b>	136	ca. 1%
<b>RWE</b>	9,000	22%
<b>VEAG</b>	11,500	29%
<b>VEW</b>	2,000	5%
<b>EnBW</b>	2,100	5%
<b>HEW</b>	360	1%
<b>Regional Distribution Companies and Municipalities</b>	3,121	7%
<b>TOTAL</b>	40,150	100%

Source: VDEW, 1997.

The relevance of this argument is proved by the slow and lengthy negotiations which lead to the first associations' agreement in 1998. The former contained an ill designed distance related tariff although power transport does generally not involve distance related costs. Moreover, time consuming negotiations preceded the adoption of the second associations' agreement which will last until December 2001. Although a more cost-reflecting network access tariff was chosen<sup>730</sup>, several features are inconsistent with a fair TPA regime. In fact, the negotiations are not based on objective, transparent and non discriminatory criteria alone. For instance, it is still disputed whether the consumer is entitled to conclude a single sales contract for power with the chosen supplier so that it is up to the supplier to agree on TPA with the network operators or if it is mandatory that the consumer concludes a TPA contract at least with the owner of the low voltage distribution grid<sup>731</sup>.

<sup>730</sup> q.v. BDI, VIK and VDEW, 2<sup>nd</sup> *Associations' Agreement*, (13/12/1999) p 6.

<sup>731</sup> If one insists on a contract for TPA between the consumer and the local grid owner, the grid owner will be in an advantageous position in order to slow down the process in every single case or to make individual competing offers; q.v. *Financial Times Deutschland*, *RWE*

#### **8.7.4.4 Economic and Financial Strength Art. 2 I lit. b 2nd Variant MR1997**

The exorbitant economic and financial strength of the vertically integrated undertakings which operate on the affected markets is beyond serious doubt. The Share capital<sup>732</sup>, the guaranteed income as a result of former exclusive concession agreements and demarcations contracts in combination with a cost-plus pricing and the various expansions<sup>733</sup> may be the predominant indicators.

#### **8.7.4.5 Alternatives Available to Consumers Art. 2 I lit. b 3rd Variant MR1997**

The need to develop effective competition on the relevant market of distribution of electricity via the transmission grid is and affected markets is underlined by the lack of alternatives to ordinary consumers as the networks are a natural monopoly and by the fact that even interconnectors are owned by the Verbund utilities. Finally, fuel switching capabilities are considered to be too expensive to be realised by average consumers<sup>734</sup>.

#### **8.7.4.6 Barriers To Entry Art. 2 I lit. b 4th Variant MR1997**

Similarly to the previous chapter, the transmission networks do not only restrict consumers' choices but provide also for natural monopolies, i.e. essential facilities of which the duplication is hardly economically feasible and hardly environmentally desirable. As long as interconnector capacities are insignificant and are controlled by the Verbund utilities, other barriers to entry relate to the necessary investment in modern base-load, medium-load and peak-load

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*Plus macht Druck, um eine grundsätzliche Frage des Stromwettbewerbs in Deutschland zu klären* (02/01/01), <http://www.ftd.de>.

<sup>732</sup> q.v. Annexes 10.7.2 Capital Links among German utilities.

<sup>733</sup> e.g. VIAG founded a successful telecommunications division called VIAG Interkom. RWE recently acquired Thames Water so as to implement a multi utility strategy.

<sup>734</sup> Commission Decision, Case IV/M1673, 2000 (VEBA/VIAG) paragraph 83-84.

power stations. Therefore, the protection of competition on the current market is even more important.

**8.7.4.7 Demand Trends, Interests of Consumers and Technological Development: Art. 2 I lit. b 5th-7th Variant MR1997**

As the demand trends are relatively stable, the problem arises that new competitors are facing the difficulty that expansion is only feasible to the detriment of other energy companies, which provides for an important barrier to entry. However, this situation does not foster competition between the existing market players in the long run, as other factors of the market may facilitate joint dominance instead of fierce competition.

Furthermore, the post-liberalisation scenario is still in its initial stage so that it is not prudent to conclude that price reductions for consumers within the last 12-15 months are sufficient to meet consumers' interests in the long run because oil price developments, the likelihood to close down base load nuclear power stations due to the phasing out talks regarding the nuclear industry and the option to consolidate generation activities by merging of entities will provide for opportunities to cut supply quickly so that stable prices or even price increases are foreseeable in the long run. Finally, technological developments are not boosted by the merger.

#### **8.7.4.10 Prognostic Evaluation**

The addition of the factors defining the present structure of the market, the actual and potential competition, the market position of the parties, their powers, the lack of alternatives to consumers, demand trends, consumer interests and technological progress highlight the seriousness of the concern to develop competition on the affected markets. Consequently, factors which impede competition on the newly liberalised market of electricity generation and wholesale via the transmission net must neither be ignored nor left unaddressed but they must be limited by pro-active competition policies. Therefore, it is justifiable to block the concentration unless the parties propose restrictions which will limit the explicit threat to the competitive structure in a manner that efficiently remedies the anti-competitive aspects. Such incidental provisions may require a divestiture of assets in order to create new powerful competitors or at least provide international energy investors with promising options for investments in order to initiate power projects with a reasonable chance of success.

In brief, the promotion of competition by undertakings must at least outweigh the potential of the parties to create even higher barriers of entry by means of consolidation and pooling of operations.

In order to evaluate the impact of the concentration on the affected markets, the Commission intends to predict the future consequences of the notified concentration provided that it was hypothetically cleared without any incidental provisions.

This prediction is further complicated as the Commission has to take the likely outcome of parallel German merger control proceedings between RWE/VEW into account in order to come to a valid conclusion. In pursuing this prognosis,

the Commission evaluates the probable effects of both concentrations on the affected markets.

Firstly, the generation of power and its feeding in the transmission grid is considered. The result is exemplified in the subsequent table which should be contrasted to an abovementioned table<sup>735</sup>:

**Table 10: Predicted Status Quo Ex Post: Electricity Generation and The Market Shares Regarding the Feeding of Power in The Transmission Grid**

Company	Generation in TWh in 1998	market share regarding the feeding of power in the transmission grid (%)
VEBA+VIAG +BEWAG (the latter was jointly controlled by VIAG and Southern Energy Inc. in 1998)	<b>131.9</b>	36.3%
RWE alone	<b>120.4</b>	33.1%
RWE+VEW	<b>140.2</b>	38.5%
VEAG	<b>43.9</b>	12.1%
EnBW	<b>35.3</b>	9.7%
HEW	<b>12.6</b>	3.46%

Source: Commission Decision, Case IV/M1673, 2000 (VEBA/VIAG) paragraph 65.

Secondly, it is calculated to what extent the sale of electricity via the transmission grid by the vertically integrated utilities will be responsible for later retail sales of power. This is indicated by the subsequent table that should be contrasted to table eight<sup>736</sup>:

<sup>735</sup> Table 6: Status Quo Ante: Electricity Generation and The Market Shares Regarding the Feeding of Power in The Transmission Grid

<sup>736</sup> Table 8: Status Quo Ante: Concentration of The Market Owing to High Proportion of Retail Electricity Sales Depending on Verbund Utilities' Production.

**Table 11: Predicted Status Quo Ex Post: Responsibility for Retail Electricity Sales**

<b>Company</b>	<b>Responsibility for Retail Electricity Sales in Germany in TWh</b>	<b>Equal a Percentage of Retail Sales of ... %</b>
VEBA+VIAG +BEWAG (the latter was jointly controlled by VIAG and Southern Energy Inc. in 1998)	<b>175.1</b>	36.6%
RWE alone	<b>151.4</b>	31.5%
RWE+VEW	<b>194.6</b>	40.6%
VEAG	<b>Attributed to its shareholders</b>	Attributed to its shareholders
EnBW	<b>44.3</b>	9.3%
HEW	<b>15.4</b>	3.2%

Source: Commission Decision, Case IV/M1673, 2000 (VEBA/VIAG) paragraph 67.

After having collected the presented data, the Commission creates an hypothesis that - even if the notified concentration RWE/VEW was not cleared - a collective dominant position of VEBA/VIAG and RWE might arise<sup>737</sup>. This thesis will be well reasoned if the forthcoming analysis supports the conclusion that the necessary conditions of joint dominance are fulfilled which were - in general - introduced above<sup>738</sup>. Therefore, it is necessary to ask whether a small group of powerful competitors with equal strength is available which may co-ordinate their behaviour - without relying on formal allegedly legally binding or mere gentlemen's agreements - simply by a quick adaptation to the present behaviour of its competitor so as to imitate a single economic entity and to remove internal competition.

<sup>737</sup> Commission Decision, Case IV/M1673, 2000 (VEBA/VIAG) paragraph 60.

<sup>738</sup> supra at 6.5.3.2.16 Joint Dominance under Art. 2 II; I MR1989.

Firstly, the future VEBA/VIAG group feeds 131.9 TWh in the transmission grid and is responsible for 175.1 TWh of retail electricity sales in Germany<sup>739</sup>. Whereas RWE alone amounts to 120.4 TWh and 151.0 TWh respectively. Together with VEW 140.2 TWh are fed into the grid and the group will be responsible for 194.6 TWh of retail sales. Consequently, both groups are nearly of equal strength.

The exorbitant market power of the group results from the combined market share of VEBA/VIAG and RWE which would amount to 69.4% as to feeding of electricity in the transmission grid or to 86.8% together with VEW.

Secondly, the electricity fed in by VEBA/VIAG and RWE to the transmission grid would be responsible for 68.1% of the later retail electricity sales from the regional distribution grids or for 77.2% together with VEW.

Thirdly, the tables 10 and 11 clarify that an enormous difference as to market shares exist between VEBA/VIAG and RWE compared with the largest external competitor<sup>740</sup>.

Moreover, figures relating to installed capacity indicate the strong position of the group VEBA/VIAG and RWE/VEW:

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<sup>739</sup> q.v. tables 9-10. The Commission states that the advantage of RWE/VEW after the likely clearance of the concentration would be insignificant: q.v. Commission Decision, Case IV/M1673, 2000 (VEBA/VIAG) paragraph 63.

