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TITLE OF THE RESEARCH PAPER: What Are the Micro-, Macro- and Socio-Economic Implications of Mergers and Acquisitions and Shall Legislators and Cartel Authorities Respond with a Regulatory Regime that Focuses on Competition Law Considerations rather than Relying on Public Interest and Industrial Policy Objectives?

ABSTRACT OF THE PAPER:

This research paper examines not only the micro-economic rationale of concentrations but also the macroeconomic and societal implications in order to establish how competition shall respond to the challenges created by dominant undertakings which can impose unfavourable trading conditions without any risk of declining market shares owing to immense behavioural independence from competition. Additionally, it is questioned whether merger control law shall take public interests into account if parties allege that a concentration fosters economic development.

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Research Paper

What Are the Micro-, Macro- and Socio-Economic Implications of Mergers and Acquisitions and Shall Legislators and Cartel Authorities Respond with a Regulatory Regime that Focuses on Competition Law Considerations rather than Relying on Public Interest and Industrial Policy Objectives ?

by

Henning Matthiesen

University of Dundee

Centre for Energy, Petroleum and Mineral Law and Policy

LL.M. Programme

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Abbreviations

EC	European Community
ECSCT	Treaty Establishing the European Coal and Steel Community
ECT	Treaty Establishing the European Economic Community, as Amended by the Treaty of Amsterdam
HHI	Herfindahl-Hirschmann-Index
IEMD	Internal Electricity Market Directive
IGMD	Internal Gas Market Directive
JV	Joint Venture
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, as Amended by Corrigendum to Council Regulation 4064/89/EEC of 21 December 1989 on the Control of Concentrations between Undertakings, O.J. L 257, 21/09/90, p 13.

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; 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.
SCP	Structure-Conduct-Performance Model
TPA	Third Party Access

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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).

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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.

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Kommentar:

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as Amended on 23 February 1984, O.J. C 51 23/02/84 p 8;

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1. Introduction

This paper will discuss the relevance of merger control regimes in liberal market economies so as to establish how one should tackle the micro- and macro-economic and societal implications of concentrations of undertakings which is especially important for supranational merger control under either Art. 66 Treaty Establishing the European Coal and Steal Community[1] [ECSCT], Art. 81 and 82 Treaty Establishing the European Economic Community[2] [ECT], as it was introduced by the Commission[3] and reviewed by the ECJ[4], the original Merger Regulation[5] [MR1989] or the amended Merger Regulation of 1997[6] [MR1997].

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[1] 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).

[2] 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, ECT).

[3] Firstly, concentrations were deemed to be excluded from the scope of Art. 81 ECT so that they could only be analysed by the criteria of Art. 82 ECT: 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 ECSCT as the ECT does not address merger control; q.v. M. Furse, Competition Law of the UK and EC (1st ed.) (London, U.K., Blackstone Press Ltd., 1999).

[4] The ECJ found as early as 1973 that Art.82 ECT was a tool to monitor concentrations: q.v. ECJ Case 6/72 *Continental Can 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 ECT with respect to minority shareholdings: q.v. ECJ Cases 142/84 & 156/84 *BAT and Reynolds v Commission* [1987] 4487.

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

[6] 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).

The significance of mergers and acquisitions in the energy industries will have a decisive influence on the liberalisation of European electricity and gas markets which was introduced by the Internal Electricity Market Directive[7] [IEMD], the Hydrocarbons Directive[8] and the Internal Gas Market Directive[9] [IGMD]. The paper will focus on the disputable idea that - according to different societal values - regulatory amendments - especially the introduction of third party access by means of the said directives - only form the first necessary condition for attaining economic alterations and increased competitiveness of European energy supply industries whereas the marketers' pro-active strategies regarding mergers represent the second and decisive criterion in order to increase the competitive performance of the European energy supply industries. Such pro-active Conduct is threatened by corporate policies that create defensive concentrations, only intended to achieve horizontal and vertical integration in order to conserve oligopolistic market structures, so that such behaviour should be closely monitored by merger control and generally outlawed.

The approach of the paper is backed by the fact that concentrations of independent undertakings play a crucial 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.

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[7] 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).
[8] 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.
[9] 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.

A second justification is closely related to the ambivalent nature of concentrations: As they can be used not only to increase the process of market opening and the expansion into new markets by pooling scarce resources but also to create regional or national champions, to create barriers to market entry of new competitors, enable cross-subsidisation so as to expand a dominate position on heretofore competitive up- and downstream markets, the merger control regime has to fulfil the extremely sensitive task of enabling undertakings to generate the abovementioned pro-competitive benefits and of proportionately[10] limiting the opportunities to establish or strengthen dominant positions which can easily be abused later.

