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THE ROLE OF EFFICIENCY CONSIDERATIONS UNDER THE EU MERGER CONTROL

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ABSTRACT

There is a wide agreement that the aim of competition law is to promote efficiency. Therefore, it is logical that efficiencies should form an integral part of competition policy and in particular that they should be taken into account in the process of merger appraisal. This conclusion is not affected by the welfare standard, which the authorities choose to apply when enforcing the competition rules.

The system of EU merger control which was in force before May 2004 failed to explicitly endorse efficiency considerations. Nonetheless, the vagueness of the relevant legal texts provided enough manoeuvring space to adopt an extensive interpretation that served to the benefit of efficiencies, which were gradually introduced through the Commission's

decisional practice. Such approach was indeed pursuing a correct goal, but has also created additional problems among which the inconsistency in the treatment of efficiencies and the resulting lack of legal certainty was the most serious. An important step was taken in May 2004 when efficiencies were explicitly given a role in the EU merger control through Regulation 139/2004. The merging undertakings now have the benefit of a firm legal basis and rather detailed guidelines for invoking efficiencies in support of the notified concentration. Nevertheless, the approach that has been established appears on its face quite restrictive and sceptical to efficiency claims, which is why it is questionable whether the successfulness of efficiency claims will greatly increase in practice. However, there is still hope for the future since the legal texts, which explain the treatment of efficiencies, resemble the system that was in force before May 2004 in the sense of being relatively vague and therefore susceptible to different interpretations. Consequently it is for the Commission to use its decisional practice to further shape the role of efficiencies in the EU merger control.

A INTRODUCTION

Business world is characterized by a trend of intense globalisation, in which the undertakings are resorting to mergers and acquisitions in order to protect and improve their competitive position in the market. This process of industrial consolidation is vividly reflected in the statistical data,[1] which reveals that the number of notified concentrations in the EU has been almost steadily increasing since 1990, when the Commission was for the first time explicitly entrusted with the power to appraise the compatibility of concentrations with the common market.[2]

[1] — 'European Merger Control - Council Regulation 4064/89 and - Statistics' <http://europa.eu.int/comm/competition/mergers/cases/stats.html> (2 February 2005).

[2] Council Regulation (EEC) 4064/89 of 21 December 1989 on the Control of Concentrations between Undertakings [1989] OJ L 395/1, as amended [1997] OJ L 180/1.

Why do undertakings merge? Naturally, the reason behind the transaction might be solely to increase the market power of companies or to satisfy megalomaniac desires of their chief executives,[3] but most commonly the reason that underlies concentrations is that various efficiencies could be achieved (such as for example economies of scale and scope, workforce rationalisation or managerial efficiencies).[4] It follows that efficiencies should play some role in the merger control. However, as it will be demonstrated, several theoretically and practically complex issues need to be resolved before efficiency considerations can be properly acknowledged. In light of the highly politicised and thereby potentially contentious decisions that have to be adopted in this respect a question may be raised, whether it is at all worth embarking upon the path of disentangling the concerns related to efficiencies.

The answer is clear – it is not only recommendable, but in fact necessary to take efficiencies into account, if any respect is to be paid to the aim of improving the competitiveness of European industry through corporate reorganisations, which is mentioned in both Regulation 4064/89[5] and Regulation 139/2004.[6] Notwithstanding this, the EU had not explicitly acknowledged the role of efficiencies in its merger control until 2004, when the Guidelines[7] and the Regulation 139/2004[8] came into force. Moreover, before 2004 the

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[3] M de la Mano 'For the Customer's Sake: The Competitive Effects of Efficiencies in European Merger Control' (Enterprise Papers No 11 European Commission 2002) 41.

[4] N Calviño 'Some Thoughts on the Role of Efficiencies in Merger Control' in G Drauz and M Reynolds (eds) *EC Merger Control: A Major Reform in Progress* (Richmond Law & Tax Richmond 2003) 221–222.

[5] Regulation 4064/89 (n 2) Recitals 3–4.

[6] Council Regulation (EC) 139/2004 of 20 January 2004 on the Control of Concentrations between Undertakings [2004] OJ L 24/1 (the EC Merger Regulation) Recitals 3–4.

[7] Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings [2004] OJ C 31/5, [76]–[88].

[8] Regulation 139/2004 (n 6) Recital 29.

Commission occasionally relied on efficiencies in order to prove the anti-competitive nature of the transaction.[9] The system which was oblivious and occasionally even hostile towards efficiencies arguably had a discouraging effect on those transactions that would through the creation of efficiencies genuinely contribute to the competitiveness of the European industry. Furthermore, it had also affected several international concentrations spurred by the process of globalisation such as the widely debated *General Electric/Honeywell* transaction.[10] This case clearly revealed how important efficiencies may be for the outcome of the appraisal of certain concentrations and the great gap separating the EU approach from the US system[11] (and indirectly from other jurisdictions explicitly recognizing efficiencies such as Canada,[12] Brazil,[13] UK[14] and Australia[15]). *General Electric/Honeywell* illustrates not only the need for explicit treatment of efficiencies in EU merger control, but also calls for a certain convergence of the appraisal of efficiencies in major jurisdictions.[16]

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[9] As an example in *AT&T/NCR* (Case IV/M050) [1991] OJ C016/1, [30], the Commission stated: 'It is not excluded that potential advantages flowing from synergies may create or strengthen a dominant position.'

[10] *General Electric/Honeywell* (Case COMP/M2220) [2004] OJ L048/1.

[11] L Colley 'From "Defence" to "Attack"? Quantifying Efficiency Arguments in Mergers' (2004) 25 ECLR 342, 343.

[12] IK Gotts and CS Goldman 'The Role of Efficiencies in M&A Global Antitrust in Review: Still in Flux?' in BE Hawk (ed) *International Antitrust Law & Policy: Annual Proceedings of the Fordham Corporate Law Institute* (Juris Publishing Inc Huntington 2003) 230–242; P Glossop 'Canada: Mergers – Enforcement Guidelines - Revisions' (2005) 26 ECLR 20.

[13] JIG Franceschini and EA Pereira 'Economic Efficiencies from a Legal Standpoint under Brazilian Law' in BE Hawk (ed) *International Antitrust Law & Policy: Annual Proceedings of the Fordham Corporate Law Institute* (Juris Publishing Inc Yonkers 1999).

[14] J Vickers 'Competition Economics and Policy' (2003) 24 ECLR 95, 98–101.

[15] — 'Substantive Standards for Mergers and the Role of Efficiencies' in BE Hawk (ed) *International Antitrust Law & Policy: Annual Proceedings of the Fordham Corporate Law Institute* (Juris Publishing Inc Huntington 2003) 335.

[16] Gotts and Goldman (n 12) 299.

In 2004 the EU explicitly endorsed efficiency considerations in its merger control and published Guidelines, which provide a detailed insight to Commission's approach to the efficiency claims. The question that arises is whether this reform will really have the desired impact and bring the European competition law in line with the findings of economists or was the Commission perhaps too cautious to introduce the necessary far-reaching changes?

First part of this paper provides the theoretical basis for the discussion and explains the concepts which enable us to address the question of the proper role of efficiencies in merger control. The second part analyses the treatment of efficiencies in the EU before May 2004, while the third part introduces a critical assessment of the present EU approach to efficiencies and attempts to offer some solutions for the future.

B DEFINING THE CONCEPTS

1. The Concept of Efficiencies

From the perspective of economists, efficiency should be understood 'as referring to an event that increases the total value of all economically measurable assets in society'.[17] This definition is a good starting point, but is somehow too vague to be of substantial practical value, since there are evidently numerous events that fall within its broad scope. For this

[17] MN Berry 'Efficiencies and Horizontal Mergers: In Search of a Defense' (1996) 33 San Diego L Rev 515, 532. Compare RM Vernail 'One Step Forward, One Step Back: How the Pass-on Requirement for Efficiency Benefits in FTC v. Staples Undermines the Revisions to the Horizontal Merger Guidelines Efficiencies Section' (1998) 7 George Mason L Rev 133, 134.

reason it is useful to distinguish between (at least) three general categories of efficiencies: allocative, productive and dynamic efficiencies.[18]

(a) Allocative efficiency

The term allocative efficiency (or Pareto efficiency) relates to the effective allocation of resources and is deemed to be

> achieved when the existing stock of (final and intermediate) goods are allocated through the price system to those buyers who value them most, in terms of willingness to pay or willingness to forego other consumption possibilities.[19]

This in essence denotes the idea that the undertakings provide goods and services that are needed by the consumers and sell them at the prices, which they are willing to pay and which reflect the cost of resources used.[20] The loss sustained in case of the allocative inefficiency is termed dead-weight loss.

(b) Productive efficiency

Productive (or technical) efficiency is easiest to quantify and is consequently the most uncontroversial category of efficiencies, which is why the competition authorities are more inclined to take it into account.[21] It is reached when goods and services are produced with the least use of resources or in other words when with the given amount of resources the

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[18] Some authors recognise more than three general categories of efficiencies. For example JS Venit 'The Role of Efficiencies in Merger Control' in G Drauz and M Reynolds (eds) *EC Merger Control: A Major Reform in Progress* (Richmond Law & Tax Richmond 2003) 233–237; CS Goldman IK Gotts and ME Piaskoski 'The Role of Efficiencies in Telecommunications Merger Review' (2003-2004) 56 Federal Communication LJ 87, 126–136.

[19] Mano (n 3) 8.

[20] RJ Van den Bergh and PD Camesasca *European Competition Law and Economics: A Comparative Perspective* (Intersentia Antwerpen 2001) 5.

