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KATRI PAAS

Implications of Smallness of an Economy on Merger Control

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All errors, omissions and inconsistencies in the dissertation remain mine.

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INTRODUCTION

Background and reasons for the choice of topic

Besides the prohibition of anti-competitive agreements and abuse of dominance, merger control is one of the three pillars of typical competition law systems. Unlike the two other pillars, merger control is targeted to regulate market structure by way of *ex ante* regulation. The underlying theoretical justification of merger control is based on the so called structure-conduct-performance (SCP) paradigm,[1] which suggests that each market's structure tends to influence how the firms behave on the market, which in turn tends to influence their performance. The causalities suggested by this paradigm have been challenged by the Chicago School economists.[2] Therefore, clear-cut and purely structural merger assessment is rarely used, and as will be seen below, merger control assessment of most competition regimes considers a wider range of elements.

In light of the general trend of copying the principles of the EU merger control by the EU Member States (or on the global scale, copying the rules of large competition law regimes such as the US or EU system by smaller regimes across the globe), there have been voices questioning whether "one size fits for all" when it comes to competition law.[3] Smallness of an economy may cause

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[1] Taylor, Martyn D.: "International Competition Law – A New Dimension for the WTO?", Cambridge University Press, Cambridge, 2006, p. 84.

[2] Shepherd, William G.: "The Economics of Industrial Organization: Analysis, Markets, Policies", 4th edition, Prentice Hall, Upper Saddle River, New Jersey, 1997, pp. 5–7.

[3] OECD Global Forum on Competition: "Small Economies and Competition Policy: A Background Paper", CCNM/GF/COMP(2003)4, February 2003. Available online: http://www.oecd.org/dataoecd/57/57/2486546.pdf (last visited 15.05.2009), (OECD Background Paper);
Evans, Lewis; Hughes, Patrick: "Competition Policy in Small Distant Open Economies: Some Lessons from the Economics Literature", in New Zealand Treasury Working Paper 03/31, December 2003. Available online: http://www.treasury.govt.nz/publications/research-policy/wp/2003/03-31/ (last visited 15.05.2009);
Horn, Henrik; Stennek, Johan: "The Political Economy of EU Merger Control: Small vs. Large Member States", Institute for International Economic Studies, September, 2005. Available online: http://www.econ-law.se/Papers/Horn-Stennek-revised.pdf (last visited 15.05.2009);
Sampson, Cezley: "Competition and Regulatory Institutional Structures in Micro-states: The Case of the Caribbean", paper submitted under Competition, Regulation and Development Research Forum, 2005–2007. Available online: http://www.circ.in/pdf/Competition%20And%20Regulatory%20Institutional%20Structures%20In%20Mic.pdf (last visited 15.05.2009);
Competition, Regulation and Development Research Forum (CDRF): "Competition and Regulatory Regimes in Small & Developing Countries", in Policy Brief, 2/07. Available online: http://www.circ.in/pdf/PolicyBrief2.pdf (last visited 15.05.2009);
Competition Law Forum: "Small Economies and Competition Policy – A Fair Deal?", summary of conference presentations and discussions, Luxembourg, October 2007.

various problems in the context of merger control, in particular in relation to the lack of enforcement power of the controlling competition authority and limited resources. Moreover, it has been generally recognized that market structures in small economies tend to be more concentrated than market structures in large economies, where economies of scale and scope are easier to achieve. This raises the question whether such features call for specifically tailored competition rules for small economies.

At the beginning of this decade, Michal S. Gal published several articles and a monograph on the competition policy for small economies pointing to implications of smallness of economy to markets.[4] The choice of the topic of this thesis has been inspired by Gal's works. However, the discussion of this thesis is not limited only to elaborating on her ideas; rather, the thesis looks into the implications of smallness on various aspects of merger control in more specific level, integrating the ideas of various authors and the theory and practice of various merger control regimes.

Competition law has become an increasingly important field of law in Estonia over the recent years. The study of implications smallness of economy to competition law, including merger control, is therefore of significant relevance for Estonia as a small economy. However, no academic studies have been published on this topic in Estonia thus far. Hence, this dissertation is novel in this field and to the author's knowledge it is the first doctoral thesis on competition law in Estonia.

It should be noted at the outset that for the purposes of the discussion in this thesis the term "economy" is used inter-changeably with the terms "country" or "state".

Available online: http://www.eventsforce.net/OXYGEN/media/uploaded/EVOXYGEN/event_82/Small%20Economies%20Conference%20-%20Summary%20transcript.pdf?popup=1 (last visited 15.05.2009).

[4] Gal, Michal S.: "Size Does Matter: The Effect of Market Size in Optimal Competition Policy", in Southern California Law Review, September 2001, pp. 1437–1478, (Gal 2001);
Gal, Michal, S: "Market Conditions under Magnifying Glass: The Effects of Market Size on Optimal Competition Policy", in American Journal of Comparative Law, Spring 2002, pp. 303- 338, (Gal 2002);
Gal, Michal, S: "Competition Policy in Small Economies – Prepared Remarks for the OECD Session on Small Economies", OECD Global Forum on Competition, CCNM/GF/COMP/WD(2003)42, February 2003. Available online: http://www.oecd.org/dataoecd/57/28/2486919.pdf (last visited 15.05.2009), (Gal/OECD);
Gal, Michal, S.: "Competition Policy for Small Economies", Harvard University Press, Cambridge, Massachusetts, London 2003, (Gal 2003).

Aims and hypotheses

Inspired by the above conundrum relating to the benefits of resorting to merger control rules of the EU merger control by its Member States on the one hand, and the need to take into account the particularities caused by the smallness of an economy on the other hand, this thesis discusses the effects of smallness of economy on merger control. The aim of this thesis is to study whether the principles applicable to merger control in large economies are equally appropriate in small economies, and in particular, whether the principles of the EU merger control are appropriate for small economies of the EU. As the author is most familiar with the merger control rules and practice of Estonia, the thesis uses the Estonian merger control regime as the main example of a small economy.

The main hypotheses that this dissertation seeks to prove are as follows:

1) Small economies can and should be lead by the same substantive standards as large economies, but enforcement differences may derive from the choice of goals merger control is destined to pursue in a particular jurisdiction.
2) Smallness of economy calls for a special design of merger control with regard to jurisdictional and enforcement issues, in particular:
   a. Small economies should adopt a wide approach to the concept of merger and be able to control minority acquisitions and interlocking directorships;
   b. Voluntary merger notification is preferred to mandatory in case of small economies.
3) Extraterritorial enforcement of merger control rules may pose more problems to small economies than to large economies, but within the EU, the re-attribution of jurisdiction between the European Commission and Member States could reduce enforcement problems for small economies.
4) Smallness of economy may justify wider use of behavioural commitment remedies.

Structure of the thesis

Based on the research aims and hypotheses, the thesis is made up of four chapters. In order to set a framework for the further analysis, the first chapter explains the concept of smallness for the purposes of this thesis and discusses the attributes of smallness to merger control.

The second chapter discusses the implications of smallness to substantive merger control assessment. First, market definition issues are considered, as defining relevant market is a starting point of any merger control assessment. Thereafter, theories of harm related to different types of mergers, substantive assessment test and various elements of merger control assessment are analyzed. Finally, the second chapter discusses the countervailing benefits of mergers, which could serve as defences in favour of permitting a merger which has otherwise been found to bring about anti-competitive results.

The third chapter of the thesis focuses on jurisdiction and enforcement. It discusses first the types of transactions covered by merger control. Thereafter, various merger control notification systems are analyzed in search for the most appropriate system for small economies. The third chapter also discusses the matters related to extraterritorial application of merger control rules, first from the perspective of large economies and in broad international scale to identify the general issues, and then from small economies' perspective. Finally, the third chapter deals with the enforcement issues within the EU looking at various measures and mechanisms that could help to alleviate enforcement problems for small economies within the EU.

The fourth chapter of the thesis deals with commitment remedies applicable in the case of anti-competitive (illegal) mergers. It first makes some general remarks about commitment remedies, the different types of remedies applicable in merger control and the principles for the choice of remedies. Thereafter, it discusses the benefits of structural commitment remedies and provides justification for wider use of behavioural commitment remedies in small economies, as compared to large economies, coupled with various case studies.

Finally, conclusions summarizing the most important findings of the discussion follow.

Method and sources

In order to test the hypotheses, the thesis uses mostly the analytical and comparative method. It uses the EU merger control rules and practice as the main source of reference and as an example of a large economy, contrasting it with the respective rules and experience of other large economies (such as the US and the UK), where relevant. As noted above, the thesis uses the Estonian merger control regime as the main example of a small economy to test the hypotheses. However, where appropriate and relevant, examples from other small economies are also used.

The thesis uses various types of source material. The works of Michal Gal, Lino Briguglio and Eugene Buttigieg, Henrik Horn and Johann Stennek, John Cook and Chris Kerse, Simon Bishop and Mike Walter, Alison Jones and Brenda Sufrin, Richard Which, Richard Burnley, and Morten Broberg, among many others, have served as significant reference materials. Besides personal authors, reports, studies, guidelines and recommendations by various competition authorities (most importantly the European Commission, the US Federal Trade Commission and Department of Justice, and the UK Competition Commission and Office of Free Trading) and international bodies (OECD Global Forum on Competition, ICN Merger Working Group, Nordic Working Group), have been consulted. Legal acts, court judgments and decisions by competition authorities have been used. For the case studies, a cases collection "Competition Cases from the European Union" edited by Ioannis Kokkoris, as well as annual reports of various competition authorities have been an invaluable source materials.

CHAPTER I
SMALLNESS OF AN ECONOMY AND MERGER CONTROL

1.1. Smallness in conventional terms

In conventional terms, smallness with respect to the size of an economy is commonly defined on the basis of one or more of the following criteria – population, land area, and gross domestic product (GDP)[5]. These indicators relate to the measurement of the magnitude of an economy in terms of its fundamental resources – human, land, and capital.[6] Some authors have used indexes combining all these measures,[7] which may indeed give the most balanced picture, but adds significant complexity and is less easily comprehensible than single criterion based definitions.

Out of the three criteria, population appears the most commonly used indicator of smallness.[8] It has been suggested that population is highly correlated with land area as well as with GDP; therefore, the use of population as an indicator of size helps to highlight small states' limited resources.[9] Various studies have used differing thresholds with this respect.[10] For instance, the American economist Simon Kuznets used an upper limit of ten million people for defining small economy in 1960,[11] while more recently, the World Bank has set the threshold of 1.5 million people to define smallness.[12] Furthermore,

---

5 "Gross domestic product (GDP) is a measure for the economic activity. It is defined as the value of all goods and services produced less the value of any goods or services used in their creation." – definition given at Eurostat webpage. Available online: http://epp.eurostat.ec.europa.eu/tgm/web/table/description.jsp (last visited 15.05.2009).

