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Is the relevant EU legislation regarding competition law on mergers effective in preventing mergers that result in a dominant market position? Or is the Commission exceeding its competence in its application of legislation causing it to be ineffective in light of relevant case law?

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Abstract

This dissertation was written as part of the LLM in Transnational and European Commercial Law at the International Hellenic University.

This dissertation is primarily concerned with the question is the competition legislation in relation to merger control effective in preventing mergers that result in a dominant market position or whether the Commission is exceeding its competence in its application of it causing it to become ineffective in the light of relevant case law.

Looking at the current legislation, the role of the Commission, the judicial review procedure available, statistics and the relevant literature, it will conclude that the legislation is sufficient as the Commission has successfully prohibited mergers in a dominant position, and that it rarely exceeds in competence in this area, and that in those instances the judicial review procedure available is sufficient to remedy this. Although changes may be warranted in this area they are yet to come to fruition. Therefore, merger control in the context of the European Union and the commissions role within this area can be said to be appropriate.

I would like to acknowledge my supervisor Dr Pavlos Masouros for his advice, guidance and support. To my family and friends who have given me encouragement and the belief to complete this dissertation. Without you all I couldn't have done it. Thank you.

Alexandra Sheridan
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Preface

This dissertation is original, unpublished, independent work by the author, A, Sheridan.

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Introduction

Mergers of companies/concentrations can occur in a domestic supranational or international sphere. There has been an increase worldwide of systems of competition law, over 110 countries around the globe have competition law, and in over 100 of these countries merger control is included in their systems. This expansion of systems of merger control has had a greater impact than other anti-competition rules. It has been explained as an expansion of global business rather than a disregard for the rules, due to the pre notification of mergers being mandatory and firms being international rather than purely domestic, any proposed merger with a cross border or international element may find themselves having to notify various competition authorities¹. Granted mergers can occur internationally and domestically this discussion will specifically focus on mergers that have a cross border element in the European Union². This dissertation will look to assess whether the relevant EU legislation regarding competition law on mergers is effective in preventing mergers that result in a dominant market position. Or if the Commission is exceeding its competence in its application of legislation causing it to be ineffective in light of relevant case law.

It will start by looking at the current merger legislation in the EU and describing the role of the commission in implementing this legislation. It will consider the judicial review in the balance and checks of the commissions decisions and specifically consider instances in which the Courts have overturned the commissions prohibitions of certain mergers. The case law is thin on the ground as we will see, during the years of 1990 and 2015 a total of 24 proposed mergers notified to the commission have been prohibited. Furthermore, only four of these decisions have been overturned, *Airtours plc*³, *Schneider Electric*⁴, *Tetra Laval*⁵ and *MIC*⁶. These cases will be briefly outlined and a review of the relevant literature surrounding this area will be discussed highlighting the observations made by academics. The following observations are made following the review, there is no derogatory comments regarding the merger control legislation and it is sufficient as does allow for the prohibition of mergers that would create a domination as statistics show there have been 28 prohibitions. It is the Commission that has

¹ Whish R & Bailey D (2012). Competition Law. New York : Oxford University Press

² To be referred to as EU

³ Case T – 342/99, *Airtours v Commission* , 2002 E.C.R. II-2585

⁴ Case C-440/07 *Commission of the European Communities v Schneider Electric SA* [2009] E.C.R. I-6413

⁵ Case C-12/03 P, *Commission V. Tetra Laval*, 2005 O.J. (C82) 1

⁶ Case T- 310/00 *MCI Inc. v. Commission* [2004] ECR II- 3253, [2004] 5 CMLR 1274

come under scrutiny for the application of the European Union Merger Regulation^{7,8}, its assessments and evidence provided when making a judgement. The Judicial review provided by the Community courts has largely been praised as it has moved from allowing the Commission a wide discretion in this area to providing a comprehensive review procedure narrowing the Commissions discretion. The introduction of the expedited procedure has allowed for a more economic time frame although after its initial inclusion seems to have tapered off, this has produced alternatives to be proposed to continue the effective review of the Commissions decisions in merger control cases. It will conclude the system of merger control in the EU is sufficient and that the case law in which the Courts have annulled the commissions decisions does not support the need for immediate change, regardless that an institution taking on the role of judge and jury is not ideal. There may be alternatives to make EU merger control more effective and fair, but currently this is not an option and that Commission is far exceeding its competence in its application of legislation causing it to be ineffective in light of relevant case law.

Current Merger legislation in the EU

Competition law constitutes one of the most important aspects of the European Union and has a significant influence on European business and industry⁹. Title VII, chapter 1, of the Treaty on the Functioning of the European Union¹⁰ lays down the Core legislation for the EU rules on competition¹¹ Merger control is just one aspect of competition law. There are various sources of merger control legislation in the EU. Provisions are located in the Treaty on the functioning of the European Union¹². The framework legislation for merger decisions in the EU are the EC Merger Regulation^{13,14} and the Implementing Regulation¹⁵. There are also various notices and guidelines published by the commission¹⁶. The first Merger Regulation was adopted by

⁷ To be referred to as EUMR

⁸ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)

⁹ Dr Pavlos Masouros – Class notes

¹⁰ TFEU

¹¹ Dr P Masouros – Class notes

¹² Article 101, 102, and 106 are core provisions

¹³ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)

¹⁴ Refer to as ECMR

¹⁵ Commission Regulation (EC) No 802/2004

¹⁶ Commission Consolidated Jurisdictional Notice, Commission Notice on a simplified procedure, Commission Notice on case referral, Commission Notice on the definition of the relevant market, Guidelines on the assessment of horizontal mergers, Guidelines on the assessment of non-horizontal mergers, Commission Notice on remedies,

the Council of the European Communities over 25 years ago¹⁷ and was referred to as ‘‘EU Merger Regulation’’. It has been amended twice in 1971 and in 2004 resulting in the current Merger Regulation in force today¹⁸. In 2004 the Commission published a White paper evaluating the Merger regulation since 2004 and also proposes adjustments that if adopted would bring significant changes to the current EU framework¹⁹. Mergers/concentrations having a community dimension are investigated exclusively by the commission, those that do not fall under the merger laws of the Member States^{20,21}. Community dimension is defined in Article 1(2) or Article 1(3) of the EUMR²².

The main principle of the EUMR is the idea of a one- stop merger control²³, this allows that concentrations that have a Community dimension shall only be investigated by the Commission, this is found Article 21 of the EUMR. Extra weight is given to this via Regulation 1/2003 that grants the Commission power to be able to enforce Article 101 and 102 of the Treaty on the Functioning of the EU. In addition to the EUMR there is also the Implementing regulation²⁴, this sets out the rules on notifications, time limits, right to be heard, access to file and remedies to name but a few. This regulation has been amended and provides the format form needed for when undertakings offer commitments to remedy concerns that they may have regarding the proposed merger and its effect on competition.

The commission also publishes notices and guidelines on both procedural and substantive issues including; on the definition of the relevant market, Guidelines on the assessment of horizontal mergers, Notice on a simplified procedure for treatment of certain concentrations, Notice on restrictions directly related and necessary to concentrations, Notice on Case Referral in respect of concentrations, Notice on access to the file, Consolidated Jurisdictional Notice, Guidelines on the assessment of non- horizontal mergers. The Commission has also published

Commission Notice on restrictions, Decision 2011/695/EU of the President of the European Commission on the function and terms of reference of the hearing officer in certain competition proceedings and Commission Notice on the rules for access to the Commission file

¹⁷ Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ L 395, 30 December 1989, p. 1).