[21] Telecommunications Merger Review (n 18) 127.

maximum possible output is achieved. If the combination of resources used is not the most effective combination available, the productive inefficiency or so-called X-inefficiency arises. In general productive efficiency depends on the existing technology and prices of resources.[22]

(c) Dynamic efficiency

In contrast to productive and allocative efficiency, which are of static nature and relate to a given point of time, dynamic (or innovative) efficiency involves a temporal or dynamic dimension. Dynamic efficiency by means of innovation, research and development leads to cost savings, new products and processes as well as to the improvement of existing goods and services.

The problem with dynamic efficiencies is that they are prospective in nature and concentrate on future benefits, which makes them difficult to quantify and consequently to prove.[23] It is therefore not surprising that 'the economic discussion of how to take technological progress into account must be one of the most frequently undertaken in industrial organisation'.[24] Despite the problems with measuring the dynamic efficiencies they have to be considered as they 'provide the greatest potential enhancement of social wealth'[25] and 'the single most important factor in the growth of real output in the industrial world'.[26]

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[22] Mano (n 3) 8-9.
[23] Gotts and Goldman (n 12) 282–283.

[24] PD Camesasca *European Merger Control: Getting the Efficiencies Right* (Intersentia-Hart Antwerpen 2000) [231].

[25] JF Brodley 'Proof of Efficiencies in Mergers and Joint Ventures' (1996) 64 Antitrust LJ 575, 581.

[26] ibid.

(d) Transactional efficiency and specific types of efficiencies

Part of the economic theory argues in favour of an expanded list of the categories of efficiencies. A particularly often mentioned category are transactional efficiencies, which are achieved by elimination of double marginalisation (that is the costs of doing business with third parties).[27] Transactional efficiencies are claimed to frequently facilitate undertakings' efforts in achieving other three classes of efficiencies.[28]

A detailed analysis of all other possible types of efficiencies[29] is, although useful, not necessary for the assessment which follows.

2. Efficiencies and Competition Law

Should efficiencies play a notable role in the application of competition law? The answer is without doubt in the affirmative.

It is widely agreed that competition law aims to promote efficiency[30] and some commentators go even further in claiming efficiency to be in fact the ultimate goal of competition law[31] and competition policy.[32] The latter conclusion might prima facie seem

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[27] Venit (n 18) 235.

[28] WJ Kolasky and AR Dick 'The Merger Guidelines and the Integration of Efficiencies into Antitrust review of Horizontal Mergers' (2003) 71 Antitrust LJ 207, 249.

[29] A detailed account of specific classes of efficiencies is provided in Camesasca (n 24) [144]–[187] and Mano (n 3) 62-70.

[30] TJ Muris 'The Efficiency Defense under Section 7 of the Clayton Act' (1980) 30 Case Western Reserve L Rev 381, 381; Brodley (n 25) 575; D Hildebrand *The Role of Economic Analysis in the EC Competition Rules* (2nd edn Kluwer Law International The Hague 2002) 388.

[31] Kolasky and Dick (n 28) 207.

[32] M Furse 'The Role of Competition Policy: A Survey' (1996) 17 ECLR 250, 257-258.

rather preposterous, but eventually it may prove to be correct. Recent development of the competition law supports this far-reaching assertion as there has been a strong tendency of 'significant narrowing of competition law objectives in the direction of a more economic based analysis, according even greater weight to economic efficiency'.[33] As an illustration, it is worth considering the reform of the EU competition law in previous years which emphatically confirms this view. For example the Notice on the Definition of the Relevant Market provided greater use of economic analysis in defining the relevant market. It should also not be forgotten that Mario Monti, former Commissioner responsible for competition, explicitly referred to the economic interpretation of EU competition rules as one of his main goals during his term in office.[34] On the other hand, as an objection to these findings it can be argued that competition policy is, in practice, regularly found to pursue non-economic objectives[35] such as single market integration. This argument can be easily dismissed with the explanation that all competition law objectives that are not related to the concept of economic efficiency could be better achieved through means other than competition law.[36]

It is submitted that the focus of competition law on achieving economic efficiency would provide a much needed clarity in the functioning of competition policy as well as relieve competition authorities of various (in)direct political pressures. It would at the same time bring no harm to non-economic objectives that are occasionally pursued through

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[33] CD Ehlermann and LL Laudati 'Introduction' in CD Ehlermann and LL Laudati (eds) *European Competition Law Annual 1997: the Objectives of Competition Policy* (Hart Publishing Oxford 1998) ix.

[34] M Monti 'EU Competition Policy After May 2004' in BE Hawk (ed) *International Antitrust Law & Policy: Annual Proceedings of the Fordham Corporate Law Institute* (Juris Publishing Inc Huntington 2004) 406–407.

[35] BJ Rodger and A MacCulloch *Competition Law and Policy in the EC and UK* (2nd edn Cavendish Publishing Limited London 2001) 12–15; I Yuzhanov 'Competition Law and Policy – the Role of Political Influence' in BE Hawk (ed) *International Antitrust Law & Policy: Annual Proceedings of the Fordham Corporate Law Institute* (Juris Publishing Inc Huntington 2002) 623.

[36] F Jenny 'Competition and Efficiency' in BE Hawk (ed) *Antitrust in a Global Economy: Annual Proceedings of the Fordham Corporate Law Institute* (Transnational Juris Publications Inc Irvington-on-Hudson 1994) 218; Ehlermann and Laudati (n 33) ix; Van den Bergh and Camesasca (n 20) 6.

competition rules. Nevertheless, at the moment it is questionable, whether the competition law in any jurisdiction has reached a stage for such a revolutionary departure from contemporary practice, although it is worth noting that the approach of the Canadian authorities to the merger between Superior Propane and ICG Propane[37] does provide a suggestion in this direction.

In conclusion, regardless of the position taken as to the proper relationship of efficiencies to the competition law, there is a common understanding that they should form an integral part of competition policy.

3. The Importance of Welfare Standards

Interestingly, the approaches of competition authorities from various jurisdictions may vary considerably even when they do take efficiencies into account. The reason for this divergence is that domestic competition systems may adhere to different welfare standards which in practice define what types of efficiencies will be considered and how they will be evaluated.

(a) Consumer welfare standard

According to the consumer welfare standard, the competition rules ought to prevent unfair transfers of wealth from consumers to the producers.[38] The application of this standard restrains the possibility of successful efficiency claims[39] and is moreover not consistent with the conclusions of traditional welfare theory, because it leads to total disregard of the

[37] Description of the development of the case can be found in Gotts and Goldman (n 12) 236–242.

[38] Camesasca (n 24) [16]–[17].

[39] ibid [17].

maximization of social welfare that could be achieved through the wealth transfers to producers, which can also be deemed socially positive.[40] Under this standard three distinct approaches can be considered.

(i) Pure price standard

If this standard is followed a merger is approved only on condition that it does not lead to an increase in market power, which is why efficiencies are not considered even if they would result in a decrease of prices.[41]

(ii) Modified price standard

The modified price standard allows a merger that increases the market power to proceed, if it generates efficiencies, which cause the post-merger prices to decrease thereby implying that some of the efficiencies are passed on to consumers.[42] This standard has been subjected to severe criticism for not considering the efficiencies that benefit the merging undertakings and for resulting in the prohibition of some welfare enhancing mergers (type II error),[43] where despite the large cost savings, the proposed merger is doomed for causing a small price increase.[44]

(iii) Consumer surplus standard

The consumer surplus standard recognises that undertakings producing substitutable products and services do not compete only on price, but also on other non-price related elements such

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[40] Gotts and Goldman (n 12) 246.

[41] Venit (n 18) 256.

[42] ibid.

[43] In contrast type I error exists where a merger that produces net harmful effects is allowed to proceed.

[44] Venit (n 18) 260.

as quality and the extent of aftersales services.[45] Therefore, in contrast to the modified price standard, even if after the merger prices would increase, the transaction will not be opposed, if it produces efficiencies which, in accordance with the passing-on requirement, completely offset the total loss to consumer welfare. This standard is criticised mainly because it leads to the prohibition of some mergers that would benefit the society as a whole solely due to the fact that they hurt consumers as a particular class of the society.[46]

(b) Total surplus standard

As regards the total surplus standard, the emphasis is not on whether the consumers are better off because of the merger but rather on the consequences of the transaction for the total societal welfare. Under this approach, which is based on Kaldor-Hicks efficiency,[47] there is no requirement of the efficiencies being passed on to consumers,[48] since only the total surplus is of importance, namely the sum of consumer surplus (the difference between consumers' willingness to pay for a product and the market prices being charged) and the producer surplus (the difference between the firm's revenues and its economic costs).[49] Moreover, the transfers of wealth from consumers to producers are regarded as neutral.

Although some argue against the neutrality of wealth transfers between consumers and shareholders of the merged firm as well as against the same treatment of consumers and shareholders,[50] there is much to be said in support of the adoption of this standard.[51] Most of

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[45] Mano (n 3) 18.

[46] Further critique of the approach is provided in Venit (n 18) 261.

[47] Camesasca (n 24) [18].

[48] ibid [21].

[49] Gotts and Goldman (n 12) 250.

[50] Venit (n 18) 262.

[51] ibid 261–262; Mano (n 3) 19.

the economists prefer the total surplus standard over the consumer welfare standard.[52] In addition, it is more hospitable to efficiency claims due to the absence of a passing-on requirement.

