

The Appraisal of Collective Dominance under the
Clarified Substantive Test of the New EC Merger
Regulation

– *A step towards greater global convergence of merger control?*

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3. Introduction

3.1 Foreword

The overall purpose of a merger control system is to ensure effective competition. In an effective competitive market, high quality products are accessible at low prices. In addition, a wide diversity of goods and services are offered and the market is innovative.² If a firm, through a merger, significantly increases its market power, it may be able to endanger effective competition in the market.

The EC Merger Regulation (“the ECMR”) was adopted by the Council of Ministers in 1989 after intense debates concerning the need of a European merger control system.³ The system’s main influence was German competition law, which in turn was based on the *ordoliberal school*, primarily originating from the University of Freiburg.⁴ One of the main purposes of German antitrust law was to prevent dominant undertakings from threatening the existence of small and medium-sized companies in a market. German, and thus European, competition law therefore established a Market Dominance test (“MD Test”) as the substantive test according to which mergers should be appraised. When the ECMR came into force on the 21st of September 1990, it consequently prescribed that a concentration which has a community dimension and “creates or strengthens a dominant position as a result of which competition would be significantly impeded in the Common Market or a substantial part of it” was caught by the ECMR. It was fairly predictable that a MD test would be established in EC competition law, since the legal terminology was familiar and the notion of “dominance” already established by the European Court of Justice (“the ECJ”) in its application of Article 82 EC Treaty.⁵

The concept of dominance was, however, not defined under the ECMR and consequently was to be dealt with by the Commission in its decisions. In 2002, the Commission had taken decisions in over 2000 merger cases.⁶ Over the years, it came to adopt a dynamic approach in its application of the notion of dominance under the ECMR.⁷ The MD test evolved and the Commission found the test to be sufficiently flexible to apply to new situations, such as the concept of oligopolistic markets.

Oligopolistic markets were examined in depth for the first time in the *Nestlé/Perrier*⁸ case. This case was followed by various other merger decisions which considered whether a concentration created or reinforced a “collective dominant position”. In the subsequent

² Horizontal Merger Guidelines, para 8.

³ Council Regulation 4064/89 on the control of concentrations between undertakings [1990] L257/13. Before the entering into force of the ECMR, general competition rules in Article 81 and 82 EC Treaty were applied to mergers.

⁴ F. Rill, Rosenblatt, p. 131 and Schmitz, p. 542.

⁵ However, the application of dominance under the ECMR was different from the way dominance was applied under Article 82 EC Treaty. The analysis under the ECMR was prospective and also prescribed that a dominant position should “significantly impede competition”.

⁶ Lowe, 30 October 2002.

⁷ Levy, p. 157.

⁸ Case No IV/M.190 *Nestlé/Perrier*, OJ [1992] L 56/1, [1993] 4 CMLR M17. A summary of the case is available in the subsequent chapter 5.1 EC Practice.

*Airtours/FirstChoice*⁹ case, the Commission was, on appeal to the Court of First Instance (“the CFI”), severely criticised for its economic assessment of mergers and the Court subsequently established a high standard of proof. Moreover, commentators questioned whether the MD test really was capable of handling all the different problems a merger could give rise to. In particular, there were doubts as to whether so called “*non-collusive oligopolies*”, not giving rise to neither collective nor single dominance concerns, were caught by the ECMR.

When the Commission published its *Green Paper on the Review of Council Regulation (EEC) No 4064/89* (“Green Paper”), it encouraged the initiation of a discussion on the possible amendment of the European substantive standard. The Green Paper was followed by lively discussions involving competition law specialists world-wide. One of the most controversial topics concerned the possible alignment of the European substantive standard with the *substantial lessening of competition test* (“the SLC test”) used in the US. The discussions aimed at the creation of global convergence in merger control enforcement. The reform process ultimately resulted in what was called a “clarification” of the MD test, prescribing a *significant impediment of effective competition test* (“the SIEC test”) in the ‘new’ Regulation. The ‘new’ ECMR replaced Council Regulation (EEC) No 4064/89 and came into force on the 1st of May 2004, the same day as the enlargement of the EU from 15 to 25 Member States.¹⁰

At present, the EC thus prescribes a SIEC test in the appraisal of mergers, while the US, along with other major jurisdictions such as Canada, Australia, UK, Ireland and New Zealand, instead use a SLC test. The two systems have, despite the different wordings, been claimed to produce convergent assessments of a merger’s competitive effects and hence highly similar outcomes in case law. With a constantly rising number of mergers being notified in multiple jurisdictions, the question is how far the two systems actually have come in relation to global convergence of merger control.

3.2 Purpose

The purpose of this paper is to describe how a merger, which raises collective dominance concerns, is appraised under the SIEC test in the ECMR. Furthermore, this paper intends to analyze whether or not the ECMR reform of the European substantive assessment has resulted in a greater global convergence of merger control, especially in regards to the assessment of coordinated effects.

3.3 Disposition¹¹

The paper begins with a section on the definition of collective dominance and a brief description of the economic aspects of coordinated effects. The paper then continues with a review of the EC and US case law on collective dominance. The subsequent chapter describes the ECMR reform process in regards to the European substantive test, including the

⁹ Case IV/M.1524 *Airtours/First Choice*, OJ [2000] L 93/1, [2000] 5 CMLR 494. A summary of the case is available in the subsequent chapter 5.1 EC Practice.

¹⁰ Council Regulation 139/2004 on the control of concentrations between undertakings [2004] OJ L24/1.

¹¹ In order to make the paper shorter, this paragraph should go out.

arguments in favour of and against an alignment of the MD test with the SLC standard used in the US.

The paper will then present the substantive assessments made by the European Commission and its US counterparts when assessing a concentration which raises collective dominance or coordinated interaction concerns. The paper subsequently explains the key factors considered in the assessment of a merger. Finally, the analysis discusses the question raised in this paper: Has the reformed substantive test under the new ECMR resulted in a greater global convergence of merger control?

4. Definition of Collective Dominance

In a perfectly competitive market companies are not able to influence the prices themselves. Instead, companies receive the price from the market and eventually the price corresponds to the cost of producing the product. However, perfectly competitive markets are in reality very rare. Instead, a lot of markets are oligopolistic.¹² If one firm reduces its price for a product in an oligopolistic market, it would rapidly grasp the attention of customers, forcing other firms to reduce their prices as well. As a consequence, a firm in an oligopolistic market seldom raises its price above the level of its competitors, as the firm in that case would risk being abandoned by its customers. On the other hand, if the firms in an oligopolistic market are aware of this fact, they might try to *tacitly* match their pricing conduct, resulting in all firms charging high prices above the competitive level.