6 Bernal, Richard L.: "The Integration of Small Economies in the Free Trade Area of the Americas", in Policy Papers on the Americas, The Center for Strategic and International Studies Americas Program, Vol. IX, Study 1, February 1998, p. 3. Available online: http://ctrc.sice.oas.org/trc/Articles/Bernal.pdf (last visited 15.05. 2009).

7 Damijan, Jože P.: "Main Economic Characteristics of Small Countries: Some Empirical Evidence" in Small Countries in a Global Economy, edited by Salvatore, Dominik; Svetličič, Marjan; Damijan, Jože, Palgrave, 2001, pp. 91–130.

8 Bernal., p. 2.

9 Commonwealth Secretariat and World Bank: Small States: "Meeting Challenges in the Global Economy", Report of Commonwealth Secretariat /World Bank Task Force on Small States, April 2000, section. 7. Available online: http://www.thecommonwealth.org/Shared_ASP_Files/UploadedFiles/03D192EA-CCF2-4FA2-96B3-F7DA64AD245B_taskforcereport.pdf (last visited 15.05.2009), (Commonwealth Secretariat and World Bank).

10 See Bernal, p. 2, for more detailed summary of various studies setting a threshold of smallness of economies.

11 Kuznets, Simon: "Economic Growth of Small Nations", in Economic Consequences of the Size of Nations, edited by Robinson, Edvin A.G., Macmillan, London, 1960, p. 9.

12 Commonwealth Secretariat and World Bank, section 7.

another American economist Dominick Salvatore has classified small economies into three groupings – extremely small (those with population less than one million), very small (those with population between one and five million) and small (those with population between five and 16 million).[13]

As noted by Kuznets, setting any such dividing line is a rough decision and is relative to the differences in economic and social potentials that one wishes to emphasize. As the dividing threshold of smallness is moved up or down, the weight of the various arguments on the particularities of small economies changes – the specific features associated with smallness would be progressively more apparent the smaller the nation and less apparent the closer the size of the nation is to a given threshold.[14] If these considerations are born in mind there is no special significance in the selection of a particular threshold to define small economies.

In addition to population, land area and overall GDP of an economy, GDP per capita in purchasing power parity (PPP)[15] or in purchasing power standard (PPS)[16] may be of relevance for the purposes of competition policy, as it shows the wealth of the population that represents the demand of the market. A nation with sizable population may not represent equally sizeable market if the purchase potential of the population is low, while a high GDP per capita may alleviate the effects of small population. Hence, due to the effect of GDP per capita some economies with large population may nevertheless be considered small and vice versa.

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[13] Salvatore, Dominick: "The Economic Performance and Small Versus Large Nations", in Small Countries in a Global Economy, edited by Salvatore, Dominik; Svetličič, Marjan; Damijan, Jože, Palgrave, 2001, pp. 71–90.

[14] Kuznets, p. 14.

[15] "Purchasing power parity (PPP) is defined as the number of currency units required to buy products equivalent to what can be bought with one unit of the currency of the base country of the comparison, or with one unit of the common currency of a group of countries, such as *e.g.,* the EU Member States. As such PPPs are annual interspatial conversion rates that equalise the purchasing power of different currencies by eliminating the differences in price levels between countries. PPPs reflect the relative purchasing power of each currency." – definition given at Eurostat webpage. Available online: http://ec.europa.eu/eurostat/ramon/nomenclatures/index.cfm?TargetUrl=DSP_GLOSSARY_NOM_DTL_VIEW&StrNom=CODED2&StrLanguageCode=EN&IntKey=16701285&RdoSearch=BEGIN&TxtSearch=Purchasing%20Power%20Parity&CboTheme=&IntCurrentPage=1 (last visited 15.05.2009).

[16] "Purchasing power standard (PPS) is the name given by Eurostat to the artificial currency unit in which the PPPs and real final expenditures for the EU 25 are expressed – namely, "euros based on the EU 27"." – definition given at Eurostat webpage. Available online: http://ec.europa.eu/eurostat/ramon/nomenclatures/index.cfm?TargetUrl=DSP_GLOSSARY_NOM_DTL_VIEW&StrNom=CODED2&StrLanguageCode=EN&IntKey=21712912&RdoSearch=BEGIN&TxtSearch=Purchasing%20Power%20Standard&CboTheme=&IntCurrentPage=1 (last visited 15.05.2009).

1.2. Relative smallness of an economy within the EU

In order to understand the concept of “small economy”, it should first be noted that an economy as such does not have a size. An economy has an inherent extension defined by actors participating in it (*e.g.,* enterprises, consumers) and the primary resources it is based upon. It is the territory in which the economy takes place, which has size. Therefore, the notion of “small economy” is a mixed term which describes an economic circumstance on the one hand, and a state on the other. Law is always linked to territory, whereas economic activity is not, or is so only to a lesser extent. Hence, the precise notion would be “economy in a small state”, while the notion “small economy” is in a way a contraction of both.[17]

As could be seen above, there is no single definition of a small economy. This is because size is a relative concept, and therefore, the notion of “small economy” depends greatly on the framework which is being used as comparison.[18]

In the context of the EU, the relative smallness on many of its Members States in comparison to the whole EU or its largest Member States becomes apparent in the Table 1, which provides a comparison of the EU and its Member States’ population, GDP and GDP per capita in PPS.

The table indicates that while the five largest EU Member States (France, Germany, Italy, Spain and the UK) make up each 8-17% of the total EU population and 8–20% of the total EU GDP, the same indicators for the smallest EU Member States (such as Cyprus, Estonia, Latvia, Luxembourg, Malta, Slovenia) remain under 0.5% of the EU total each. These examples provide the most drastic comparison, while there is a range of other Member States whose population and GDP is less than 3% of the EU total each.[19]

As noted above, GDP per capita may have some influence on whether an economy which appears small in terms of population or GDP represents an equally sizeable market. Hence, the rather modest GDP per capita of Poland or Romania in comparison with the EU average may have the effect of attracting the characteristics of a small economy, while the significantly higher than EU average GDP per capita of some other Member States such as Luxembourg, the Netherlands, Austria or Sweden could work towards negating the effects of smallness.

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[17] Stoffel, Walter A.: “International Mergers: Merger in Small Economies”, in Annual Proceedings of the Fordham Competition Law Institute, International Antitrust Law & Policy, edited by Hawk, Barry E., Fordham Competition Law Institute, Juris Publishing, Inc., 2007, p. 322.

[18] Stoffel, p. 322.

[19] There are all together 19 EU Member States whose population and GDP is less than 3% of the EU total each: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, Portugal, Slovakia, Slovenia, Sweden.

Table 1: Comparison of EU and its Member States' population, GDP and GDP per capita in PPS, 2007

	Population		GDP at market prices (MEUR)		GDP per capita in PPS	
	Size of population in 2007	% of EU total	Total GDP in 2007	% of EU total	GDP per capita in PPS in 2007	EU-27 = 100[20]
EU (27 countries)	495 090 294	100	12 303 961	100	24 800	100.0
Austria	8 298 923	1.68	270 837	2.20	31 600	127.3
Belgium	10 584 534	2.14	330 800	2.69	29 300	118.0
Bulgaria	7 679 290	1.55	28 899	0.23	9 500	38.1
Czech Republic	10 287 189	2.08	127 498	1.04	20 200	81.5
Cyprus	778 684	0.16	15 636	0.13	23 100	93.1
Denmark	5 447 084	1.10	227 665	1.85	30 500	122.8
Estonia	1 342 409	0.27	15 547	0.13	17 900	72.1
Finland	5 276 955	1.07	179 734	1.46	29 000	116.8
France	63 392 140	12.80	1 892 242	15.38	27 600	111.2
Germany	82 314 906	16.63	2 422 900	19.69	28 100	113.1
Greece	11 171 740	2.26	228 949	1.86	24 300	97.8
Hungary	10 066 158	2.03	101 077	0.82	15 700	63.5
Ireland	4 312 526	0.87	185 632	1.51	36 300	146.3
Italy	59 131 287	11.94	1 535 540	12.48	25 200	101.4
Latvia	2 281 305	0.46	19 936	0.16	14 400	58.0
Lithuania	3 384 879	0.68	28 018	0.23	15 000	60.3
Luxembourg	476 187	0.10	36 137	0.29	68 500	276.3
Malta	407 810	0.08	5 399	0.04	19 100	77.1
Netherlands	16 357 992	3.30	567 066	4.61	32 900	132.6
Poland	38 125 479	7.70	308 638	2.51	13 300	53.8
Portugal	10 599 095	2.14	162 756	1.32	18 500	74.6
Romania	21 565 119	4.36	121 431	0.99	10 100	40.7
Slovakia	5 393 637	1.09	54 827	0.45	17 000	68.5
Slovenia	2 010 377	0.41	33 542	0.27	22 000	88.7
Spain	44 474 631	8.98	1 049 848	8.53	26 500	106.8
Sweden	9 113 257	1.84	331 952	2.70	31 300	126.1
United Kingdom	60 816 701	12.28	2 018 828	16.41	28 700	115.8

Source: compiled by the author on the basis of the data available online at Eurostat webpage: http://epp.eurostat.ec.europa.eu (last visited 15.05.2009)

[20] The volume index of GDP per capita in PPS is expressed in relation to the EU (EU-27) average set to equal 100. If the index of a country is higher than 100, this country's level of GDP per head is higher than the EU average and vice versa.

However, in general, the five largest economies are also in the lead with respect to the main business indicators as can be seen from the data of structural business statistics presented in Table 2.