<sup>740</sup> Commission Decision, Case IV/M1673, 2000 (VEBA/VIAG) paragraph 64.

**Table 12: Predicted Status Quo Ex Post: Generation Capacity**

Company	Generation Capacity in GW	Percentage
VEBA+VIAG +BEWAG (the latter was jointly controlled by VIAG and Southern Energy, Inc. in 1998)	<b>31.4</b>	31.6%
RWE alone	<b>19.8</b>	19.9%
RWE+VEW	<b>24.0</b>	24.1%
VEAG	<b>9.4</b>	9.5%
EnBW	<b>7.7</b>	7.8%
HEW	<b>3.8</b>	3.8%
Regional Distribution Companies, Municipalities	<b>23.1</b>	23.2%

Source: Commission Decision, Case IV/M1673, 2000 (VEBA/VIAG) paragraph 69.

This market power is enhanced if one considers the market share of base load plants operated by the group:

**Table 13: Status Quo Ex Post: Structure of Power Stations**

Company	Power Station Base load (GW)	Power Station Medium Load (GW)	Power Station Peak Load (GW)	Total (GW)
<b>VEBA/VIAG/ BEWAG</b>	17.1	5.8	7.8	30.7
<b>RWE</b>	15.3	4.2	1.7	21.2
<b>RWE/VEW</b>	17.8	5.0	3.8	26.6
<b>VEAG</b>	8.0	0.1	2.8	10.9
<b>EnBW</b>	4.7	0.8	1.5	7.0
<b>HEW</b>	2.2	0.2	1.7	4.1

Source: Commission Decision, Case IV/M1673, 2000 (VEBA/VIAG) paragraph 75.

Power supply from reliable sources and grids is a product with nearly identical characteristics so one has to conclude that competition will be reduced to price competition or cross utility competition in general.

Furthermore, the highly concentrated nature of the market prior or after an unconditional clearance will provide for an extremely transparent business environment for the involved management<sup>741</sup>. Peaceful behaviour is even more interesting owing to the parallel existence of former closed supply areas and network ownership and owing to stable demand predictions<sup>742</sup>.

Additionally, the low cross-product and price elasticity of demand and the high barriers to entry provide for a further incentive to less aggressive competi-

<sup>741</sup> Commission Decision, Case IV/M1673, 2000 (VEBA/VIAG) paragraph 72.

<sup>742</sup> Commission Decision, Case IV/M1673, 2000 (VEBA/VIAG) paragraph 58, 80, 81.

tion<sup>743</sup>. However, even more specific factors are the capital links between the Verbund utilities with regard to either other Verbund utilities like VEAG or BEWAG.

Hence, the members of the potential duopoly participate in regional distribution companies and companies partly owned by municipalities<sup>744</sup> which provides not only for secure sources of consumer demand and but also gives another incentive not to lose the benefits of co-operation from these daughter undertakings by excessive competition between the parents. This is exemplified by the following table:

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<sup>743</sup> The barriers to entry were already assessed with regard to the present market structure under Art. 2 I lit. a and under Art. 2 I lit. b MR1997; q.v. Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 82.

<sup>744</sup> An indicative list of majority and minority shareholdings in municipal energy undertakings is provided by paragraph 115 of Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 76.



structures and reveal similar marginal costs and define additional mutual interests.

Given the parallel power distribution between the mentioned entities, both groups' turnovers will suffer severely in case of long term rate wars without any chance of market expansion by acquisition of new consumer groups<sup>746</sup> whereby a peaceful adaptation of competitor's strategies will prevent both factions in the group with stable and protected revenues. The Commission points out that this finding is consistent with initial price reductions in the early stages of liberalisation<sup>747</sup> because it takes due time before the competitors are used to the market environment and are able to define the scope for collective dominance.

Another facilitator of joint dominance is the high proportion of the transmission grid that will be owned by the entities VEBA/VIAG and RWE/VEW according to table:

***Table 15: Predicted Status Quo Ex Post: Transmission Network Ownership***

Company	Transmission Network in km	Percentage
VEBA+VIAG +BEWAG (the latter was jointly controlled by VIAG and Southern Energy, Inc. in 1998)	<b>12.069</b>	30%
RWE alone	<b>9.000</b>	22%
RWE+VEW	<b>11.000</b>	27%
VEAG	<b>11.500</b>	29%
EnBW	<b>2100</b>	5%
HEW	<b>360</b>	1%
Regional Distribution Companies, Municipalities	<b>3.121</b>	8%

Source: VDEW, 1997.

The strong position of VEBA/VIAG and RWE/VEW is enhanced by the abovementioned control of the interconnectors so that the even acquisition of

<sup>746</sup> Commission Decision, Case IV/M1673, 2000 (VEBA/VIAG) paragraph 64.

<sup>747</sup> Commission Decision, Case IV/M1673, 2000 (VEBA/VIAG) paragraph 74.

HEW by Vattenfall does hardly generate any present opportunities for market opening by means of imports<sup>748</sup>.

The fact that the grid owners will benefit from surcharges for balancing of energy must not be neglected especially as the grid operations were only unbundled in legal or management terms and in terms of separated accounts. However, no ownership unbundling is ordered so that an important incentive is provided to maximise the costs of network access and the balancing of energy and to minimise the costs of power in combination with in-transparent tariffs for access<sup>749</sup>. Additionally, there is an incentive to discriminate between applicants for grid access whether they belong to the group of the grid owner or not. This is especially true in case of congestions and it has to be criticised that the second associations' agreement does not provide for congestion management mechanisms<sup>750</sup> so that the grid owner can enact more or less discretionary decisions.

This conclusion is backed by the rule within the second associations' agreement which insists on a t-component for a grid access that crosses the border between the Northern and Southern trading zones. On a prima facie basis, it is considered to be beneficial that the surcharge is not due if the applicant can offset the flow of electricity by means of antagonistic flows within the same period. However, this is a discriminatory tool as especially large utilities with commercial operations and plants in both trading zones are able to circumvent the surcharge by reciprocal activities<sup>751</sup>.

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<sup>748</sup> The interconnectors to Denmark and Sweden are controlled by VEBA: Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 23 with reference to a study of UCPTÉ, 1998 and paragraph 109.

<sup>749</sup> Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 109 and 122.

<sup>750</sup> Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 124

<sup>751</sup> Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 109 and 121.

The second associations' agreement even increased the costs for balancing services compared with the first version<sup>752</sup>.

If one summarises the transmission grid related aspects of power liberalisation in Germany, it must be concluded that the development of a market for electricity trade is impeded by the utilities VEBA/VIAG and RWE/VEW with regard to

- interconnector control
- control over generation
- network ownership
- provisions in the associations agreement regarding t-component, offsetting and balancing services
- statutory requirements lacking a mandatory ownership unbundling

In combination with the factors of transparent product and market structure, former closed supply areas, stable demand trends and various capital links among the transmission utilities and between them and downstream companies,

an exorbitant probability of joint dominance exists so that the external competition between VEBA/VIAG and RWE/VEW will be co-ordinated and internal competition will be removed by means of a quick adaptation of the behaviour of competitors without any need to rely on additional concerted practices in terms of Art. 81 ECT.

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<sup>752</sup> Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 122; q.v. BDI, VIK and VDEW, *2<sup>nd</sup> Associations' Agreement*, (13/12/1999) p 7.

Thereby, the Commission concluded that the proposed concentration fulfilled the criteria of dominance in terms of Art. 2 I and III MR1997<sup>753</sup>. In accordance with the arguments presented above, this finding is consistent with the doctrine of collective dominance.

#### **8.7.5 Incidental Provisions Imposed on The Parties by The Commission**

Having established that the concentration fulfils the criteria of the dominance test pursuant to Art. 2 MR1997, the Commission is obliged to communicate its concerns to the parties in form of a statement of objections pursuant to Art. 18 I and III MR1997 and to provide them with an opportunity to communicate their comments on the Commission's negative assessment within a hearing<sup>754</sup>. Furthermore, the announcement to enact a statement of objections will alert the parties to propose alterations of the concentration pursuant to Art. 8 II 2 MR1997 in order to remove any scope for future collective dominance on the relevant market for generation of electricity in order to sell it via the transmission grid and the affected markets for distribution, supply, import, export and trading of electricity. However, it has to be stressed that Art. 18 II of the implementing regulation<sup>755</sup> requires the parties to make this commitments within three months after the initiation of phase two proceedings.

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<sup>753</sup> Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 130.

<sup>754</sup> The legal basis for hearings are Art. 18 I; 7 IV; 8 II; 8 III-V; 14-15 MR1997; Art. 14 Commission Regulation 447/98/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 061, 02/03/1998, p 1 Including Annex I (Form CO); q.v. supra at 6.6.1.6 Hearings.

<sup>755</sup> Art. 18 II Commission Regulation 447/98/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O.J. L 061, 02/03/1998, p 1 Including Annex I (Form CO).

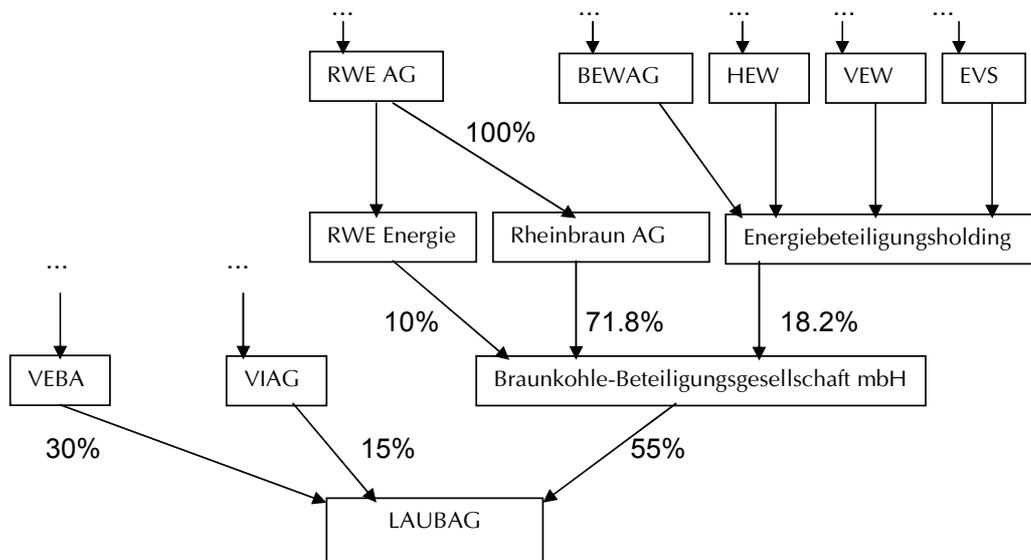
As a result of negotiations during the hearings, the parties proposed several undertakings, which were accepted by the Commission. The incidental provisions are explained below. Later, the efficiency of the undertakings will be critically assessed as well.