Collective dominance (sometimes also referred to as “*coordinated effects*”) implies a situation in an oligopolistic market where a small amount of firms each have high market shares, without being individually dominant.¹³ After a merger, the firms are able to compete less strongly with each other in the market. This is the result of an altered market structure with fewer firms in the market and the merged entity having a larger combined market share. The market’s new structure enables two or more firms to achieve and maintain a “*tacit understanding*” not to compete effectively and thus increase prices.¹⁴ The firms in a collectively dominant market are interdependent and constantly try to match each other’s marketing strategy to maximise profits.¹⁵ Since they assume a less aggressive form of competitive behaviour the competition in the market is at a minimum. Economists usually refer to this situation as “*tacit*” *collusion*.¹⁶

In order for the firms to find it lucrative to enter into such a tacit understanding, they must be convinced that the other firms in the market will adhere to it as well. One firm could easily deviate from the understanding through cutting its price and thereby increasing its short-term profit. Therefore, economic theories suggest that a retaliatory mechanism must be in place in order for collective dominance to be achieved and maintained.¹⁷ One way to

¹² The word “oligopoly” means “sale by a few sellers”.

¹³ Collective dominance can also be referred to as *joint* or *oligopolistic dominance*.

¹⁴ Bishop, Walker, p. 271, para. 7.28.

¹⁵ Whish, p. 507.

¹⁶ “Tacit” as the firms do not communicate explicitly to reach the understanding and there is no formal agreement between them. Usually, a few firms start matching each other’s behaviour in the market, and the remaining firms then follow. A situation where the firms have entered into a formal agreement is called “explicit collusion” and could be caught under Article 81 EC Treaty.

¹⁷ Bishop, Walker, para. 7.29, p. 272.

punish firms deviating from the understanding would be to initiate a price war.¹⁸ The purpose of a retaliatory mechanism is thus for the firms to find it more profitable to adhere to the understanding than to deviate from it. Generally, it is more likely that firms coordinate their behaviour when a merger leads to an increase in market concentration and small differences in the market share levels of the larger firms.¹⁹

Hence, a merger could result in a market structure which facilitates for firms to *create or strengthen a collective dominant position* in an oligopolistic market.²⁰ Furthermore, collective dominance can appear in diverse forms. The firms can, for instance, coordinate their price behaviour, limit their production or output, or divide the market (for example geographically) between themselves.²¹

5. Review of the EC and US Case Law on Collective Dominance

5.1 EC Practice

Although there is an extensive literature on oligopolistic markets, it does not provide sufficient guidance as to precisely *when* a merger results in competition being tacitly collusive. Instead, economic theories have focused more on the way tacit understanding is achieved and maintained. Thus, it has not been an easy task for the Community Courts to decide when competition in a market really is tacitly collusive. Until the *Airtours/FirstChoice* case, case law often concerned mergers reducing the number of suppliers in a market from three to two, defining this as a situation of collective dominance.²²

In the *Nestlé/Perrier*²³ case, two years subsequent to the entering into force of the ECMR, the Commission examined oligopolistic markets under the Regulation for the first time. The case concerned an acquisition of Perrier by Nestlé in the market of bottled water. The merger would have resulted in the two top firms jointly possessing a 75 % share of the market. The Commission focused mainly on structural factors in its judgment, such as market concentration and the fact that the merger would decrease the number of firms in the market from three to two. Before the *Nestlé/Perrier* case it was uncertain as to whether the ECMR was applicable to cases of collective dominance. While Article 82 EC Treaty explicitly prescribed that it applied to abuse of a dominant position “by one or more undertakings”, the ECMR lacked a corresponding provision. Notwithstanding, the Commission established that collective dominance could be caught under the ECMR, concluding that the Regulation must be considered applicable to anti-competitive behaviour, whether arising from single firm or collective dominance. The Commission required commitments from Nestlé and Perrier in order to receive clearance for the merger.

¹⁸ Whish, p. 509.

¹⁹ Bishop, Walker, para. 7.30, p. 273. A more thorough review of the industry characteristics conducive to a finding of collective dominance (or coordinated interaction in the US) is available in the subsequent chapter 7. The substantive assessments in the EC and the US.

²⁰ It could also be that firms already adopted a coordinated behaviour before the merger, and the merger facilitates for those firms to coordinate their behaviour more robustly.

²¹ Horizontal Merger Guidelines, para. 40.

²² Bishop, Walker, para. 7.48, pp. 280-281.

²³ See note 7 above.

In 1994, the Commission required commitments in another case as a condition of clearing a concentration. The *Kali und Salz*²⁴ case concerned a merger between two German undertakings in the potash sector, Kali und Salz AG and Mitteldeutsche Kali AG ('Mdk'). The Commission established a finding of collective dominance on the grounds of structural links between Kali und Salz and a third undertaking, SCPA.²⁵ The Commission's decision was appealed by France, SCPA and its parent company ECM. On appeal, the ECJ confirmed that the ECMR applied to situations of collective dominance, but that the Commission had failed to prove collective dominance in this particular case. The ECJ stated that, in order for the Commission to establish a finding of collective dominance, it has to prove that the concentration significantly impedes competition through allowing the undertakings to:

*"...adopt a **common policy** [emphasis added] in the market and act to a considerable extent independently of their competitors, their customers, and also of consumers."*²⁶

In the subsequent *Gencor/Lonrho*²⁷ case, the Commission prohibited a merger outright for the first time on the basis of creating a collective dominant position. The case concerned a South African company, Gencor, operating in the mineral resources and metal industries. Gencor, in concert with Lonrho, an English company, planned to jointly acquire the company Implats. Implats would through the acquisition become the sole owner of two other companies, Eastplats and Westplats [LPD]. The Commission held that the concentration would have resulted in the creation of a "*dominant duopoly position*" between another company, Amplats, and Implats/LPD in the world platinum and rhodium market. Gencor and Lonrho offered commitments which, however, did not satisfy the Commission and the merger was blocked. Gencor appealed to the CFI, but the Commission's decision was upheld by the Court. The CFI concluded in its judgment, in line with the outcome of the *Kali und Salz* case, that concentrations which "*create or strengthen collective dominance*" are caught by the ECMR. In addition, the CFI established that structural links were not a prerequisite to a finding of collective dominance.²⁸

In 2002, the Commission decided to directly prohibit the planned *Airtours/First Choice*²⁹ merger. The case concerned a hostile acquisition in the market for holiday packages in the UK. The Commission held in its decision that the acquisition of First Choice by its competitor Airtours would create a collective dominant position post-merger on behalf of three companies (Airtours/First Choice; 31 %, Thomson Travel Group; 27 %, Thomas Cook; 20%). The decision was appealed to the CFI. On appeal, the CFI concluded that the Commission failed to establish the existence of a collective dominant position and annulled the Commission's decision. In paragraph 62 of its judgment, the CFI laid down three conditions which have to be fulfilled in order to establish a finding of collective dominance:

1. **Market transparency;** the market has to be sufficiently transparent for the firms to be able to monitor each others behaviour and thus tacitly create a common policy.
2. **Sustainability and the existence of a retaliatory mechanism;** the common policy must be sustainable over time. This is achieved through ensuring the punishment of deviating firms.