¹⁸ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L 24, 29 January 2004, p. 1).

¹⁹ Koppenfels U (2015) A Fresh Look at the EU Merger Regulation? The European Commission’s White Paper ‘‘Towards More Effective EU Merger Control’’. *Liverpool Law Review* (2015) 36:7-31

²⁰ To be referred to as MS

²¹ This is not something that will be discussed as this paper is solely from a EU perspective

²² This removes a large amount of substantial transactions due to the two-thirds rule where two undertakings are from the same member state.

²³ Harker M (2007). Cross-border mergers in the EU : The Commission v The Member States. *European Competition Journal*. Vol 3 No 2. P507

²⁴ Regulation 802/2004

supplementary information including best practice guidelines in regards to merger control, these include DG Competition Best Practices on the conduct of EC merger control proceedings, Best Practice Guidelines: the Commission's model texts for divestiture commitments and the trustee mandate, Market Share Ranges in Non- confidential Versions of Merger Decisions and Best practices for the submission of economic evidence and data collection concerning the application of Articles 101 and 102 TFEU and in merger cases.

Role of the Commission and the procedure undertaken

The Commission's function is set out in Article 213(2) in the Treaty of the Functioning of the European Union. It states

“The Members of the Commission shall, in the general interest of the Community, be completely independent in the performance of their duties. In the performance of these duties, they shall neither seek nor take instructions from any government or from any other body. They shall refrain from any action incompatible with their duties. Each Member State undertakes to respect this principle and not to seek to influence the Members of the Commission in the performance of their tasks”.

It is the Commission that is in charge of initiating legislative process within the EU²⁵, and irrespective of being subject to review by the Community Courts, the Commission “is the investigator, judge and jury in competition trials”²⁶. Klaus has labelled the Commission as the “driving force behind Community policy. Todorov and Valcke go as far to brand it the “Guardian of the Treaties”²⁷. Since the adoption of the initial Merger Regulation²⁸, it is the Commission who has the sole authority of implementing the regulation²⁹. There are various internal constituencies that make up the Commission and it is important to mention them briefly. These internal constituencies include the case team and its hierarchy in charge of the investigation, the Deputy Director General³⁰, Director of the Policy Directorate, Director

²⁵ Including various other roles including initiating proceedings against MS if they don't comply with their obligations, administrative functions, regulatory functions, overseeing the MS's implementation of Councils regulations

²⁶ Whish p844

²⁷ Todorov F & Valcke A (2006). Judicial review of merger control decisions in the European Union. The antitrust bulletin: Vol. 51, No 2/summer 2006 p341

²⁸ Commission Regulation 4064/1989, 1989 O.J. (L 395).

²⁹ Kovacic W et al. Merger control procedures and institutions : A comparison of EU and US practice. The antitrust bulletin vol 59, No 1/spring 2014 p58

³⁰ DDG, who is in charge of merger control

General of DG COMP, the Competition Commissioner and his cabinet, the Legal Service, the Hearing Officer, the Chief Economist and their team, other Commission services and the College of Commissioners. It is an accumulation of all these constituents that work towards making decisions whenever a potential case is notified to Commission³¹.

Upon the Commission receiving notification of a merger between concentrations that fall within the scope of the EUMR³². The notification of a proposed merger, requires the Commission to start their substantive assessment beginning with a definition of the relevant product and geographic markets. The Commissions Notice on market definition states that the main purpose is to “identify in a systematic way the competitive constraints that the undertakings involved faced”. In *France v Commission*³³ it was held that a proper definition of the relevant market is a necessary precondition for any assessment of the effect of a concentration on competition under the EUMR. Although it is not binding in subsequent investigations³⁴. A merger will be declared incompatible with the common market if it would significantly impede effective competition especially in the creation or strengthening of a dominant position. The Commission has a period of 25 days to decide if the proposed merger does not raise doubts with its compatibility with EU law³⁵, or that its compatibility does raise doubts and that further proceedings must be initiated³⁶. A Decision in the first instance under Article 6.1(b)³⁷ is commonly known as a Phase I decision, these decisions may be straight forward, or may involve some commitments from the parties so that the merger is fully compatible with EU law³⁸. The second decision under Article 6.1(c)³⁹ sets into motion a Phase II investigation and decision. Under a Phase II investigation the Commission has to take one of three decisions within 90 days of initiating proceedings under Article 6.1(c). The first that

³¹ Kovacic W et al (2014) p59

³² Article 1 EUMR

³³ Cases C- 68/94 *France v Commission* [1998] ECR I- 1375, [1998] 4 CMLR 829

³⁴ Case T- 102/96 *Gencor v Commission* [1999] ECR II- 753, [1999] 4 CMLR 971

³⁵ Article 6.1(b) EUMR

³⁶ Article 6.1 (c) EUMR

³⁷ Article 6.1(b) states “Where it finds that the concentration notified, although falling within the scope of this Regulation, does not raise serious doubts as to its compatibility with the common market. A decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration.

³⁸ Examples of cases, case COMP/M.6258-Teva/Cephalon, case COMP/M.6447-IAG/bmi, case COMP/M.6459-Sony/Mubadala/EMI music publishing, case COMP/M.6611-Aria Foods/Milk Link

³⁹ Article 6.1(b) states “Without prejudice to paragraph 2, where the Commission finds that the concentration notified falls within the scope of this Regulation and raises serious doubts as to its compatibility with the common market, it shall decide to initiate proceedings. Without prejudice to Article 9, such proceedings shall be closed by means of a decision as provided for in Article 8(1) to (4), unless the undertakings concerned have demonstrated to the satisfaction of the Commission that they have abandoned the concentration.

the merger is compatible with EU legislation⁴⁰. The second is that with suggested modifications the merger is compatible with EU Law⁴¹, and thirdly is that the merger is not compatible with EU Law⁴². No mergers are to be consummated without the Commission's decision, Article 7 of the EUMR states that "concentration with a Community dimension as defined in Article 1, or which is to be examined by the Commission pursuant to Article 4(5), shall not be implemented either before its notification or until it has been declared compatible with the common market pursuant to a decision under Articles 6(1)(b), 8(1) or 8(2), or on the basis of a presumption according to Article 10(6)" Authorised mergers when parties offer up commitments to remedy the concerns in regards to competition by the Commission are legally binding. When approving a merger with commitments or prohibiting a merger totally, it requires "the full college of Commissioners" in order to make these decisions^{43,44}. The Commission has its own internal checks regarding the fairness of their proceeding, this is in the form of a Hearing officer. There are two Hearing Officers that have a range of functions which includes overseeing the fairness in procedure. Appeals can also be made judicially in regards to the commissions decisions. Any appeal is first taken to the General Court and any further appeal is heard by the European Court of Justice⁴⁵.