Table 2: Main indicators for the EU-27 non-financial business economy, 2004

	Enterprises		Turnover		Value added		Persons employed	
	No. of enter-prises	**% of EU-27**	**Turnover in MEUR**	**% of EU-27**	**Value added in MEUR**	**% of EU-27**	**No. of persons employed (ths)**	**% of EU-27**
Austria	264 756	1.4	426 428	2.2	122 795	2.4	2 354	1.9
Belgium	395 002	2.1	681 170	3.6	139 118	2.7	2 383	1.9
Bulgaria	240 408	1.3	52 119	0.3	8 288	0.2	1 771	1.4
Czech Rep.	879 649	4.7	239 128	1.3	52 495	1.0	3 573	2.9
Cyprus[21]	:	0.2	:	0.1	:	0.1	:	0.2
Denmark	192 318	1.0	360 370	1.9	102 168	2.0	1 660	1.3
Estonia	35 773	0.2	25 412	0.1	5 076	0.1	384	0.3
Finland	186 102	1.0	286 892	1.5	72 762	1.4	1 213	1.0
France	2 226 887	11.8	2 901 660	15.3	718 122	14.1	14 287	11.4
Germany	1 695 360	9.0	3 776 609	19.9	1 068 460	21.0	20 687	16.5
Greece	:	:	:	:	:	:	:	:
Hungary	563 760	3.0	197 264	1.0	36 103	0.7	2 573	2.1
Ireland[22]	:	0.5	:	1.4	:	1.6	:	0.8
Italy	3 740 000	19.8	2 422 608	12.8	567 204	11.1	14 687	11.7
Latvia	58 384	0.3	23 981	0.1	5 339	0.1	593	0.5
Lithuania	53 398	0.3	32 346	0.2	6 973	0.1	794	0.6
Luxembourg[23]	21 784	0.1	49 496	0.3	11 321	0.2	199	0.2
Malta	:	:	:	:	:	:	:	:
Netherlands	485 055	2.6	986 469	5.2	234 001	4.6	4 609	3.7
Poland	1 457 071	7.7	440 387	2.3	104 778	2.1	7 484	6.0
Portugal	583 780	3.1	288 410	1.5	64 481	1.3	2 944	2.4
Romania	376 563	2.0	110 107	0.6	21 583	0.4	4 001	3.2
Slovakia	35 679	0.2	63 669	0.3	13 195	0.3	895	0.7
Slovenia	89 093	0.5	55 108	0.3	13 511	0.3	568	0.5
Spain	2 454 715	13.0	1 718 799	9.0	458 712	9.0	12 839	10.3
Sweden	504 097	2.7	531 045	2.8	148 043	2.9	2 579	2.1
UK	1 530 323	8.1	3 153 178	16.6	965 093	18.9	17 993	14.4

Source: compiled by the author on the basis of Eurostat (SBS): "European Business facts and figures, 2007".[24]

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[21] Excluding real estate activities and research and development.

[22] Excluding mining and quarrying of energy producing materials and electricity, gas and water supply.

[23] 2003 data.

[24] Eurostat (SBS): "European Business facts and figures, 2007" is Eurostat's main reference publication that uses structural business statistics. It covers what is referred to as the business economy, i.e. the sum of industry, construction and services (NACE Sections C to K). It does not cover agriculture, forestry and fishing, nor the public administration and largely non-market services such as education and health. Due to the

Table 2 shows that together the economies of Germany, Spain, France, Italy and the UK generated about three quarters (74.1%) of the added value within the EU-27's non-financial business economy in 2004, made 73.5% of all sales, and employed nearly two thirds (64.4%) of the EU-27's workforce within 61.6% of all EU enterprises. At the same time, the smallest economies of the EU (such as Cyprus, Estonia, Latvia, Luxembourg, Slovenia)[25] made up less than 0.5% each with respect to all these indicators.

Furthermore, Table 3 presents the two EU Member States with the highest levels of value added for main non-financial business sectors[26].

Table 3: Largest Member States on the basis of value added for main non-financial business sectors, 2004[27]

Sector	**Largest**	**Second largest**
Food, beverages & tobacco	Germany	UK
Textiles, clothing, leather & footwear	Italy	Germany
Wood & paper	Germany	Italy
Chemicals, rubber & plastics	Germany	France
Other non-metallic mineral products	Germany	Italy
Metals & metal products	Germany	Italy
Machinery & equipment	Germany	Italy
Electrical machinery & optical equipment	Germany	France
Transport equipment	Germany	France
Furniture & other manufacturing	Germany	Italy
Non-energy mining & quarrying	UK	Germany
Energy	UK	Germany
Recycling & water supply	Germany	UK
Construction	UK	Spain
Motor trades	Germany	UK
Wholesale trade	UK	Germany
Retail trade & repair	UK	Germany
Hotels & restaurants	UK	France
Transport services	Germany	UK
Communications & media	Germany	UK
Business services	UK	Germany
Real estate, renting & R&D	Germany	UK

Source: compiled by the author on the basis of Eurostat (SBS): "European Business facts and figures, 2007".[28]

lack of standard business statistics, financial services are kept separate from the other sectors referred to as the non-financial business economy (NACE Sections C to I and K). Available online: http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-BW-07-001/EN/KS-BW-07-001-EN.PDF (last visited 15.05.2009).

[25] No data on Malta available.

[26] Please see supra note 24 on the choice of sectors listed in the table.

[27] Data on Greece and Malta, not available; Luxembourg, 2003.

[28] Eurostat (SBS): "European Business facts and figures, 2007".

It can be seen from Table 3 that the five largest Member States represent the highest value added among the EU-27 with respect to the main non-financial business sectors. Germany was ranked either first or second for the vast majority of activities, with the only exceptions being construction and hotels and restaurants which were dominated by UK and France. Italy was among the two largest producers for six of the industrial activities, while the UK was one of the two principal generators of added value for each of the service sectors, and Spain was among the two largest generators of value added in construction sector.

Hence, there appears to be a large discrepancy between the large and the small not only with respect to general indicators such as population and GDP, but also with regard to the more business specific indicators such as the number of enterprises, total turnover and value added, as well as the number of employees. Furthermore, the large economies tend to dominate in all sectors of economy. In this light, regardless of the exact definition of smallness, it is clear that certain economies are small (such as Austria, Belgium, Bulgaria, Czech Republic, Denmark, Finland, Greece, Hungary, Ireland, Lithuania, Portugal, Slovakia, Sweden) or even very small (such as Cyprus, Estonia, Latvia, Luxembourg, Malta, Slovenia) compared with certain other economies or compared with the EU-27 in total. As noted above, the smaller the economy, the more the attributes related to smallness are likely to be felt. Nevertheless, these named countries are regarded as small economies for the purposes of this thesis.

1.3. Relative smallness in the context of merger control thresholds

The size of an economy and the enterprises active therein has implications in the context of the EU and national merger control. Whether a merger falls subject to control by the European Commission depends on whether the merger has a Community dimension, which in turn depends on the turnover of the merging firms.

Table 4 below sets out the merger control thresholds of EU, Germany and Estonia to provide grounds for comparison.

Table 4: Merger thresholds of EU, Germany and Estonia

Jurisdiction	Threshold
EU[29]	A concentration is subject to control by the European Commission if: (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5,000 million; and (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State. A concentration that does not meet the above thresholds is subject to control by the European Commission if: (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2,500 million; (b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million; (c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and (d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.
Germany[30]	A concentration is subject to control by the German Federal Cartel Office (*Bundeskartellamt*, GFCO) if: (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 500 million; (b) the domestic turnover of at least one undertaking concerned is more than EUR 25 million; and (c) the domestic turnover of another of the participating undertakings is more than EUR 5 million.[31]

[29] Article 1(2) and (3) and Article 4(1) of the Council Regulation (EC) No. 139/2004 of 20.01.2004 on the control of concentrations between undertakings, O.J. L 24, 29.01.2004, pp. 1–22 (ECMR).

[30] Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*), the 7th revision. Available online: http://bundesrecht.juris.de/gwb/index.html (last visited 15.05.2009), (German ARC).

[31] The last criterion was added to the German threshold only since 25.03.2009. See GFCO website: “Second Domestic Turnover Threshold enters into force on 25 March,

Jurisdiction	Threshold
Estonia[32].	A concentration is subject to control by the Estonian Competition Authority (ECA) if: (a) the aggregate turnover in Estonia of the parties to the concentration is more than EEK 100 million (approximately EUR 6.4 million); and (b) the aggregate turnover in Estonia of each of at least two parties to the concentration is more than EEK 30 million (approximately EUR 1.9 million).

Source: compiled by the author on the basis of the referred legal acts.

One can notice a drastic difference in the values of the turnovers between the three thresholds criteria. While the worldwide turnover threshold of the German merger control is five to ten times lower than the worldwide turnover criteria in the case of the EU merger control, it is still more than 75 times higher than the equivalent criterion in case of the Estonian merger control. Hence, the size of firms that a competition authority of a small economy is controlling tends to be rather different from a large economy.

It should also be noticed that the companies from small economies are only rarely subject to control by the European Commission. Only one merger involving a firm with Estonian origin was subject to control by the European Commission in 2008, and even in the case of this merger the Community dimension thresholds were not exceeded, but the merger was controlled by the Commission only as a result of the case referral.[33] At the same time, only in January 2008, the European Commission was notified of eight cases involving German companies.[34]

Hence, the size of an economy tends to have an impact on the size of firms operating in it and the size of firms seated in the economy, which in turn, tends to have impact on the frequency of mergers involving domestic firms falling subject to control by the European Commission. Of course, not only the mergers of domestic firms have impact on the national markets, but also the transactions between foreign firms may have significant effects. National competition authorities can control such mergers if they have effects in their markets, provided the merger is not subject to control by the European Commission. It is likely that the mergers of large firms from large economies are more often felt in small economies, than the effects of the mergers of

2009”. Available online: http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/0904_Zweite_ Inlandsumsatzschwelle_e.pdf (last visited 15.05.2009).

[32] Competition Act (*Konkurentsiseadus*), RT I 2001, 56, 332.

[33] Commission Decision of 10.03.2008, Case No. COMP/M.4992, *ArcelorMittal/Galvex*.

[34] Author’s conclusion on the basis of the data available on the DG COMP web site: http://ec.europa.eu/comm/competition/mergers/cases/index/by_year_2008.html (last visited 15.05.2009).

smaller firms from small economies are felt in large economies. In this sense, it appears balanced that mergers involving small economies' firms are only rarely controlled by the European Commission.

However, small economies may well appear to be the losers in this situation. The national competition authority of the home state of the merging firms, who is best placed to enforce any action against the merger should it have anti-competitive effects, has no obligation to consider the effects of the merger to other states. Where a merger of large firms with significant cross-border effects does not meet the ECMR thresholds, the large economy hosting the large firm is well placed to enforce its national merger control rules taking into account the effect in its domestic markets. A small economy may also choose to control such mergers, but if the merger raises competition problem only for the small economy (and the merger is cleared by the larger hosting countries), the small economy's enforcement power against such merger may be rather limited (see more in Section 3.3). Yet, taken the large amount of mergers involving companies from large economies that meet the ECMR thresholds, one can assume that there is at least equally sizeable amount of mergers which remain below the thresholds, but still have significant cross-border effects, which the competition authorities of the large economies might not take into account.

1.4. Special attributes of smallness in the context of competition law and policy

1.4.1. Special attributes due to economic factors

Small economies are likely to have a small domestic market, which limits the possibilities of competition.[35] Domestic demand is often small compared to the quantities required for producing at minimum efficient scale (the scale at which average cost is minimised). Therefore, market concentration levels tend to be relatively high in small economies.[36] This difficulty of achieving minimum efficient scale for domestic firms due to low domestic demand is one of the most widely recognized effects of the smallness of an economy.[37] As put by

35 Evans & Hughes, pp. 3–5;
Briguglio, Lino; Buttigieg, Eugene: "Competition Constraints in Small Jurisdictions", CCNM/GF/COMP/WD(2003)32, January 2003, p. 7. Available online: http://www.oecd.org/dataoecd/57/8/2486833.pdf (last visited 15.05.2009).