²⁴ Case No IV/M. 308 *Kali und Salz*, OJ [1994] L 186/38.

²⁵ These structural links included for instance an export cartel and a joint venture in Canada.

²⁶ See note 22 above, para. 221.

²⁷ Case No IV/M.619 *Gencor/Lonrho*, OJ [1997] L 11/30, [1999] 4 CMLR 1076.

²⁸ *Idem*, para. 273.

²⁹ See note 8 above.

3. **The absence of competitive constraint;** externals, such as current and future competitors and consumers, should not be able to jeopardize the existence of the common policy.

Furthermore, the CFI criticised the Commission severely for the lack of sufficient evidence to prove a collective dominant position and hence established a high burden of prove. The ruling of the CFI in the *Airtours/First Choice* case also boosted the debate on so called *non-collusive oligopolies*, which, according to the wording of the CFI's judgment, would not be caught by the ECMR.³⁰

5.2 US Practice

In resemblance with EC precedent, early US case law focused mainly on structural issues and the Courts consequently blocked mergers mainly on the basis of market share levels.³¹ In 1962, the Supreme Court considered its first major merger case under the amended Section 7 of the Clayton Act, *Brown Shoe Co. v. United States*.³² The case concerned an acquisition of Kinney by Brown Shoe, both firms being manufacturers and sellers in the shoe business. While Brown was the third largest shoe seller, possessing a 6 % share of the US market, Kinney was the eighth largest seller holding nearly a 2 % market share. Although the Supreme Court established that Kinney through the merger would increase its market share by only 5 %, the merger was blocked. The Supreme Court concluded that the fact that a large national chain possessed a market share of this size *can* adversely affect competition.³³ Among the factors considered by the Supreme Court in its assessment was market concentration, history of the market, stability of market shares, buyer power and barriers to entry.

A year after, in 1963, the Supreme Court ruled in a case regarding a bank merger in *United States v. Philadelphia National Bank*.³⁴ The case concerned a merger between Philadelphia National Bank (second largest bank in Philadelphia holding a market share of 22 %) and Girard Trust Corn Exchange Bank (third largest bank in the same area with a 15 % share of the market). The Supreme Court concluded that:

*"...a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially [emphasis added] that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."*³⁵

In *United States v. Von's Grocery Co*³⁶ the Supreme Court blocked a merger between Von's Grocery and Shopping Bag Food Stores, two competing grocery chains, where the combined post-merger market share would have been 7,5 %. Justice Stewart and Harlan dissented and

³⁰ A non-collusive oligopoly means a situation where a firm can receive benefits through acting individually in an oligopolistic market. It is referred to as "non-collusive" since it does not require any co-ordination. I will describe this scenario a bit further under the subsequent chapter 6.1.2 Non-collusive Oligopolies - the "Enforcement Gap".

³¹ Wilson, p. 85.

³² Case *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

³³ *Idem*, para. 63.

³⁴ Case *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963).

³⁵ *Idem*, para. 363.

³⁶ Case *United States v. Von's Grocery Co.*, 384 U.S. 270, 278 (1966).

severely criticised the structural approach of the majority, maintaining that a concentration could not be blocked simply because it resulted in fewer competitors in the market. Following the divided opinions of the Justices in *United States v. Von's Grocery Co* the Supreme Court ultimately changed its structural approach when clearing the *United States v. General Dynamics Corporation* merger in 1974. The case concerned an acquisition of United Electric Coal Company, (open-cast mining) by General Dynamics (aircraft and communications). The Court concluded that the acquisition did not reduce competition, although it resulted in a significant increase of concentration.³⁷

6. The ECMR Reform – Market Dominance vs. Substantial Lessening of Competition

6.1 *The Arguments in Favour of and Against an Amendment of the MD Test*

The CFI's decision in *Airtours/FirstChoice* initiated a lively debate on the MD test's suitability in assessing the coordinated effects of a merger. The debate coincided with the commencement of the reform process of the ECMR by the Commission. In the Commission's Green Paper it thus welcomed comments regarding the potential amendment of the substantive test in the ECMR. Below are described some of the main issues brought forward in the discussions regarding a potential alteration of the European MD standard to the SLC model in the US.

6.1.1 Structural and Behavioural Issues in Merger Control

Opponents of the MD test meant that the test was not capable of taking into account all relevant economic factors in the assessment of mergers.³⁸ The MD test was criticised for creating a legal "strait-jacket", forcing the Commission only to focus on static structural issues, such as market shares, and thus neglecting the important dynamic and behavioural factors in the merger assessment.³⁹ Commentators argued that structural issues did not provide sufficient information on the level of competition in the market and therefore the approach was claimed to result in the neglect of the consumer welfare interest in European merger policy.⁴⁰ In addition, the Commission received criticism for frequently using what can be called the "checklist approach" in its practice.⁴¹ Opponents of the existing test meant that the SLC test would be better suited for merger control, since it focused more on the relevant issue – the outcome of mergers in terms of loss of competition.⁴²

The Commission disagreed with the argument that its assessment was based on mainly structural grounds. The Commission maintained that it had developed a more dynamic and analytical approach towards the notion of dominance in its recent practice, focusing on a

³⁷ This was mainly due to a failing firm defence.

³⁸ Lowe, 17 February 2003.

³⁹ R. Sullivan, R. Mainers, p. 191.

⁴⁰ Walker, p. 22.

⁴¹ The "checklist" would consist of industry characteristics which indicated the probability of and are relevant to the assessment of co-ordinated effects in a market. Opponents meant that the Commission simply ticked off each of the characteristics when assessing a merger, and if a majority of the characteristics were fulfilled, the merger was blocked.