### 8.7.5.1 Divestiture of Equity Stakes in VEAG, LAUBAG and Mining Privileges

The parties VEBA and VIAG propose to divest their equity stakes in VEAG of 26.25% and 22.5% so as to allow VEAG to become a third powerful and independent competitor on the German market for the generation of electricity and the feeding of electricity in the transmission grid.

Secondly, VEBA/VIAG suggest, to sell their shareholdings in LAUBAG to the acquirer of VEAG. LAUBAG is an East German lignite producer and an important supplier of VEAG<sup>756</sup>. The ownership structure of LAUBAG is quite complex and is illustrated up to the most relevant levels by the following table<sup>757</sup>:

**Table 16: Ownership Structure of LAUBAG**



<sup>756</sup> q.v. table 13: Status Quo Ex Post: Joint Daughter Undertakings and Commission Decision, Case IV/M1673, 2000 (VEBA/VIAG) paragraph 79 and 215.

<sup>757</sup> Commission Decision, Case IV/M1673, 2000 (VEBA/VIAG) Annex Undertakings, point I.

Finally, VEBA/VIAG will give up their East German mining privileges that are owned by the shareholders of LAUBAG according to their shareholdings and which and leased to the former. The acquirer of VEAG shall become the owner of said privileges<sup>758</sup>.

#### **8.7.5.2 Temporal Guarantee Regarding A Taking of Delivery of VEAG's Power By Downstream Affiliates of VEBA/VIAG**

In order to secure the market position of the generation and transmission company VEAG, which was previously prevented from securing its consumer base by means of acquiring downstream companies, VEBA/VIAG promise to take delivery of power generated by VEAG to market conditions: The affiliated regional distribution companies of the parties - i.e. TEAG, e.dis, Avacon-Ost - must purchase 100% of their power needed until 31/12/2003 using ordinary demand patterns. The purchase obligation is generally reduced in 2004 by 10%<sup>759</sup>. The power price is linked to the price of summer 2000 and consists of the components energy and network access. From 01/01/2002 on, only the energy component will be relevant to the price calculation. Additionally, the parties promise not to invoke specific termination clauses attached to a major loan granted to VEAG in May 1999<sup>760</sup>. The background is to assure VEAG's credit line as the former is still weak in financial terms owing to major investments in power stations in the 1990s<sup>761</sup>.

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<sup>758</sup> Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) Annex Undertakings, Chapeau of point I 1. .

<sup>759</sup> However, if the demand of regional distribution companies increases, the purchase obligation will increase as well. A decrease is not relevant: q.v. Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 216 and Annex I.5 lit a-d .

<sup>760</sup> Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) Annex Undertakings I.4. .

<sup>761</sup> Financial Times, *Veag Well-Positioned to Assume Powerful Role* (09/10/2000), <http://www.ft.com>.

### **8.7.5.3 Divestiture of Equity Stakes in BEWAG**

VEBA/VIAG promise to divest their assets of 26% and 28.7% of ordinary shares in BEWAG<sup>762</sup>. This commitment is accompanied by additional safeguards that are similar to those attached to the separation of VEAG and LAUBAG and which will be discussed infra<sup>763</sup>.

### **8.7.5.4 Divestiture of Equity Stakes in VEW**

VIAG proposes to honour the commitment that it will sell its shareholdings in VEW<sup>764</sup> so as to remove any direct equity link between the future groups of VEBA/VIAG and RWE/VEW. The safeguards, which protect the efficacy of the divestiture commitment, are comparable to the mentioned divestiture safeguards<sup>765</sup>.

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<sup>762</sup> VEBA entered into an obligation in front of the Federal Cartel Office not to execute more than 20% of the votes attributed to its ordinary shares on 17/09/1997; q.v. Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 217 and Annex Undertakings, Chapeau of point II .

<sup>763</sup> infra at: 7.7.6 Theoretical Efficacy of the Undertakings to Remedy the Situation: i.e. time period for the divestiture, commission of a competent trustee for the sale in case of temporal excession subjet to Commission's approval, financial power and business expertise of the acquirer, approval of the acquirer(s); appointment of a second trustee subject to approval who executes voting rights q.v. Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 217 and Annex Undertakings point II 1-3.

<sup>764</sup> VIAG did not only hold 11.13% of the shares of VEW but also had a subsidiary Contigas which holds 30% of EVG which again holds 24.7% of VEW: Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 218.

<sup>765</sup> q.v. Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) Annex Undertakings point II 1.-3. .

#### **8.7.5.5 Divestiture of Equity Stakes in HEW**

As HEW is one of the entities which might acquire VEAG facilitated by an acquisition of BEWAG so as to form a powerful competitor independent from the two groups VEBA/VIAG and RWE/VEW, it is well received by the Commission, that VEBA suggests to sell its direct equity participation of 15.4% in HEW<sup>766</sup>. Substantive and Procedural safeguards as to the separation of assets also apply<sup>767</sup>. However, it does not propose to divest its shareholding in the Swedish Sydkraft which owns 15.4% in HEW. This is justifiable as VEBA's share in Sydkraft is only amounts to 17.6% and Sydkraft's stake is too small to ensure board representation and access to sensitive commercial data<sup>768</sup>. Finally, the question is of rather academic interest since Sydkraft has already sold its stake in HEW to Vattenfall<sup>769</sup>.

#### **8.7.5.6 Divestiture of Equity Stakes in RHENAG**

Moreover, VEBA will terminate its minority engagement in 41.3% of the equity of RHENAG which is controlled by RWE which owns 54.1% of the share capital<sup>770</sup>. Again, safeguards are attached in order to guarantee the efficacy of the divestiture<sup>771</sup>. This undertaking will remove another area of mutual interest between the two future groups.

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<sup>766</sup>This reflects 14.2% of voting rights in HEW: Commission Decision, Case IV/M1673, 2000 (VEBA/VIAG) paragraph 219.

<sup>767</sup>q.v. safeguards that were discussed above; Commission Decision, Case IV/M1673, 2000 (VEBA/VIAG) Annex Undertakings point IV.1.-2..

<sup>768</sup>Commission Decision, Case IV/M1673, 2000 (VEBA/VIAG) paragraph 241.

<sup>769</sup>In October, Sydkraft sold its stake of 15.4% in HEW to Vattenfall that owned already 26.2% of HEW. E.on sold its stake of 15.4% (14.2% of votes) in HEW to Vattenfall, too. Institutional Investors sold another 7.8% to Vattenfall. The latter holds approximately 71.2% of the votes: Financial Times Deutschland, *Vattenfall: HEW-Übernahme ist erst der Anfang* (19/10/2000), <http://www.ftd.de>.

<sup>770</sup>Commission Decision, Case IV/M1673, 2000 (VEBA/VIAG) paragraph 220.

<sup>771</sup>Commission Decision, Case IV/M1673, 2000 (VEBA/VIAG) Annex Undertakings point V1.-2..

### **8.7.5.7 Obligation Not to Impose The T-Component on Applicants for TPA**

In order to tackle the drawbacks of the second associations' agreement, VEBA/VIAG promise not to impose the t-component on entities who apply for TPA for transactions that cross the boundary between the Northern and Southern trading zones in Germany<sup>772</sup>. Clearly, this will remove the opportunity for the two future groups VEBA/VIAG and RWE/VEW to benefit unduly from the ability to avoid the t-component by means of offsetting of transactions owing to their diverse operations - i.e. power stations, subsidiaries and consumers - in both trading zones<sup>773</sup>.

### **8.7.5.8 Obligation to Transparent Billing Calculation**

Another drawback of the associations agreement is addressed by the obligation of VEBA/VIAG to apply a transparent method for the calculation of bills<sup>774</sup>. Therefore, the wholesale consumer<sup>775</sup> has to receive detailed information as to the network access fee, power price, metering fee, taxes and levies related to renewable energy, co-generation, concession fees and VAT. Thereby, the transparency of power prices with respect to transaction involving TPA is increased so that electricity trade is facilitated and cross-subsidisation is combated<sup>776</sup>.

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<sup>772</sup> It is interesting that this obligation will be immediately valid on the condition that RWE/VEW agreed to honour a comparable obligation in the German proceedings: q.v. Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 221 and Annex Undertakings point VI and VIII 4.

<sup>773</sup> q.v. Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 243.

<sup>774</sup> Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 222.

<sup>775</sup> A consumer who takes delivery via the 110kV network or higher. Wholesale consumers delivered via the 20 kV network is included from 1 January 2001.

<sup>776</sup> Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 244.

#### **8.7.5.9 Obligation Regarding The Billing of Balancing Services**

In order to address the potential scope of discrimination against electricity traders by means of excessive fees for power balancing, the parties commit themselves to offer transparent cost reflecting prices<sup>777</sup>. Therefore, the parties are prevented from offering cheaper power that is cross-subsidised by means of high balancing fees imposed on applicants for TPA<sup>778</sup>.