The notification of a proposed merger, requires the Commission to start their substantive assessment beginning with a definition of the relevant product and geographic markets⁴⁶. The Commissions Notice on market definition states that the main purpose is to "identify in a systematic way the competitive constraints that the undertakings involved faced". In *France v Commission*⁴⁷ it was held that a proper definition of the relevant market is a necessary precondition for any assessment of the effect of a concentration on competition under the EUMR. Although it is not binding in subsequent investigations⁴⁸. A merger will be declared incompatible with the common market if it would significantly impede effective competition especially in the creation or strengthening of a dominant position⁴⁹. Prior to the substantive

⁴⁰ Article 8.1 EUMR

⁴¹ Article 8.2 EUMR

⁴² Article 8.3 EUMR

⁴³ Bellis JF, Porter E, Bael V (Eds) (2011). *Merger Control : Jurisdictional Comparisons*. London : Sweet and Maxwell

⁴⁴ Whish p830

⁴⁵ Whish p891-7

⁴⁶ Bellis JF, Porter E, Bael V (Eds) (2011)

⁴⁷ Renshaw A & Blockx J (2013) *Judicial review of mergers in the EU*. *The Antitrust Bulletin* : Vol 58, Nos 2 & 3 Summer-Fall 2013

⁴⁸ *Coca Cola v Commission*

⁴⁹ Article 8.3 EUMR

test creation in 2004 there was jurisprudence for the definition of dominance⁵⁰, which was applied effectively in single firm and collective dominance and even in vertical mergers, however applying it in instances of non-collusive oligopoly caused problems. It is in this instance where we find the case law in which it could be said that the Commission has not applied the regulation as it should.

Statistics

21 September 1990 to 31 December 2015

I.) NOTIFICATION

	B0	B1	B2	B3	B4	B6	B8	B7	B8	B8	00	01	02	03	04	06	08	07	08	08	10	11	12	13	14	16	Total
Number of notified cases	11	64	99	99	95	110	131	163	224	276	330	335	277	211	247	318	396	402	348	299	274	309	233	277	303	837	8083
Cases withdrawn - Phase 1	0	0	3	1	6	4	5	9	5	7	8	8	3	0	3	6	7	5	10	6	4	9	4	1	6	8	128
Cases withdrawn - Phase 2	0	0	0	1	0	0	1	0	4	5	5	4	1	0	2	3	2	2	3	2	0	1	1	0	0	2	88

II.) REFERRAL

	B0	B1	B2	B3	B4	B6	B8	B7	B8	B8	00	01	02	03	04	06	08	07	08	08	10	11	12	13	14	16	Total
Art 4(4) request (Form RS)															2	14	13	5	9	8	6	10	13	11	16	18	120
Art 4(4) referral to Member State															2	11	13	5	9	6	7	10	12	9	14	12	110
Art 4(4) partial referral to Member State															0	0	0	1	0	0	0	1	0	2	0	2	8
Art 4(4) refusal of referral															0	0	0	0	0	0	0	0	0	0	0	0	0
Art 4(5) request (Form RS)															20	28	38	51	23	23	26	18	22	13	19	20	201
Art 4(5) referral accepted															16	24	39	50	22	25	24	17	22	11	19	18	233
Art 4(5) refusal of referral															2	0	0	2	0	0	1	0	1	0	0	1	7
Art 22 request	0	0	0	1	0	1	1	1	0	0	0	0	2	1	1	4	3	2	1	3	1	3	1	1	1	1	32
Art 22(3) referral (Art 22.4 taken in conjunction with article 8 or 3 under Reg. 4084/02)	0	0	0	1	0	1	1	1	0	0	0	0	2	1	1	3	3	2	3	1	2	2	2	1	1	1	28
Art 22(3) refusal of referral															1	1	0	0	0	1	0	1	0	1	0	0	4
Art 19 request	0	1	1	1	1	0	3	7	4	9	4	9	8	10	4	7	6	3	5	3	11	2	2	2	2	8	103
Art 19(3) partial referral to Member State	0	0	1	0	1	0	0	6	3	2	3	6	7	1	1	3	1	1	2	0	3	0	1	0	0	1	43
Art 19(3) full referral	0	0	0	1	0	0	3	1	1	3	2	1	4	8	2	3	1	1	2	1	4	2	1	0	0	0	41
Art 19(3) refusal of referral	0	1	0	0	0	0	0	0	0	1	0	0	0	1	0	0	0	1	0	1	1	0	0	0	3	8	12

III.) FIRST PHASE DECISION

	B0	B1	B2	B3	B4	B6	B8	B7	B8	B8	00	01	02	03	04	06	08	07	08	08	10	11	12	13	14	16	Total
Art 6(2) out of scope Merger Regulation	2	5	9	4	5	9	6	4	4	1	1	1	1	0	0	0	0	0	0	0	0	0	0	0	1	1	64
Art 6(1) compatible	5	47	43	49	78	90	109	118	196	225	278	299	238	203	220	276	323	368	307	225	253	298	254	252	280	297	8332
Art 6(1b) compatible, under simplified procedure (figures included in 6(1b) compatible above)	0	0	0	0	0	0	0	0	0	0	41	141	103	110	138	169	211	238	190	143	143	191	171	196	207	222	2634
Art 6(1) in conjunction with Art 6(2) (compatible w. commitments)	0	3	4	0	2	3	0	2	12	16	26	11	10	11	12	15	13	18	19	13	14	5	9	11	12	18	264

IV.) PHASE II PROCEEDINGS INITIATED

	B0	B1	B2	B3	B4	B6	B8	B7	B8	B8	00	01	02	03	04	06	08	07	08	08	10	11	12	13	14	16	Total
Art 6(1) (c)	0	6	4	4	6	7	6	11	11	20	18	21	7	9	8	10	13	15	10	5	4	8	10	6	8	11	232

V.) SECOND PHASE DECISIONS

	B0	B1	B2	B3	B4	B6	B8	B7	B8	B8	00	01	02	03	04	06	08	07	08	08	10	11	12	13	14	16	Total
Art 6(1) compatible (3.2 under Reg. 4084/02)	0	1	1	1	2	2	1	1	3	0	3	5	2	2	2	4	5	9	0	1	4	1	2	2	1	1	67
Art 6(2) compatible with commitments	0	3	3	2	2	3	3	7	4	7	12	9	5	6	4	3	6	4	5	3	2	1	6	2	5	7	114
Art 6(3) prohibition	0	1	0	0	1	2	3	1	2	1	2	5	0	0	1	0	0	1	0	0	0	1	1	2	0	0	24
Art 6(4) restore effective competition	0	0	0	0	0	0	0	2	0	0	0	0	2	0	0	0	0	0	0	0	0	0	0	0	0	0	4

VI.) OTHER DECISIONS

	B0	B1	B2	B3	B4	B6	B8	B7	B8	B8	00	01	02	03	04	06	08	07	08	08	10	11	12	13	14	16	Total
Art 6(3) decision revoked	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
Art 6(6) decision revoked	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Art 7(1) decision imposing fines	0	0	0	0	0	0	0	0	1	4	1	0	1	0	1	0	0	0	0	1	0	0	0	0	1	0	10
Art 7(3) derogation from suspension (7.4 under Reg. 4084/02)	1	1	2	3	3	2	4	5	13	7	4	7	14	8	10	6	2	3	6	5	1	3	1	1	1	1	114
Art 21	0	0	0	0	0	1	0	1	0	1	1	0	1	0	0	0	2	1	0	0	0	0	0	0	0	0	8

⁵⁰ Continental Can v Commission, United Brands v Commission.