⁴² Lowe, 17 February 2003.

transaction's predicted effect on price, output and innovation.⁴³ Additionally, the Commission found the MD test sufficiently flexible and capable of capturing a wide amount of concentrations:

*"The fact that the dominance test has undergone such an evolution is natural, and Article 2 has so far proved sufficiently flexible to accommodate an effects analysis made on the basis of more sophisticated micro-economic tools, instruments and models developed by econometric and industrial organisation research."*⁴⁴

Moreover, the Commission maintained that the MD test in reality was not that different from the SLC standard in the US. The tests generally applied the same substantive assessment criteria (such as market structure and barriers to entry).⁴⁵ Additionally, both the Commission and its US counterparts constantly made a comprehensive assessment of the market's overall competitive conditions post- and pre-merger, with the same ultimate goal; consumer protection. The fact that the two systems in reality were very similar was also, according to the Commission, confirmed by the convergent outcomes in case law.⁴⁶ The Commission's view was supported by Green Paper respondents asserting that the MD test had very well served its purpose and that an alteration of the substantive test was unnecessary.⁴⁷ Some commentators even dismissed the debate on the grounds that it was simply a semantic issue.⁴⁸

6.1.2 Non-collusive Oligopolies - the "Enforcement Gap"

One of the main arguments against the retention of the MD test was that there existed an "enforcement gap" in the current test. The gap would arise when the second and third largest firms in a market (the firms being the closest substitutes) would merge. The merging firms would remain smaller than the existing market leader post-merger. However, the firms would still unilaterally be able to raise prices and consequently exercise market power.⁴⁹ This scenario (often referred to as a *non-collusive oligopoly*) would neither qualify as collective nor single firm dominance, and thus opponents of the MD test feared that this competition endangering behaviour would not be caught by the ECMR at all.

The Commission dismissed this argument, saying that this was a very hypothetical scenario and that it so far never encountered such a situation in its practice.⁵⁰ In addition, proponents of the MD test claimed that if the Commission would have encountered such a situation, it would probably have applied the MD test.⁵¹ Hence, when the SIEC test was adapted, some commentators maintained that the amendment of the test, for the reason of making the Regulation applicable to non-collusive oligopolies, only spelled out already existing case law.⁵²

⁴³ Levy, p. 158.

⁴⁴ Green Paper, para. 163.

⁴⁵ Boege, 28th of September 2002.

⁴⁶ Lowe, 17 February 2003.

⁴⁷ International Chamber of Commerce, 16th of April 2002.

⁴⁸ Lowe, 30th of October 2002.

⁴⁹ The price increases could not be overpowered by externals, through for instance new entries.

⁵⁰ Green Paper, para. 166.

⁵¹ Levy, pp. 162.

⁵² Lowe, 17th of February 2003.

6.1.3 The Cross-contamination Effect

Proponents of the SLC standard perceived the meaning of the word “dominance” as uncertain in EC merger control.⁵³ In addition, some commentators feared that the wording “dominance” in Article 2(3) ECMR, which was identical with the one in Article 82 EC Treaty, could result in a so called “cross-contamination” effect.⁵⁴ Consequently, a finding of dominance under the ECMR could be used in a future Article 82 case. This so called “spill-over” effect was undesirable since a broad interpretation of dominance in merger cases could lead to a wide application of Article 82. Some commentators maintained that the risk of a spill-over effect would remain even if a SLC standard was to be adopted. The fact that a firm had market power under an SLC test could probably lead to the same effect.⁵⁵

6.1.4 Practical Issues

An amendment of the substantive test could also involve certain practical complications. The Commission feared that the implementation of a new test would result in legal uncertainty and unpredictability to a certain extent. Since the existing case-law was based on the MD test, it would be difficult to forecast the outcome of a merger case if a new test was implemented.⁵⁶ This uncertainty would not involve only Courts and legal practitioners, but also the industry itself. In addition, if the new test would result in the extensive practice based on the MD test being inapplicable, it would take years to build up a corresponding body of case law.⁵⁷ Opponents of the SLC standard also found the test uncertain, as it was generally more vague and flexible than the European MD test.⁵⁸ It was also feared that the SLC standard, containing lower thresholds than the MD standard, would permit the Commission to become more interventionist.⁵⁹

6.1.5 Harming International Convergence

One of the most debated issues concerned whether or not the implementation of a SLC test in EC merger control would result in a greater international convergence and consistency in decision-making. The proponents of the SLC standard, used in the US, feared different decisions regarding the same transaction.⁶⁰ This was the case with the *GE/Honeywell*⁶¹ merger, which was notified in both jurisdictions and, while it was cleared by the US Department of Justice, it was blocked by the Commission for creating or strengthening a dominant position in the aviation industry.

⁵³ Vickers, p. 183.

⁵⁴ Lowe, 30th of October 2002.

⁵⁵ Levy, pp. 168.

⁵⁶ Green Paper, para. 161.

⁵⁷ Lowe, 30th of October 2002.

⁵⁸ This perception was based on the varying interpretations of the Clayton Act in US case law since the Act entered into force in 1914.

⁵⁹ However, this issue could probably have been taken into consideration in the creation of the Horizontal Merger Guidelines.

⁶⁰ Green Paper, para. 160.

⁶¹ Case M. 2220 *GE/Honeywell*, [2004] OJ. L48/I.

The proponents of the SLC test meant that a change would create legal certainty, through helping the merging parties to assess the probability of the clearance of a merger notified in several countries.⁶² Furthermore, it was maintained that an amendment would facilitate for the merging parties, who would not be forced to present different arguments supporting their case, depending on which substantive test was used. Some of the respondents to the Commission's Green Paper also meant that mergers were becoming more and more international in scope and therefore it was time for a global standard of merger assessment.⁶³ Several other jurisdictions had recently adopted the SLC test in their national legislations (such as the UK, Ireland and New Zealand). Additionally, proponents of the SLC test meant that the considerable US body of case law could be influential for the interpretation of the SLC test in the EC. However, US law as an influence was not that appealing to all competition law practitioners, some warned that convergent interpretations could become a "peer pressure".⁶⁴

As I have already mentioned above, the Commission asserted that there was a significant degree of convergence between the EC and US case law. Inevitably, the *GE/Honeywell* case constituted the big exception. Whether the difference between the decisions of the European Commission and its US counterparts in *GE/Honeywell* really was a result of diverse substantive tests, or if other factors influenced the outcome, was a debated issue. Some commentators claimed that the opposing decisions in fact were a result of the EC and the US applying different substantive tests and that this difference could have been avoided with the same standard. Stefan Schmitz commented on this issue:

*"Although it is certainly remarkable that, for the first time, the Commission stopped a US merger that had already received clearance from its home authority, the outcome of the case did not come as a surprise to many competition law observers. The truth of the matter is that it was only a matter of time before the different merger control regimes and tests in Europe and the US would arrive at different results for the same merger. The problem of having different merger control regimes in the world's two largest economies has simply been dormant for a long time."*⁶⁵