(c) Weighted standard

While the total surplus standard views the wealth transfer from consumers to producer's shareholders as neutral, the weighted standard adopts a peculiar approach to such redistributive effects by assigning different weights to reductions in consumer welfare and increases in the shareholders' welfare respectively.[53] Accordingly, the merger will be allowed to proceed if the weighted sum is greater than zero.[54] However, an enormous problem with the application of this standard is that the definition of appropriate weights necessarily involves a high degree of discretion and therefore opens up a question of legal certainty.[55]

(d) Hillsdown or "potential competition" standard

Lastly, a standard that is seldom mentioned, because it is burdened with internal inconsistencies and serious implementation difficulties, needs to be briefly presented.[56] The Hillsdown standard views an 'anti-competitive effect of a merger as the entire loss in consumer welfare resulting from the merger after the exercise of post-merger market

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[52] LH Röller J Stennek and F Verboven 'Efficiency Gains from Mergers' in European Commission *European Economy: The Efficiency Defence and the European System of Merger Control* (Reports and Studies No 5 European Communities Belgium 2001) 54; Confederation of Swedish Enterprise 'Merger Control Reform' <http://europa.eu.int/comm/competition/mergers/review/contributions/ref038_svenskt_ naringsliv_en.pdf> (5 March 2005) 16; C Luescher 'Efficiency Considerations in European Merger Control – Just Another Battle Ground for the European Commission, Economists and Competition Lawyers' (2004) 25 ECLR 72, 78.

[53] M de la Mano 'For the Customer's Sake: The Competitive Effects of Efficiencies in European Merger Control' (Enterprise Papers No 11 European Commission 2002) 23.

[54] ibid.

[55] Venit (n 18) 262.

[56] The standard was first suggested in Canada in the so-called Hillsdown decision. Mano (n 53) 23.

power'[57] and the 'efficiency gains are required to exceed the entire loss in consumer welfare resulting from it.'[58]

(e) The choice of a welfare standard

The welfare theory clearly stands on the position that competition rules should pursue the total surplus standard. In reality, however, the choice of a welfare standard does not reflect the findings of the economic science, but rather has the nature of a political choice,[59] which works against the adoption of the total surplus standard.[60] It is argued similarly as above that in the present stage of the development of competition law the public apprehension of competition policy is not yet at a level where it would allow the policy makers to take a radical step of adopting the total surplus standard. Namely, it is hardly conceivable that the general public would be willing to endorse the decision of the authorities approving a merger, which would be beneficial overall, but would cause severe harm to the welfare of consumers and bring even larger profits to the producers. For these reasons it seems that the adoption of total surplus standard remains only a theoretical possibility and that other standards will prevail in practice.

4. Efficiencies and Merger Control

Since merger regulation constitutes one of the cornerstones of competition law it seems logical that efficiency considerations should play an important role in the appraisal of mergers. A survey of business practice also points in this direction, while the achievement of

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[57] ibid.

[58] ibid.

[59] F Ilzkovitz and R Meiklejohn 'European Merger Control: Do We Need an Efficiency Defense?' (2003) 3 J of Industry, Competition and Trade 57, 71.

[60] M Ganslandt and L Persson 'Comments on the Treatment of Efficiencies and Market Integration in the Commission's Proposal for Draft Horizontal Merger Guidelines' (2003) <http://europa.eu.int/comm/competition/mergers/review/contributions/ref017_iui_en.pdf> 5.

efficiencies is regularly alleged by the undertakings concerned as one of the reasons for merging.[61] However, in spite of these findings efficiencies for a long time remained unacknowledged by the competition authorities[62] and even worse were sometimes regarded as an evidence of the anti-competitive nature of the proposed concentration.[63] However, an extremely influential series of articles by Oliver Williamson[64] finally established that efficiencies are 'a highly desirable result of mergers and that a proper enforcement policy would maximize overall efficiency in the economy.'[65] Therefore, the contemporary debate should not revolve around the question whether efficiencies should be acknowledged, but rather around the question of how to properly take them into the account.

C WHAT ROLE DID EFFICIENCIES PLAY IN THE EU BEFORE MAY 2004?

1. No Explicit Basis for Considering Efficiency Claims

Despite the importance of efficiency considerations in the appraisal of concentrations, the issue was not explicitly addressed in Regulation 4064/89 nor in any of the measures implementing it. The EU apparently decided to take the approach which was contrary to the

[61] *Aerospatiale-Alenia/de Havilland* (Case IV/M053) [1991] OJ L334/42, [65]–[68]; *Gencor/Lonrho* (Case IV/M619) [1997] OJ L11/30, [212]; *Saint-Gobain/Wacker-Chemie/NOM* (Case IV/M774) [1997] OJ L247/1, [244]–[245]; *Danish Crown/Vestjyske Slagterier* (Case IV/M1313) [2000] OJ L20/1, [198].

[62] J Kattan 'Efficiencies and Merger Analysis' (1994) 62 Antitrust LJ 513, 515; WJ Kolasky and AR Dick 'The Merger Guidelines and the Integration of Efficiencies into Antitrust review of Horizontal Mergers' (2003) 71 Antitrust LJ 207, 209.

[63] *AT&T/NCR* (Case IV/M050) [1991] OJ C016/1, [30].

[64] AA Fisher and RH Lande 'Efficiency Considerations in Merger Enforcement' (1983) 71 California L Rev 1580, 1583; Kattan (n 62) 515; Kolasky and Dick (n 62) 209.

[65] Fisher and Lande (n 64) 1583.

conclusions of the economic theory. It was claimed by officials that the reason underlying a conscious decision to exclude[66] the explicit recognition of efficiencies was to be found in

> the history surrounding the adoption of the Merger Regulation and the subsequent commitment by the Commission to make it clear that merger policy was … not an instrument of industrial policy.[67]

This is on its face a sensible explanation, especially if one bears in mind that national industrial policy concerns and interest in protecting the economic sovereignty were the main reasons delaying the adoption of merger legislation.[68] However, the persuasiveness of this line of reasoning diminishes in light of a finding that efficiency defence does not provide for the introduction of social or regional policy interests in the merger control, but rather uses an economic rationale in clearing a concentration that otherwise harms competition.[69] Moreover, in spite of the claims that efficiencies were disregarded in order to prove that EC merger control is purely competition-based,[70] there was interestingly no provision expressly prohibiting the assessment of efficiencies. Therefore, the question arises whether the legislator has perhaps intentionally left the door ajar to be able to indirectly and implicitly bring efficiency considerations in the EU merger control.[71]

2. Possible Legal Basis for Efficiency Claims

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[66] The provision, which would provide firmer basis for the inclusion of efficiencies in the appraisal of concentrations was removed from the draft of the Regulation 4064/89. PE Noel 'Efficiency Considerations in the Assessment of Horizontal Mergers under European and U.S. Antitrust Law' (1997) 18 ECLR 498, 503–504; M Motta 'E.C. Merger Policy and the Airtours Case' (2000) 21 ECLR 199, 202.

[67] P Lowe 'Review of the EC Merger Regulation – Forging a Way Ahead' (speech delivered at the European Merger Control Conference 8 November 2002, Conrad Hotel, Brussels) 10.

[68] W Sauter *Competition Law and Industrial Policy in the EU* (Clarendon Press Oxford 1997) 133.

[69] Noel (n 66) 503.

[70] C Rakovsky and V Verouden 'Comments on the Role of Efficiencies in EC Merger Control' in G Drauz and M Reynolds (eds) *EC Merger Control: A Major Reform in Progress* (Richmond Law & Tax Richmond 2003) 203.

[71] Noel (n 66) 503.

(a) Article 2(1)(a)

A very limited possibility for introducing efficiencies in merger control was to be found in Article 2(1)(a) of the Regulation 4064/89,[72] which required the Commission to take into account 'the structure of all the markets concerned' when assessing the compatibility of a concentration with the common market.

(b) Substantive test

Further option, which provided firmer grounds for efficiency claims, was identified in the so-called second limb of the compatibility test as defined in Article 2(2) and Article 2(3) of the Regulation 4064/89. This test entailed two cumulative conditions: a creation or strengthening of dominance and a subsequent finding of significant impediment of competition.[73] Therefore, even if a concentration would lead to a creation or strengthening of dominance, it could still be saved by arguing that it will bring about substantial efficiencies[74] that will offset any significant impediment of effective competition. In support of this view one could cite the words of the former Commissioner Monti, who stated 'there should be an "efficiency defence" that could mitigate a finding of dominance.'[75] On the whole, this appears to be the only logical interpretation of the substantive test under Regulation 4064/89, since if

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[72] PD Camesasca *European Merger Control: Getting the Efficiencies Right* (Intersentia-Hart Antwerpen 2000) [457]–[460].

[73] Mano (n 53) 33; IK Gotts and CS Goldman 'The Role of Efficiencies in M&A Global Antitrust in Review: Still in Flux?' in BE Hawk (ed) *International Antitrust Law & Policy: Annual Proceedings of the Fordham Corporate Law Institute* (Juris Publishing Inc Huntington 2003) 219; Substantive Standards for Mergers and the Role of Efficiencies (n 15) 340.

[74] J Crémer and others 'Collective letter by a group of academic economists' <http://europa.eu.int/comm/competition/mergers/review/comments/ref124_collectivelettertommontipostdeadline.pdf> (20 April 2005).

[75] M Monti 'Review of the EC Merger Regulation – Roadmap for the Reform Project' (speech delivered at the Conference on Reform of European Merger Control 5 June 2002, British Chamber of Commerce, Brussels).

significant impediment of competition was an unavoidable consequence of dominance, the reference to it under the substantive test would be redundant.