36 OECD Background Paper, p. 4, section 9.
McEwin, Robert I.: "Competition Law in a Small Open Economy", in University of New South Wales Law Journal, Vol. 26, No. 1, 2003, p. 251.

37 See *e.g.,* Gal/OECD; Horn & Stennek; OECD Global Forum on Competition: "Competition Policy and Small Economies: Note by the Secretariat", CCNM/GF/COMP(2003)5, February 2003. Available online: http://www.oecd.org/dataoecd/57/13/2486724.pdf (last visited 15.05.2009); (OECD Note by the Secretariat).

Michal S. Gal "[t]he basic handicap resulting from small size is the need to produce at levels that cater to a large portion of demand in order to achieve minimum costs of production".[38] Therefore, small economies can support only a small number of competitors in many industries.

Another characteristic of small economies relates to barriers to entry. There are natural barriers, due to the poor chances of success of setting new business operating at least in the level of minimal efficient scale in goods and services already supplied by existing firms.[39] Moreover, in a small market, bulk buying is often required to avoid excessive fragmentation of cargoes, especially in the case of raw materials, and this limits the number of players in that market.[40]

Yet another characteristic of small economies is collusion between suppliers, which tends to be easier to accomplish by firms when only a few firms operate in the market and when everybody knows each other.[41] Such an environment facilitates also the maintaining of collusive arrangements because when "everybody knows everybody else" there is no need for detailed and difficult-to-manage (vulnerable) contractual arrangements.[42] In such circumstances, parallel behaviour is common, and the authorities may not find it easy to distinguish between concerted practices and independent action.[43]

It has also been noted that import and export considerations play relatively more important role for small economies than for large economies. As has been pointed out in the Estonian submission to the OECD Global Forum on Competition, one the one hand, imports can supplement or replace lacking domestic production. This means that where domestic production is too costly or impossible due to the problem of achieving minimum efficient scale or due to scarce or lacking resources, import goods could satisfy the demand in small economies.[44] At the same time, foreign export markets can broaden the sources of demand and increase the potential for expansion that is necessary for achieving minimum efficient scale by exploiting economies of scale[45] and scope[46] for the firms seated in small economies.[47]

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38 Gal 2002, p. 309.

39 Briguglio & Buttigieg, p. 7. Gal 2002, p. 309.

40 Briguglio & Buttigieg, p. 7.

41 *Ibid*.

42 OECD Background Paper, Section 2.2, authored by Matti Purasjoki, p. 8.

43 *Ibid.*

44 OECD Global Forum on Competition: "Estonia – Competition Problems in a Small Country", CCNM/GF/COMP/WD(2003)5, January 2003. Available online: http://www.oecd.org/dataoecd/57/44/2486151.pdf (last visited 15.05.2009), (OECD Estonia).

45 Economies of scale exist where the average costs per unit of output decrease with the increase in the scale or magnitude of the output being produced by a firm.

46 Economies of scope exist when it is cheaper to produce two or more goods together (joint production) than to produce them separately. Economies of scope could be associated with efficiencies arising from joint marketing or distribution of different types of goods.

47 OECD Estonia.

On the other hand, small size often implies poor natural resource endowment and low inter-industry linkages, which results in a relatively high import content in relation to GDP, whereas there are severe limitations on import substitution possibilities. This reality often leads to domination of the market by firms monopolising or dominating import channels.[48] As regards exports, a small domestic market and the need for a relatively large amount of foreign exchange to pay for the large import bill, gives rise to a relatively high dependence on exports and therefore on economic conditions in the rest of the world. At the same time, small economies have very limited ability to influence the prices of exports – while most economies are to varying degrees price takers, small economies tend to be price takers to a much higher extent due to the relative very small volume of trade in relation to the world markets in products they import and export. In order to be able to compete in the international market, a critical size is required, which could again raise the argument for rationalisation, and against fragmentation.[49]

On account of the relatively greater role of trade in small economies than in large economies, small economies are likely more affected by mergers taking place outside their jurisdiction than large economies are.

1.4.2. Special attributes due to political and cultural factors

In small economies, not only markets but also political activities are concentrated. A small economy cannot sustain a great number of political operators or a political agenda to many issues at a time, and a successful political concept is often extremely pragmatically designed.[50] Such political environment has a tendency to cause the political elite to favour and support so called national champions to a larger extent than do politicians of large economies and award special treatment to these champions: protect them from foreign competition, secure them oversized development benefits etc. The political elite may also try to protect the national champions from the competition authorities either openly, through legislative means, or indirectly, by affecting the activities of the authorities.[51]

Furthermore, as mentioned above small economies share the phenomena of everybody knows each other. The smaller and the less dispersed is the population, the higher the likelihood that politicians, entrepreneurs, regulators and press representatives have personal relations either as a result of having attended same school, student organizations, sports clubs, etc. It is difficult

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[48] Briguglio & Buttigieg, p. 10.
[49] *Ibid.*, p. 11.
[50] OECD Background Paper, Section 2.2, authored by Matti Purasjoki, pp. 7–8.
[51] *Ibid.*

adopt policies or decisions adverse to the interests of persons related to law enforcers or legislators.[52]

In addition, the size of the population has a bearing on competition law and policy – the smaller is the population, the more limited is the pool of educated lawyers and economists from which the competition authority can choose its personnel. Furthermore, due to fixed minimum level of costs necessary for the operation of any competition authority, the costs related to competition law enforcement tend to be relatively higher per capita in small economies.[53] Although the competition authorities of small economies need a smaller number of personnel, the proportionality rule does not hold, due to the problem of indivisibility, especially in matters associated with administration.[54] It is particularly important to set the enforcement priorities right under such circumstances. In order to better cope with scarce resources, regional cooperation as well as cross-sectoral cooperation (with consumer protection agencies and sector regulators) could be advisable.[55]

1.4.3. Special attributes due to enforcement issues

From the perspective of national competition authorities, four types of merger situations can be distinguished:

(i) Domestic mergers where all firms concerned have their seat within the state of the authority;

(ii) Foreign mergers where the firms concerned have their seat in one and the same foreign state;

(iii) International mergers where one of the firms concerned is foreign and the other has the seat in the state of the authority;

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[52] *Ibid.,* Briguglio & Buttigieg, p. 13.

[53] OECD Background Paper, Section 2.2, authored by Matti Purasjoki, pp. 8–9.

[54] Briguglio & Buttigieg, p. 13.

This is clearly illustrated by the simple comparison of the population of EU and Estonia and the number of competition authority officials. According to the DG COMP 2009 Annual Management Plan (available online: http://ec.europa.eu/competition/publications/annual_management_plan/amp_2009_en.pdf, last visited 15.05.2009), the European Commission's DG COMP staff comprises of 736 officials (excluding staid aid department) and the Merger Control department therein comprises of 100 officials (without taking into account the additional staff working of competition law issues at Commission's Legal Service). This makes approximately one competition official per more than 670,000 EU residents, and more specifically, one merger control official per almost 5 million EU residents. At the same time, according to the webpage of the ECA (http://www.konkurentsiamet.ee/?id=13258, last visited 15.05.2009), the staff of the Competition Service of the ECA comprises of 19 officials, including four merger control officials. This makes approximately one competition official per more than 70,000 Estonian residents, and one merger control official per 335,000 Estonian residents.

[55] OECD Background Paper, Section 2.2, authored by Matti Purasjoki, pp. 8–9.

(iv) Foreign international mergers where the companies concerned have their seat in two (or more) foreign states.[56]

Small economies are more often confronted with foreign, international and foreign international mergers than larger economies.[57] They can claim international jurisdiction over these mergers by virtue of effects doctrine (or similar doctrines),[58] which enables extraterritorial application of competition law.[59] Yet their actual enforcement power to give effect either to their notification requirements at first or their merger prohibition thereafter could be limited.[60]

These concerns are particularly evident in case of mergers of large multinational firms, if the merging parties are not seated in the small economy which is nevertheless affected by the merger, because the actual bargaining and enforcement power of the competition authorities of small economies vis-à-vis such market players is often rather limited.[61] Moreover, even if such firms are seated in the small economy, they may simply decide to relocate their activities from the small economy, should the small economy hinder their merger, if the expected benefits from the merger for the firms exceed the proceeds obtained from the small economies.

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56 Stoffel, p. 323.

57 *Ibid.*

58 The effects doctrine will be discussed further in Section 3.3 of this thesis.

59 Stoffel, p. 324.

60 Competition Law Forum: "Small Economies and Competition Policy – A Fair Deal?", summary of conference presentations and discussions in Luxembourg, October 2007. Available online: http://www.eventsforce.net/OXYGEN/media/uploaded/EVOXYGEN/event_82/Small%20Economies%20Conference%20-%20Summary%20transcript.pdf?popup=1 (last visited 15.05.2009).

61 Gal 2003, pp. 244–246.

CHAPTER 2
SUBSTANTIVE ASSESSMENT OF MERGERS

2.1. Definition of relevant market

2.1.1. Concept of relevant market and its relevance for merger control assessment

In order to assess the effects of a given conduct or transaction, competition authorities, as a rule, start the analysis by defining the relevant markets, where the firms concerned are active. The main objective of defining a market is to identify the competitors of the merging firms that are capable of constraining their behaviour.[62] As noted by the previous European Commissioner for Competition Mario Monti "[m]arket definition is not an end it itself but a tool to identify situations where there might be competition concerns".[63] Even though this statement concerned EU merger control, it can equally be regarded true for the purposes of other merger control regimes.

It should be borne in mind that the term "market" is, in English and in most languages, one of the most ambiguous around, connoting sometimes a place during a particular time or sometimes a segment of demand for a product with particular attributes.[64] For the purposes of competition law, "market" should be understood to consist of "buyer(s) and seller(s) of something with definable attributes during defined period of time within a defined geographic area at a price (range of prices)."[65] For the determination of relevant market for the purposes of a case at hand, competition authorities usually distinguish between the relevant product (goods and services) market and the relevant geographic market. In order to delineate a relevant market, substitutability of products and geographic areas is taken as a decisive factor. As a market consists of both buyers and sellers, the substitutability can also be analyzed from both demand and supply side.

While the overall objective of defining the relevant market is to identify the competitive environment in which the merging firms operate, the most practical use of relevant market definition becomes apparent in calculation of market shares of the merging firms and their competitors, which in turn provide some

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62 Commission Notice on the definition of relevant market for the purposes of Community competition law, section 2, O.J. C 372 of 09.12.1997, pp. 5–13, ("EC notice on the definition of relevant market").