Other commentators claimed that the conflicting conclusions were a result of different underlying philosophies, and not a consequence of different wordings.⁶⁶ According to this approach, the EC and the US seek to satisfy different objectives with the respective merger control system. The US system intends to protect *consumers* from behaviour endangering effective competition in a market. In contrast, the European system has been claimed to have several objectives. In the provisions of the EC Treaty it is stated that EC law intends to *uphold effective competition* and seek to support the creation of a *Common Market* among the Member States of the EU. The latter could imply that the EC is even more eager to block transactions which harm effective competition than its US counterparts.⁶⁷ Professor Mario Monti⁶⁸ commented on the fact that the *GE/Honeywell* merger as a single case could attract so much attention in the media and thereby contribute to the perception that there were diverse underlying philosophies concerning merger control in the EC and in the US:

⁶² Competition Law Association, 21st of February 2003, p. 1.

⁶³ *Idem*.

⁶⁴ Lowe, Philip, 30th of October 2002.

⁶⁵ Schmitz, pp. 539.

⁶⁶ Levy, Nicholas, 2003, pp. 172.

⁶⁷ Veljanovski, p. 6.

⁶⁸ Professor Mario Monti was a Member of the European Commission responsible for Competition 1999-2004.

“...the EU and US agree on what competition policy should be all about. We share a common fundamental vision of the role and limitations of public intervention. We both agree that the ultimate purpose of our respective intervention in the market-place should be to ensure that consumer welfare is not harmed.”⁶⁹

Commentators agreeing with the Commission on this matter maintained that the differences between the two substantive tests in fact were minimal. Different substantive tests did not automatically mean that the tests were based on different economic theories or doctrines. In applying both tests, an examination of the relevant market had to be made and competitive constraints post-merger and the affect on the market had to be identified.⁷⁰ In fact, some meant that the opposing outcomes of the *GE/Honeywell* case instead depended on a diverse assessment of the competitive effects of the transaction. The difference between the assessments could be a result of, for instance, diverse competition policies, political influences, or the reluctance of an authority to apply fresh economic theories.⁷¹ In addition, the Commission maintained that a change to a SLC standard would create a greater divergence within the European Union, since almost all EU Member States, including the candidate countries, applied a MD test in their national legislations.⁷² Supporters of the retention of the MD test in EC merger control asserted that harmonization of national competition laws within the Community must be regarded as the main focus in the debate.⁷³

6.2 The Solution – A ‘Clarification’ of the MD Test

Ultimately, the Commission decided to propose a ‘clarification’ to the existing wording in the ECMR, instead of replacing the MD test with a SLC standard. The new SIEC test would enable the Commission to intervene against all anti-competitive mergers (including mergers in oligopolistic markets) and put an end to the time-consuming debate on the scope of the MD test.⁷⁴ The SIEC test focused more on the relevant question; the impact of mergers on competition, and it would at the same time preserve the existing precedence by the Commission and the Community Courts. The new ECMR was part of a “merger control package” including the Horizontal Merger Guidelines and reforms within the Commission, such as the creation of a post of Chief Competition Economist. The Horizontal Merger Guidelines prescribed for the first time levels of concentration which would indicate when a merger has an anti-competitive effect and also established that efficiencies should be considered under some given circumstances.⁷⁵

7. The Substantive Assessments in the EC and the US

⁶⁹ Monti, 28th of February 2004.

⁷⁰ Green Paper, para 162.

⁷¹ Boege, 28th of September 2002.

⁷² Green Paper, para. 161.

⁷³ International Chamber of Commerce, 16th of April 2002.

⁷⁴ A closer review of the SIEC test is available under the subsequent chapter 7.1 The Significant Impediment of Effective Competition Test in the EC.

⁷⁵ Monti, 28th of February 2004.

7.1 *The Significant Impediment of Effective Competition Test in the EC*

Previous to the Commission's competitive assessment of a merger, it has to define the relevant product and geographic markets.⁷⁶ Demand substitutability is essential in market definition, but also supply substitutability and potential competition are given attention in the appraisal.⁷⁷ The Commission then continues to assess the foreseeable impact of a merger in the relevant markets.

At present, the substantive test in Article 2(3) of the ECMR reads:

"A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market."

In its assessment of the competitive effects of a merger, the Commission compares the possible result of the merger in question with the competitive circumstances the market would have encountered if the merger would not take place. The Commission may also examine possible future alterations in the market (such as the exit or entry of firms) if these alterations can be "reasonably predicted".⁷⁸ As I have mentioned above, the Commission was previously criticised for having a "checklist" approach when assessing a merger. However, in the Horizontal Mergers Guidelines it is explicitly prescribed that the factors are not to be "mechanically applied in each and every case".⁷⁹ Instead, the mergers will be assessed on a case-to-case basis, involving the elements which are relevant to the prevailing circumstances of that particular merger.

According to the Commission's Horizontal Merger Guidelines, there are four necessary conditions to establish a finding of collective dominance:

1. The possibility of reaching a common understanding;
2. The ability of firms to monitor each other to ensure the coordination terms are adhered to;
3. The existence of a credible deterrence mechanism which can be activated if firms deviate;
4. The fact that externals cannot undermine the coordination.

7.1.3 Key Factors in Assessing the Risk of Collective Dominance

The Commission takes all accessible relevant information on the characteristics of the markets concerned into account when assessing a merger. Below I describe some of the key factors that usually are analyzed during the assessment. These can be divided into *internal* and *external factors*. Market concentration, symmetry, stability, structural links, product

⁷⁶ In order for a merger to be caught by the ECMR, it has to have a community dimension in accordance with Article 1 ECMR.

⁷⁷ The Commission's *Notice on the definition of the relevant market for the purposes of Community competition law* provides useful guidance regarding market definition. Market definition is a very complex issue and a detailed review in relation to this matter lies outside the scope of this paper.

⁷⁸ Horizontal Merger Guidelines, para. 9.