The paper will address the topic by means of the following methodology: Firstly, a brief account of the economic notion of concentration will be given. Secondly the microeconomic rationale of mergers is scrutinised, before the macro-economic implications are discussed. Finally, the socio-economic and societal effects of mergers are considered before it will be concluded that a comprehensive merger control regime that is efficiently monitored is a condicio-sine-qua-non for a balanced development of industrial sectors and that an approach limited to preserve abuses of dominant positions on relevant product or service markets and to prevent barriers to entry and exit is superior, compared with a broad industrial policy regime that primarily concentrates on public interests.

[10] 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 examiniation and decision.

2. Background

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 either by trying to create oligopolies or by achieving vertically integrated companies or by preparing for relentless competition.

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 maximum extent and due respect to public interests as a merger or take-over bid shall not proceed if the outcome dis-proportionately detriments competition on markets for similar products or services. Products or services will be similar if they are exchangeable in regional[11], temporal[12] and functional terms[13]. This specification must be made from the perspective of the average counterpart on the market. What the average consumer deemes to be exchangeable defines the relevant market[14].

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[11] Geographical criteria like supply regions, transportation costs.

[12] Temporal market definition depends inter alia on shop opening hours, preferred delivery periods.

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

[14] 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.

2.1 Concentration of Undertakings

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

2.1.1 Undertaking in terms of Merger Control Law

For the purposes of merger control, the term undertaking has to be interpreted extremely broadly[18] so as to include not only entities pursuant to company law dogmatic[19], but also sole traders, public enterprises[20], influential institutional or even private shareholders[21]. The reason is that all these 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.

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[15] 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 Euorpean Communities (1st ed.) (London, U.K., Blackstone Press Limited, 1991) p 35.

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

[17] Art. 3 II MR1997.

[18] q.v. for European Antritrust Law: Art. 3 I lit. b 1st Variant "persons" and Art. 3 I lit. b 2nd Variant "undertakings" MR1989 and MR1997; q.v. for German Antitrust Law: BGHZ 74,359, 364 *Brost und Funke v WAZ*; V. Emmerich, Kartellrecht (8th ed.) (München, Germany, C.H.Beck, 1999) p 17-18 and 270.

[19] e.g. corporations, private (limited liability) companies, PLCs, partnerships.

[20] 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, e.g. awarding contracts for the completion of infrastructure projects to private companies. For instance, several federal states could merge their public procurement activities so as to ensure better conditions.

[21] e.g. German merger control: White Paper Regarding the Antitrust Act, Federal Parliament Gazette [Bundestagsdrucksache] 8/2136 and 8/3690; V. Emmerich Kartellrecht (8th ed.) (München, Germany, C.H.Beck, 1999) p 270.

Within the scope of European merger control law, a JV used to be described by two criteria: Firstly, it was necessary that the JV autonomously performed its tasks on a long lasting basis[22]. Secondly, it was cumulatively 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[23]. Such JVs are called Concentrative JVs. If these included ancillary or severable restraints, MR1989 and Art. 81 ECT were cumulatively applicable[24]. Other types of JVs, i.e. concentrative ones involving non-ancillary and non-severable competitive restraints, concentrative ones below the turnover thresholds, or cooperative ones were only governed by Art. 81 ECT[25]. Nowadays, it is - apart from the turnover thresholds[26] - solely relevant whether an organisational structure is established that is able to fulfil functions of autonomous entities on a long-lasting basis[27]. 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[28]. For the purpose of this paper, the term merger is used in a broad sense so that it will generally refer to the abovementioned phenomena. This approach is supported by the fact, that -

[22] Art. 3 II 2nd Sentence MR1989.
[23] Art. 3 II 2nd sub-paragraph MR1989. Concentrative joint ventures were covered by the Merger Regulation if they met the critieria of turnover and geographical allocation pursuant to Art. 1 MR1989. Otherwise, Art. 81 I ECT was applicable.
[24] T.A. Downes and J. Ellison, The Legal Control of Mergers in the Euorpean Communities (1st ed.) (London, U.K., Blackstone Press Limited, 1991) p 149.
[25] T.A. Downes and J. Ellison, The Legal Control of Mergers in the Euorpean Communities (1st ed.) (London, U.K., Blackstone Press Limited, 1991) p 149.
[26] Art. 1 II MR1989; Art. 1 II-III MR1997.
[27] Art. 3 II MR1997. However, quantitative thresholds are discussed infra.
[28] 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

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 takeover bid by the "partner" will be issued or even more inconvenient companies may try to threaten the entity in the foreseeable future[29].