#### **8.7.5.10 Obligation to Sell Reserved Interconnector Capacity to ELTRA**

Hence, VEBA commits itself to give up its reserved capacity of 400 MW regarding the interconnector to Denmark that has a total transmission capacity 1200 MW<sup>779</sup>. VEBA acquired a transportation right of 400 MW from ELTRA in order to take delivery of electricity from Statkraft. VEBA promises to re-sell its transportation right to the Danish utility ELTRA basically on the original conditions<sup>780</sup>. Statkraft will receive financial payments which equal the profits that were made if the power sales agreement was honoured in reality<sup>781</sup>. Thereby, new competitors may import electricity to Germany by means of bidding for the freed capacities of the interconnector. The intention is that additional capacity will be available so that inter alia Vattenfall will be able to sell cheap electricity to its German subsidiary HEW so as to intensify price competition in Germany<sup>782</sup>.

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<sup>777</sup> They must offer balancing services on the base of daily calculated service fees or on the base of labour based prices: q.v. Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 223, 246 and Annex Undertakings point VI 3..

<sup>778</sup> q.v. supra 7.5.5.8.

<sup>779</sup> Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 224.

<sup>780</sup> the re-sale price is lower reflecting the period of usage by Preussen Elektra.

<sup>781</sup> Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) Annex Undertakings VII.

<sup>782</sup> This is especially relevant as power prices in Scandinavia are lower: q.v. Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 247.

#### **8.7.5.11 Condition Precedent linked to The Outcome of the German RWE/VEW Proceedings**

Finally, the parties agree on the fact that certain obligations are not deemed to be fulfilled unless the entities RWE/VEW entered into the obligations not only to sell their stakes in VEAG and LAUBAG, but also to sell mining privileges. Moreover, said obligations must be legally valid<sup>783</sup>.

Similarly, it is regulated that VEBA/VIAG will not have fulfilled their obligations as to the application of the second associations' agreement unless the RWE/VEW group subscribes to honour comparable undertakings with respect to the clearance of their concentration under German law<sup>784</sup>. The rationale of this condition precedent is that the undertakings imposed on VEBA/VIAG will be sufficient to avoid a duopoly of both groups if a powerful third competitor is formed by VEAG and if small competitors can benefit from efficient TPA to the large proportions of the transmission grid owned by both groups.

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<sup>783</sup> Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 225 and Annex Undertakings point VIII 4. .

<sup>784</sup> Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 225.

### 8.7.6 Theoretical Efficacy of the Undertakings to Remedy the Situation?

Although the Commission conditionally cleared the concentration, it is not beyond reasonable doubt whether the quoted commitments are indeed sufficient to remedy the threat that the groups VEBA/VIAG and RWE/VEW will jointly dominant the affected markets.

First of all, it is highly beneficial that the Commission insisted on various safeguards which are designed to assure the efficacy of the divestiture of VIAG's participation in VEW and of both groups' equity stakes in VEAG, LAUBAG, BEWAG, HEW and RHENAG: The divestiture obligation is accompanied by the provision that the acquirer must not only be either an existing competitor or a potential competitor on the relevant market but also that the acquirer must be backed by adequate long term financial resources and that he must have sufficient expertise in the power sector<sup>785</sup>. Clearly, the purchaser must be independent from both groups in terms of capital links. Prior to the transactions, the parties VEBA/VIAG must obtain a prior approval of the Commission as to the identity of the acquirer(s). Moreover, the prior consent of the successor of the Treuhandanstalt, the privatisation agency regarding formerly state owned companies, is required as far as VEAG is concerned<sup>786</sup>. The urgency of the restructuring is underlined by the fact, that the parties need to comply with a strict time limit of 13/12/2000<sup>787</sup>.

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<sup>785</sup> Commission Decision, Case IV/M1673, 2000 (VEBA/VIAG) Annex Undertakings point I.1. lit. a.

<sup>786</sup> This requirement is valid until 2013; q.v. Commission Decision, Case IV/M1673, 2000 (VEBA/VIAG) Annex Undertakings point I.1. lit. a.; II 1 lit. a.; III 1 lit. a.; IV 1 lit. a.; V 1.; Die Zeit, *Das elektrische Monopoly*, 33 (14/12/2000).

<sup>787</sup> The deadline is quoted in the articles: Financial Times, *VEAG Well-Positioned to Assume Powerful Role* (09/10/2000), <http://www.ft.com>; Financial Times, *Court to Unlock VEAG's Future* (03/12/2000), <http://www.ft.com>; Die Zeit, *Das elektrische Monopoly*, 33 (14/12/2000).

As a measure of last resort, the parties have to commission a competent trustee for the sale - subject to the approval of the Commission if the fail to meet the time limit<sup>788</sup>. The trustee will carry out the restructuring under close supervision by the Commission if the parties did not divest the assets mentioned above on time<sup>789</sup>. The parties also have to commission a second trustee who will be responsible to execute the voting rights attributed to the shares of VEBA/VIAG in VEAG and LAUBAG<sup>790</sup>.

However, the Commission's competition policy behind these divestitures is not well reasoned: It is stated that the threat of a duopoly of VEBA/VIAG and RWE/VEW should be removed by the creation of a new independent and powerful competitor on the relevant market for generation of electricity for the feeding of power in the transmission grid in Germany<sup>791</sup> rather than by an outright prohibition of both concentrations. This conclusion is justifiable only if a conditional clearance under Art. 8 II 1-2 MR1997 is a suitable, necessary and proportionate means. Necessity means that the tool is either the solely effective solution or - if more options are available - a solution that is far less detrimental to the addressees' interests while it will be either equally effective or insignificantly less effective.

It is alleged that the presented divestitures, the alterations regarding the application of the associations' agreement and the creation of moderate spare ca-

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<sup>788</sup> Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) Annex Undertakings point I.1. lit. b; II 1. lit. b; III 1.lit. b; IV 1.lit. b.

<sup>789</sup> If the parties do not engage in reasonable divestiture efforts, the Commission may even inaugurate the mandate of the trustee in an earlier stage.

<sup>790</sup> Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) Annex Undertakings point I 3.; II 2.; IV 2.; V 2. The trustee will be independent in general. Parties' consent is needed if decisions are required affecting the financial value of the investments.

<sup>791</sup> Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 226.

capacity regarding the interconnector to Denmark are suitable, necessary and proportionate means to prevent a future duopoly<sup>792</sup>.

In fact, this thesis is extremely doubtful. Firstly, one must question the suitability of the propositions accepted by the Commission to prevent a duopoly.

Clearly, it would be more suitable to block the concentrations and to use the Commission's and Federal Cartel Office's powers under the collective dominance doctrine under Art. 82 ECT and Section 19 GWB1998<sup>793</sup> respectively in order to coerce the most influential vertically integrated utilities, i.e. VEBA, VIAG, RWE and VEW,

- to sell their stakes in VEAG, LAUBAG, BEWAG, RHENAG to a qualified independent investor
- to sell divest their transmission and distribution operations (ownership unbundling) rather than applying the associations' agreement in a way sustained by the present undertakings as it is sustainable to conclude that the whole agreement interferes with Art. 81 ECT or at least Section 1; 22 GWB1998
- to free interconnector capacity at every border by means of the essential facilities doctrine pursuant to Art. 82 ECT or Section 19 GWB1998.

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<sup>792</sup> Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 238.

<sup>793</sup> Section 22 outlaws suggestions of commercial conduct which contravene statutory or administrative prohibitions: Antitrust Act of 26 August 1998, Federal Law Gazette 1998 I 2521, as Amended on 22 December 1999, Federal Law Gazette 1999 I 2626. Alternatively, the agreement could be regarded as a cartel under Section 1 GWB1998.

As the presented alternative is far more detrimental to the parties' objectives, it is indispensable to assess whether this solution would far more effectively remove any scope for collective dominance in combination with a finding that the commitments accepted by the Commission are not sufficiently efficient.

First of all, this solution would be far more effective as neither VEBA nor VIAG, RWE and VEW can any longer rely on equity links and commercial links as to VEAG and jointly owned downstream companies.

Secondly, a larger number of competitors would provide international investors with greater opportunities to invest and to enhance competition so as to create a truly de-concentrated market. This finding is backed by the thesis that it is extremely likely that the new structure of E.on, RWE and HEW/BEWAG/VEAG/Vattenfall produces another collective dominance with even greater detrimental effects.

The same arguments, put forward to develop the threat of a collective dominance of VEBA/VIAG and RWE/VEW as a result of an hypothetical unmodified clearance can be used to defend the alternative solution: As a consequence of the undertakings imposed on VEBA/VIAG and RWE/VEW it is extremely likely that a joint dominance of four groups will occur: E.on, RWE, EnBW/EdF and the new north eastern company HEW/Vattenfall/VEAG/BEWAG. The Commission fails to indicate why the latter structure would be significantly less powerful than the unmodified structure. However, the Commission goes on to argue that - as a result of the presented undertakings - the utility VEAG will become an independent powerful competitor after the groups sold their stakes and provided that a powerful independent purchaser is selected who is able to bear VEAG's debts resulting from major

investments in modern lignite fuelled power stations in the 1990s resulting from the upgrade of the power sector in Eastern Germany. VEAG may play an important role in the future power market owing to its modern power stations, its transmission grid and its interconnectors<sup>794</sup>.

Obviously, HEW - assisted by Vattenfall - is the candidate that is preferred by the Commission and it is suggested that HEW uses an acquisition of BEWAG as a multiplier of power and as a tool to secure its take-over of VEAG. This is backed the fact that VEBA is asked to sell its equity stakes in HEW and VIAG to divest its stake in BEWAG<sup>795</sup>.

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<sup>794</sup> Die Zeit, *Das elektrische Monopoly*, 33 (14/12/2000); Financial Times, *VEAG Well-Positioned to Assume Powerful Role* (09/10/2000), <http://www.ft.com>.

<sup>795</sup> Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 240-241.

### **8.7.7 Factual Efficacy of Implementation of Incidental Provisions?**

The efficacy of the implementation of the incidental provisions that were accepted by the Commission as sufficient to remedy the threat of a duopoly between VEBA/VIAG and RWE/VEW is questioned by several incidents which reveal the weakness of the present regime of formulation and implementation of incidental provisions.