⁷⁹ *Idem*, para. 13.

homogeneity and market transparency can be assigned as internal factors, while entry barriers and buyer power can be attributed as external factors.⁸⁰

The external factors relate to the fact that externals (such as consumers or other firms not involved in the tacit agreement) should be unable to put the result of the coordination at risk. Otherwise, coordination would be unsuccessful. If there are enough external factors to avert the firms from raising their prices, concerns can be dismissed even though internal factors (such as stability, symmetry and transparency) are sufficient for the firms to perfectly coordinate their behaviour.⁸¹

7.1.3.1 Market Concentration

Collective dominance is more probable in a market containing a small number of relatively equally strong firms.⁸² When two firms collectively have a high market share, usually between 50-60 % of the market, it is rather likely that the Commission will initiate a more thorough (Phase II) investigation.⁸³ Recently, the Commission has started to measure market concentration according to the Herfindahl-Hirschmann Index (HHI).⁸⁴ This method for measuring market concentration was for instance used by the Commission in the *Airtours/FirstChoice* case and in other subsequent merger cases. Essentially, the HHI provides an indication of the competitive pressure in the market after the merger. The alteration (“delta”) also provides valuable information about the direct change in concentration the merger would result in.

The Commission’s competitive analysis entails both current and post-merger market shares. The post-merger market shares are calculated as the sum of the merging parties’ joint market shares.⁸⁵ Historical data can also provide information, showing if the market share level has been stable or unstable over a period of time. However, while market share levels are important in the appraisal, they are not the sole factor in assessing whether a merger raises competitive concerns.

7.1.3.2 Symmetry

Symmetry in a market with a high concentration can be conducive to anti-competitive behaviour. In the Commission’s Horizontal Merger Guidelines, it mentions that symmetry is relevant “*especially in terms of cost structure, market shares, capacity levels and levels of vertical integration.*”⁸⁶ For instance, where there is lack of symmetry in market shares between the bigger firms in a market, this may result in fewer incentives for the firms to coordinate their

⁸⁰ The reason for which only entry barriers and buyer power are described as external factors in this chapter and not other factors, such as for instance exit barriers, is that these external factors are given special consideration by the Commission in its assessment, Horizontal Merger Guidelines, para. 57.

⁸¹ Bishop, Walker, p. 280, para. 7.47.

⁸² Van Bael & Bellis, p. 826.

⁸³ *Idem*, p. 827.

⁸⁴ The HHI is the sum of the squares of all firms’ individual market shares. No detailed review of the calculation of the HHI will be given here, but the Horizontal Mergers Guidelines contain thresholds for when the Commission considers a merger not to require extensive analysis and vice versa (see Horizontal Merger Guidelines, para. 19-20.)

⁸⁵ Horizontal Merger Guidelines, para. 15.

⁸⁶ *Idem*, para. 48.

market behaviour.⁸⁷ Naturally, it is easier for firms to achieve a tacit understanding if they have similar views about the suitable level of prices or output in the market.⁸⁸ On the other hand, it is more difficult to maintain a tacit understanding if the firms are subject to diverse circumstances, such as different producing costs. Additionally, it is more difficult to achieve and maintain a tacit understanding in a market where the products are highly differentiated, product quality is imperative or where the market is highly innovative.⁸⁹

7.1.3.3 Stability

A market, in which the level of market shares has been stable for a certain period of time, can be conducive to collective dominance. It is extremely difficult for firms to maintain a tacit understanding not to compete effectively in a market where the conditions are constantly altered.⁹⁰ In a market with a more instable market share level, the competition is therefore most likely more effective.⁹¹ Moreover, a market which is sufficiently stable to give rise to collective dominance concerns should offer stability in demand as well as in price. When both of these factors are stable, it is easier for the firms to detect if another firm is deviating from the tacit understanding.⁹² Furthermore, the elasticity of industry demand should be low, since it facilitates the enforcement of the tacit understanding.⁹³

7.1.3.4 Structural Links

As I have mentioned above, the Commission established a finding of collective dominance on the basis of structural grounds in the *Kali und Salz* case. Although not crucial (concluded by the CFI in the subsequent *Gencor/Lonhro* judgment) structural links are still important in the assessment of a concentration giving rise to collective dominance concerns. Structural links may lead to the firms becoming interdependent of one another. The firms can exchange future plans and strategies and be concerned with each others interests. Structural links could also be conducive to ways of retaliation. Structural links have been identified in case law on numerous occasions, and they have for instance included cross-shareholdings or participation in joint ventures.⁹⁴

7.1.3.5 Product Homogeneity

Tacit co-ordination of prices is more likely to occur on homogenous markets than in heterogeneous ones. Firms in homogenous markets are normally more apt to compete on prices, since there are no other characteristics that distinguish their products from those of

⁸⁷ Van Bael & Bellis, pp. 827-828.

⁸⁸ Horizontal Merger Guidelines, para. 44.

⁸⁹ Bishop, Walker, pp. 278-279, para 7.41.

⁹⁰ Idem, p. 277, para. 7.38.

⁹¹ Van Bael & Bellis, p. 828.

⁹² Bishop, Walker, p. 277, para. 7.38.

⁹³ Idem. Bishop and Walker refer to three reasons for which it is difficult to enforce a tacit understanding in a market with high elasticity of industry demand. These are; 1. It is not profitable for the firms to force prices higher than competitive levels; 2. The elasticity of the demand of each firm is high, increasing the incentives to deviate; 3. Deviations inflict less damage on the other firms, making it complicated to discover deviations.

⁹⁴ These examples are also mentioned in the Horizontal Merger Guidelines, para 48.

other firms. Usually, there is also a greater price transparency in homogenous markets, since the prices are easier to compare when the actual products are highly comparable. This makes tacit collusion practically unfeasible in heterogeneous markets where the products are personalized according to each customer's special needs.⁹⁵

7.1.3.6 Innovation

In a highly innovative market, tacit coordination is fairly uncommon, since an important innovation can grant enormous advantages to a firm. Usually, a homogenous market also involves low product innovation. This was the case in *Kali und Salz*, where the Commission established a collective dominant position on the grounds that potash was a homogenous product and innovations in the market were unlikely.

7.1.3.7 Market Transparency

In a market with high price transparency, firms can easily set identical prices, without having to enter into an explicit agreement to do so. Similarly, it is easier for a firm to observe the level of sales of other firms on a transparent market, in order to adjust its market behaviour accordingly.⁹⁶ Since a highly transparent market facilitates for the firms to monitor each other's behaviour, it also makes it easier to detect if another firm is deviating from the tacit understanding.⁹⁷ However, there are markets with high price transparency, where it is difficult to attain and maintain a tacit understanding, such as markets with differentiated products.⁹⁸

In a transparent market, prices are available in public, for instance through websites or trade associations. Information can also be accessed through cross-share-holdings or involvement in joint ventures.⁹⁹ A market's level of transparency is related to its degree of market concentration. It is apparent that it is easier to identify a deviation by another firm in a concentrated market. Larger firms can simply analyze their own sales to detect deviations by other large firms in the market. In addition, it is generally much easier to notice deviations by larger firms than by smaller ones.¹⁰⁰

Where market transactions take place on for instance public exchange, the markets logically tend to be more transparent than where transactions are negotiated bilaterally.¹⁰¹ The Commission's Horizontal Merger Guidelines prescribes that the key issue is to determine what exactly firms can conclude on the basis of the available information. For instance, does a lowered price by a competitor constitute a deviation or is it simply a result of the competitor assuming that the coordinated price is about to decrease?¹⁰²

⁹⁵ Van Bael & Bellis, p. 829.