Nonetheless, the Commission's decisional practice appears at odds with this analysis, since it clearly rejected all efficiency claims once dominance has been concluded upon. In *Danish Crown/Vestjyske Slagterier* it held:

> The creation of a dominant position in the relevant markets … means that the efficiencies argument put forward by the parties cannot be taken into account in the assessment of the present merger.[76]

The position taken by the Commission is in accord with the view of those commentators who link dominance directly with a significant impediment of competition[77] despite the fragile economic foundations for such assertions.[78] Moreover, the Commission's practice is internally inconsistent, while in several decisions the finding of dominance did not lead to the conclusion that efficiencies cannot be invoked as it may be expected, but rather to the finding that the conditions for their applicability are not met.[79]

As noted by Camesasca the approach acknowledging the two-tier structure of the compatibility test could have been groundbreaking for the acknowledgement of efficiency considerations, but not until the ECJ adopted a relevant authoritative ruling.[80] It is not unreasonable to speculate that such a ruling could have potentially even allowed the

[76] *Danish Crown/Vestjyske Slagterier* (Case IV/M1313) [2000] OJ L20/1, [198].

[77] C Jones and FE González-Díaz *The EEC Merger Regulation* (Sweet & Maxwell London 1992) 154–156; TG Portwood *Mergers under EEC Competition Law* (The Athlone Press London 1994) 92; RJ Van den Bergh and PD Camesasca *European Competition Law and Economics: A Comparative Perspective* (Intersentia Antwerpen 2001) 345.

[78] Mano (n 53) 34–35.

[79] JS Venit 'The Role of Efficiencies in Merger Control' in G Drauz and M Reynolds (eds) *EC Merger Control: A Major Reform in Progress* (Richmond Law & Tax Richmond 2003) 246.

[80] Camesasca (n 72) [471].

efficiencies to be evaluated under the total surplus standard,[81] which is pleaded by the economists. However, the ECJ refrained from taking such a daring step.

(c) Article 2(1)(b)

The reference to the development of technical and economic progress in Article 2(1)(b) of the Regulation 4064/89 was understood by scholars as the most viable basis for invoking efficiencies.[82] The idea that Article 2(1)(b) provided the legal basis for efficiency considerations was confirmed by the Commission[83] and implicitly also by the CFI[84] in the *Vittel v Commission*[85] judgement, where it stated that 'Article 2(1)(b) … requires the Commission to draw up an economic balance for the concentration in question'.[86]

It is worth remembering that anti-competitive agreements between undertakings, which fall under Article 81(1) of the Treaty are not prohibited, if they bring about substantial efficiencies and thereby satisfy the terms of Article 81(3) of the Treaty. The explanatory notes to the Regulation 4064/89 connected the interpretation of the term technical and economic progress found in Article 2(1)(b) with the principles and case law developed under Article 81(3).[87] Although helpful at first sight, the reference to Article 81(3) in fact cannot contribute to the understanding of the concept of efficiencies under Article 2(1)(b) due to

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[81] C Luescher 'Efficiency Considerations in European Merger Control – Just Another Battle Ground for the European Commission, Economists and Competition Lawyers' (2004) 25 ECLR 72, 81.

[82] R Van den Bergh 'Modern Industrial Organisation Versus Old-fashioned European Competition Law' (1996) 17 ECLR 75, 86; Ilzkovitz and Meiklejohn (n 59) 66-68; Luescher (n 81) 80.

[83] M Monti 'Keynote Address: Merger Control in the European Union – a Radical Reform' in G Drauz and M Reynolds (eds) *EC Merger Control: A Major Reform in Progress* (Richmond Law & Tax Richmond 2003) 8.

[84] Venit (n 79) 242.

[85] Case T-12/93 *Comité Central d'Enterprise de la Société Anonyme Vittel v Commission* [1995] ECR II-1247.

[86] ibid [39].

[87] Gotts and Goldman (n 73) 220.

several peculiar features. Namely, under Article 2(1)(b) efficiencies were not a requirement, it seemed to be narrower in covering only efficiencies achieved through innovation, the requirement that consumers should obtain a fair share of benefits was absent and lastly the stipulation that technical and economic progress should not form an obstacle to competition circumscribed the chances of successfully invoking efficiencies as any improvement of the firm's efficiency is always likely to increase its market power.[88] For all these reasons the appraisal of efficiencies under the Regulation 4064/89 did not benefit from the experience accumulated under Article 81(3).[89]

Nonetheless, there still remained the option of constructing the approach to the appraisal of efficiencies under Article 2(1)(b) from the start, if it was not for the almost insurmountable constraints that such claims faced. First of all, it has to be pointed out that Sir Brittan has set down a clear limit on the possible reach of efficiency claims by elaborating that once 'a dominant position which significantly impedes competition has been found there is no way around a declaration of incompatibility.'[90] Therefore, efficiencies could not have been used as a trump card to save an otherwise anti-competitive concentration.[91] Second constraint stemmed from the wording of Article 2(1)(b), which required the technical and economic progress to be to consumers' advantage. That requirement implied that a consumer welfare standard ought to have been applied in assessing efficiencies,[92] which necessarily

[88] F Ilzkovitz and R Meiklejohn 'European Merger Control: Do We Need an Efficiency Defense?' in European Commission *European Economy: The Efficiency Defence and the European System of Merger Control* (Reports and Studies No 5 European Communities Belgium 2001) 14.

[89] M de la Mano 'For the Customer's Sake: The Competitive Effects of Efficiencies in European Merger Control' (Enterprise Papers No 11 European Commission 2002) 28.

[90] This statement also speaks in favour of the two-tier structure of the compatibility test. Camesasca (n 72) [419].

[91] L Colley 'From "Defence" to "Attack"? Quantifying Efficiency Arguments in Mergers' (2004) 25 ECLR 342, 343.

[92] Mano (n 89) 26; Luescher (n 81) 81.

resulted in the severe limitations of their practical availability. The fact that the degree of passing-on requirement was not specified did not increase the successfulness of efficiency claims either. To illustrate, in *Accor/Wagons-Lits* the Commission rejected the alleged benefits of an increase in productivity by stating that 'the new undertaking … will have no interest to pass any assumed gains on to the consumer.'[93] The same reason was given by the Commission in refusing to take into account alleged efficiencies in *Aerospatiale-Alenia/de Havilland*[94] and *Saint-Gobain/Wacker-Chemie/NOM*.[95] Lastly, the condition of Article 2(1)(b) that technical and economic progress must not form an obstacle of competition arguably limited efficiencies to only those cases, which anyway would not raise competition concerns.[96] Due to the last condition, the entire Article 2(1)(b) was made 'meaningless'[97] and any efficiency claim was practically destined to fail. Although this highly restrictive condition could have been reinterpreted in order to allow for the acknowledgement of efficiencies,[98] the Commission adhered to the textual reading of Article 2(1)(b) as revealed in *MSG Media Service* and rejected efficiencies alleged by the parties.[99]

3. Efficiencies in Practice

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[93] *Accor/Wagons-Lits* (Case IV/M126) [1992] OJ L204/1, [26].

[94] *Aerospatiale-Alenia/de Havilland* (Case IV/M053) [1991] OJ L334/42, [69].

[95] *Saint-Gobain/Wacker-Chemie/NOM* (Case IV/M774) [1997] OJ L247/1, [214].

[96] Van den Bergh (n 82) 86.

[97] I Van Bael and JF Bellis *Competition Law of the European Community* (3rd edn CCH Europe Bicester 1994) 469; LH Röller J Stennek and F Verboven 'Efficiency Gains from Mergers' in European Commission *European Economy: The Efficiency Defence and the European System of Merger Control* (Reports and Studies No 5 European Communities Belgium 2001) 80.

[98] The term competition would have to be interpreted as meaning a price level. Röller Stennek and Verboven (n 97) 81.

[99] *MSG Media Service* (Case IV/M469) [1994] OJ L364/1, [100]–[101].

To sum up, although efficiencies were not explicitly included in the system of merger control based on Regulation 4064/89, there is a widespread belief that the Regulation did in fact contain several possible legal basis on which the parties could base their efficiency claims.[100] Therefore, not surprisingly the Commission has considered such claims in some of its decisions. A brief summary of those cases that allow a glimpse at some of the aspects of the Commission's approach is therefore appropriate.

In *Aerospatiale-Alenia/de Havilland* the Commission concluded that the alleged 'cost savings would have a negligible impact'[101] and further 'would not arise as a consequence of the concentration per se'.[102] Therefore apart from the impact of passing-on condition, this decision proved that efficiencies would have to be substantial as well as merger specific to be considered. The importance of merger specificity was further demonstrated in *Nordic Satellite Distribution* where the Commission denied any value to otherwise significant efficiencies, because it was found inter alia that 'the proposed operation is not necessary in order to create' the efficiencies.[103]

The Commission placed the burden of proving the claimed efficiencies on the parties relying on them as revealed in *Accor/Wagons-Lits* case. Namely, one of the reasons for the conclusion that the increases in productivity, argued by the parties, cannot be taken into account was that these increases 'remain vague, and have not been evaluated.'[104]

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[100] European Commission 'Green Paper on the Review of Council Regulation (EEC) No 4064/89 ("Merger Review") – Summary of the Replies Received' <http://europa.eu.int/comm/competition/mergers/review/comments/summary_publication.pdf> (26 March 2005), [117].

[101] *Aerospatiale-Alenia/de Havilland* (Case IV/M053) [1991] OJ L334/42, [65].