The European Commission publishes statistics regarding mergers, including the number of notifications received, referrals, first phase decisions, phase II proceeding initiated, second phase decisions, and other decisions⁵¹.

Using the most up to date statistics published, it can be seen that during the years of 1990 to December 2015 that commission has received 6063 notifications⁵². Of these 5332⁵³ were found compatible with Article 6.1(b)⁵⁴ and 54 fell outside the scope of the Merger regulation all together. Authorised mergers only after the parties offer up commitments in both Phase I and Phase II to remedy the Commissions concerns and make the merger compatible with merger legislation totalled 368. This equates to 6.07% of all cases. From the total notifications only 24 cases have been prohibited under Article 8.3, this equates to less than 1%⁵⁵ of all proposed mergers notified to the Commission. Including the prohibited decisions only 238 of all merger notifications have had Phase II proceedings initiated, only 3.93% which is a very small number.

Under Phase II decisions the Commission found that 57 of these proposed mergers were compatible under Art 8.1 of the EUMR. A further 114 were found to be compatible under Article 8.2 with commitments from the parties. As stated above 24 mergers with found to be incompatible with the EUMR and therefore prohibited. The most probation decisions occurred in 2001 in which five proposed mergers were denied by the Commission. Of the notifications that had Phase II proceedings initiated 171 have been found compatible under Art 8.1 and Art 8.2⁵⁶. Thus refining the statistics solely to second phase decisions only 12% of Phase II cases were prohibited⁵⁷. These figures highlight that the Commission do not prohibit a large number of notifications that they receive. However, the statistics confirm that the legislation is sufficient in preventing mergers that do result in a dominant position as the Commission had prohibited 24 cases without the Community Courts annulling these decisions.

⁵¹ Statistics obtained from <http://ec.europa.eu/competition/mergers/statistics>

⁵² The most notifications being received in 2007 with 402 proposed mergers being notified.

⁵³ 88%

⁵⁴ EUMR

⁵⁵ 0.40%

⁵⁶ These include commitments from the parties

⁵⁷ This does not account for the cases that were withdrawn during Phase II.

Judicial review – check and balances for the Commission

Decisions of the Commission are subject to judicial review by the EU Courts, this is set out in Art 263 of the TFEU, it states

“The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers”

Art 18 of the EUMR deals with parties who have the right to appeal the Commission’s decisions. This is parties to the transactions and also third parties. In the case of third parties Article 18(4) states

“ ...Natural or legal persons showing a sufficient interest and especially members of the administrative or management bodies of the undertakings concerned or the recognised representatives of their employees shall be entitled, upon application, to be heard”.

Appeals were relatively few in early days of merger control⁵⁸, In the later half on the 90’s there was a growing concern that the Commission possessed too much power as they were prosecutor, judge and jury in merger cases, and that the judicial control of the Commission was unsatisfactory. In this period prohibition decisions by the commission increased, however in response there was a “dramatic series of annulments” by the courts. In the period between June and October 2002 there were three annulments in the cases of *Airtours*⁵⁹, *Schnider Electric*⁶⁰

⁵⁸ Collective dominance meaning tended to dominate cases such as See Cases C- 68/94 France v Commission [1998] ECR I- 1375, [1998] 4 CMLR 829, paras 169–178; Case T- 102/96 Gencor v Commission [1999] ECR II- 753, [1999] 4 CMLR 971, paras 148–158.)

⁵⁹ 2002 E.C.R. II-2585

⁶⁰ 2002 E.C.R. 11-4071

and *Tetra Laval*⁶¹. As Bailey rightfully points out the Community Courts are willing to annul merger decisions made by the Commission based on either insufficient evidence or inadequate reason, therefore not satisfying the legal standard required. This observation is evidentially supported by the above mentioned cases.

There are two judicial authorities within the European Union, the primary authority is the European Court of Justice⁶² and following an amendment to the EC treaty in 1989 the General Court⁶³ which was formally known as the Court of First Instance. After consultation with the Commission and Parliament a proposal from the court of justice was agreed by the Member States in the Single European Act it created a court that has the jurisdiction to hear and determine cases at first instance. It is subject to appeal to the Court of Justice on points of law only. The court of Justice has the power to declare institution's decisions void, although it does not have effect until the time for appealing has passed⁶⁴, or if there is an appeal until the ruling is passed⁶⁵. The General Court was created to assist the ECJ with the constant growth of judicial activity, the GC is not independent of the ECJ but forms part of it⁶⁶. The GC is the first port of call for direct actions against Community legal acts and competition law brought by natural or legal persons⁶⁷. It does not hear cases brought by any of the EU institutions or Member states⁶⁸. The legal basis which identifies the ECJ as one of the Unions institutions is Article 13 of the TFEU. Articles 25-281 of the TFEU provide the provision of ECJ, with Articles 254-256 concerning the General Court. Its jurisdiction is set out in Article 256 of the TFEU⁶⁹

There have been concerns about judicial review especially in the time taken to obtain a judgement often making the process to lack any real purpose. The General Court had been viewed as a lengthy process, and perhaps as some academics said granted the commission a high level of discretion in its application of economic analysis when making their decisions⁷⁰. The "expedited procedure" has tried to address this. This entered into force 1st February 2001

⁶¹ 2002. E.C.R. II-4382

⁶² To be referred to as the ECJ

⁶³ To be referred to as the GC

⁶⁴ This removes the confusion that may arise if the CFI and ECJ disagrees

⁶⁵ Slynn G (1989) Court of First Instance of the European Communities. *Northwestern Journal of International Law and Business*. Volume 9. Winter 1989.

⁶⁶ Whish R & Bailey D (2012)

⁶⁷ <http://www.cardiff.ac.uk/insrv/resources/edc/Court%20of%20Justice.pdf>

⁶⁸ Although it does hear Actions brought by member states against the Council relating to acts adopted in the field of State aid, dumping and acts by which it exercises implementing powers

⁶⁹ This contains what actions the court has jurisdiction to hear

⁷⁰ Todorov F & Valcke A (2006). Judicial review of merger control decisions in the European Union. *The antitrust bulletin*: Vol. 51, No 2 p339.

this allows the GC to deal with certain cases in a more efficient time frame, this is important in cases of prohibition as market conditions can and may change dramatically from the time of the Commission's decision and the courts judgement. This procedure can only be used in simplified pleadings, and by the end of June 2011 ten merger appeals had used the expedited procedure. The shortest case from appeal to judgement was seven months⁷¹, and the longest was 21⁷². Any appeal from the GC is directed to the ECJ. The ECJ settle disputes regarding member states, institutions, and private parties who may have a dispute with either of previous. The ECJ's issues preliminary rulings as a guide for national courts in applying Community law when the dispute may mean having to interpret Community law. The ECJ can also issue legally binding opinions following a requests from either a MS or an EU institution regarding agreements between the EU and non EU states.