As the drawbacks resulting from the text of Art. 8 MR1989/1997 were discussed above<sup>796</sup>, it is preferable to focus on factual deficiencies of the undertakings.

Firstly, it is questionable in terms of competence and expertise if the Commission and the Federal Cartel Office design future market structures on an incidental basis, depending on an eventual application for a merger. It would be more efficient to apply given competences *ex officio* in order to define long lasting amendments of competitive structures.

Secondly, the parties applying for a concentration have a strong commercial incentive not to propose more than the absolute minimum of restructuring. Despite the threat of fines, periodic penalty payments and revocations, they may submit false or at least not complete information or even interpret vague data in a way that would not be upheld after the merger was implemented.

For example, VEBA/VIAG denied the availability of excess capacity regarding the generation of base load electricity in Germany as to the feeding in the transmission grid<sup>797</sup>. The Commission criticises this allegation due to a lack of

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<sup>796</sup> *supra* at 6.6.3.2.4 Implementation of Undertakings and Evaluation .

<sup>797</sup> Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 101.

evidence and states that over-capacities are necessary to establish liquidity for third party power trading<sup>798</sup>.

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<sup>798</sup> Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 104 and 128.

Moreover, the parties said that they did not intend to shut down base load capacity with a view to reducing supply, facilitating trade and increasing prices<sup>799</sup>. However, the Commission failed to insist on any commitment of the parties, not to close down base load electricity for the near future. It may be contrary to good faith, that E.on, the successor of VEBA/VIAG announced within four months after the clearance of the merger in June 2000 that it was planning to close down plant generating base load electricity<sup>800</sup>. It is even less surprising, that the new RWE utility announced a similar closure plan only four days later<sup>801</sup>. This incident is a clear indicator of joint dominance because both groups adopt a "new interpretation" of old economic facts at the same time although plans of closure were denied during the merger proceedings<sup>802</sup>. The closure of base load capacities does not only impede electricity trade - given the limited import facilities - but also threatens the consumers as the regional distribution companies and the municipal companies are either depending on the groups or lack financial resources to build new power plants on their own.

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<sup>799</sup> Commission Decision, Case IV/M1673, 2000 (VEBA/VIAG) paragraph 103.

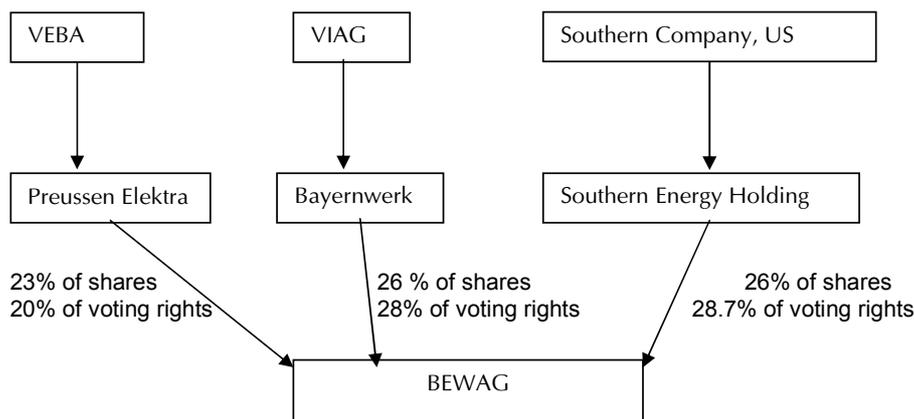
<sup>800</sup> q.v. E.on announces a closure of power stations owing to over-capacities of allegedly 10,000 MW: Financial Times Deutschland, *E.on Energie: Chef kündigt Schließung von Kraftwerken an* (04/10/2000), <http://www.ftd.de>; Later it is specified that the nuclear power station Stade will be closed in 2003 although the "atomic industry consensus" would have allowed E.on to continue to operate Stade until 2004 due to overcapacities of allegedly 4800 MW: Financial Times Deutschland, *E.on Energie: Kernkraftwerk Stade geht 2003 vom Netz* (09/10/2000), <http://www.ftd.de>.

<sup>801</sup> Similarly in terms of time and scope, RWE announces a closure of 5,000 MW of installed capacities including a nuclear power station and fossil fuel plants that are no longer competitive: Financial Times Deutschland, *RWE: Energieversorger nimmt Kraftwerke vom Netz* (10/10/2000), <http://www.ftd.de>; Financial Times, *RWE Announces Closures* (10/10/2000), <http://www.ft.com>.

<sup>802</sup> q.v. Commission Decision, Case IV/M1673, 2000 (VEBA/VIAG) paragraph 103-104.

Thirdly, the effective and speedy implementation of the undertakings relating to VEBA's and VIAG's stakes in VEAG is countered by the long take-over battle over BEWAG which should have been used so as to facilitate the take-over of VEAG as BEWAG has a mediate equity participation in VEAG. BEWAG's ownership structure is exemplified by the following table:

**Table 17: Ownership Structure of BEWAG**



HEW sought to acquire VEBA's and VIAG's stake in BEWAG but Southern Energy, Inc. wanted to take unilateral control of BEWAG as well in order to obtain a majority stake in VEAG. Therefore, Southern Energy applied for a temporary court injunction which should prevent VEBA/VIAG from selling its stakes in BEWAG to HEW. A similar application was made by the Senate of Berlin. Both applications were based on the 1997 privatisation agreement of BEWAG and the 1997 consortium agreement which allegedly vested Southern Energy with pre-emption rights<sup>803</sup>. The injunctions were granted by the court. In September, Southern Energy claimed to have offered a partnership agree-

<sup>803</sup> Financial Times Deutschland, *BEWAG: Vorschlag Southern Energys findet kein Gehör* (26/09/2000), <http://www.ftd.de>.

ment regarding the control of BEWAG on the condition that Southern Energy would be the majority shareholder<sup>804</sup>. Vattenfall denied to have received an offer and formally refused to co-operate on 1 October 2000<sup>805</sup>. In the meantime, a potential acquisition of VEAG by EnBW - supported by EdF - was considered but the Cartel authorities refused to accept EnBW as a bidder because they preferred four independent powerful competitors in the future market for electricity generation and transmission rather than three groups<sup>806</sup>. However, due to mounting political criticisms<sup>807</sup>, the Senate later withdrew from its injunction after an agreement was concluded with HEW. The agreements states that BEWAG would bit together with HEW/Vattenfall for VEAG and that HEW would not shift BEWAG's management from Berlin to Hamburg in case of a successful acquisition of BEWAG<sup>808</sup>.

The period to place a bid for E.on's stake of 48.75% and for RWE's stake of 32.5%<sup>809</sup> in VEAG ended on 15/11/2000<sup>810</sup>. Vattenfall AB acquired sole control in HEW in October<sup>811</sup> and HEW continued to insist that its bid for VEAG will

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<sup>804</sup> Financial Times Deutschland, *BEWAG: Vorschlag Southern Energys findet kein Gehör* (26/09/2000), <http://www.ftd.de>.

<sup>805</sup> Financial Times Deutschland, *BEWAG: Vorschlag Southern Energys findet kein Gehör* (26/09/2000), <http://www.ftd.de>; Financial Times Deutschland, *Vattenfall: Verwunderung über Southern-Vorschlag zu BEWAG* (01/10/2000), <http://www.ftd.de>.

<sup>806</sup> i.e. E.on, RWE, EnBW, VATTENFALL/HEW/BEWAG/VEAG; q.v. Financial Times, *VEAG: Übernahme durch EnBW praktisch ausgeschlossen* (06/10/00), <http://www.ftd.de>.

<sup>807</sup> Financial Times Deutschland, *HEW/Southern Energie: Keine Annäherung im Streit um BEWAG-Beteiligung* (01/11/2000), <http://www.ftd.de>.

<sup>808</sup> Financial Times, *Vattenfall Wins a Victory in The Battle for VEAG* (05/11/2000), <http://www.ft.com>; Financial Times, *Court to Unlock VEAG's Future* (03/12/2000), <http://www.ft.com>.

<sup>809</sup> RWE holds its old immediate stake of 26.25%. Then, it acquired the former VEW's stake of 25% in EBH GmbH which holds 25% of VEAG which leads to additional 5%; q.v. Table 13: Status Quo Ex Post: Joint Daughter Undertakings; Financial Times Deutschland, *HEW/Southern Energie: Keine Annäherung im Streit um BEWAG Beteiligung* (01/11/2000), <http://www.ftd.de>.

<sup>810</sup> Other bids were placed by BEWAG (potentially pooled bid with HEW), HEW/Vattenfall, EnBW/EdF, NRG Energy, American Electric Power, ENEL: Financial Times, *Court to Unlock VEAG's Future* (03/12/2000), <http://www.ft.com>.

<sup>811</sup> Financial Times Deutschland, *Vattenfall: HEW-Übernahme ist erst der Anfang* (19/10/2000), <http://www.ftd.de>. The former and current ownership structure of HEW is assess below.

depend on a successful acquisition of BEWAG<sup>812</sup>. In the meantime, Vattenfall offered Southern Energy to sell its stake in BEWAG to HEW on the condition that Southern Energy will be granted a 25% + one share participation in the North Eastern energy group that is due to be created. This offer was rejected<sup>813</sup>. On 4 December 2000, the Court prevented a take-over of BEWAG by HEW on the grounds that an arbitration between E.on and Southern Energy is necessary to settle the dispute<sup>814</sup>. The court held that the consortium agreements between VEBA, VIAG, Southern Energy and the Senate regarding the privatisation of BEWAG were no longer valid due to the doctrine of *clausula rebus sic stantibus*, i.e. the agreements are deemed not to be valid any longer as the implied legal basis of the obligations to grant a pre-emption right to Southern Energy is eroded owing to VEBA's and VIAG's divestiture commitments as a result of their merger. The Commission announced not to grant any extension as to the sale of VEAG so that no time is left for a prior settlement of the dispute regarding BEWAG through arbitration<sup>815</sup>.