2.1.2 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[30]. 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[31]. 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[32] and not between the shareholder and the target company because

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Federal Law Gazette 1995 I 428, as amended on 22 July 1998, Federal Law Gazette 1998 I 1878).

[29] 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.

[30] Art. 3 III lit a.-b. MR1989 and MR1997.

[31] V. Emmerich, Kartellrecht (8th 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 hareholder-agreements.

[32] T.A. Downes and J. Ellison, The Legal Control of Mergers in the Euorpean Communities (1st ed.) (London, U.K., Blackstone Press Limited, 1991) p 36.

only undertakings operate on markets according to the rationale of competition law.

2.2 Categories of Mergers

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 consumers[33]. 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[34]. Lastly, hybrid mergers[35] involve undertakings that partly compete in relevant product markets, partly engage in up- or downstream businesses and partly engage in absolutely separate sectors.

3. Microeconomic Rationale of Mergers

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.

[33] R. Whish, Competition Law (3rd ed.) (London, U.K., Butterworths, 1993) p 665.
[34] V. Emmerich, Kartellrecht (8th ed.) (München, Germany, C.H.Beck, 1999) p 266-267.
[35] They can also be called "market combination mergers"; q.v. V. Emmerich, Kartellrecht (8th ed.) (München, Germany, C.H.Beck, 1999) p 267.

3.1 Microeconomic Benefits of Mergers

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

3.1.1 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[36] 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[37].

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 only operate in a downstream segment of the commodity chain[38].

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

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[36] J.J. Spengler, *Vertical Integration and Antitrust Policy*, Journal of Political Economiy 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 (3rd ed.) (London, U.K., Butterworths, 1993) p 666.

[37] R. Whish, Competition Law (3rd ed.) (London, U.K., Butterworths, 1993) p 666.

[38] 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).

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.

Compared with single activity companies, vertically integrated ones benefit from reduced volume risks as well[39]. The overall potential of risk reduction by offsetting antagonistic risks along the supply chain[40] can be illustrated by the following examples:

A scarcity of a commodity increases the supply risk and the purchase price risk. Higher purchase prices generally lead 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 riks 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[41].

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[39] 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.

[40] 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).

[41] 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[42].

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[43]. However, this argument is also true for horizontal mergers.

3.1.2 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[44]. 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

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

[43] 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).

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

position on market for regionally, temporally and functionally relevant products 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[45].

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[46] functions, especially the traditionally neglected brand building in the utility sectors[47].

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[45] q.v. Theory of monopolistic Competition.

[46] 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).

[47] 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 agrument 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[48], whereas short-term electricity or gas trading requires more sophisticated models[49]. 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[50]. Such integration can also lead to managerial economies[51] 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

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[48] 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).

[49] e.g. the so called profit-at-risk model, which becomes relevant after the forward markets near the delivery date so that wether 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).

[50] 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.

[51] R. Whish, Competition Law (3rd ed.) (London, U.K., Butterworths, 1993) p 664.

supervision of different kind of plants involve comparable total quality management skills[52].

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[53].

Lastly, it must not 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[54] - 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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[52] e.g. programmes to increase plant efficiency, reduce maintenance and increase reliability.

[53] 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).

[54] W.J. Simpson, *Canada Analysis - The Missing Link*, Petroleum Economist 19 (March 2000).

3.1.3 Microeconomic Benefitial 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[55]. Especially, the power to undermine free markets by means of systematic predatory pricing[56] is criticised which is financed by revenues or gentle price increases in other product markets[57].

The second school focuses on the concept of "relevant market power"[58] which is widely accepted as a yardstick to examine whether a dominant position is available[59]. 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

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[55] The so called deep pocket theory, q.v. R. Whish, Competition Law (3rd ed.) (London, U.K., Butterworths, 1993) p 669; V. Emmerich, Kartellrecht (8th ed.) (München, Germany, C.H.Beck, 1999) p 267.
[56] systematic pricing below costs, dumping.
[57] The strategy is called "cross subsidisation".
[58] A. Bork, The Antitrust Paradox, (1st ed.) (New York, U.S., Harper Collins Publishers, 1978) Chapter 12; V. Emmerich, Kartellrecht (8th ed.) (München, Germany, C.H.Beck, 1999) p 178.
[59] q.v. Art. 82 ECT; Section 19 I in combination with 19 II 1 No.1 1st and 2nd Variant and No.2 German Antritrust Act of 26 August 1998 [Gesetz gegen Wettbewerbsbeschränkungen], Federal Law Gazette 1998 I 2521.

so impressive that potential or real competitors abstain from commencing serious attacks. Consequently, the said opportunities form real incentives for founding conglomerates and these mergers must be controlled, too.