Relevant case law

It is rare for the Commission to prohibit a merger in its entirety⁷³. There have been more cases in which the Commission has allowed mergers upon commitments by the parties, these are referred to as remedies. The legal basis is found in Art 6(2) of the EUMR in phase I and Art 8(2) for phase II

In total the courts have annulled just four of the mergers prohibited by the Commission, this occurred in the following cases *Airtours plc*⁷⁴, *Schneider Electric*⁷⁵, *Tetra Laval*⁷⁶ and *MIC*⁷⁷. It is these four cases that are of particular relevance to this thesis, the facts of the cases and reasons for annulment will be set out briefly below.

***Airtours v Commission*⁷⁸**

On the 29th April 1999 the Commission received a notification of a proposed concentration by *Airtours* who wished to acquire the whole of First Choice plc by way of a public bid. The notification constitutes a concentration within the meaning of Article 3(1)(b) of the Merger

⁷¹ Case T- 87/05 EDP v Commission [2005] ECR II- 3745, [2005] 5 CMLR 1436

⁷² Case T- 464/04 Impala v Commission [2006] ECR II- 2289, [2006] 5 CMLR 1049. This case was made slower by Impala themselves.

⁷³ The statistics have been discussed above

⁷⁴ Case T – 342/99, *Airtours v Commission* , 2002 E.C.R. II-2585

⁷⁵ Case C-440/07 Commission of the European Communities v Schneider Electric SA [2009] E.C.R. I-6413

⁷⁶ Case C-12/03 P, Commission V. Tetra Laval, 2005 O.J. (C82) 1

⁷⁷ [2004] ECR II- 3253

⁷⁸ 2002 E.C.R. II-2585

regulation. This acquisition would result in a reduction of number of major tour operators in the UK, however no single firm would be individually dominant.

The Commission in its 1999 decision⁷⁹ declared the takeover of First Choice plc by Airtours plc to be incompatible with the common market and the operation of the European Economic Area pursuant to Article 8(3) of Regulation 4064/89.⁸⁰, on the basis that it would create a collective dominant position. The reasoning used by the Commission suggested that each of the remaining firms would be unilaterally able to exercise market power even with acting in a coordinated manner.

The GC however annulled the Commission's decision. The court criticized the Commission's analysis saying that decision was "vitiating by a series of errors of assessment"⁸¹. The judgement associated collective dominance with co-ordinated effects. If the Commission thought the problem in this case was one of unilateral as opposed to co-ordinated effects, there was a gap in the MR. It appeared that the problem was with the word dominance that was not necessarily applicable in certain situations. This raised a great amount of uncertainty⁸². The judgement however created a clear guidance in future assessments of mergers in an oligopolistic market by setting out three necessary conditions, thus intending to make future cases more predictable⁸³.

Schneider Electric⁸⁴

In February 2001 Schneider Electric SA and Legrand SA notified the Commission of the proposal by Schneider to make a public exchange offer in respect of all the shares in Legrand held by the public⁸⁵.

The Commission made a declaration of incompatibility under Regulation 1310/97 in relation to the merger between S and L as it would result in a concentration that would be incompatible with the Common Market⁸⁶. The Commission initiated a Phase II investigation, during which the Commission des Operations de Bourse announced the final outcome of Schneider's offer

⁷⁹ 22nd September 1999

⁸⁰ Now 2004 EUMR

⁸¹ Overd A (2002) p375

⁸² Overd A (2002) P376

⁸³ Para 62 of Airtour decision

⁸⁴ Case T-310/01, Schneider Electric SA V. Commission, 2002 E.C.R. 11-4071 (annulment of prohibition decision)

Case T-77/02, Schneider Electric v. Commission, 2002 E.C.R. 11-4201 (annulment of divestiture decision)

⁸⁵ This was in accordance with the requirement of the then Regulation 4064/89

⁸⁶ Para 19 of the judgement

for Legarnds shares of which they acquired 98.7%⁸⁷. Schneider proposed commitments to remedy this which the Commission rejected⁸⁸ and The Commission required S to divest itself of substantial parts of L's business. The commission decision was annulled by the GC citing grounds of inadequate investigation on the commission part and the breach of Schneider's defence by not detailing sufficiently its objections the merger. In this instance the GC also awarded damages for participating in the commissions proposed merger control procedure.

The Commissions appealed to the ECJ not for the reasons that the GC was wrong to overturn the prohibition, but that the prohibition was a direct cause of S's loss resulting from the transfer price reduction. This appeal was only allowed in part and overturned the damages awarded as there was no direct causal link between the price reduction and the illegality vitiating the Commission's decisions. The direct cause of the damage claimed was S's decision.

Tetra Laval BV⁸⁹

In March 2001⁹⁰ Tetra Laval announced a public bid for all outstanding shares in Sidel SA, and on the same day acquired 9.75% of the shares in Sidel from Azeo and Sidel's directors⁹¹. Tetra in accordance with the bid acquired the majority of the shares making its holding above 95% and its voting rights above 95%. This acquirement was notified to the commission⁹² and it was agreed that this constituted an acquisition⁹³.

This merger was prohibited by the Commission on the grounds that the merger would encourage T to "leverage" its pre-existing dominant position by persuading its customers to choose S's machines. This was overturned by the GC⁹⁴. Following this the Commission then appealed to the ECJ against the decision of the General Court in 2003 to annul their decision 2004/124.

On appeal the Commission contended that the GC had exceeded its power of review under the EC Treaty Art 230, and Council Regulation 4064/89 Art 2 in that had created a presumption of

⁸⁷ Para 27 of judgement

⁸⁸ Para 59 of judgement

⁸⁹ Case C-12/03 commission of the European Communities v Tetra Laval BV [2005] E.C.R. I-987

⁹⁰ 27th March 2001

⁹¹ Para 6 of judgement

⁹² This was in accordance to Article 7(3) of the EUMR

⁹³ Within the meaning of Article 3(1)(b)

⁹⁴ Case T – 5/02 Tetra Laval BV v Commission, 2002. E.C.R. II-4382 – Annulment of prohibition
Case T80 – 02, Tetra Laval v. Commission, 2002 E.C.R. II-4519 – Annulment of divestiture decision

legality unsupported by the evidence in regard to the effect of the merger on the market in which T already held a dominant position. However, the ECJ dismissed the Commission's appeal on the grounds that 1) The GC had correctly interpreted the tests applicable in a judicial review of a Commission decision on the effects of a concentration⁹⁵, 2) that proof of anti-competitive effects required precision examination and analysis similar to what is required in collective dominance situations⁹⁶. Therefore, the GC had neither infringed Art 230 EC or misapplied Art 2 of Regulation 4064/89 when reviewing the Commission's decision.

MCI Inc. v. Commission⁹⁷

In October 1999⁹⁸ WorldCom and Sprint signed an agreement and plan of merger⁹⁹ which was to be effected through an exchange of shares between the undertakings¹⁰⁰. This merger was between two American companies who notified the Commission of the reasons that they believed that there was not community dimension. They further notified that Sprint had provided WorldCom a formal undertaking that it would divest itself of its holdings in Global One before the merger took place, and so its turnover would not include its portion in Global One¹⁰¹. In June however the parties faxed a letter to the Commission stating that "the parties no longer proposed to implement the proposed merger in the form presented in the notification"¹⁰². Although the parties had during proceedings notified the Commission of their intentions not to merge the Commission adopted decision 2003/790/EC prohibiting the merger under Art 8(3)¹⁰³. The GC annulled the Commission's decision due to the fact that the parties had ended their agreement by the time the Commission had published its decision. The court held the fact that the parties were continuing to negotiate did not allow the Commission to adopt a decision¹⁰⁴.