[102] ibid.

[103] *Nordic Satellite Distribution* (Case IV/M490) [1996] OJ L53/20, [151].

[104] *Accor/Wagons-Lits* (Case IV/M126) [1992] OJ L204/1, [26].

In contrast to the decisions, which have somehow contributed to the understanding of the conditions for successful efficiency claims, there is a stream of cases in which the Commission adopted a hostile approach towards the purported efficiencies and interpreted them as an evidence of the anti-competitiveness of the proposed concentration, an approach usually referred to as the efficiency offence.[105] It has to be admitted that in principle some room for an efficiency offence does in fact exist, 'but is restricted to exceptional cases related to long-run foreclosing behaviour.'[106] Therefore, there is no doubt that in general the concept of efficiency offence constitutes a misconceived policy approach.[107] For this reason the former Commissioner Monti went to great lengths to refute any possibility of an efficiency offence in EU merger control.[108] Nonetheless, not only has he failed to convince the scholars,[109] but also the Commission's decisions point in the opposite direction. Namely, the efficiency offence argument was clearly adopted in *AT&T/NCR*, where the Commission stated: 'It is not excluded that potential advantages flowing from synergies may create or strengthen a dominant position.'[110] Similar reasoning was adopted in *Aerospatiale-Alenia/de Havilland*, where the possibility of achieving the claimed static efficiencies was regarded as a sign of a competitive advantage over the parties' competitors.[111] However, the case that

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[105] Colley (n 91) 342.

[106] Mano (n 89) 26.

[107] F Jenny 'EEC Merger Control: Economies as an Antitrust Defense or an Antitrust Attack?' in BE Hawk (ed) *International Antitrust Law & Policy: Annual Proceedings of the Fordham Corporate Law Institute* (Transnational Juris Publications Inc Irvington-on-Hudson 1993) 603.

[108] Monti (n 75).

[109] Jenny (n 107) 603; BE Hawk and HL Huser *European Community Merger Control: A Practitioner's Guide* (Kluwer Law International The Hague 1996) 268; V Korah *An Introductory Guide to EC Competition Law and Practice* (7th edn Hart Publishing Oxford 2000) 312.

[110] *AT&T/NCR* (Case IV/M050) [1991] OJ C016/1, [30].

[111] Jenny (n 107) 602.

most vividly reflected the controversy, that might result from treating efficiencies as an offence, was *General Electric/Honeywell*[112] in which the Commission decided to prohibit the concentration for the reason that 'it would make the merged firm so efficient that its competitors would not be able to keep up and would be forced to exit the marketplace.'[113]

Despite the negative attitude towards efficiency claims that characterizes the Commission's past decisional practice, efficiencies are believed to have occasionally played a positive role, although behind the curtains, in constituting one of the elements on which the decision to clear a concentration was based.[114] Among those cases are *Alcatel/Telettra*,[115] *Mannesman/Valourec/Ilva*,[116] *Mercedes-Benz/Kässbohrer*,[117] *ABB/Daimler-Benz*,[118] *Agfa-Gevaert/DuPont*[119] and probably also *Air France/KLM*.[120] In these cases the Commission has presumably taken the alleged efficiencies into account without explicitly relying on them, which means that they have indeed constituted a factor in allowing the notified concentrations to proceed.

4. Conclusion

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[112] *General Electric/Honeywell* (Case COMP/M2220) [2004] OJ L048/1.

[113] Venit (n 79) 245.

[114] Mano (n 89) 29.

[115] *Alcatel/Telettra* (Case IV/M042) [1991] OJ L122/48.

[116] *Mannesmann/Vallourec/Ilva* (Case IV/M315) [1994] OJ L102/15.

[117] *Mercedes-Benz/Kässbohrer* (Case IV/M477) [1995] OJ L211/1, [66].

[118] *ABB/Daimler-Benz* (Case IV/M580) [1997] OJ L11/1, [63]–[65].

[119] *Agfa-Gevaert/DuPont* (Case IV/M986) [1998] OJ L211/22, [61].

[120] *Air France/KLM* (Case IV/M3280) [2004] OJ C060/5; RJ Van den Bergh and PD Camesasca *European Competition Law and Economics: A Comparative Perspective* (Intersentia Antwerpen 2001) 347; A Weitbrecht 'EU Merger Control in 2004 – an Overview' (2005) 26 ECLR 67, 70–71.

It can be stated that in spite of the lack of the explicit endorsement of efficiencies, the Commission's decisions have confirmed that Regulation 4064/89 did entail provisions on which the efficiency claims could be based. An obvious question that follows is why the Commission even ventured in the issue of efficiencies and did not simply disregard them? It is possible to argue along the lines that the Commission, which was aware both of what the proper role of efficiencies should be and of the opposition of some Member States to the incorporation of the efficiency concept in the EU merger control, has tried to resolve the problem by gradually bringing the efficiency considerations in the merger appraisal through the back door. Its long-term plan might have been to construe a systematic approach to efficiencies through a series of relatively low-key decisions, thereby resorting to a technique of incrementalism, which the ECJ has been so successfully using.[121]

It was argued that by 'handling efficiencies in-between lines, the Commission has no fall-back line to defend itself against accusations of … industrial policy considerations'[122] and 'to avoid this critique the Commission seems to insert efficiencies during the evaluative process … in doing so avoiding a final finding of dominance, substantially hindering competition.'[123] Moreover, the legal basis for invoking efficiencies were beset with inconsistencies and contradictions that the Commission not only failed to resolve, but perhaps even heightened,[124] which resulted in detriment to legal certainty. As if controversies coupled with the lack of transparency were not enough, the undertakings were under a

[121] M Shapiro 'The European Court of Justice' in P Craig and G de Búrca (eds) *The Evolution of EU Law* (Oxford University Press Oxford 1999) 321–327 .

[122] PD Camesasca *European Merger Control: Getting the Efficiencies Right* (Intersentia-Hart Antwerpen 2000) [444].

[123] ibid.

[124] R Van den Bergh 'Modern Industrial Organisation Versus Old-fashioned European Competition Law' (1996) 17 ECLR 75, 85; Röller Stennek and Verboven (n 97) 82.

constant threat of efficiency offence, which discouraged efficiency claims and effectively resulted in lack of relevant case law.

For the reasons submitted it can be concluded that the efficiencies did not play a decisive role under the system established by the Regulation 4064/89.[125] Nonetheless, the rare decisions that did deal with efficiencies managed at least to spark calls by scholars[126] and undertakings[127] for an explicit treatment of efficiencies.

D WHERE DO WE STAND?

1. Explicit Role of Efficiencies

Regulation 139/2004 at last cleared all doubts about the availability of efficiency claims in EU merger control. The preamble of the Regulation expressly states that 'any substantiated and likely efficiencies put forward by the undertakings concerned'[128] will be taken into account. The change in the EU merger system is not merely fictitious as it is accompanied by the novel features introduced in the Form CO[129] and the DG Competition Best Practices on the Conduct of EC Merger Control Proceedings[130] as well as by the Guidelines,[131] which provide a detailed description of the Commission's approach to efficiencies.

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[125] Hawk and Huser (n 109) 269; PE Noel 'Efficiency Considerations in the Assessment of Horizontal Mergers under European and U.S. Antitrust Law' (1997) 18 ECLR 498, 514.

[126] W Sauter *Competition Law and Industrial Policy in the EU* (Clarendon Press Oxford 1997) 139.

[127] Green Paper on the Review of Regulation 4064/89 – Summary of the Replies Received (n 100) [113].

[128] Council Regulation (EC) 139/2004 of 20 January 2004 on the Control of Concentrations between Undertakings [2004] OJ L 24/1 (the EC Merger Regulation) Recital 29.

[129] Section 9 invites the parties to present efficiency claims. Commission Regulation (EC) 802/2004 of 7 April 2004 Implementing Council Regulation (EC) 139/2004 of 20 January 2004 on the Control of Concentrations between Undertakings [2004] OJ L 133/1, 20.

[130] DG Competition 'Best Practices on the Conduct of EC Merger Control Proceedings' <http://europa.eu.int/comm/competition/mergers/legislation/regulation/best_practices.pdf> (2 April 2005), [18].

It is undisputable that the new legislation constitutes a vital step in the direction of awarding efficiencies a proper role in the EU merger control. However, although the Regulation 139/2004 'greatly improves clarity in this area'[132] and thereby enhances legal certainty, it has to be pointed out that efficiencies are mentioned nowhere in the legally binding part of the Regulation, which indirectly partly diminishes the importance of efficiency concerns in the appraisal of concentrations. Besides, since the details about the assessment of efficiencies are determined in the Guidelines rather than to be inserted as an integral part of the legislative package, the weight of such claims is further adversely affected.[133]

On the other hand, it is likely that the path chosen is not a reflection of the intention to circumscribe the impact of the change, but rather a consequence of a wide agreement about there being no need to amend Regulation 4064/89 in order to establish a legal base for the assessment of efficiencies.[134] Accordingly, Article 2(1)(b) on which the relevant section of the Guidelines is built[135] has not been altered. From this perspective it appears as if the express reference to the efficiencies in the preamble of Regulation 139/2004 mainly serves to give publicity to the Commission's decision to pay more attention to an element of the appraisal that has always been present but has not been explicitly acknowledged for various

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[131] Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings [2004] OJ C 31/5.

[132] Colley (n 91) 342.

[133] S Rickard 'European Merger Reform' (2002) 13 Intl Company and Commercial L Rev 408, 412.