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<sup>812</sup> Financial Times, *Vattenfall Wins a Victory in The Battle for VEAG* (05/11/2000), <http://www.ft.com>.

<sup>813</sup> FAZ, *BEWAG-Streit wird am Montag entschieden*, 16 (01/12/2000).

<sup>814</sup> Financial Times Deutschland, *BEWAG: Übernahme durch HEW vorerst gestoppt* (04/12/2000), <http://www.ftd.de>; Financial Times, *Court puts BEWAG Sale on Ice* (04/12/2000), <http://www.ft.com>.

<sup>815</sup> Financial Times Deutschland, *BEWAG will im Ausland expandieren* (05/12/2000), <http://www.ftd.de>.

In the meantime, E.on communicated its interest to acquire businesses from Endesa and Iberdrola in Spain who are required to divest owing to a recent concentration so that observers speculated in public whether the Spanish Utilities would bid for VEAG as well<sup>816</sup>. It was reported that the bids of Endesa/Iberdrola for VEAG and LAUBAG exceeded DM 3bn, as did ENEL's of DM 3.1bn<sup>817</sup>. However, it was believed that HEW would bid up to DM 3bn and was granted an informal right of a last offer by E.on<sup>818</sup>.

These rumours did not last for a long time. They might have been inspired by the vendor's wish to persuade HEW/Vattenfall to submit a higher bid even though they could secure control of BEWAG. Nevertheless, BEWAG and HEW official were keen on bidding together even though BEWAG wants to be treated like an equal partner whereas Vattenfall insists on sole control over VEAG<sup>819</sup>. As early as on 11 December, it was reported that HEW/Vattenfall would win the contest after having bid close to DM 3bn for VEAG and LAUBAG<sup>820</sup>. It is reported that the pressure of politicians, unions, the Federal Cartel Office and the Commission, and the threat of the VEAG's mediate minority shareholders HEW and BEWAG could challenge the E.on's and RWE's decisions were sufficient to secure the acceptance of HEW's bid.

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<sup>816</sup> Financial Times Deutschland, *RWE und E.on wollen VEAG an Spanier verkaufen* (07/12/2000), <http://www.ftd.de>; Financial Times Deutschland, *E.on: Konzern plant Einkaufstour durch Europa* (07/12/2000), <http://www.ftd.de>; FAZ, *Hochspannung*, 24 (08/12/2000); FAZ, *Das Poker um den ostdeutschen Strommarkt geht in die letzte Runde*, 16 (08/12/2000). The rumours were rejected by RWE but upheld by VEAG officials.

<sup>817</sup> FAZ, *Das Poker um den ostdeutschen Strommarkt geht in die letzte Runde*, 16 (08/12/2000); FAZ, *Die HEW ist bei der VEAG fast am Ziel*, 21 (13/12/2000).

<sup>818</sup> FAZ, *Das Poker um den ostdeutschen Strommarkt geht in die letzte Runde*, 16 (08/12/2000).

<sup>819</sup> FAZ, *Das Poker um den ostdeutschen Strommarkt geht in die letzte Runde*, 16 (08/12/2000).

<sup>820</sup> Financial Times, *Vattenfall Poised to Win VEAG* (11/12/2000), <http://www.ft.com>; Financial Times Deutschland, *VEAG: HEW und Vattenfall übernehmen Mehrheit* (11/12/2000), <http://www.ftd.de>; between DM 2.5 bn and DM 3bn. FAZ, *Die HEW ist bei der VEAG fast am Ziel*, 21 (13/12/2000): close to DM 3bn

The deadlock as to the acquisition of BEWAG by HEW is still unresolved even though Vattenfall continued to offer that Southern Energy could obtain an equity stake of 25% plus one share in the new North-Eastern-Energy group that is due to be created<sup>821</sup>. Thereby, Southern Energy could block certain strategic decisions according to company law.

Clearly, this highly dramatic take-over battle reveals a structural weakness of the Commission's ability to enforce undertakings and that it is highly probable to rely on the trustee to sell assets. The larger the values and the political interests at stake, the less probable is a clear-cut micro-economic reasoning as to the acceptance of bidding. It is questionable from the rationale of competition law whether politicised decision-making should define the outcome. From the point of development of European markets it would have been better if a company, entirely privately owned, had acquired VEAG and LAUBAG rather than a public undertaking like Vattenfall.

Moreover, it is questioned whether Vattenfall is as independent from the large German utilities as it is alleged by the Commission and Federal Cartel office in their clearance decisions. E.on seems to favour a sale of its VEAG assets to Vattenfall as it has a shareholding in Sydkraft<sup>822</sup>. This shareholding could lead to intense price competition between E.on and Vattenfall but it is more probable that it will facilitate a future collective dominance not only in the Swedish but also in the German market as intense price competition either in Germany or in Sweden would harm both undertakings. Another speculation states that

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<sup>821</sup> Financial Times Deutschland, *HEW:Zwei Jahre Aufbauzeit für Nord-Ost-Stromkonzern* (27/12/2000), <http://www.ftd.de>.

<sup>822</sup> Commission Decision, Case IV/M1673, 2000 (VEBA/VIAG) paragraph 79; Die Zeit, *Das elektrische Monopoly*, 33 (14/12/2000).

Vattenfall is due to be privatised, soon. Thereby, E.on could attempt to acquire Vattenfall so as to re-acquire HEW, LAUBAG and VEAG as well<sup>823</sup>.

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<sup>823</sup> Die Zeit, *Das elektrische Monopoly*, 33 (14/12/2000).

### **8.7.8 Reasons behind the theoretical and factual Deficiencies of the Present System of Merger Control with Respect to Incidental Provisions in the Energy Sector**

Obviously, the VEBA/VIAG case provides for the most relevant example of powerful tendencies towards concentration in the electricity sector so far. However, an interesting question has not been addressed so far: What are the reasons behind the relatively benevolent definition and implementation of incidental provisions in the VEBA/VIAG case?

First of all, it is the weakness of the present IEMD and the IGMD which effectuates the outcome of merger control proceedings. If the European energy legislator fails to implement a tight transnational legal framework concerning regulated TPA and ownership unbundling, it will be hardly feasible that competition authorities - usually lacking specific expertise in the energy sector - can overcome deficiencies of the relevant directives. Clearly, it is in general not the task of the Commission as a transnational executive unit to ignore sector specific legislation by the Council. The only exception available could be the implied powers doctrine. However, this exceptional doctrine has to be interpreted extremely narrowly in order to protect the legislator's role according to the principle of constitutional state. Consequently, the Commission lacks the power to impose regulated TPA and ownership unbundling in general on entities seeking clearance of a given concentration.

Secondly, the Commission probably lacks the political power to formulate and implement more effective undertakings<sup>824</sup>.

Thirdly, a subsidiary regulatory attempt by means of incidental provisions would be inconsistent with the principle of non discrimination as it is not justifi-

able to punish the undertakings concerned with regulatory tools that are not applied in general to a business sector.

Fourthly, it is even more relevant from the perspective of the principles of constitutional state and democracy that undertakings must not only be able to foresee the future regulatory framework for an adequate period of time with sufficient precision but they must also be able to affect future policies by means of lobby groups which target the legislator. It is a great difference in terms of fair participation whether the Commission is lobbied by major and minor NGOs in its role as an initiator of proposals for primary legislation or whether an administrative organ is lobbied while the decision of a present case is pending. Such a lobbying solely based on hearings requires more rapid lobbying based on considerable funds and managerial resources and is by its nature more dangerous for independent decision making because individual casehandlers have greater responsibilities and are easier manipulated if they are targeted with in-transparent means.

Moreover, it is worth while questioning why the underlying energy legislation, i.e. the IEMD and the IGMD are too weak to facilitate more stringent rules as to the liberalisation of the energy sector and what the policy options are in order to remedy the situation.

Although the energy sector is not a special sector that is characterised by its specific nature as a natural monopoly as it was alleged in the past decades, the general public still reacts extremely sensitive to price shifts even though the dependence on scarce resources per unit of output in industrialised countries is far less than during the first and second oil supply crises. Unfortu-

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<sup>824</sup> For instance, the German federal minister for economics, Mr. Müller, was cited that he did not share the concerns that the Federal Cartel Office and the Commission communicated with

nately, there is still no transnational European response to relative supply shortages and price increases that occurred in the mid of 2000. Instead of Community wide energy conservation policies, public turmoil easily persuaded several national governments - who feared to lose future elections - to grant unsustainable short term gifts to the fuel consuming society. For instance, the current German Ecology taxes do - apart from their title - not target the consumption of resources in general as otherwise major consumers would not be exempted. Moreover, it is against the very nature of a tax to indicate that the revenues will be spent for public pension funds. It is even less persuasive that future tax increases are offset by means of additional future income tax allowances for people who use private or public transport to go to work. The public sensitivity as to energy prices is another factor which limits the ability of the Commission to define more stringent standards as to the organisation of national energy sectors in stringent accordance with competition law.

The fifth argument relates to constitutional laws which provide for another impediment of the re-organisation of the electricity and gas supply industries. Even if consensus was reached in the Council as to ownership unbundling and mandatory regulatory TPA in the Member States, it would be difficult to adopt such a directive as both mandatory ownership unbundling and regulated TPA interfere with private property that may be well protected by national constitutions whereas Art. 295 ECT restricts the competence of the EC so that it is not allowed to release primary legislation which expropriates present property or re-defines the scope of future property with respect to energy networks.

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regard to the concentrations of VEBA/VIAG and RWE/VEW.

If the EC was enabled to release primary law that restricts property rights, additional provisions would have to be added to the primary law which govern the liability of the EC in case of justified or unjustifiable interference with certain property rights so that the addressee of said measures receives either

- damages, i.e. monetary damages or natural restitution which intend to mirror the hypothetical situation in which the addressee would be today in economic terms if the factual interference with property rights had not occurred in the past
- a mere restitution of the status quo ex ante
- proportionate compensation.