⁹⁵ Using the reasoning in Case C-68/94 France v Commissions of the European Communities [1998] E.C.R. I-1375

⁹⁶ Including close examination of the circumstances and conditions in the market

⁹⁷ Case T – 310/00 MCI Inc. v. Commission, 2004 O.J. (C 300) 38

⁹⁸ 4th October 1999

⁹⁹ Falling within the definition of a merger under Article 3(1)(a) of the MR

¹⁰⁰ Para 2 of judgement

¹⁰¹ Para 3 of judgement

¹⁰² Para 13 of judgement

¹⁰³ Regulation No 4064/89

¹⁰⁴ Para 49 of judgement

Literature Review

The academic literature surrounding merger control is vast, and much has been written about the Commissions role in this area, and more recently in the aftermath of the four cases discussed above about the Communities Court's new found willingness to review the commissions decisions in this area and further still annulling them when it deems it necessary. The widely noted opinion by a prominent amount of commentators is that the Commission plays the most "prominent role in the enforcement of merger control"¹⁰⁵. The Commission as mentioned numerous times receives a 'great freedom of action' as it able to choose the types of evidence or the economic approach most appropriate to a particular case"^{106,107}. The Commissions appreciation in enforcement was outlined in the case of *Consten and Grundig*¹⁰⁸. This margin of appreciation is due to the fact that it has deal with complex economic matters. This stance has changed since the early 90's and although the Commission is still given a 'margin of appreciation' when it comes to the economic assessment of concentrations wishing to merge, the commission claim that this discretion has been eroded recently¹⁰⁹. This is something that most commentators have picked up on in the light of the Community Courts judgements. Traditionally as in the Case of *Remia*¹¹⁰the court appeared to limit its scope of review to "whether the relevant procedural rules have been complied with, whether the statement of the reasons for the decision is adequate, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers"¹¹¹. Indeed, under Art2 of the ECMR it is the Commission that has the burden of proving that a notified merger does not impede competition in the Common Market.

It was also observed that Commissions decisions regarding mergers was not always subjected to significant judicial review. The Courts have made it clear that they have no problem in reviewing the Commission's findings, including primary facts and any interpretations that have drawn when determining if the Commissions assessment is free from manifest errors. Which explains that the three judgements in *Airtours*, *Schneider* and *Tetra Laval* collectively "sent a strong signal to the Commission that it needed to be more rigorous in its investigations". As

¹⁰⁵ Renshaw A & Blockx J (2013) p496

¹⁰⁶ Case T- 210/01 General Electric v Commission [2005] ECR II- 5575, [2006] 4 CMLR 686, para 519

¹⁰⁷ Whish R & Bailey D (2012)p831

¹⁰⁸ Joint Case C-56/64 Etablissements Consten Sarl v Commission of the European Economic Community, Case C-58/64 Grundig-Verkaufs GmbH v Commission of the European Economic Community [1966] E.C.R. 299

¹⁰⁹ Whish R & Bailey D (2012) p851

¹¹⁰ Case 42/84, *Remia B.V., Verenigde Bedrijven Nutricia N.V. and Another v E.C. Commission* [1985] E.C.R. 2545,

¹¹¹ *Ibid* at para [34].

rightfully stated the court in these judgements succeeded in mollifying some of the concerns about the excessive power of the Commission and weak supervision themselves¹¹². This is a sentiment that is reiterated throughout the literature. Renshaw and Blockx point to the fact that the possibility of appeal and the courts scrutiny has forced the Commission to improve its analysis of cases notified to itself. The opinion of the ECJ and the Community Courts generally has changed over time, it had been viewed as “technical and subservient” and that it simply applies treaty provisions of the EU¹¹³. However, the courts have become recognized as the ultimate force of the integration of Europe¹¹⁴. Geoffrey Garret described the courts as “faithful agent of the EU member states”¹¹⁵. Following these observations, it can be successfully be argued that the relationship between the Commission and the EU courts has shifted from an “integration imperative during the foundational period of the Community, to one where the Court is characterized as ‘saviour’ of the European Commission. However a more recent critical relationship of the system has matured, reflecting a need for increased credibility and legitimacy¹¹⁶. The landmark judgments of the EU in which the Courts annulled the Commissions prohibition of the proposed mergers are evidencing a heightened standard of review that is in keeping with this observation¹¹⁷.

Although the commission may have discretion re economic assessment it does not leave it free from review from the Community Courts and that this is an “an important part of the whole merger control architecture”¹¹⁸. Court annulled *Schneider* on grounds that the Commissions final decision contained basic arguments that were not included in its statement of objections and its detailed factual analysis. This further confirms *Airtours* and its willingness to review in depth the Commissions analysis. The cases of *Tertra Laval*, *Schneider* and *Airtours* are renowned. They raise a debate amongst both practitioners and academics in regards to the standard or proof for a commission to prohibit a concentration. They also raised the debate amongst commentator regarding the scope of judicial review in merger decisions, and whether the CFI had gone beyond its boundaries of legitimate judicial review? The opinion is split on

¹¹²Whish R & Bailey D (2012) P892

¹¹³ Matti, W & Slaughter A (1998). Revisiting the European Court of Justice. *International Organization*, Vol. 52, No 1

¹¹⁴ Gibson J; Calderia G (1995). The Legitimacy of Transnational Legal Institutions : Compliance, Support, and the European Court of Justice. *American Journal of Political Science*, Vol. 39 Issue 2 p462

¹¹⁵ Garret G (1995). The Politics of legal integration in the European Union. *International Organization* 46

¹¹⁶ Gerber footnote 192

¹¹⁷ Jaeger M (2011). The standard of review in competition cases involving complex economic assessments : towards the marginalisation of the marginal review?. *Journal of European Competition Law and Practice*. 2(4) 295-314

¹¹⁸ Perte L & Nucara A (2005) p703

this some issue with some commentators agreeing that the CFI did infringe Art 230 of the Treaty and Art 2 of the EUMR. The Commission also considered this in the *Tetra Laval* case, and concluded that the CFI had imposed disproportionate standard of proof for prohibitions and that the court had in fact exceeded its role in reviewing decisions by replacing the Commissions view with its own. However there is no general rule was laid down as to what is the burden of proof required by the Commission under the EUMR, which removes any dependable boundaries of the judicial review that can be undertaken by the Courts legitimizing it increased standards. It has been successfully argued that the *Tetra Laval* ruling has significantly strengthened judicial control over the commission¹¹⁹ and raised the standard of proof. Although Bay and Calzado¹²⁰ go further than just suggesting the courts set out a clear and concise test but that the standard should be the same for all merger cases, not just in prohibition but when clearing a merger also¹²¹. I find this argument to be one that is compelling and one that not so many commentators picked up on. It is the correct suggestion that not the standard of proof should be applied equally across all merger decisions, it would in my opinion make the judicial review procedure not only more predictable but credible. However, the Commission is subject to solid transparency requirements and must justify its decision to intervene or not intervene, according to the ECJ the standard of proof is the same for both¹²².