⁹⁶ Bishop, Walker, p. 278, para. 7.39.

⁹⁷ Van Bael & Bellis, p. 830.

⁹⁸ Bishop, Walker, p. 278, para. 7.40.

⁹⁹ Horizontal Merger Guidelines, para. 47.

¹⁰⁰ Bishop, Walker, para. 7.40, p. 278.

¹⁰¹ Horizontal Merger Guidelines, para. 50.

¹⁰² Idem, para. 50.

7.1.3.8 Retaliation

The existence of a retaliatory mechanism, which prevents firms from deviating from the tacit understanding, supports a finding of collective dominance. It is more likely that a tacit understanding can be sustained when the firms are threatened to be punished if they deviate. In the absence of a retaliatory mechanism, the firms could be tempted to, for instance, lower their prices, offer discounts or increase output to gain short-term profits. Retaliation requires a rather transparent market, since the firms have to be able to monitor when a firm deviates.¹⁰³ In order for the retaliatory mechanism to be sustainable, it also has to be credible. If there is not sufficient certainty that a retaliatory mechanism will be activated when a firm deviates, it cannot be understood as credible.¹⁰⁴ It is also possible that the deviation and the punishment can take place in different markets.¹⁰⁵

7.1.3.9 Entry Barriers

In a market with only a few or no barriers to entry it is difficult to maintain a tacit understanding. If the firms collectively raise prices, other competitors will shortly enter the market. Hence, high barriers to entry help prevent potential competitors from entering the market.¹⁰⁶

7.1.3.10 Buyer Power

Powerful customers, holding a considerable share of market demand, can provide incentives for firms to deviate from the tacit understanding. For example, a large customer might offer to buy a product at a lower price than the price set tacitly by the firms, but nevertheless far above the suppliers' marginal costs, thus creating an incentive for a firm to deviate to gain profits.¹⁰⁷

7.2 *The Substantial Lessening of Competition test in the US*

The US way of looking at market definition is in many ways similar to the European approach. This is not that surprising, as global economic theories lie behind the concept of market definition. Since the 1950's, US merger control has been governed by the Clayton Act.¹⁰⁸ Section 7 of the Clayton Act prescribes the US substantive test:

"No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of

¹⁰³ Van Bael & Bellis, pp. 830-831.

¹⁰⁴ Horizontal Merger Guidelines, para. 52.

¹⁰⁵ Idem, para. 55.

¹⁰⁶ Van Bael & Bellis, p. 831.

¹⁰⁷ Bishop, Walker, p. 280, para. 7.47.

¹⁰⁸ Before the 1950's American mergers were mainly appraised under the Sherman Act. Although the US Clayton Act entered into force in 1914, it was not until after Congress passed the Celler-Kefauver Antimerger Act it became applicable to mergers.

*such acquisition may be **substantially to lessen competition, or to tend to create a monopoly** [emphasis added]."*

The relevant question according to US law is thus if the merger will lead to a decrease in competition in a market. It is enough to establish an anti-competitive behaviour under US merger control, since a merger can be caught by the Clayton Act regardless if the behaviour is caused by single firm or collective dominance.¹⁰⁹ Since the 1970's, US Antitrust law has been influenced by the *Chicago School*, originating from the University of Chicago. The *Chicago school* has two main characteristics, the first being that the single non-negotiable purpose of antitrust law is consumer welfare, and the second being that economic theories must be applied thoroughly.¹¹⁰ The early focus on the protection of small competitors in US Antitrust practice has hence in recent years moved towards a focus on consumer welfare.

¹⁰⁹ Neale, Goyder, p. 470.

¹¹⁰ Schmitz, p. 547.

7.2.2 Key Factors in Assessing the Risk of Coordinated Interaction

In the US Horizontal Merger Guidelines the definition of collective dominance (“or coordinated interaction” as it is referred to in the US Horizontal Merger Guidelines) is as follows:

“Coordinated interaction is comprised of actions by a group of firms that are profitable for each of them only as a result of the accommodating interaction of the others. This behaviour includes tacit or express collusion and may or may not be lawful in and of itself.”¹¹¹

The US Horizontal Merger Guidelines provide that in order to establish a finding of coordinated interaction, the market conditions must be conducive to three provisions on the post-merger market:

1. Reaching terms of coordination;
2. Detecting deviations from the terms; and
3. Punishing those deviations.

The US Horizontal Merger Guidelines also stipulate that certain market conditions can be conducive to several of the above mentioned provisions. The US Horizontal Merger Guidelines refer to information on market conditions, firm and product heterogeneity, pricing and marketing practices, buyers’ and sellers’ characteristics, and the characteristics of typical transactions, as some examples of market factors which can be relevant in the assessment.¹¹²

The market concentration in the relevant market(s) is only the starting point when assessing a merger. The history of the market can also be a factor that influences the outcome of the assessment. Furthermore, factors such as previous engagement of firms in express collusion can convey that the market conditions are appraised as conducive to coordinated interaction.¹¹³ The US Horizontal Merger Guidelines also provide that a high degree of caution should be applied when trying to foresee the future outcome of a merger. Since insufficient or opposing information is not uncommon in a merger investigation, the assessment can only advise as to whether or not the market conditions are *conducive to coordinated interaction* on the post-merger market.

The US Horizontal Merger Guidelines therefore list certain conditions that can be perceived as *conducive to reaching terms of coordination*. Factors that can be conducive to reaching terms of coordination are, for instance, product or firm homogeneity, existing practices among firms and key information about rival firms and the market. On the other hand, product or firm heterogeneity or lack of information in the market, may be conducive to hinder reaching terms of coordination.¹¹⁴ The coordination terms do not necessarily have to result in a monopoly outcome to be damaging to consumers. Although “imperfections” exist in the market, it can still be profitable for firms to reach terms of coordination. However, if there are enough imperfections, the firms will no longer find it profitable to coordinate their behaviour and it is unlikely that there will be coordinated interaction in the post-merger market.

¹¹¹ US Horizontal Merger Guidelines, para 2.1.

¹¹² Idem.

¹¹³ Idem.