[134] Commission Proposal for a Council Regulation on the Control of Concentrations between Undertakings COM(2002)711 final (28 January 2003) (Proposal) 9.

[135] — 'Substantive Standards for Mergers and the Role of Efficiencies' in BE Hawk (ed) *International Antitrust Law & Policy: Annual Proceedings of the Fordham Corporate Law Institute* (Juris Publishing Inc Huntington 2003) 340.

political reasons. This view is further supported by the structure of the Guidelines, which reveals that, while indeed clarifying the conditions for efficiency claims, the Guidelines in large part consolidate and explicate the directions laid by the Commission's past decisions. Lastly, the reason why the treatment of efficiencies is explained in non-binding Guidelines and not in a form of a Regulation might be that such an instrument affords the Commission greater flexibility.[136]

2. The Guidelines

Under Regulation 4064/89 it was argued that appropriate guidelines, which would clearly elaborate the role of efficiencies were required.[137] After the move to the explicit treatment of efficiencies such calls intensified,[138] so it is of no surprise that the Draft Guidelines[139] were most warmly welcomed by the business community.[140] However, while the Guidelines are indeed bringing the Commission's approach to efficiencies more in line with the teachings of economic science, there is nevertheless a lot more that could be done.

(a) Welfare standard

As submitted earlier, economists favour the total surplus standard over the consumer welfare standard, because the latter severely narrows the scope for considering efficiencies.

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[136] Röller Stennek and Verboven (n 97) 113.

[137] M de la Mano 'For the Customer's Sake: The Competitive Effects of Efficiencies in European Merger Control' (Enterprise Papers No 11 European Commission 2002) 31.

[138] Green Paper on the Review of Regulation 4064/89 – Summary of the Replies Received (n 100) [115].

[139] Draft Commission Notice on the Appraisal of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings [2002] OJ C331/18.

[140] Comments submitted by Olswang [26], Department of Trade and Industry, UK [29], Linklaters [4.1], UNICE [3.2] and Wragge&Co [5.1], which can all be found on — 'Contributions Received on Draft Notice on the Appraisal of Horizontal Mergers' <http://europa.eu.int/comm/competition/mergers/review/contributions.html> (3 April 2005).

Nevertheless, despite its obvious limitations, the consumer welfare standard has been retained as the relevant standard for appraising efficiencies.[141] While the Commission has not opted for an explicit confirmation of the relevant welfare standard, the wording of the Guidelines does not leave much doubt.[142] Firstly, the section of the Guidelines that addresses efficiencies is based on the Article 2(1)(b) of the Regulation 139/2004,[143] which requires the application of the consumer welfare standard. Secondly, it is specifically stated that efficiencies can save a concentration only when they are likely to enhance its ability 'to act pro-competitively for the benefit of consumers'.[144] Thirdly, the efficiencies count only if they are passed on to consumers.[145]

Since theory recognizes three variations of the consumer welfare standard, it would be helpful to ascertain which of them is favoured by the Commission. The survey of the past decisional practice spurred diverging scholarly opinions as some claim that it reflects a modified price standard,[146] while others believe that a consumer surplus standard was pursued.[147] Since the Guidelines include among the efficiencies that will be taken into

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141 C Luescher 'Efficiency Considerations in European Merger Control – Just Another Battle Ground for the European Commission, Economists and Competition Lawyers' (2004) 25 ECLR 72, 81.

142 Contrast JS Venit 'The Role of Efficiencies in Merger Control' in G Drauz and M Reynolds (eds) *EC Merger Control: A Major Reform in Progress* (Richmond Law & Tax Richmond 2003) 251, 263.

143 Guidelines (n 131) [76].

144 ibid [77].

145 ibid [84].

146 Venit (n 142) 260.

147 IK Gotts and CS Goldman 'The Role of Efficiencies in M&A Global Antitrust in Review: Still in Flux?' in BE Hawk (ed) *International Antitrust Law & Policy: Annual Proceedings of the Fordham Corporate Law Institute* (Juris Publishing Inc Huntington 2003) 247.

account those that lead to lower prices as well as those that produce other benefits to consumers,[148] it seems that a consumer surplus standard will be applied by the Commission.

In sum, because European competition policy regards consumer interests as being of primary importance,[149] it appears that any idea of the adoption of a total surplus standard remains an utter illusion.[150]

(b) Benefit to consumers

The first of the three essential conditions that have to be satisfied if the efficiencies are to be taken into account by the Commission is that they benefit the consumers. This condition, which confirms the central role awarded to consumer interests, is fulfilled if efficiencies are timely, substantial and passed on to consumers.[151]

(i) Which efficiencies count?

The Guidelines are in line with contemporary economic science in this respect, since they acknowledge not only static but also dynamic efficiencies.[152] However, it is interesting to note that according to the Commission's officials the initial competitive assessment will focus solely on the static efficiencies and the dynamic efficiencies will come into play only

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[148] Guidelines (n 131) [80].

[149] M Monti 'A Reformed Competition Policy: Achievements and Challenges for the Future' [2004] (3) Competition Policy Newsletter 2.

[150] F Ilzkovitz and R Meiklejohn 'European Merger Control: Do We Need an Efficiency Defense?' in European Commission *European Economy: The Efficiency Defence and the European System of Merger Control* (Reports and Studies No 5 European Communities Belgium 2001) 18.

[151] Guidelines (n 131) [79]–[84].

[152] ibid [80]–[81].

in the final assessment.[153] While it is true that the latter efficiencies are harder to prove and quantify, it is questionable whether this justifies the limitation of the initial assessment to static efficiencies to the potential detriment of those concentrations that purport to achieve solely dynamic efficiencies.

Furthermore, it is emphasized that reductions in variable or marginal costs are more likely to be relevant than reductions in fixed costs, since the latter are less likely to lead to lower prices for consumers.[154] Economic literature agrees with this view under the condition that greater weight is assigned by the authorities to short-term consumer welfare, but warns that since 'the theoretical distinction between fixed and variable costs blurs almost beyond recognition in real firms and markets … a long-run approach' is recommendable.[155] The Commission apparently disregarded the warning and decided to concentrate on short-run consumer welfare, which is additionally confirmed by the requirement of the efficiencies' timeliness.

The explanation that cost reductions resulting from anti-competitive reductions in output will not be taken into account[156] further proves the importance of consumers' interests, while if the producer surplus could be considered in the process of assessment, such savings would matter.[157] Moreover, this statement implies that some of the ideas articulated

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[153] P Lowe 'Review of the EC Merger Regulation – Forging a Way Ahead' (speech delivered at the European Merger Control Conference 8 November 2002, Conrad Hotel, Brussels) 10.

[154] Guidelines (n 131) [80].

[155] M de la Mano 'For the Customer's Sake: The Competitive Effects of Efficiencies in European Merger Control' (Enterprise Papers No 11 European Commission 2002) 47–48.

[156] Guidelines (n 131) [80].

[157] LH Röller J Stennek and F Verboven 'Efficiency Gains from Mergers' in European Commission *European Economy: The Efficiency Defence and the European System of Merger Control* (Reports and Studies No 5 European Communities Belgium 2001) 115.

in the economic literature concerning welfare standards will find a place in the Commission's practice. Namely, under the consumer welfare standard real efficiencies ought to be preferred to pecuniary or redistributive efficiencies, which are those reductions that cannot be deemed to be real resource savings.[158] Similarly, synergies should be preferred to non-synergy efficiencies.[159] The term synergy denotes those efficiencies which enable the parties to adopt such output/cost configurations that would not be achievable by any of the parties unilaterally.[160] The distinction needs to be distinguished from the concept of merger specificity, since for an efficiency to be classified as a non-synergy it is not required that there is a realistic option of achieving the same result through unilateral action and a mere possibility of such option suffices.[161]

It is also mentioned in the Guidelines that efficiencies may reduce the risk of coordinated effects in the relevant market.[162] Even before the Guidelines were adopted the idea appears to have found its practical application in the *Airtours/First Choice*[163] decision.[164] However, the Commission should be cautious, because the argument could as well run in the opposite direction stating that cost reductions stemming from the concentration actually reduce cost-asymmetries and facilitate collusion.[165]

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[158] ibid 114.

[159] Mano (n 155) 45–46.

[160] ibid.

[161] ibid.

[162] Guidelines (n 131) [82].

[163] *Airtours/First Choice* (Case IV/M1524) [2000] OJ L93/1, [146].

[164] Gotts and Goldman (n 147) 272.

[165] ibid.

(ii) Efficiencies need to be timely

Time is another factor that can vastly affect the parties' chances of successfully invoking efficiencies. The Guidelines demand the efficiencies to be timely[166] but the Commission is reasonable and does not require them to be achieved instantaneously. Rather, it discounts the importance of those efficiencies that will materialise in the future, which means that the later they are expected to be achieved the greater the discount of their weight. One has to highly commend the Commission for not placing an absolute bar on the timeframe in which the efficiencies are to be achieved, despite proposals by some scholars that a four-year time period should count as relevant.[167] Nevertheless, it has been suggested that, in practice, the proper discounting should lead the efficiencies planned to be realized in 20 years to be completely disregarded.[168] Regardless of the sound logic that supports this conclusion, a question can be raised whether there is any need to resort to the use of any specific time periods. It seems that the best solution is to avoid predetermining an assessment by relying on some theoretically calculated relevant timeframes and to approach each claim on an individual basis.

(iii) Efficiencies have to be substantial

It was made clear, prior to the adoption of the Guidelines, in *Aerospatiale-Alenia/de Havilland*[169] that efficiencies might be rejected due to lack of substantiality. What the requirement of substantiality stands for is not expressly stated in the Guidelines, but it is

[166] Guidelines (n 131) [83].