63 Monti, Mario: "Market definition as Cornerstone of EC Competition Policy", speech/01/439 given at Workshop on Market Definition – Helsinki Fair Centre, October 2001. Available online: http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/01/439&format=HTML&aged=0&language=EN&guiLanguage=en (last visited 15.05.2009), (Monti 2001).

64 Ewing, Ky P.: "Competition Rules for the 21st Century: Principles from America's Experience", Kluwer Law International, The Hague, London, New York 2003, p. 183.

65 *Ibid.*, p. 184.

quantitative indication of the competitive situation in the market. Market shares are calculated on the basis of the total sales or output of all firms identified as market participants in the defined relevant market.

2.1.2. Relevant product market

For the purposes of the EC merger control, a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use.[66] The generally accepted conceptual approach used for defining a relevant market definition is the so called "small but significant non-transitory increase in price" (SSNIP) test (also known as the hypothetical monopolist test). This test considers customers' likely response to a SSNIP by a hypothetical monopolist. If the customers would likely start buying substitute products in such an extent as to render the price increase unprofitable for the monopolist due to the resulting loss of sales, such substitutes are included to the relevant market. This would be done until the set of products is such that the SSNIP would be profitable.[67] Hence the relevant product market is defined as the smallest group of products for which a hypothetical monopolist could sustain a SSNIP profitably.[68]

Commonly, the concept behind the SSNIP test has been to assume a price increase for the group of products in question in the range 5–10%, whilst all other prices remain unchanged and this price rise is assumed to last for the foreseeable future. The response is typically considered to occur in short term, *i.e.,* within a year of the price rise (although the exact time period will depend on the nature of the market considered).[69] There are a number of aspects to be borne in mind when using the SSNIP test, such as the inflation, impact of product differentiation, substitution chains and customer segmentation, the existence of after-markets (*i.e.*, secondary markets dependent on the prior sale of a primary product through after-sales servicing or spare parts supply). Such considerations may affect the results of the test.[70]

It is important to consider also the so called "cellophane fallacy" phenomenon, which could occur where the existing price level is already significantly higher than the price level that would result from the competitive market, for instance because the market is already to some extent monopolized. In such

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66 EC notice on the definition of relevant market, section 7.

67 *Ibid.*, sections 15–17; Ewing, p.186.

68 UK Competition Commission: "Merger References: Competition Commission Guidelines" June 2003, section 2.5. Available online: http://www.competition-commission.org.uk/rep_pub/rules_and_guide/pdf/cc2.pdf (last visited 15.05.2009), ("UK merger guidelines").

69 EC notice of the definition of market, sections 15–17.

70 See more in Scott, Andrew, *et al.*: "Merger Control in the United Kingdom", Oxford University Press, 2005, pp. 114–115.

cases, an increase in price would cause a significant number of purchasers to stop buying, or switch to alternatives that would not otherwise have been regarded as reasonable substitutes. As a result, a further price rise might well be unprofitable. The application of the SSNIP test might, therefore, erroneously suggest that other products should be included in the resulting product market even though they would not have been seen as substitutes had the competitive price level been used as the starting point for the test.[71] This may be of particular relevance for small economies, where markets tend to be highly concentrated and not as competitive as in large economies.

In addition to the above described demand side substitution analysis, supply side substitution can be taken into consideration.[72] Supply side substitution occurs when a price rise prompts other firms to start supplying an effective substitute to the product in question at short notice. Supply side substitution usually comes from firms with existing facilities, providing similar products. This may often be the case where suppliers produce a wide range of qualities or grades of a specific product (*e.g.,* different grades of a basic chemical or different grades of paper). Even if from the consumers' perspective, the different grades are not substitutable, the different grades may together form a single relevant product market provided that most suppliers can offer all the various grades sufficiently quickly and without significant additional costs.[73]

Drawing the dividing line between supply side substitution and potential new entry is not always straightforward. The difference is typically one of timing and amount of investment – supply side substitution is considered to occur in the short run with little or no investment required, whereas new entry is likely to occur over a longer period and may require more significant investment. Therefore, any significant investment or set-up costs, especially those which are unlikely to be recoverable in case of exit, will reduce the likelihood of supply side substitution. Potential competition by way of new entry, which also serves as a source of competitive constraint, is not taken into account when defining markets, but in further stages of merger assessment.[74]

There are differences in the way how the EU and the US competition authorities treat supply side substitution when defining a relevant product market.[75] The EC merger regime allows firms likely to participate in the market

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[71] UK merger guidelines, section 2.9. This problem is generally known as the "cellophane fallacy" after the Du Pont case in the US (*US v El Du Pont de Nemours &Co*, [1956] 351 US 377). In addition, so called reverse-cellophane fallacy phenomenon could occur, where the current price level is unnaturally low, so that one could always be able to increase profit by raising the price (see Scott, *et al.*, p 114).

[72] EC notice on the definition of relevant market, sections 20–23.

[73] Van Bael, Ivo; Bellis, Jean-Francois: "Competition Law of the European Community", Kluwer Law International, 2004, pp. 138–139; EC notice on the definition of market, section 21.

[74] EC notice on the definition of market, section 24.

[75] Padilla, Atilano J.: "The Role of Supply-Side Substitution in the Definition of the Relevant Market in Merger Control", a report for DG Enterprise A/4, European

by way of supply side substitution to be incorporated in the relevant market. At the same time, the US regime uses market aggregation method, whereby supply side substitution is taken into account for calculation of market shares. The US Horizontal Merger Guidelines envisage that market definition is based on demand side substitutability considerations only.[76] Supply substitution factors are considered in the identification of firms that would likely participate in the relevant market in response to price increase by current producers or sellers (*i.e.,* identification of "firms that participate through supply response"). The market size and market shares are calculated by adding the likely sales or output of firms that participate through supply response to the sales or output of the current producers or sellers.[77] Because of this difference, there may be discrepancies in the market shares of merging parties as calculated under the EC or US approach. However, as long as market shares and market concentration levels are not given decisive weight in the overall merger assessment, the difference in approaches to market share calculation are not prone to be the source for differing end results. Therefore, from the perspective of small economies (or any other economies) there is not much difference whether to use the EU or US approach.

In general, defining the relevant product market is a rather technical exercise and the above principles can be applied alike regardless of the size of economy. Therefore, smallness of economy appears to have little bearing on the relevant product market defining process and outcomes.

2.1.3. Relevant geographic market

The geographic market may be global, regional (*e.g.*, EU-wide or EEA-wide, or including certain regions such as Nordic countries or Baltic States), national, or limited to certain localities. In order to define a relevant geographic market, the SSNIP test, including both demand and supply side substitution is applicable as in the case of defining the relevant product market.

In considering the geographic market, the test looks at whether a SSNIP of the products in the relevant product market in a narrowly defined region would be profitable. If a SSNIP would not be profitable, for instance because customers switch to products in neighbouring areas, then these areas are added to the market and the procedure is repeated. Hence, relevant market is defined as the smallest area in which a hypothetical monopolist could sustain a SSNIP

Commission, Madrid, June, 2001, p. 3. Available online: http://ec.europa.eu/enterprise/library/lib-competition/doc/supply-side_substitution.pdf (last visited 15.05. 2009).

[76] US Department of Justice and the Federal Trade Commission: "Horizontal Merger Guidelines", of 02.04.1992, revised 08.04.1997. Available online: http://www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html (last visited 15.05.2009), ("US horizontal merger guidelines").

[77] *Ibid*., section 1.

profitably.[78] However, as in the case of relevant product market, running the full SSNIP test requires taking into account various considerations and is not always practicable.

Depending on the product concerned a wide range of factors may be relevant in determining the geographic market. Most commonly, prices across different national and geographic boundaries are compared – significant price differences would allow assuming narrow separate markets.[79] Product characteristics such as perishability also serve as an important indicator. The European Commission looks into the following type of evidence to define geographical markets – past evidence of diversion of orders to other areas, basic demand characteristics (national preferences, language, culture, life style), views of customers and competitors, current geographic pattern of purchases, trade flows or patterns of shipments, barriers and switching costs associated to divert orders to companies located in other areas.[80]

Not only the influence of general indicators, demand and supply side factors is decisive, but also an analysis of purely geographic borderlines is required. Recognition of the fact that a firm may produce a number of different products and operate in a number of different geographic markets is essential. Commercial banks may serve as an example. They supply multiple services to multiple types of customers. Large corporations, for example, obtain credit from many sources and the geographic market is very broad, probably worldwide, for the types of banking services they demand. On the other hand, the geographic market is likely to be much narrower for small customers demanding retail banking services from the offices in their immediate neighbourhood. This geographic diversion adds a dimension, which has to be treated carefully.[81]

In relation to the European Commission's prohibition of the proposed merger of Volvo and Scania – the firms of relatively small Member States – in 2000[82], it was questioned whether asymmetry exists with respect to the mergers of firms from small economies and whether such asymmetry should affect the principles of geographic market definition.[83] The acclaimed possible asymmetry is related to the tendency for smaller economies to support fewer firms, which is for the competitive pressure is consequently likely to be weaker in such markets. There is also a strong tendency for firms to serve primarily the markets in which they are seated (*i.e.,* typically a "home market bias" exists).[84] Hence, a

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78 UK merger guidelines, section 2.29.

79 Cook, John C., Kerse, Chris, S.: "E.C. Merger Control", 3rd edition, Sweet & Maxwell, London, 2000, p. 139;
Bellamy, Christopher; Child, Graham: "European Community Law of Competition", 5th edition, Sweet 6 Maxwell, London 2001, page 399–400, section 6–128.

80 EC notice on the definition of market, sections 44–50.

81 Hildebrand, Doris: "The Role of Economic analysis in the EC Competition Rules", 2nd edition, Kluwer Law International, the Hague, London, New York, 2008, p. 379.

82 Commission Decision of 15.03.2000, Case No. COMP/m: 1672 – Volvo/Scania.

83 Monti 2001; Horn & Stennek.

84 Horn & Stennek, p. 7.

merger between firms of a given magnitude in terms of turnover is more likely to lead to a dominance finding in a smaller than in a larger Member State. As a result large firms active in small economies could be treated differently from equally large firms in large economies, in the sense that their possibilities to merge domestically tend to be more limited, due to the merger policy being pursued. In this light, it has been tested whether the method of geographical market delineation is the cause of the asymmetry between small and large Member States and thus, whether the geographic market should be defined more widely (*e.g.*, as EU-wide rather than national) in case of small economies.[85] However, such suggestion has not been supported[86] and in the author's opinion, rightly so. After all, market definition is only a tool for identifying the competitive constraints and setting a relevant framework for competitive assessment, not a replacement to that. If the asymmetry related to smallness is to have implications on substantive merger assessment, it is the further analysis and permissibly of defences, if at all, which it could affect.