As these principles are not laid down at present, it is exclusively up to the Member States to decide on expropriations or re-definitions of property rights based on the wide discretion attributed to national parliaments. Therefore, this remedy is not effective at present, so that the Commission has to restrict itself when it tries to negotiate more far reaching undertakings with the parties of a given concentration.

Another element relates to the different stages, in which the national energy markets are. This difference impedes a proper definition of a single European competition policy in the energy sector. This is valid in particular in the gas sector where mature markets and infant market are available depending on the number of consumers, the size of the grid and the proportion of amortisation of the network and equipment.

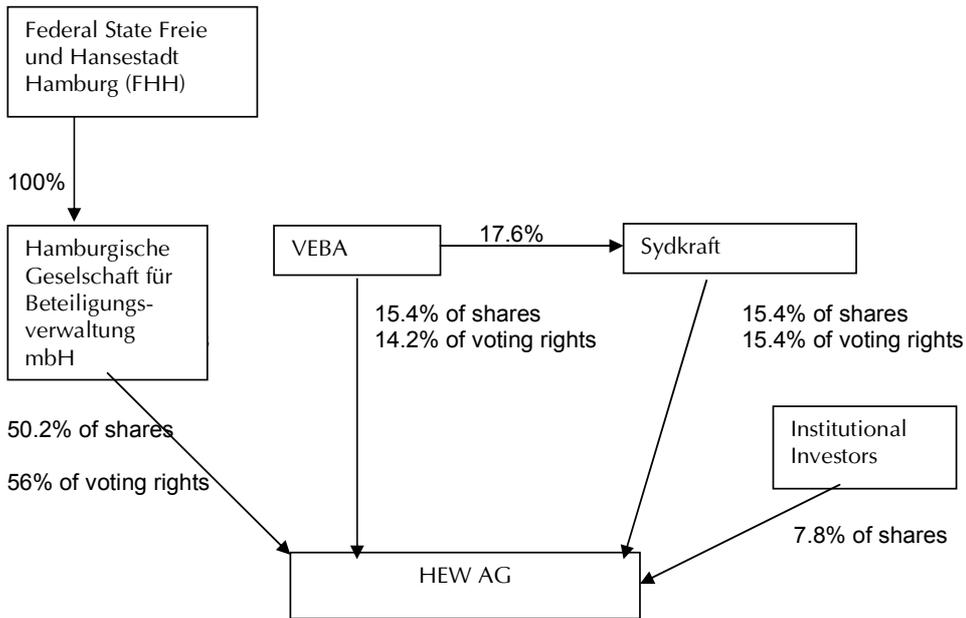
Luckily, the Commission did not simply give in. Contrarily, new regulatory options were invented so as to increase the efficiency of the liberalisation of the energy sector. To this end, the Florence and Madrid Process were formed

with respect to electricity and gas. By means of consensual decision making involving independent groups including newly created NGOs like ETSO, the scope for a more transparent EC wide system of network access is discussed. Especially, a system of cross border tariffs for international transactions is due to be developed, soon. This shall include sophisticated systems of interconnector congestion management. Effective Access to interconnectors is a crucial feature for the attainment of future relevant product markets of European scope regarding the generation, transmission, distribution, supply, metering of electricity. Similar difficulties and discussions occur in the gas sector. However, objective, transparent, non-discriminatory access to gas storage facilities is an additional problem of the liberalisation of the gas industries. Consequently, the undertakings accepted by the Commission should be classified as a regulatory tool of limited value. It may nevertheless help to overcome some urgent deficiencies owing to the incomplete liberalisation of energy markets in Germany as a result of insufficient primary legislation. Undertakings imposed on the parties of a concentration have subsidiary relevance owing to the above discussed considerations and incorporate various structural pitfalls. However, as merger decisions are less likely to be challenged in courts, incidental provisions are nevertheless a speedy tool to overcome the worst deficiencies in a given situation. Thereby, the Commission's approach is justifiable unless better legal instruments of liberalisation and regulation are in place.

### 8.8 HEW/Vattenfall

On 17 February 2000, the parties FHH and Vattenfall AB notified a transaction pursuant to Art. 4 II 2nd Variant MR1997 regarding the vertically integrated company HEW AG that generates electricity in order to sell it to wholesale consumers via the transmission grid and to the general public via the distribution network. The then ownership structure of HEW AG is exemplified by the following table:

**Table 18: Status Quo Ex Ante: Ownership Structure of HEW**



Sources: Commission Decision, Case IV/M1673, 2000 (*VEBA/VIAG*) paragraph 79 and Commission Decision Case IV/M1842, 2000 (*Vattenfall/HEW*) paragraph 5; Financial Times Deutschland, Vattenfall: HEW-Übernahme ist erst der Anfang (19/10/2000), <http://www.ftd.de>.

The FHH will sell 25.1% of its shares - equalling 25.1% of its voting rights to Vattenfall (Deutschland) GmbH, a subsidiary of Vattenfall AB. The voting rights of FHH will be executed by Hamburgische Gesellschaft für Beteiligungsverwaltung mbH (HGV) in general. However, HGV and Vattenfall (Deutschland) set up a partnership called Vattenfall HGV Holding GbR which shall execute the voting rights of both partners on a lasting basis.

According to the agreement, FHH gives up sole control over HEW. As a result of the agreement establishing a 50:50 partnership between HGV and Vattenfall (Deutschland), the voting rights of both notifying entities will be pooled. Thereby, a joint control is established by the parent undertakings FHH and Vattenfall AB which are relevant as HGV and Vattenfall (Deutschland) are intentionally set up for the purposes of administering equity participation. The operation is a concentration as HEW will become a full function joint venture in terms of Art. 3 II MR1997<sup>825</sup>. The transaction has a Community dimension<sup>826</sup>. It is declared compatible with the common market pursuant to Art. 6 I lit. b MR1997<sup>827</sup>. The Commission does not regard HEW's position in Hamburg as a dominant one as the relevant market is of national defined pursuant to the findings of the VEBA/VIAG case.

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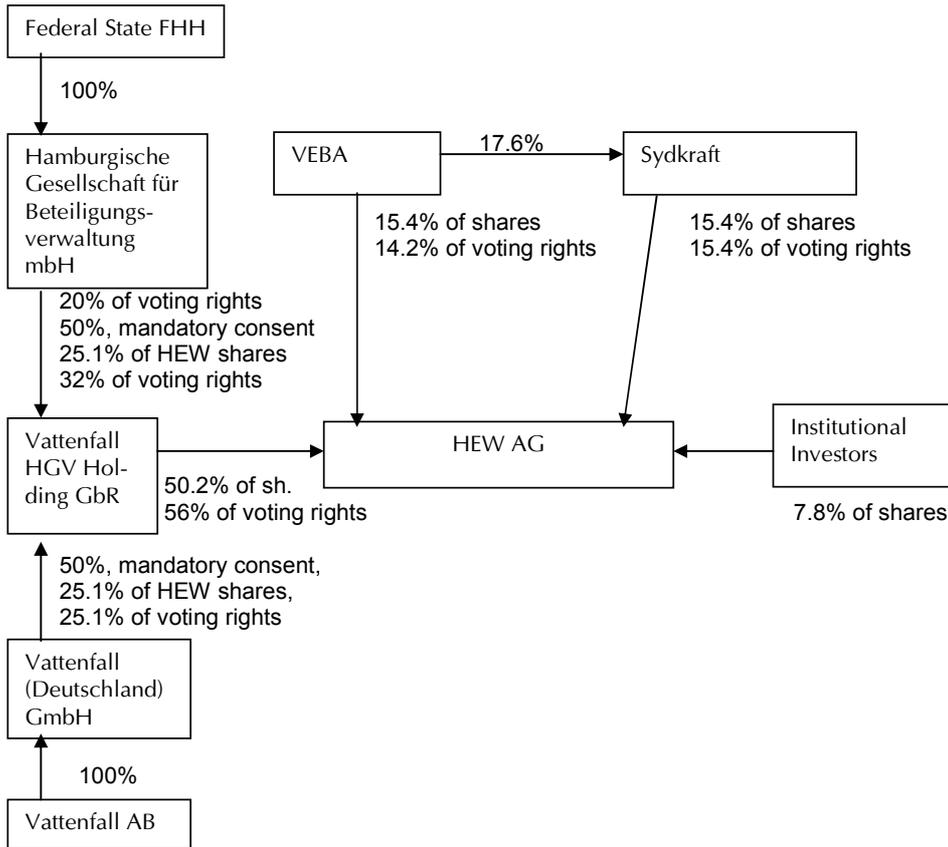
<sup>825</sup> The term was discussed earlier: q.v. 6.3.1.3 Concentrative JVs under MR1989 and 7.1.1 The New Assessment of JVs under Art. 1 I; 3 I-V MR1997 and Commission Decision Case IV/M1842, 2000 (*Vattenfall/HEW*) paragraph 9-10.

<sup>826</sup> Commission Decision Case IV/M1842, 2000 (*Vattenfall/HEW*) paragraph 11.

<sup>827</sup> Commission Decision Case IV/M1842, 2000 (*Vattenfall/HEW*) paragraph 17.

However, this national market definition seems to contradict the Commission's geographic market definitions in the cases *EdF/London Electricity* and *EdF/South Western Electricity* as HEW is insofar similar to London Electricity and South Western as HEW's small consumer supply activities still focus on its former protected region. Moreover, the former tariff consumers focus on HEW as a supplier. If one considers a distinct market, HEW will still hold a dominant position in its former protected region, too. This dispute does not need to be solved as the then minor activities of Vattenfall would by no means significantly strengthen HEW's position on such a distinct market and is bound to decrease gradually. Finally, HEW's ownership structure is as follows:

**Table 19: Status Quo Ex Post: Ownership Structure of HEW**



Sources: Commission Decision, Case IV/M1673, 2000 (VEBA/VIAG) paragraph 79; Commission Decision Case IV/M1842, 2000 (Vattenfall/HEW) paragraph 5; Financial Times Deutschland, Vattenfall: HEW-Übernahme ist erst der Anfang (19/10/2000), <http://www.ftd.de>.