¹¹⁴ Idem, para 2.11.

In the subsequent paragraph, the US Horizontal Merger Guidelines describe *conditions conducive to detecting and punishing deviations*. To begin with, there must be a *credible* threat of punishment in order to establish coordinated interaction. The fact that other firms may engage for instance in a price war, would be sufficient to prove a credible punishment mechanism.¹¹⁵ It should also be possible to activate the punishment quickly. Factors such as high market transparency are also mentioned as conducive to a finding of coordinated interaction.

Buyer characteristics can also be significant in the assessment. In markets where buyers enter into big contracts on a long-term basis, deviation can involve large profits, creating an incentive for the firms to deviate from the terms of coordination. The US Horizontal Merger Guidelines also consider that mergers involving so called *maverick firms* are more likely to result in coordinated interaction.¹¹⁶

8. Analysis

It is fair to say that EC merger control does not have the same long merger control tradition as the US, where the Clayton Act has been in force for almost a century. Not only EC merger control, but also merger control systems in the respective EU Member States' national legislations are fairly new. It is, however, a completely different issue, as to whether the two systems have different underlying fundamental goals. Some US competition law practitioners insist that consumer protection is, mostly due to the *Chicago school* influence, the main goal of US antitrust law, and that the European system does not have the same single purpose as the US system. It might be true that the European system does not have an exclusive principle protected by its merger control system, but indeed aims at protecting also other interests, such as the Common Market objective. But this does not necessarily have to mean that the European system puts less weight on the protection of consumers in its merger assessment. One aspect of this issue which seems to be agreed upon by both American and European competition law practitioners is that the protection of the consumer welfare interest must play a prominent part in the merger assessment.

The opinions of world competition law practitioners were divided in the debates surrounding the reform of European merger control, and in particular, the possible amendment of the substantive standard. If a "non-collusive oligopoly gap" ever existed in EC merger control, it has been closed through the modification of the MD test. The substantive SIEC test now seems to be capable of applying to the diverse problems mergers can give rise to in oligopolistic markets. The assessments of mergers according to the 'old' MD standard demonstrated major similarities with the SLC test in the US. The present SIEC test might have converged the standards even more. Whether it is "*substantial lessening of competition*" or "*significant impediment of effective competition*", the two tests ultimately raise the same question: what losses in terms of competition has the merger resulted in? The

¹¹⁵ Idem, para. 2.12.

¹¹⁶ Idem, para. 2.12 define maverick firms as "...firms that have a greater economic incentive to deviate from the terms of coordination than do most of their rivals (e.g., firms that are unusually disruptive and competitive influences in the market.)"

wordings of the two tests are now more similar than the MD and SLC tests were.¹¹⁷ Stating that the SIEC test was a *big* step towards global convergence in merger control would, however, strike me as an overstatement, since the extensive case law already established a great deal of convergence prior to the EC merger control reform and the subsequent modification of the substantive test.

The Horizontal Merger Guidelines also provides a useful tool and an insight into the Commission's assessment of mergers, as well as a "quality assurance" for the Commission's review. The fact that the Commission uses the wording "coordinated effects" and explicitly prescribes the conditions which have to be fulfilled to establish a finding of collective dominance, could indicate that the Commission today has a better understanding of the economic aspects of collective dominance than previously.¹¹⁸ A conclusion to be drawn from the reviews of the respective substantive assessments in the EU and the US above is that there are no major differences between the EC Horizontal Merger Guidelines and the US equivalence. Basically, the same factors and industry characteristics are to be given attention in the assessment. The Commission has also abandoned its simplistic approach with a "checklist", acknowledging that a merger may require that certain aspects and characteristics of the market are analyzed more thoroughly, while others cannot be perceived as relevant for the assessment of whether the merger in question gives rise to collective dominance concerns. In addition, both the EC and the US have moved away from the initial structural approach in merger assessment towards an overall assessment of the competitive effects (both structural and behavioural) of a merger.

Following this argumentation, the SIEC and SLC tests share a common underlying goal and ultimately raise the same question in assessing a merger. Could we on the basis of these two conclusions expect the outcomes of cases notified in both the EU and the US to be absolutely convergent in the future? The answer to this question is obviously no, since convergent assessments do not mean that the factual circumstances in a case are appraised equally. It is quite likely that these differences could have emerged even though an SLC test would have been adapted in EC Merger Control.

With over 60 countries in the world reviewing mergers, the merger control system has unquestionably proven its importance. One can only expect that more countries will establish merger control systems in their respective jurisdictions. Co-operation over the borders is crucial without doubt, as mergers are apt to affect multiple jurisdictions and end up on the table of lawyers and judges of multiple antitrust authorities and Courts. The creation of the International Competition Network will most probably facilitate the essential co-operation between the Commission, the Courts and Competition Agencies and its counterparts in other jurisdictions. European merger control can probably be expected to further develop the theories of collective dominance and become more sophisticated, especially with the new Horizontal Merger Guidelines and the creation of a post of Chief Economist. From the US perspective, an Antitrust Modernization Commission was created pursuant to the Antitrust Modernization Commission Act of 2002. The purpose of the Antitrust Modernization Commission is to examine whether there is a need for a modernisation of the US antitrust laws.

¹¹⁷ However, two tests do not have to be identically-worded to have the same approach to merger analysis. Both the MD test and the SLC test seem to have relied on the same economic theories and prescribe a high standard of proof.

¹¹⁸ Especially taking into consideration a retaliatory mechanism as a condition to sustain tacit coordination.

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9.2 Statutes, Notices and Guidelines

The Celler-Kefauver Antimerger Act

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Council Regulation 139/2004 on the control of concentrations between undertakings [2004] O.J. L24/1. [ECMR]

The Clayton Act

The EC Treaty

Green Paper on the Review of Council Regulation (EEC) No 4064/89 presented by the Commission, Brussels, 11.12.2001, COM (2001) 745/6. [Green Paper]

Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03) [Horizontal Merger Guidelines]

Notice on the definition of the relevant market for the purposes of Community competition law [Notice on Market Definition]

The Sherman Anti-Trust Act

US Horizontal Merger Guidelines issued April 2, 1992, Revised April 8, 1997, [cit. US Horizontal Merger Guidelines.]

9.3 Case Law

Case No IV/M.190 *Nestlé/Perrier*, OJ [1992] L 56/1, [1993] 4 CMLR M17.

Case No IV/M. 308 *Kali und Salz*, OJ [1994] L 186/38.

Case No IV/M.619 *Gencor/Lonrho*, OJ [1997] L 11/30, [1999] 4 CMLR 1076.

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