Nevertheless, in the author's view, certain additional aspects should be borne in mind in relation to geographic market definition in case of small economies. It is quite natural that any national competition authority looks first at the domestic market and the domestic firms, active on the market, when determining the scope of the market in question. Even if the market is likely wider than the domestic market, the national competition authorities often evaluate the situation either simultaneously or solely from the domestic perspective.[87] This tendency can be noticed in the practice of the ECA, for instance *OAO Severstal/ISG Sparrows Point LLC*,[88] which concerned the acquisition of a US-based steel production facility by a Russian-based steel producer Severstal. The relevant market in this case was the market for cold-rolled flat carbon steel products, which the European Commission had previously defined as at least EEA-wide.[89] The ECA took notice of the Commission's such practice, while still noting that the joint market share of the merging parties in Estonia exceeded 15% and therefore, considered this as an affected market, even though in EEA-wide market the merging parties' market share was marginal.[90]

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85 *Ibid*., pp. 7–11.

86 Monti 2001, Horn & Stennek, pp. 10–11.

87 Author's conclusion on the basis of Competition Cases from the European Union, edited by Kokkoris, Ioannis, Sweet & Maxwell, London, 2008.

88 Decision of Estonian Competition Authority of 25.04.2008, Case No. 3.1-8/08-016KO – *OAO Severstal/ISG Sparrows Point LLC*. Available online (in Estonian): http://www.konkurentsiamet.ee/public/Koondumised/2008/ko2008_7.pdf (last visited 15.05.2009).

89 See *e.g.*, Commission Decision of 02.06.2006, Case No. COMP/M.4137 – *Mittal/Arcelor*.

90 Several other cases provide similar examples. See *e.g.*, Decision of Estonian Competition Authority of 25.10.2005, No. 48-KO – *Rautaruukki Oyj/PPTH Steel-*

In this case, the market shares of the firms concerned are likely to look higher than in case of more widely defined geographical markets, which, in turn, tends to raise concerns about the merger. As noted in the Section 1.4.1 small economies tend to be dependent of exports and imports to a greater extent than large economies. It could be expected that the scope of geographic markets in case of small open economies often tends to be much wider than its political borders – due to the small size of the domestic markets, firms have incentives to look for export opportunities more actively than the firms in large economies which can provide sufficient market for achieving economies of scale. Hence, there may be a tendency for larger amount of cross-border scope of markets in case of small economies as compared to the larger amount of national scope of markets in case of large economies.[91]

Furthermore, it is important not to forget to take imports into consideration when defining relevant market if import in fact serves as a source of supply substitution or to include imports into the calculation of market shares and hence use import-corrected market concentration indexes. Such considerations should be taken into account when defining the scope of geographical market both in large and small economies.[92] However, the relatively higher proportional importance of trade in the case of small economies as compared with large economies allows assuming that imports could have relatively greater significance as a source of supply side substitution in small economies.

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management Oy. Available online (in Estonian): http://www.konkurentsiamet.ee/public/Koondumised/2005/ko200548.pdf (last visited 15.05.2009).

Decision of Estonian Competition Authority of 03.06.2008, Case No. 5.1-5/025KO – *Nucor Corporation/Duferco Participations Holding Ltd/Duferdofin S.p.A.*, Available online (in Estonian): http://www.konkurentsiamet.ee/public/Koondumised/2008/ko2008_12.pdf (last visited 15.05.2009).

[91] This is exemplified by the survey carried out by the Commission in 2001, which studied the Commission's merger decisions adopted over 1995–2000. Out of 1295 decisions taken during the reference period, in 184 (14.2%) markets were defined as national; in 187 (14.4%), markets were wider than national; and in the remaining 924 (71.4%) the scope of markets was left open, because competition concerns would not arise under any alternative definition (either EEA-wide, regional or national). With respect cases involving companies from Nordic countries (i.e. the relatively small Member States at the time of the survey), the results showed a somewhat larger predominance of wider than national markets as compared with national markets – in 24 out of 228 decisions (10.5%), markets were considered national; wider than national markets were found in a further 30 (13.2%) and markets were left open in the remaining 174 (76.34%). In case of more problematic cases involving the second phase proceedings, in 6 out of 12 cases serious doubts were raised in at least one market defined as either "regional" (often covering the entire Nordic area) or "EEA-wide". In the remaining 6, only national markets were considered (see Monti 2001, p. 10).

[92] OECD Global Forum on Competition: "Denmark – Special Aspects of Competition Policy in Small Economies", CCNM/GF/COMP/WD(2003)16, January 2003, p. 2. Available online: http://www.oecd.org/dataoecd/58/26/2485941.pdf (last visited 15.05.2009), (OECD Denmark).

A process of market integration, including ongoing process of liberalization, may lead to wider geographic markets, *i.e.,* to "europeanization" or "globalization" of the national markets.[93] In the light of globalization processes, there have been voices calling for wider use of supply substitution arguments in the defining the geographical markets. It has even been suggested that the definition of geographical market should include so called multi-nationality considerations.[94] According to proponents of such view, the more multinational firms there are within an industry, the more likely that competitive reactions will occur across geographical boundaries, which is for foreign direct investments should be considered as much a source of potential supply as is trade.[95] In the author's view, the competitive constraints exposed by multi-national corporations and foreign direct investments can be of great relevance in small economies and such considerations should be taken into account. However, due to difficulties of assessing the quantitative relevance of their impact, including their share to the calculation of market shares would be a speculative exercise. Therefore, it is seems more sound to include such considerations into the competitive assessment of potential competition in the further stages of the merger appraisal.

Besides the possibly greater significance of trade flows to the geographic market definition in small economies, the substitutability chains could have a relatively more significant effect in small economies and could even lead to difference in the outcomes of market definition depending on location of the authority controlling a merger. In the authors view, while the scope of geographic market depends greatly on the goods in question, the scope can differ also from various countries' perspective on account of the size of the country and its location. Let us imagine four countries A, B, C and D (see Schedule 1) of which A and D are relatively smaller than others and are not centrally located.

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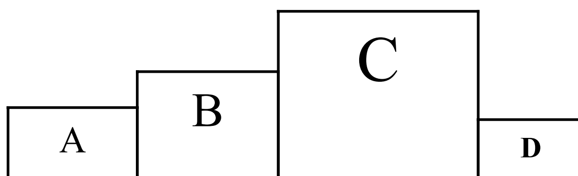
[93] Ritter, Lennart, *et al.*: "EC Competition Law: a Practitioner's Guide", 3rd edition, Kluwer Law International, The Hague, etc. 2004, p. 42.

[94] Sleuwaegen, Leo; *et al.*: "The implications of globalization for the definition of the relevant geographic market in competition and competitiveness analysis", a report for DG Enterprise, European Commission, 2001, pp. 4 and 66. Available online: http://ec.europa.eu/enterprise/library/lib-competition/doc/globalisation_and_gmd.pdf (last visited 15.05.2009).

[95] *Ibid*.

Schedule 1.



In case of perishable products, which can be transported only to limited distances, even if the prices and other trading conditions of the products would be homogenous across all countries, the scope of geographic market for country A would likely involve A and B; for B the scope would likely include A, B and part of C; for C the scope would likely include only C, or may be additionally D and (parts of) B; for D the scope would include D and part of C. Hence, the scope of relevant market is not the same for example from the perspective of A and B or from the perspective of B and D. If the competition authorities of each of the countries A, B, C and D were to define the market from their point of view, there would likely be differences in the scope of definitions and possibly some areas could fit into different partially overlapping definitions. At the same time, if the markets would be defined by the a centralized controlling organ such as the European Commission, the market would be either defined as national or regional, but there would not be overlaps, whereby certain areas would belong into two different definitions.

Thus, even though defining the scope of markets is a rather technical process, which should not differ regardless of the size of economy, the end result of defining the scope of the market may diverge from the perspective of the economies concerned due to the size as well as location of an economy. This diversion should not be substantive, *i.e.,* it should not be caused by applying diverging principles for market delineation, but practical, *i.e.,* caused by the diverging factual circumstances of any given jurisdiction.

2.2. Theories of harm in case of various types of mergers

2.2.1. Theories of harm in case of horizontal mergers

It is possible to distinguish between three types of mergers:

1) horizontal mergers – *i.e.,* mergers between rivals operating in the same relevant market;
2) vertical mergers – *i.e.,* mergers, which involve firms operating at different levels of supply chain, *e.g.*, where a producer of a certain product merges with a supplier (upstream firm) or a distributor (downstream firm);
3) conglomerate type mergers – *i.e.,* mergers, where the merging firms do not have a pre-existing horizontal or vertical competitive relationship.

The economic effects of the different types of merger are diverse. It should be noted that a merger of firms operating in multiple markets may fall into several of the above categories and thus, have various effects.

In general, horizontal mergers are considered the most harmful to competition, as they reduce the number of competitors in the market by definition. The potential harmful economic effects of horizontal mergers can be divided into two broad categories – non-coordinated effects (or unilateral effects) and coordinated effects.[96]

Non-coordinated effects relate directly to the merged entity's increased ability to exploit market power if the merger removes important competitive constraints on one or more sellers. For instance, if prior to the merger one of the merging firms had raised its price, it would have lost some sales to the other merging firm, but the merger removes this particular constraint. Hence, the most direct effect of the merger will be the loss of competition between the merging firms. Non-merging firms in the same market can also benefit from the reduction of competitive pressure which results from the merger, since the merging firms' price increase may switch some demand to the rival firms, which may find it profitable to increase their prices. Such expected reactions by competitors may, in turn, be a relevant factor influencing the merged entity's incentives to increase prices. Therefore, the reduction of competition could lead to significant price increases in the relevant market.[97]

A number of factors, which taken separately are not necessarily decisive, may influence whether significant non-coordinated effects are likely to result from a merger. For instance, non-coordinated effects are likely if merging firms have large market shares, merging firms are close competitors, customers have limited possibilities of switching suppliers, competitors are unlikely to increase supply if prices increase, merged entity is able to hinder expansion by competitors, or merger eliminates an important competitive force.[98]

Coordinated effects occur when the merger, by increasing the level of concentration of the market and interdependence of market participants' strategies, changes the nature of competition in such a way that firms that previously were not coordinating their behaviour, are now significantly more likely to coordinate and raise prices or otherwise engage in coordinated interaction that harms consumers.[99] The merger may also make coordination easier, more stable or more effective for firms which were coordinating prior to the merger.[100] Such coordinated interaction is comprised of actions by a group of firms that are

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[96] Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, O.J. C 31, 05.02.2004, pp. 5–18, (EC horizontal merger guidelines), section 22;
Bishop, Simon; Walter, Mike: "The Economics of EC Competition Law: Concepts, Application and Measurement", Sweet & Maxwell, London 2002, p. 259.