In regards to the standard of the proof this was looked at in the cases of *Airtour's Schneider Electric* and *Tetra Laval*. In each of the cases the wording regarding this has stayed the same. It has been suggested that the CFI has raised the standard of proof. These cases bought a lot of academic attention in regards to the standards of proof that the Commission must reach in order to satisfy their decision. It is well known that the Community Courts do not lightly disagree with the Commission's analysis except in the case were there is a manifest error of assessment¹²³. Nevertheless, a great emphasis was placed on the requisite legal standard and what is required of the Commission. The court requires the need for the Commission put forward evidence that the conditions of Art 2(3) ECMR have been satisfied¹²⁴. It is from these rulings that a reoccurring question is raised within the literature, this is whether the GC has in

¹¹⁹ Petre & Nucara (2005). Standard of proof and scope of judicial review in EC merger cases : everything clear after Tetra Laval (2005) E.C.L.R, 26(12) 692-704; Szczordrowski J (2012).Standard of judicial review of merger decisions concerning oligopolistic markets. Yearbook of Antitrust and Regulatory Studies. Vol 2012, 5(6)

¹²⁰ Bay M & Calzado J (2005) Tetra Laval II : the coming of age of the judicial review of merger decisions. W. Comp, 28(4), 433-453

¹²¹ This something that could be assessed as a lone topic but it is worth mentioning.

¹²² Case T- 464/04 Impala v Commission [2006] ECR II- 2289, [2006] 5 CMLR 1049

¹²³ Bailey p846

¹²⁴ Bailey (2003)

fact raised the standard of proof with its ruling. Some make the observation that the GC has indeed created a new and high standard of proof¹²⁵. Prete argued that this observation is correct evidenced by the fact that the test applied was stricter and the actual review carried out by the GC was more concise¹²⁶. However, the ECJ on appeal by the commission did not articulate a precise and transparent test, which leaves a grey area.

Academics point to the fact that the courts have had an important role in the substantive development of merger control in the EU, especially in the judgements of *Airtours* and *Tetra Laval*. The *Airtour's* decision has been described as being of crucial importance¹²⁷, based around the concept of collective dominance. The court clarified the test for collective dominance so that future cases should be predictable. The Director at Lexecon Ltd who acted as economic advisor to *Airtour's* during the case and the appeal described the Courts decision to overturn the Commission's prohibition of the proposed merger as "watershed in the EU merger policy. It is rightfully argued that the most significant aspect of the judgement is the clarity given for assessments of future mergers in oligopolistic markets. The decision was also referred to as "a wakeup call" to Commission due to the severity of the judgement. It reinforces the calls for greater transparency and accountability of the Commission's decision making process. The Commission is under an obligation to publish their final decisions; however, it can be said that it is not full transparency in its decisions as the evidence gathered during an investigation is only made available to the parties concerned in the merger^{128,129}. The Commission stance of the ruling is significantly different to the academic view, the former Director General of the DG Competition said that the judgement "was a real blow" "important warning shot" and the Commission would have to take it serious. This statement it could be argued sets the mind-set of the Commission is that of a time gone by when it had a greater margin of appreciation in its analysis. It was thought that this ruling would create some

¹²⁵ J. Temple Lang, "Two important Merger Regulation judgments: the implications of Schneider-LeGrand and Tetra Laval-Sidel" [2003] E.L. Rev. 268

A. Burnside, "Preuve Solide: The CFI Raises The Bar" in Competition December 2002, available on www.sweetandmaxwell.co.uk; Andreangeli A (2005) Fairness and timing in Merger Control proceedings : will the "stop-the-clock" clause work? European Competition Law Review 26(7), 403-409

¹²⁶ Perte L & Nucara A (2005). Standard of proof and scope of judicial review in EC merger cases : everything clear after tetra Laval?. European Competition Law Review

¹²⁷ Haupt H (2002). Case Comment : Collective dominance under Article 82 E.C and E.C. merger control in the light of the Airtours judgement. European Competition Law Review 23(9), 434-444

¹²⁸ The commission has occasionally provided a non-confidential version to third parties but is not required to do so

¹²⁹ Kovacic, W et al (2014) p91

predictability¹³⁰ in regards to collective dominance, however it was noted that Moving forward from the *Airtour's* decision it was observed that the Commission's thinking regarding to collective dominance had evolved even being described as more sophisticated, however it has not been systematic the Commission's stance is still viewed as unpredictable¹³¹, highlighting the need for change in this area¹³². This lack of predictability confirms Stroux's correct observation that guidelines on the assessment of collective dominance are "badly needed" to provide the Commission with a framework for assessment¹³³. Contrary to this some commentators believe there may be uneven standards applied within the GC and that the fate of a particular merger decision may be substantially influenced by the chamber who deals with the case, and that not all will apply the standard of judicial review. Some chambers may follow the traditional theory of allowing the discretion to the Commission when assessing complex economic matters, whereas others will apply a more thorough scrutiny¹³⁴. There is no concrete evidence to support this theory and as in life each case is different and each person will have their own view, however it is something that has been raised and should be borne in mind.

One reoccurring problem that has been noted about the effectiveness of the Merger Control system in the EU is the time taken by the Courts to reach its judgement. It was noted that the length of proceeding before the GC was increasing and so the expedited procedure was introduced¹³⁵. The average time was 27.5 months in cases other than intellectual property and staff cases¹³⁶. The expedited procedure was positively picked by up on in the literature and following its introduction several cases were heard under this procedure¹³⁷. Commentators noted that the use of this fast track procedure confirmed that the court can deal effectively with complex issues in a reduced time frame¹³⁸ and this was evidentially backed up in the case of

¹³⁰ Nicolas Petit, *The Future of the Court of Justice in EU Competition Law, New Role and Responsibilities, in THE COURT OF JUSTICE AND THE CONSTRUCTION OF EUROPE: ANALYSES AND PERSPECTIVES ON SIXTY YEARS OF CASE-LAW* 397 (Ct. of Justice European Union ed., 2013).

¹³¹ Overd A (2002). Editorial : After the Airtours appeal. *European Competition Law Review*. 23(8), 375 – 377

¹³² Overd A (2002). Editorial : After the Airtours appeal. *European Competition Law Review*. 23(8), 375 – 377

¹³³ Stroux S (2002). Case Comment : Collective dominance under the Merger Regulation : a serious evidentiary reprimand for the Commission. *European Law Review*, 27(6), 736 – 746. P743

¹³⁴ Bay M et al. (2007)

¹³⁵ Amendments to the Rules of Procedure of the Court of First Instance of the European Communities, 2000 O.J. (L 322) 4. In 2000, judgment was rendered. on average after 27.5 months in cases other than intellectual property and staff cases.