[167] Substantive Standards for Mergers and the Role of Efficiencies (n 135) 319-320.

[168] ibid 332.

[169] *Aerospatiale-Alenia/de Havilland* (Case IV/M053) [1991] OJ L334/42, [69].

possible to deduce that the concept directly relates to the issue of anti-competitive effects of the proposed concentration.[170] The Commission pursues a sliding scale approach, according to which, the greater the possible negative effects on competition, the larger the efficiencies have to be and further states that for this reason it is highly unlikely that a concentration amounting to a monopoly or near-monopoly can be saved on the basis of efficiency claims.[171] A sliding scale approach under which anti-competitive effects cannot be merely mathematically compared to the asserted efficiencies, with all the implications this bears for the mergers resulting in monopoly or near-monopoly, is also applied by the US authorities,[172] despite strong assertions by scholars that there is no reason to exclude mergers leading to monopoly or near-monopoly.[173] It should be observed that the Commission does not completely exclude the possibility of saving a concentration resulting in monopoly or near-monopoly, but it does raise a high presumption against such a claim, which, considering the evidentiary problems related to efficiencies, appears extremely difficult to be overturned in practice. Thus, the presumption has to be criticized and the Commission advised to change it in future versions of the Guidelines.

Interestingly, it is asserted that the Commission will acknowledge spillover effects, which are not explicitly mentioned in the Guidelines.[174] The theory of spillover effects explains that 'merger-induced efficiencies will be replicated in some form by rivals of the merging parties … through the process of imitation or emulation … over a period of time'.[175]

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[170] Guidelines (n 131) [86].

[171] ibid [84].

[172] Venit (n 142) 267.

[173] Mano (n 155) 22; Luescher (n 141) 79.

[174] Substantive Standards for Mergers and the Role of Efficiencies (n 135) 332.

[175] J Kattan 'Efficiencies and Merger Analysis' (1994) 62 Antitrust LJ 513, 522–523.

The process of imitation refers to the attempts of the parties' competitors to imitate the efficiencies that were achieved through a merger, whereas emulation describes a process, where the competitors strive to reach the same results as realized by the merging parties, but through different means and methods. Due to the acknowledgement of the spillover theory, the substantiality condition should not be applied in a strict fashion, while efficiencies aided by the spillover effects have a much stronger chance of outweighing the anti-competitive effects of mergers.[176] Although the theory of spillover effects has to be applied with some reservation,[177] the sole finding that the Commission intends to introduce the theory in its practice calls for two conclusions. Firstly, if the spillover effects are considered in the assessment of efficiencies there is an even stronger argument against the de facto exclusion of concentrations leading to monopoly or near-monopoly. Secondly, since the processes of imitation and emulation require time to produce the spillover effects, the element of timeliness of the efficiencies ought to be interpreted very leniently.

(iv) Passing-on requirement

Since the EU authorities appraise efficiency claims under the consumer welfare standard, the requirement of passing-on becomes an inherent element of the system. Therefore, it comes of no surprise that the Guidelines follow the reasoning established in *Accor/Wagons-Lits*,[178] *Aerospatiale-Alenia/de Havilland*[179] and *Saint-Gobain/Wacker-Chemie/NOM*[180] and demand the efficiencies to be passed on to consumers to a sufficient degree. This degree allegedly

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[176] ibid 527.

[177] Kattan (n 175) 524–526.

[178] *Accor/Wagons-Lits* (Case IV/M126) [1992] OJ L204/1, [26].

[179] *Aerospatiale-Alenia/de Havilland* (Case IV/M053) [1991] OJ L334/42, [69].

[180] *Saint-Gobain/Wacker-Chemie/NOM* (Case IV/M774) [1997] OJ L247/1, [214].

depends mainly on the existence of competitive pressures and the possibility of entry in the market.[181] It is worth mentioning that the passing-on requirement is also satisfied if the efficiencies result in constant prices, although they have not been strictly passed on.[182]

However, although the passing-on requirement is a constituent element of the consumer welfare standard[183] it is heavily criticised as having absolutely no basis in economic theory.[184] The requirement has been very lucidly described by Pitofsky who has labelled it a killer qualification, which is satisfied only in a highly competitive market, where the merger would not raise concerns anyway.[185] This observation is directly relevant for the Guidelines which claim that the degree of pass-on is often related to the existence of competitive pressures.[186] The problem with such an assertion is not only that it precludes efficiency claims exactly in the cases in which they would matter,[187] but also that it runs against the finding that the degree of passing-on increases with the market power of the merged undertaking[188] and that even a monopolist will pass on cost savings to a significant degree.[189] In addition, the evidence of pass-on is rarely available, which is why the burden of

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[181] Guidelines (n 131) [84].

[182] L Colley 'From "Defence" to "Attack"? Quantifying Efficiency Arguments in Mergers' (2004) 25 ECLR 342, 346.

[183] RM Vernail 'One Step Forward, One Step Back: How the Pass-on Requirement for Efficiency Benefits in FTC v. Staples Undermines the Revisions to the Horizontal Merger Guidelines Efficiencies Section' (1998) 7 George Mason L Rev 133, 137.

[184] PL Yde and MG Vita 'Merger Efficiencies: Reconsidering the "Passing-on" Requirement' (1996) 64 Antitrust LJ 735, 735.

[185] DA Yao and TN Dahdouh 'Information Problems in Merger Decision Making and Their Impact on Development of an Efficiency Defense' (1993) 62 Antitrust LJ 23, 41–42.

[186] Guidelines (n 131) [84].

[187] Yao and Dahdouh (n 185) 42.

[188] Yde and Vita (n 184) 735.

[189] JA Hausman and GK Leonard 'Efficiencies from the Consumer Viewpoint' (1999) 7 George Mason L Rev 707, 708–710.

proof is likely, in practice, to be insurmountable for the undertakings concerned.[190] Even taking all these arguments aside, one has to be aware that the passing-on requirement sometimes paradoxically undermines the same consumer welfare that it purports to protect by, inter alia, discouraging potentially beneficial concentrations.[191]

The analysis leads to the conclusion that the passing-on requirement should be abolished and, consequently, that the total surplus standard should be adopted. However, since European political reality does not make the total surplus standard a viable solution, the answer has to lie somewhere else. It is suggested that perhaps the Commission should undertake studies and consider existing reports[192] concerning the degree of pass-on normally associated with different types of efficiencies. The Commission would, therefore, begin its assessment of efficiencies with a presumption that they are passed on to consumers to a certain degree, which would substantially lower the parties' evidentiary burden and prevent the passing-on requirement from narrowing the scope for efficiency claims. In addition, the Commission should be aware that the concept of spillover effects, if openly acknowledged, further impairs the reasoning behind the passing-on requirement.

(v) Trade-offs between markets

The question of the availability of a trade-off between different relevant markets arises in situations where a transaction would generate efficiencies in one relevant market and produce anti-competitive effects in another. This possibility exists in relation to both product and geographical dimension of the relevant market. According to the Guidelines, a trade-off

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[190] Yao and Dahdouh (n 185) 42; Vernail (n 183) 156–157.

[191] Compare Vernail (n 183) 156–157.

[192] Hausman and Leonard (n 189) 727; Röller Stennek and Verboven (n 157) 183.

'in principle' should not be allowed.[193] Although arguments in favour of the trade-off between markets have been voiced,[194] the Commission is consistently refusing to weigh the welfare of one group of consumers to the welfare of another group.[195] If the Commission engaged in such weighing, it would end up assigning greater weight to one group of consumers, which could raise allegations of politicisation of the competitive assessment process and have serious consequences for the unity of the EU in which the national interests of the Member States still run high. Controversies and accusations of this kind have emerged[196] in the highly disputed *Volvo/Scania* case,[197] where the Commission stood its ground and refused to allow the creation of the Scandinavian champion that would decrease the competition in the relevant market, but benefit the global competitive position of the merged entity.

However, it is important to note that the Commission has not opted for an outright prohibition of a trade-off as envisaged in the Draft Guidelines,[198] but has by incorporating the phrase 'in principle' confirmed that trade-offs might potentially be considered in exceptional cases. In view of the Commission's officials[199] such exceptional cases could arise where

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[193] Guidelines (n 131) [79].

[194] M Ganslandt and L Persson 'Comments on the Treatment of Efficiencies and Market Integration in the Commission's Proposal for Draft Horizontal Merger Guidelines' (2003) <http://europa.eu.int/comm/competition/mergers/review/contributions/ref017_iui_en.pdf> 20–21; Gotts and Goldman (n 147) 258.

[195] C Rakovsky and V Verouden 'Comments on the Role of Efficiencies in EC Merger Control' in G Drauz and M Reynolds (eds) *EC Merger Control: A Major Reform in Progress* (Richmond Law & Tax Richmond 2003) 205; CE Mosso 'EU Merger Control: The Current State of Play' (speech delivered at the Centre for Competition Law & Policy 14 February 2005, University of Oxford, Oxford).

[196] U Bernitz and I Gutu 'The Effect of EU Merger Policy on Large Multinationals Based in Sweden and Other Smaller EU Member States: Is the Policy Discriminatory' (2003) 24 ECLR 19.

[197] *Volvo/Scania* (Case COMP/M1672) [2001] OJ L143/74.

[198] Draft Commission Notice on the Appraisal of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings [2002] OJ C331/18, [91].