[97] EC horizontal merger guidelines, section 24.

[98] *Ibid*, sections 26–39.

[99] UK merger guidelines, section 3.1.

[100] EC horizontal merger guidelines, section 22.

profitable for each of them only as a result of the accommodating reactions of the others. This behaviour includes tacit or express collusion, and may or may not be lawful. Hence, the merger may facilitate maintenance of an illegal cartel, which could be difficult for competition authorities to detect and sanction. Moreover, if the post-merger coordination expresses in tacit collusion, it will not be classified as illegal and therefore, it cannot be controlled by the authorities regardless of its possible anti-competitive effects.[101]

Coordination may take various forms. In some markets, the most likely coordination may express in maintenance of anti-competitive price level. In other markets, coordination may involve limiting production or constraining the introduction of new capacity to the market. Firms may also coordinate by dividing the market, *e.g.*, by geographic area or other customer characteristics, or by allocating contracts in bidding markets.[102]

Successful coordinated interaction is dependent upon a number of complex market variables. There is a general understanding that the presence of three conditions is most relevant to the analysis of coordinated effects:

1) whether the coordinating firms are able to establish terms of coordination;
2) whether the coordinating firms are able to monitor each other's adherence to the terms of coordination and to detect deviations from the established terms; and
3) whether effective deterrence mechanisms exist to discourage and effectively discipline deviation from the terms of coordination.[103]

Certain conditions increase the likelihood of coordinated interaction or tacit collusion. Such factors include high concentration levels (*e.g.,* oligopolistic markets), homogeneity of products and firms, stability of demand, absence of potential entrants, pre-merger history of coordination, presence of standardized pricing or product variables, or transparency of prices and other terms of sale.[104]

As noted, effective tacit collusion requires that the participants would be able to effectively monitor each other's adherence to the terms of coordination and detect any deviation. There are a number of market factors that address the ability to monitor competitors' behaviour and detect deviations from a collusive scheme. Such factors include the availability of access to market information, presence of demand fluctuations, which can undermine the ability to detect deviations from a coordinated scheme, and presence of vertical relationships, which may enable price signalling upstream or downstream of the level of competition.[105]

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[101] Areeda, Phillip E.; Hovenkamp, Herbert: "Fundamentals of Antitrust Law", Vol. 1, Aspen Law & Business, New York, 2002, pp. 348–349.

[102] EC horizontal merger guidelines, section 40.

[103] Rill, James F., *et al.*: "Coordinated Effects Analysis under International Merger Regimes", ICN Report on Merger Guidelines, Chapter 4, April 2004, section 18. Available online: http://www.internationalcompetitionnetwork.org/media/library/conference_2nd_merida_2003/amg_chap4_coordinated.pdf (last visited 15.05.2009).

[104] EC horizontal merger guidelines, sections 44–48.

[105] *Ibid.*, sections 49–51.

Firms engaged in tacit collusion may have the incentive to deviate from the terms of coordination, even if such deviation would be quickly detected, if there is no effective mechanism by which they would be punished by their rivals. Therefore, the threat of future retaliation (*e.g.*, by way of price wars) has the effect of making the coordination intact by increasing the cost of deviation and, thereby, the net benefit of coordination. In order for the deterrence to be effective, the threat of retaliation must be credible and enacted in a timely manner.[106]

In broad terms, anti-competitive effects of horizontal mergers are related to the concept of market dominance. If a merger is likely to lead to creating or strengthening of a single firm dominance, unilateral effects are likely; whereas the occurrence of coordinated effects is indicative of possible collective dominance. Even though the above overview of the theories of harm in case of horizontal mergers is based on the EC horizontal merger guidelines, the rationale of the possible harm applies universally,[107] which is for there is no reason to diverge from the above theories when assessing mergers in small economies. Of course, the weight given to particular facts and elements of competitive assessment when applying the theories could differ, as will be seen in Sections 2.3 and 2.4.

2.2.2. Theories of harm in case of vertical mergers

Generally, mergers which integrate the merging firms vertically comprise more pro-competitive than anti-competitive effects. Vertical integration may have benefits for consumers through efficiency gains, in particular by reducing transaction costs and eliminating double marginalization[108], which may in turn enable prices to be lower for end users. Therefore, vertical mergers are seen mostly as efficiency enhancing and beneficial to consumers.[109]

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[106] *Ibid.*, sections 52–55.

[107] Rill, *et al*.

[108] Double marginalization occurs when downstream firms mark up over their marginal cost, which because of market power upstream exceeds the marginal cost of the upstream producer, hence creating a mark up on mark up (or double marginalization). A vertical merger in these circumstances would eliminate the wholesale market transaction and one of the mark ups, reducing the marginal cost downstream, resulting in both a lower price downstream and increased profits.

[109] Church, Jeffrey: "The Impact of Vertical and Conglomerate Mergers on Competition", final report for DG for Competition, European Commission, September 2004. Available online: http://ec.europa.eu/comm/competition/mergers/studies_reports/merger_impact.pdf (last visited 15.05.2009).
Lindsay, Alistair; et al: "Unilateral effects", ICN Report on Merger Guidelines, Chapter 3, April 2004, section 6.4. Available online: http://www.internationalcompetitionnetwork.org/media/library/conference_2nd_merida_2003/amg_chap3-unilateral.pdf (last visited 15.05.2009).

However, some vertical mergers raise anti-competitive concerns. Generally, vertical mergers only give rise to competition concerns if one or more merging firms possess market power in one or more markets along the supply chain.[110] Similarly with horizontal mergers, the anticompetitive effects of vertical mergers can be divided into two broad categories – non-coordinated effects and coordinated effects.[111]

Non-coordinated effects may principally arise when non-horizontal mergers give rise to foreclosure, *i.e.,* where actual or potential rivals' access to supplies or markets is hampered as a result of the merger. Such foreclosure may discourage the entry or expansion of rivals or encourage their exit. Foreclosure can be found even if the foreclosed rivals are not forced to exit the market, because the rivals may be disadvantaged and consequently led to compete less effectively. Due to such foreclosure, the merging firms and, possibly, some of their competitors as well, may be able to profitably increase the price.[112]

It is possible to distinguish two forms of foreclosure – input foreclosure and customer foreclosure. Input foreclosure occurs where the merger is likely to raise the costs of downstream rivals or where the merger likely enables the merged entity to exclude the downstream rivals completely from access to inputs.[113] Customer foreclosure occurs where the merger is likely to foreclose upstream rivals by restricting their access to a sufficient customer base.[114]

It is also recognized that in certain circumstances, vertical integration resulting from vertical mergers could create competitively objectionable barriers to entry.[115] This problem could occur where (i) the degree of vertical integration between the two markets is so extensive that entrants to one market (the "primary market") also would have to enter the other market (the "secondary market") simultaneously; (ii) the requirement of entry at the secondary level makes the entry at the primary level significantly more difficult and less likely to occur, and (iii) the structure and other characteristics of the primary market are otherwise so conducive to anti-competitive performance that the increased difficulty of entry is likely to affect its performance.[116]

Coordinated effects in case of vertical mergers are similar to coordinated effects in case of horizontal mergers. Namely, vertical mergers could have the

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[110] Bishop & Walter, p. 288.

[111] Commission Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, O.J. C 265, 18.10.2008, pp. 6–25 (EC non-horizontal merger guidelines), section 17.

[112] EC non-horizontal merger guidelines, sections 18 and 29; Bishop & Walter, pages 288–289.

[113] EC non-horizontal merger guidelines, sections 30; Church, pp. 6–8.

[114] EC non-horizontal merger guidelines, sections 30.

[115] US Non-Horizontal Merger Guidelines, originally issued as part of "U.S. Department of Justice Merger Guidelines", June 1984, section 4.21. Available online: http://www.usdoj.gov/atr/public/guidelines/2614.htm (last visited 15.05.2009), (US non-horizontal merger guidelines); UK merger guidelines, section 3.68.

[116] US non-horizontal merger guidelines, section 4.21.

effect of facilitating collusion.[117] For instance, where manufacturers are vertically integrated with retailers, they are more likely to be informed about the final prices. This makes it easier to monitor prices, which is why coordinated effects may be more likely to occur. In general, the conditions for evaluating the likeliness of coordinated effects in case of vertical mergers are the same as in case of horizontal mergers.[118]

As in the case of horizontal mergers, the understanding of possible harmful effects of vertical mergers is rather universal and the underlying rationale can be applied alike in the EU merger control and in the merger control of small economies. Again, the weight given to particular elements and concerns could be the source of divergences.

A point to note in case of small economies with respect to vertical effects is that the small size of the markets may tend to result in stronger tendency to vertical integration.[119] In Estonia, for instance, the independent companies operating on various non-banking financial markets (*e.g.*, pension funds) appear to have had difficulties competing with the subsidiaries of banks. The banks have an advantage of minimal efficient scale while operating the pension funds because the gains of their main activities can be used on neighbouring markets.[120] With respect to vertical mergers, strong tendency for vertical integration can be noticed in the pharmaceutical trading sector. In fact the only merger prohibited in Estonia thus far, was blocked mainly due to vertical foreclosure concerns.[121]

In order to be able to benefit the most from the market expanding effect of trade, it is of particular importance for small economies to ensure the openness of distribution systems.[122] Therefore, where a merger has the effect of foreclosing access to distribution systems for potential entrants or importers, it should not be favoured.

Hence, while the theories of harm in case of vertical mergers can be applied similarly in large and small economies, the latter may experience the tendency to stronger vertical integration and should be particularly wary of it.

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[117] EC non-horizontal merger guidelines, sections 19; Cook & Kerse, page 166.

[118] EC non-horizontal merger guidelines, sections 79–90.

[119] OECD Estonia, p. 4.

[120] OECD Estonia, p. 4.

[121] Decision of Estonian Competition Authority of 18.05.2008, Case No. 3.1-8/08-020KO – *Terve Pere Apteek OÜ/ OÜ Saku Apteek*. Available online (in Estonian): http://www.konkurentsiamet.ee/public/Koondumised/2008/ko2007_32.pdf (last visited 15.05.2009).

[122] *Ibid*; OECD Denmark, p. 2; OECD Global Forum on Competition: "Switzerland – Special Aspects of Competition Policy in Small Economies", CCNM/GF/COMP/WD(2003)18, January 2003, p. 4. Available online: http://www.oecd.org/dataoecd/58/22/2486055.pdf (last visited 15.05.2009), (OECD Switzerland);
OECD Global Forum on Competition: "Malta – Competition Policy in Small Economies", CCNM/GF/COMP/WD(2003)32, January 2003, p. 7. Available online: http://www.oecd.org/dataoecd/57/8/2486833.pdf (last visited 15.05.2009), (OECD Malta).