It has to be stressed that this structure was altered again in October 2000 when Vattenfall AB acquired sole control by means of purchasing the E.on's, Sydkraft's and the institutional investor's stakes in HEW facilitated by the undertakings imposed on VEBA/VIAG in the abovementioned case<sup>828</sup>.

<sup>828</sup> q.v. In October, Sydkraft sold its stake of 15.4% in HEW to Vattenfall that owned already 26.2% of HEW. E.on sold its stake of 15.4% (14.2% of votes) in HEW to Vattenfall, too. Institutional Investors sold another 7.8% to Vattenfall. The latter holds approximately 71.2% of the votes: Financial Times Deutschland, Vattenfall: HEW-Übernahme ist erst der Anfang (19/10/2000), <http://www.ftd.de>.

## 9. Conclusion

After having introduced the diverse micro-economic considerations which are responsible for corporate decisions whether to implement a concentration or not, this paper went on to discuss the macro-economic aspects of a growing tendency towards concentration<sup>829</sup>. The analytic bases of European Merger Control Law were explained which evolved not only from Art. 66 ECSC, but also from Art. 82 and 81 ECT, the merger regulation from 1989 and its successor of 1997.

The application of the principles of European merger control to the energy sector revealed that it is quite difficult to assure that only these concentrations are declared compatible with the common market that honour the principles of liberalisation of the electricity and gas industries as they are formulated in the primary EC law and specified in the IEMD and IGMD. It was elaborated with regard to the acquisitions of two U.K. regional electricity companies by EDF that the current merger control law leaves no scope for reciprocity considerations as to acquisitions by incumbent companies in liberalised markets even though the acquirer is a protected public undertaking.

Moreover, it is established that different decisions apply inconsistent market definitions.

With respect to the efficacy of incidental provisions, it is remarkable, that the provisions dealing with the parties' initiative regarding the formulation of incidental provisions should be accompanied by the power of the Commission to add certain aspects ex officio. Especially conditions are valuable as they do

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<sup>829</sup> However, this view is not uncontested, as some Academics believe that the global economy is actually de-merging and becoming less-concentrated: q.v. P. Ghemawat and F. Ghadar, *Financial Times*, *Testing The Logic of Mergers* 13 (07/06/2000).

not coerce the parties to implement anything: Only if the parties are still interested in pursuing the merger, they are obliged to comply.

The deficit regarding incidental provisions corresponds to the incomplete provisions as to the enforcement of undertakings. Contrary to the wording and based on the proportionality principle it would be more efficient if the Commission could enforce, re-define and partly revoke clearances and undertakings attached to its decisions rather than the inflexible power to revoke the complete compatibility decision.

By means of the VEBA/VIAGA and RWE/VEW cases, the question was addressed which grounds are responsible for the established analytical and practical deficiencies of merger control in the energy sector.

It was stated that the weaknesses of the IEMD and IGMD are partly responsible for weak undertaking which do not sufficiently remove the scope for dominance on the affected markets and which do not rule out any possibility of impediments of effective negotiated TPA and do not remove any commercial incentive of the grid subsidiaries of the vertically integrated companies as to access which discriminates between intra and extra group applicants. It was reported that another argument relates to the limited scope that the Commission has if it wants to remedy deficiencies of written primary law owing to the extraordinary nature of the implied powers doctrine based on the principle of constitutional state. Then, the adverse political difficulties that competition authorities are facing are taken into account.

Further, it is analysed that accidental regulation based on incidental provisions imposed on undertakings which may or not implement a concentration is by no means a consistent and non-discriminatory and predictable tool to over-

come drawbacks of primary or secondary European law in a given sector: These aspects must not be neglected as they are based on the democratic principle and the constitutional state doctrine.

With regard to a more stringent framework for TPA in the IEMD and the IGMD, it was stated that secondary legislation with regard to energy networks is bound not only by Art. 295 ECT but will be bound by the new protocol on human rights and by national constitutions which protect property rights against disproportionate expropriations or re-definitions and require a system of state liability law so as to give necessary compensation. Adverse political pressures are taken into account as well but egoistic national policies which abstain from transnational task forces in order to settle difficulties and disputes are considered, too.

Furthermore, it has been stated that different stages of the maturity of domestic markets, different consumer patterns and a potential isolation of the system makes it more difficult to apply consistent standards as to the appropriate market definition in order to boost harmonisation.

The implementation of the VEBA/VIAG merger was further complicated owing to several circumstances which were difficult if not impossible to project: the extremely valuable assets at stake, the mandatory consent of the government as to the acquisition of VEAG, the minority shareholdings of the bidders EnBW, BEWAG and HEW in VEAG, the controversy regarding BEWAG and the increased sensitivity of the public owing to the high energy crisis in combination with eco tax increases. Nevertheless, the Commission should take additional care with respect to potential impediments as to the realisation of parties' commitments: It must be properly assessed whether the parties are to be

made responsible for the alleged difficulties or not. This argument is broadened by the idea that any legal uncertainty as to the assets that are due to be disposed can well undermine the commercial value of the assets so as to prevent the future acquirers from creating a powerful competitor. Similarly, the parties may pursue a policy so as to maximise the number of valuable bids so that the acquirer that was favoured by the Commission in its reasoning may be well removed from the group of likely bidders in the future.

In contrast to the negative aspects, it can be highlighted that the Commission realised the drawbacks and flaws of the energy liberalisation project as expressed by the present IEMD and IGMD quickly so that the co-ordinative and innovative mechanisms of Florence and Madrid were created: It was a unique idea to create single view pressure groups in order to obtain an independent view from transmission system operators. Although these matters are highly complex in technical and economic terms, it is expected to reach agreement with regard to congestion management by means of either counter-trading, re-balancing, auctions, obligations to offer free capacity etc., soon. Thereby, the Commission's approach is justifiable unless better legal instruments of liberalisation and regulation are in place.

Moreover, it was stressed that undertakings put forward by the parties and accepted by the Commission must be restricted to a subsidiary legal instrument, only applied if it is strictly necessary to overcome certain detrimental aspects of given concentrations in order to provide a hint for the legislator, that the legislation should be specified.

Finally, competition as a de-central distributor of risk, wealth and power will be extended to its maximum extent, if wholesale industrial and small consumers

benefit from lower energy prices which allow both greater productivity of European products on the world markets and higher environmental standards owing to modern, cost-efficient plants and networks which would not be created if unilateral or joint dominance spread to many segments of the future internal market. The successful implementation of both national spot markets for power and gas, which will be accompanied by tools of financial risk management like forwards, futures and options, will be a valuable indication of an efficient liberalisation of national power and gas markets. Said liberalised national markets are a pre-requisite for additional convergence which will lead to energy markets of European geographic scope.

## 10. Annexes

### 10.1 Major Mergers in the Oil and Gas Industry in 1998/1999

[Omitted in the online version, please contact the author]

Source:

D. Townsend, *Mergers & Acquisitions - Leading the Merger Pack*, Petroleum Economist 34 (March 2000).

## **10.2 Major Mergers in the Power Sector in 1998/1999**

[Omitted in the online version, please contact the author]

Source:

D. Townsend, *Mergers & Acquisitions - Leading the Merger Pack*, Petroleum

Economist 34 (March 2000).

### **10.3 Significant Influence of External Business Consultants in Oil & Gas Mergers and Acquisitions**

[Omitted in the online version, please contact the author]

#### Source:

D. Townsend, *Mergers & Acquisitions - Leading the Merger Pack*, Petroleum Economist 34 (March 2000).

#### **10.4 Importance of Consultants for Power Mergers**

[Omitted in the online version, please contact the author]

Source:

D. Townsend, *Mergers & Acquisitions - Leading the Merger Pack*, Petroleum Economist 34 (March 2000).

This table shows that power companies rely to a lesser extent on external business consultants compared to oil and gas undertakings.

### **10.5 Product Market Definition Pursuant to Art. 2 MR1989**

[Omitted in the online version, please contact the author]

#### Source:

J.B. Alonso, *Market Definition in The Community's Merger Control Policy*,  
ECLR 197 (1994).

## **10.6 Structure of the German Electricity Supply Industry Prior to The Liberalisation and The VEBA/VIAG and RWE/VEW Mergers**

### **10.6.1 Three Fold Structure of The German Electricity Undertakings prior to 1998**

[Omitted in the online version, please contact the author]

#### Source:

L. Mez, *The German Electricity Reform Attempts: Reforming Co-optive Networks*, in

European Electricity Systems in Transition A Comparative Analysis of Policy and Regulation in Western Europe (A. Midtun, ed., Oxford, U.K., 1997) p 235

### **10.6.2 Capital Links between German Integrated Electricity Companies (1994)**

[Omitted in the online version, please contact the author]

Source:

L. Mez, *The German Electricity Reform Attempts: Reforming Co-optive Networks*, in

European Electricity Systems in Transition A Comparative Analysis of Policy and Regulation in Western Europe (A. Midtun, ed., Oxford, U.K., 1997) p 233

with reference to M. Stelte, Energy Databank, Berlin, 1994 and 1996.

### **10.6.3 Installed Power Capacity of The Combined Electricity Companies in MW in 1994**

[Omitted in the online version, please contact the author]

Source:

Vereinigung Deutscher Elektrizitätswerke (ed.), VDEW Statistik 1994 (Frankfurt, Germany, VDEW Verlag, 1995).

#### **10.6.4 Fuel Sources of Installed Capacity and Electricity Generation in 1992**

[Omitted in the online version, please contact the author]

Source:

Bundesministerium für Wirtschaft, Die Elektrizitätswirtschaft in der Bundesrepublik Deutschland 1994 (Frankfurt, Germany, 1996) pp. 44, 47 .

### **10.6.5 Transmission, Distribution and Supply Grid Operators in 1994**

[Omitted in the online version, please contact the author]

Source:

Mez, L., *The German Electricity Reform Attempts: Reforming Co-optive Networks*, in European Electricity Systems in Transition - A Comparative Analysis of Policy and Regulation in Western Europe (A. Midtun, ed., Oxford, U.K., 1997) p 239.