[199] Rakovsky and Verouden (n 195) 205.

efficiencies and anti-competitive effects emerge in different product markets but affect the same group of consumers. To illustrate, if in a supermarket the price of butter decreases but the price of milk increases as a result of a merger between supermarkets, the same group of consumers is subjected to positive and negative effects of the transaction.[200]

(c) Merger specificity

Merger specificity does seem to be 'a logical requirement' as Lowe describes it.[201] Namely, since the Commission in its role as a competition authority pursues the objective of protecting the competitive structure of the market, it appears entirely logical that it will accept only those efficiencies which are a direct result of the notified concentration and cannot be achieved by less anti-competitive alternatives.[202]

However, the condition of merger specificity is highly problematic because the authorities are actually second-guessing the parties' decision to merge. Such practice creates unrest in the business community which feels that authorities are interfering with their commercial freedom[203] and can, moreover, cause detriment to the welfare of consumers if planned efficiencies are rejected by the authorities on the grounds of some highly hypothetical alternatives.[204] If a strict interpretation of merger specificity is adopted and

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[200] Gotts and Goldman (n 147) 257.

[201] P Lowe 'The Future Shape of European Merger Control' (speech delivered at the RBB/FIPRA Seminar 17 February 2003, Cercle Royal Gaulois, Brussels) 10.

[202] Guidelines (n 131) [85].

[203] European Commission 'Green Paper on the Review of Council Regulation (EEC) No 4064/89 ("Merger Review") – Summary of the Replies Received' <http://europa.eu.int/comm/competition/mergers/review/comments/summary_publication.pdf> (26 March 2005), [123].

[204] Hausman and Leonard (n 189) 719.

purely theoretical alternatives to a merger are considered, the chances of successfully invoking efficiencies sharply decrease.

The Commission aptly and effectively avoids these problems by stating that only the alternatives which are reasonably practical will be considered, but although this solution adds fuel to efficiency claims, it is far from perfect for the reason that it places the burden of proving the absence of available alternatives upon the merging parties.[205] This evidentiary requirement constitutes a serious setback for the parties, because the absence of available alternatives is even harder to prove than the existence of the efficiencies themselves.[206] Since under the merger specificity requirement the Commission is actually second-guessing the undertakings' business decisions it ought to be considered whether it would not be more appropriate to place the burden of proof with the Commission or at least lower the evidentiary burden of the parties. This suggestion is further supported by a finding that merger specificity is plagued not so much by the asymmetry of information (one party has information that the other party lacks), which is often alleged by the Commission to be the reason for placing the burden of proof on the parties that possesses the relevant information, but rather by information uncertainties and general lack of reliable information.[207]

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[205] Guidelines (n 131) [85].

[206] Yao and Dahdouh (n 185) 39.

[207] ibid 40; MN Berry 'Efficiencies and Horizontal Mergers: In Search of a Defense' (1996) 33 San Diego L Rev 515, 548-549.

(d) Verifiability

Because a substantial part of efficiencies claimed by undertakings is in practice never realized,[208] the condition of verifiability constitutes a natural part of the assessment of efficiencies. However, the verifiability condition has to be applied with proper caution.

The first issue to be addressed is the allocation of the burden of proof. Although there are claims that this burden should lie with the Commission,[209] they do not seem convincing considering the apparent information asymmetry characterizing the relationship between the Commission and the parties. Namely, the parties are without doubt in possession of most of the information pertaining to the merger and thereby to the merger specific efficiencies,[210] which is why they should bear the burden of proving them.[211]

The heart of the problem of verifiability is hidden in the standard of proof. The asymmetry of information acts to support the heightened burden of proof.[212] Namely, in the context of information asymmetry it is highly likely that the merging parties would attempt to submit the information selectively by concealing the data that does not support their assertions. However, if this logic was followed, efficiency claims would be practically doomed for it is widely believed that efficiencies, which are future and, therefore,

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[208] Gotts and Goldman (n 147) 293.

[209] C Luescher 'Efficiency Considerations in European Merger Control – Just Another Battle Ground for the European Commission, Economists and Competition Lawyers' (2004) 25 ECLR 72, 84–86.

[210] JF Brodley 'Proof of Efficiencies in Mergers and Joint Ventures' (1996) 64 Antitrust LJ 575, 605; Rakovsky and Verouden (n 195) 206; P Lowe 'The Future Shape of European Merger Control' (speech delivered at the RBB/FIPRA Seminar 17 February 2003, Cercle Royal Gaulois, Brussels) 10.

[211] Yao and Dahdouh (n 185) 27.

[212] ibid 32-35.

unpredictable events, are extremely hard not only to quantify but even to prove.[213] Apart from the problem of information asymmetry the more fundamental problem of a global lack of information should not be neglected,[214] which is especially true as regards the dynamic efficiencies.

The Guidelines seem to strike a fair balance, since, while placing the burden of proof with the notifying parties, they do not impose a strict standard of proof and do not require the efficiencies to be necessarily quantified.[215] The standard of proof is marked by reasonableness, which is to be highly praised. On one hand, the quantification of efficiencies, which can be exercised mainly through the use of merger simulation techniques,[216] is required only where it is reasonably possible and on the other hand, efficiencies have to be verified in accordance with the standard of reasonable certainty.

It has to be mentioned that the problems of verifiability could be sidestepped by resorting to the use of ex post appraisal of efficiencies where the achievement of efficiency claims would be assessed some years after the concentration takes place. Although this approach has its advocates,[217] it is not only overwhelmed by numerous problems,[218] but also seems to find no support in the Guidelines.

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[213] C Jones and FE González-Díaz *The EEC Merger Regulation* (Sweet & Maxwell London 1992) 154; Berry (n 207) 542; Substantive Standards for Mergers and the Role of Efficiencies (n 135) 342–343; S Voigt and A Schmidt 'Switching to Substantial Impediments of Competition (SIC) Can Have Substantial Costs – SIC' (2004) 25 ECLR 584, 589.

[214] Yao and Dahdouh (n 185) 27.

[215] Guidelines (n 131) [86]–[88].

[216] Colley (n 182) 342.

[217] Brodley (n 210); Röller Stennek and Verboven (n 157) 116.

[218] F Ilzkovitz and R Meiklejohn 'European Merger Control: Do We Need an Efficiency Defense?' (2003) 3 J of Industry, Competition and Trade 57, 81; M Ivaldi and others 'The Economics of Unilateral Effects'

E CONCLUSION

There is no doubt that the competition reform which came into force in May 2004 bears great importance for the role of efficiencies in EU merger control. After all the debate and controversy under Regulation 4064/89, it is now firmly established that efficiencies do play a role in the assessment of concentrations by the Commission. The focus of the debate therefore shifts to the scope of the role of efficiencies.

On one hand, it is to be observed that the approach to efficiencies diverges in some crucial issues from the findings of the economic theory. In this vein, the EU stands on the position that efficiencies are to be considered under the consumer welfare standard and not the preferred total surplus standard. Furthermore, it adopts the requirement of passing-on, which is a natural part of the consumer welfare standard, but which, if applied strictly, precludes all practical possibility of successfully invoking efficiencies. Lastly, a high presumption against saving mergers leading to monopolies and near-monopolies is effected. These departures from economic theory on its face deserve heavy criticism, while in connection with the conditions of timeliness, merger specificity and verifiability, they could raise an almost insurmountable barrier to efficiency claims.

However, before a critical view towards the reform is adopted, it is necessary to venture behind the façade and consider the reasons for the EU not choosing a more openly efficiencies-friendly regime. The reasons seem to be two-fold. Firstly, there are political reasons. If one considers the difficulties that the EU faced in attempting to introduce a comprehensive merger control system and the strong opposition to the inclusion of non-

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<http://europa.eu.int/comm/competition/mergers/review/the_economics_of_unilateral_effects_ en.pdf> (20 April 2005) 64; Gotts and Goldman (n 147) 289–295.

competition based criteria, such as industrial policy concerns, it seems understandable that the EU did not dare to take a great leap forward and jump from the situation where efficiencies were not explicitly recognised to a position, which would be fully in line with economic theory, but could raise serious political issues. The second reason appears to be a 'healthy scepticism' towards efficiencies[219] which is based on the allegedly high rate of failure of efficiency claims.[220]

It is submitted that efficiencies will, despite the obvious change for the better, apparently continue to play a rather marginal role in EU merger control. This is confirmed by the fact that in almost a year after the new system has been established not a single case has been decided in which efficiencies played a decisive role. According to the Commission's officials, the Commission is still waiting for a proper case in which it could further clarify its approach to efficiencies.[221]

However, there is light at the end of the tunnel. Namely, the Guidelines are very vague as regards some of the issues (timeliness, passing-on, merger specificity, verifiability) and allow for exceptions with regard to others (substantiality, trade-offs). Therefore, they open the space for a progressive interpretation with which the Commission could significantly improve the role of efficiencies in EU merger control and increase compliance with economic theory. It remains to be seen which path the Commission will take, but in view of the positive stance towards the theory of spillover effects the future of the efficiencies looks promising.

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[219] M Monti 'Review of the EC Merger Regulation – Roadmap for the Reform Project' (speech delivered at the Conference on Reform of European Merger Control 5 June 2002, British Chamber of Commerce, Brussels).

[220] S Bishop and M Walker *The Economics of EC Competition Law: Concepts, Application and Measurement* (2nd edn Sweet & Maxwell London 2002) [7.89].

[221] CE Mosso 'EU Merger Control: The Current State of Play' (speech delivered at the Centre for Competition Law & Policy 14 February 2005, University of Oxford, Oxford).