¹³⁶ Renshaw A & Blockx J (2013) p502

¹³⁷ See Case T-310/01, *Schneider Elec. v. Comm'n*, 2002 E.C.R. II-4071; Case T-77/02, *Schneider Elec. v. Comm'n*, 2002 E.C.R. II-4201; Case T-5/02, *Tetra Laval v. Comm'n*, 2002 E.C.R. II-4381; Case T-80/02, *Tetra Laval v. Comm'n*, 2002 E.C.R. II-4519; Case T-114/02, *BaByliss v. Comm'n*, 2003 E.C.R. II-1279; Case T-119/02, *Royal Philips v. Comm'n*, 2003 E.C.R. II-1433; Case T-87/05, *EDP v. Comm'n*,

¹³⁸ Temple Lang J (2005) Two important Merger Regulation judgements: the implications of *Schneider-Legrand* and *Tetra Laval-Sidel*

Schneider and *Tetra*. This fast track procedure can preserve the commercial viability for transactions that are able to use this procedure, however this is not always the case and even under this procedure it may not allow some parties to complete their transactions¹³⁹. However, since 2006 all applications for this procedure have been refused. This could be due to the fact that this procedure requires only one ground for appeal and the cases following have been more complex and warrant the normal appeals procedure to remove time constraints. The fact that this option is available only further serves to strengthen the Courts role in merger control. Although it would seem we have taken a step backward in regards to the length of time to reach judgement as there have been no cases under the fast track for almost 10 years, some suggestions to remedy this are for extra judges¹⁴⁰, creation of specialized courts¹⁴¹, the Commission to review the case and the courts to make final judgement¹⁴², replacement of the lengthy Phase II investigation¹⁴³. It is a reoccurring criticism that academics highlight that the decision making powers in relation to antitrust cases should be removed from the commission solely to the Community courts¹⁴⁴. All of these are viable options, however this would require the EC Treaty to be changed incorporate this additional task.

The majority of the literature written in relation to the commissions decisions in relation to merger with particular reference to the specific case law mentioned above, points to the fact some change or amendment is needed. Although the annulment of the Commission's decision in *Airtours*¹⁴⁵ was overturned by the GC it has raised doubts about the Commission all in one role, as ??? rightly points to that a "single erroneous decision" does not show that there is a problem of prosecution bias within the Commission. Errors can occur any institution that we may encounter through our lives at time to time, it is weather there is "an abnormal incidence of erroneous prohibition decisions"¹⁴⁶. This cannot be the case as the statistics show a small percentage of all notifications to the Commission have been prohibited and from these only 4 overturned upon review. Are these the actions of an institution that have prosecutorial bias. I would argue not on these numbers. Only Frank Montag has attempted to show statistically that the Commission has prosecutorial bias. This was based around fines imposed for violation of Articles 81 or 82 EC, highlighting that only 4 of 24 decisions by the Commission that imposed

¹³⁹ Ibid p267

¹⁴⁰ Koppenfels U (2015)

¹⁴¹ Ibid

¹⁴² Gibson J; Calderia G (1995)

¹⁴³ Renshaw A & Blockx J (2013) p 519

¹⁴⁴ Montag F, Ehlermann, Schuman

¹⁴⁵ Case T – 342/99, *Airtours v Commission*, 2002 E.C.R. II-2585

¹⁴⁶ Montag F (1996)

finer where confirmed by the Courts¹⁴⁷. He concluded that the limited sample should not be overlooked as they provide “remarkable evidence of the Commissions poor record in reaching decisions imposing fines which come under scrutiny”¹⁴⁸. Again I stand by my earlier conclusion that a small amount of wrong decisions out of the 100’s of notifications received cannot in any way prove bias on the Commissions behalf. I would suggest that error can creep into any procedure. Slater et al believe that the Community competition needs to change or there will be future condemnation from the MS collectively or by the ECHR¹⁴⁹. Whilst not agreeing with this argument in its entirety, change is needed, as there will never be independence and impartiality when one institution is judge jury and executioner. Keeping with the theme, one interesting theory put forward is that the Commission’s role is in contravention to Article 6(1) ECHR. There have also been applications before the courts arguing that the current system of merger control in which the Commission investigates and makes decisions is incompatible with Article 6(1). However, the court disagrees¹⁵⁰. The view was taken in *Schneider Electric*¹⁵¹ was that review by the Community courts of commission decisions is sufficient. They court did however recognise that the Commission it not an “independent and impartial tribunal” as under Article 6 ECHR.

Conclusion

My focus whilst researching this area was whether the Commission does in fact exceed its competence in its application of legislation in light of relevant case law? Statistically it cannot be said that this is the case due to the small numbers of proposed concentrations actually prohibited. However, I would make the observation that due to the annulment of certain Commissions decisions by the Community courts that there may at times be applying the law wrong or overstepping it competency in its application. The legality of a Commission decision depends on whether the court can conclude on assessment of the evidence available that the two limbs of Article 2(3) of ECMR are satisfied¹⁵². The Court has proven that it is willing to

¹⁴⁷ Until 1996 which was his time of writing

¹⁴⁸ F. Montag, ‘The Case for a Radical Reform of the Infringement Procedure under Regulation 17’ (1996) 8 European Competition Law Review 428, at 430 - 432

¹⁴⁹ Slater et al (1994) Competition law proceeding before the European Commission and the right to a fair trial : no need for reform?. Global competition Law Centre Working Paper Series GCLC Working Paper 04/08

¹⁵⁰ Judgment of the Court of First Instance of 15 March 2000 in Joined Cases T-25/95 a.o. Cimenteries CBR a.o. [2000] ECR II-700, paras. 712-724

¹⁵¹ Case T-351/03

¹⁵² *Schneider Electric*

review the Commissions decisions in relation to proposed mergers; this is highlighted in the annulment of four Commission decisions¹⁵³.

As it can be seen the relationship between the Commission and the Community courts is one that has shifted over time. Although the commission had previously enjoyed a margin of appreciation the courts have proven that they will assess and if required intervene and set out substantive tests for the commission to follow. The collective dominance test was questioned by the courts relevant guidelines were set out. Furthermore, the substantial legal requirements in the burden of proof for their decisions have seen the Commission come under increased scrutiny from the General Court, although the ECJ missed the opportunity to substantially cement the requirement in case law.

This thesis set out to see if the Commission oversteps its boundaries or if in fact the legislation in this area was insufficient. It cannot be said that the legislation is insufficient as it has successfully been applied to prohibit mergers that would have created a dominant position. However, the case law would suggest that at the Commission has overstepped or carried out an insufficient analysis or over analysis incorrectly, although statistically the limited number of annulled commission decisions could be said to disprove this and show that the commission rarely oversteps its competences set out in the treaty. However, the court in its progression from practical bystander to active player in the EU merger regulation has shown that at times the Commission does need checking and that previously the Commissions freedom has made them a little over confident in their decision making in this area. The finding of the courts in their review of various cases have shown that they are will to rectify a wrong decision

Recommendations have been suggested that the Commission should not have the role as judge and jury, with various alternatives suggested by commentators, for the moment that is all their suggestions and as it stands it is still the Commission who is responsible for merger control decisions within the EU, with the Community Courts showing that they will if needed question and review decisions in which they feel the Commission has not provided substantial evidence for its decisions. I would surmise that the current system of merger control in the EU is sufficient and that the case law in which the Courts have annulled the commissions decisions does not support the need for immediate change and that Commission is far exceeding its

¹⁵³ Airtours, Schneider, Tetra Laval, MIC

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competence in its application of legislation causing it to be ineffective in light of relevant case law.

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