3.2 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.

3.2.1 In-transparent Economic Status of the Partner

First of all, a profound lack of knowledge of the true economic[60] or financial[61] status of the counterpart can cause serious detriment and which - a posteriori - may explain why the counterpart did so happily agree on the merger covenants. An analogous problem can arise if the allocation of important intellectual property rights remains non-transparent[62]. All these shortcomings can prevent the projected economies of scale[63].

3.2.2 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 becomes a future target[64].

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[60] e.g. BMW seriously mis-judged the marketing opportunities and currency fluctuations regarding the unseccussful integration of Rover although the technical and the productivity weaknesses had been solved.

[61] 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).

[62] For example, Volkswagen did not duely analyse the allocation of the Rolls Royce brand when bidding for the car manufacturer so that a dispute with BMW arose.

[63] R. Whish, Competition Law (3rd ed.) (London, U.K., Butterworths, 1993) p 671.

[64] e.g. Mannesmann's credit rating was reduced after the successfull bid for Orange Telecom in Summer 1999 and subsquently it did not have sufficient resources to defend against the bid of Voodafone Airtouch.

3.2.3 Managerial Dis-Economies

Thirdly, severe managerial dis-economies can be caused by insufficient merger preparations and unreasonable implementation: Careful strategies are 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[65] 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[66]. 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[67].

3.2.4 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 only superficially differ for marketing reasons[68] can leave consumers either unsatisfied at all or persuade them to opt for the cheapest option owing to similar basic quality

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[65] R. Whish, Competition Law (3rd ed.) (London, U.K., Butterworths, 1993) p 670.
[66] 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.
[67] R. Whish, Competition Law (3rd ed.) (London, U.K., Butterworths, 1993) p 669.
[68] 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).

standards. Even more seriously 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.

4. 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.

4.1 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[69].

4.1.1 Aggregated Productive Efficiencies

The persistent threat that companies, which do not duly perform on stock exchanges[70], 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[71].

The important role of shareholders with respect to takeover 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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[69] R. Whish, Competition Law (3rd ed.) (London, U.K., Butterworths, 1993) p 666.

[70] 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).

[71] R. Whish, Competition Law (3rd 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[72]. 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.

4.1.2 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 crucially depends 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[73]. Therefore, mergers are an important tool to avoid barriers to exit markets.

4.1.3 Tool to Rescue Weak Undertakings

Additionally, concentration provide weak companies with an important means to evade insolvency by means of pooling scarce resources[74] which is crucial in recessive periods of the business cycle.

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[72] R. Whish, Competition Law (3rd ed.) (London, U.K., Butterworths, 1993) p 667.
[73] R. Whish, Competition Law (3rd ed.) (London, U.K., Butterworths, 1993) p 667.
[74] This reflect the general idea of managerial economies and economies of scale.

4.1.4 Facilitator of Market Integration

Finally, mergers may strengthen the creation of a single and transparent European market[75] 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.

4.2 Detrimental Macroeconomic Effects of Mergers

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

4.2.1 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[76]. Its methodology is as follows:

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[75] R. Whish, Competition Law (3rd ed.) (London, U.K., Butterworths, 1993) p 668.

[76] 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. The concentration is deemed to be contrary to competition law if the result exceeds 1800 and the individual index of the largest entity involved is increased by at least 100 points. It is deemed to be legal if the concentration is below 1000 points or if cumulatively the aggregated result is between 1000 and 1800 and the increase of the largest partner is below 50.

As a matter of fact, legal uncertainty remains if the HHI exceeds 1800 points and a very powerful entity mergers with an extremely small partner[77].

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 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,
- request of dominant downstream marketers that the upstream company shall bear parts of the costs regarding brand-building and marketing.

[77] e.g. Undertaking A with a market share of 45% (HHI 2025) mergers 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.

However, it can be summarised that any kind of concrete behaviour, of which the efficacy and the detrimental effect on competitors or consumers primarily depends on the 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.

4.2.2 Unemployment and Regional Disparities

Additionally, mergers have an undisputed potential of raising unemployment rates as the realisation of synergies is closely related 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[78].

As a matter of fact, these implications can be addressed more adequately by political means that are superior to the introcution 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[79], pro-active regulatory policies with regard to land planning law and environmental standards, investments in education and

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[78] R. Whish, Competition Law (3rd ed.) (London, U.K., Butterworths, 1993) p 670.
[79] e.g. higher depreciation rates.

infrastructure and development programmes and business parks can provide the incentives for undertakings that are necessary not to abandon activities in remote, rural areas[80] without putting the efficacy of competition law at risk.

4.2.3 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[81] so that the democratic institutions are put at risk if an economic crisis occurs[82]. 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[83] 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[84]. Consequently, the IGMD explicitly entitles Member States to derogate from the IGMD in order to enforce reciprocity[85].

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[80] 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).
[81] V. Emmerich, Kartellrecht (8th ed.) (München, Germany, C.H.Beck, 1999) p 3.
[82] 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.
[83] R. Whish, Competition Law (3rd ed.) (London, U.K., Butterworths, 1993) p 671.
[84] e.g. EdF acquired the Regional Electricity Companies London Electricity and Southwestern in the UK an a share in Energiewerke Baden-Würtemberg 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).
[85] Art. 19 IGMD.

4.3 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.

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[86] 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[87]

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:

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[86] The importance of consultants is highlighted by D. Townsend, *Mergers & Acquisitions - Leading the Merger Pack*, Petroleum Economist 33 (March 2000).

[87] 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 solely the Merger Regulation, the procedure of the Merger Regulation and substantially Art. 81 or solely Art. 81 et seq. ECT may apply.

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 strictly antitrust law based considerations 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[88].

4.3.1 Public Interest Theory

The public interest approach is backed by the Preamble and Art. 1 III of the draft merger regulation[89] which would have enabled the Commission to declare the regulation inapplicable in order to attain "priority" objectives of the EC[90]. 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[91] and supported by government officials and Commission officials[92] in the aftermath of the De Havilland Decision[93].

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[88] V. Emmerich, Kartellrecht (8th ed.) (München, Germany, C.H.Beck, 1999) p 477-478.

[89] Draft Meger 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.

[90] 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 (1st ed.) (Deventer, Netherlands, Kluwer Law and Taxation Publishers, 1988), p 281.

[91] B.J. Rodger and A.MacCulloch, Competition Law and Policy in the EC and UK (1st ed.) (London, U.K., Cavendish Publishing Limited, 1999) p 3.

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

[93] 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.

4.3.2 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 relevance of industrial policy which once justified a derogation from the whole draft was intentionally reduced 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.

4.3.3 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[94] Model [SCP] is an accurate means to predict the new characteristics of business organisation:

[94] J.S. Bain, Barriers to New Competition: Their Character and Consequences in Manufacturing Industries (1st 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).

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.

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[95]. This idea can be exemplified not only by the controversy regarding the third party access [TPA] regimes of the IEMD[96] and the IGMD[97] 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[98], the derogations for take-or-pay contracts[99] and stranded investments[100] and finally the efficacy of the implementation by the Member States[101].

The latter societies will prefer relatively weak negotiated TPA or single buyer procedures which are additionally weakened by time consuming,

[95] 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).
[96] Art. 16, 17 I-V IEMD.
[97] Art. 14-16 IGMD.
[98] 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.
[99] Art. 17 in conjunction with Art. 25 I; III GMD.
[100] Art. 24 IEMD.
[101] 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.

non-transparent negotiations of concession agreements between the competitors[102] 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 dominant positions and to raise barriers to market entry so that oligopolistic structures shall prevail in the long-term.

5. Conclusion

This paper has discussed the relevance of merger control regimes in liberal market economies. It was established that a comprehensive merger control regime is indispensable in order to sustain the long term efficacy of competition law. If ignorance of concentrations prevails and public interest ideologies support attitudes generally in favour of large undertakings, the powers of competition authorities to attack cartels or dominant positions may become insufficient to guarantee allocative and productive efficiency and thereby assuring de-centralised distribution of power and wealth within the society.

This conclusion is especially important for the creation of a single market in general and more specifically for the creation of long-term a level playing field with minimum barriers to entry for the recently liberalised energy markets.

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[102] 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 seperate 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).

Attacking attempts to erect barriers to entry is crucial to introduce unimpeded cross-border electricity and gas trade and to allow investors from other Member States or third countries to challenge existing oligopolies. However, due to the ambivalent nature of mergers, the specific assessment relies on the individual case. Even then, it remains extremely difficult for cartel authorities to assess ex ante to what extent a concentration of undertakings may generate the economies of scale and scope, which the applicants claim to achieve[103], and whether these benefits will offset the drawbacks for market structure as the number of actual or potential competitors is reduced.

[103] O.E. Williamson, *Economies as an Antitrust Defense: the Welfare Trade-Offs*, Am Ec Rev 18-36 (1958); R. Whish, Competition Law (3rd ed.) (London, U.K., Butterworths, 1993) p 669.

6. Annexes

6.1 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).

6.2 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).

6.3 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).

6.4 Importance of Consultancy Firms 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.