2.2.3. Theories of harm in case of conglomerate mergers

Conglomerate mergers involve firms that do not compete in the same relevant market or have any vertical links. Such mergers can be divided into three types:

1) Market extension mergers – *i.e.,* mergers where one firm acquires another firm that sells the same product in a different geographic market;
2) Product extension mergers – *i.e.,* mergers where one firm acquires another firm that sells a product that is in some way related to the product manufactured by the acquiring firm (*e.g.,* a complementary product);
3) Diversification mergers – *i.e.,* mergers where a firm acquires another firm that sells neither the same product nor related product as the acquiring firm.[123]

It is generally acknowledged that conglomerate mergers do not cause competition problems in the majority of circumstances,[124] but are likely efficiency producing, because when complementary products are merged, there is a potential for considerable synergies that could benefit buyers.[125] There is an increased potential for tying, bundling, or analogous practices that could restrict buyers' choice but also lower prices. Under certain strict conditions, consumers could gain in the short run but suffer long term harm from such practices if they eventually result in a sufficient reduction of competitors and capacity in a market.[126] Therefore, in the eyes of some competition authorities conglomerate mergers may cause competition concerns in certain specific cases.

It has been established in competition law theory that the competitive harm in conglomerate type mergers can arise out of range effect, because they typically stem from an extension of the merged entity's product offering.[127] Two main types of competitive harm theories can be distinguished with this respect.

First, there are theories related to rivals' increased as an immediate effect caused by a merger. For instance, a merger could increase the portfolio power of the merging firms and strengthen their position across such a wide range of related products which renders the competitors unable to compete.[128] There may also be conglomerate mergers that have a disguised vertical nature, *i.e.,* where

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[123] Burnley, Richard: "Conglomerate Mergers. A Comparison of the EU and US Approaches", in EC Competition Law: A Critical Assessment, general edited by Amato, Giuliano; Ehlermann, Claus-Dieter, Hart Publishing, Oxford, Portland, Oregon, 2007, p. 496, (Burnley 2007).

[124] EC non-horizontal merger guidelines, section 92.

[125] OECD Policy Roundtables: "Portfolio Effects in Conglomerate Mergers", overview, DAFFE/COMP(2002)5, 2001, p. 1. Available online: http://www.oecd.org/dataoecd/39/3/1818237.pdf (last visited 15.05.2009)

[126] *Ibid.*

[127] Bishop & Walker, page 290.

[128] Völcker, Sven. B.: "Leveraging as a Theory of Competitive Harm in EU Merger Control", in Common Market Law Review, Vol. 40, Issue 3, June/July 2003, p. 586, (Völker 2003).

the main aim of the merger is to acquire the target's distribution channel for unrelated products, which can be accommodated for relevant products and that could otherwise be used by new entrants.[129]

Second, there is a theory of competitive harm not grounded on immediate effects and rivals' increased costs, but on leveraging effects. The latter may emerge in case of product extension conglomerate mergers (*i.e.,* where merging firms are active on different product markets) if the merger enables the merged entity to use its existing dominant, or at least strong, position in one market to create a dominant position on a second, closely-related market, for example through product bundling.[130]

The EC non-horizontal guidelines refer also to possible coordinated effects arising out of conglomerate mergers which are assessed in the framework used for assessing the coordinated effects in the case of horizontal mergers.[131]

Due to the hypothetical nature of harm potentially arising from conglomerate mergers, there is a widespread disagreement about whether such competitive concerns should constitute sufficient ground for prohibiting a merger.[132] This becomes apparent when comparing the US and EU approaches. While the US regime does not support prohibiting mergers based on conglomerate effects only,[133] conglomerate effects could constitute grounds for prohibition in the EU, subject to the requirement of clear evidence.[134] Such discrepancy appears to be related to the difference of their enforcement goals – while competition policy should strive first and foremost toward achieving economic efficiency under the US approach, the EU approach focuses on the protection of competition.[135] Even though in most cases one does not exclude the other, the two focuses do not always produce the same outcomes. While the primary goal of EU

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129 Staahl Cabrielsen, Tommy: "Conglomerate Mergers: Vertical Mergers in Disguise?", in International Journal of the Economics of Business, Vol. 10, Issue 1, 2003, pp. 1–2.

130 Völcker 2003, pp. 586–587; Bishop & Walter, pp. 292–293.

131 EC non-horizontal merger guidelines, section 119.

132 Lindsay, *et al.*, p. 15.

133 US Department of Justice: "Range Effects: United States Perspective", submission for OECD Roundtables on Portfolio Effects in Conglomerate Mergers, December 2001. Available online: http://www.usdoj.gov/atr/public/international/9550.pdf (last visited 15.05.2009).

134 The European Court of Justice (ECJ) has stated the need for clear evidence in the much debated *Tetra Laval* case by stating: "[t]he analysis of a conglomerate-type' concentration is a prospective analysis in which, first, the consideration of a lengthy period of time in the future and, secondly, the leveraging necessary to give rise to a significant impediment to effective competition mean that the chains of cause and effect are dimly discernible, uncertain and difficult to establish. That being so, the quality of the evidence produced by the Commission in order to establish that it is necessary to adopt a decision declaring the concentration incompatible with the common market is particularly important" – Judgment of ECJ of 15.02.2005, Case C-12/03 – *Commission v. Tetra Laval*, [2005] ECR I-1113, section 44.

135 Burnley 2007, p. 516.

competition law appears to be the protection of consumers rather than competitors, this paradigm is not absolute. In some exceptional cases, inefficient or less efficient competitors that might exit a market following the anticipated merger deserve protection, because their exit would unlikely to be followed by the new more efficient firm; this would mean that there will be no effective constraint on the conduct of the merged entity.[136]

In the author's view, the choice of approach to conglomerate mergers in case of small economies should depend primarily on its chosen goal for merger control policy as such (see more on that in Section 2.5). However, small economies should be particularly wary of disguised vertical effects of conglomerate mergers for reasons noted above under Section 2.2.2. Therefore, where a conglomerate merger has the effect of foreclosing access to distribution systems for potential entrants or importers, it should not be favoured.

2.3. Substantive test

The above described theories of harm, which are based on general economic principles, are tools to identify the possible harmful effects of a merger. Once identified, such harmful effects are assessed in the light of the underlying substantive test, which sets out the decisive criterion for the appraisal of whether the merger is so anti-competitive that it should be prohibited.

Most merger control regimes base their assessment on one of the following underlying substantive tests[137] – does the merger:

1) substantially lessen competition? – *i.e.*, so called SLC test, applied *e.g.*, in the US, UK, Australia, Canada, Ireland;
2) significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position? – *i.e.*, so called SIEC test, applied *e.g.*, in the EU, Belgium, Denmark, Estonia, France, Sweden;
3) lead to the creation or strengthening of a dominant position as a result of which competition would be significantly restricted? – *i.e.,* so called dominance test, applied *e.g.*, in Austria, Germany, Switzerland, Finland, Italy.

The choice of the underlying substantive test has triggered a lot of discussion since the beginning of this decade, in particular in relation to the reform of the EU merger control in 2004, when the previously applied dominance test was replaced with SIEC test in the EU. In particular, it has been questioned whether there is any substantive difference between the different tests at all.[138] Several

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136 *Ibid.*

137 Author's conclusion on the basis of Global Merger Control Manual 2008.

138 See *e.g.,* Commission Green Paper on the Review of Council Regulation (EEC) No. 4064/89, COM(2001) 745/6 final. Available online: http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0745en01.pdf (last visited 15.05.2009)
Sullivan, Kevin R.; Meiners, Brian R.: "Merger Analysis: SLC vs. Dominance", paper presented at EC Merger Control Conference, Brussels, 7–8 November 2002;

authors have come to the conclusion that the different test are in fact much closer to each other than usually thought to be.[139]

Under the dominance test, it is first necessary to establish whether a dominant position of the merging parties will be created or strengthened at all, and second, whether this dominance will significantly lessen competition. Therefore, in any case where the competition authority is to prohibit a merger under substantive test, it should prove first the dominance of merging firms.

Since the adoption of the ECMR in 1989, the application of the notion of dominance has evolved significantly. The most well-known example of this evolution is the European courts' interpretation of the dominance test as applying to situations of collective dominance in order to tackle the concerns arising out of coordinated effects in the *Kali und Salz*[140] and *Gencor*[141] cases.[142] However, the dominance test appears to fail to address so called "gap cases", *i.e.,* cases where harm to competition would raise out of non-coordinated effects without the merger creating a single firm or collective dominance. For instance, a merger between the second and third largest players in a market with only three competitors might not lead to the creation of a single firm dominance and it might not lead to the coordination of the competitive behaviour of the two remaining firms in the market, but it might substantially lessen the competitive constraint that the merging firms had exercised both on each other and the market leader.[143] The classic example of this kind of situation is the US "baby

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Gallot, Jérôme: "Substantive tests – are the differences between the dominance and the SLC tests real or semantic?", EC Merger Control Conference, Brussels, 7–8 November 2002;

Grillo, Michele; Magnani, Lara: "Antitrust Appraisal of Mergers in Oligopolistic Markets", in the collection of papers of the VI Conference on "Antitrust between EC Law and National Law", organised by the European Lawyers Union in co-operation with the Italian section of the Ligue International du Droit de la Concurrence (LIDC), edited by Raffaeli, Enrico, A., Bruylant, Brussels, 2004, pp. 291–301;

Kokkoris, Ioannis: "Do merger Simulation and Critical Loss Analysis Differ Under the SLC and Dominance Test?", in European Competition Law Review, Vol. 26, Issue 5, May 2005, p. 260.

Heimler, Alberto: "Was the Change of the Test for Merger Control in Europe Justified", in European Competition Journal, Vol. 4 No. 1, June 2008, pp.85–94;

Werden, Gregory J.: "Unilateral Competitive Effects and the Test for Merger Control", in European Competition Journal, Vol. 4 No. 1, June 2008, pp. 95–101.

[139] Grillo & Magnani, p. 293; Sullivan & Meiners, p. 19.

[140] Judgment of the ECJ of 31.03.1998, Case C-68/94 – *France and Société commerciale des potasses et de l'azote and Entreprise minière et chimique / Commission (Kali+Salz)*, [1998] ECR I-1375, sections 165–178.

[141] Judgment of CFI of 25.03.1999, Case T-102/96 – *Gencor v Commission* [1999] ECR II-753, sections 123–157.

[142] Commission Green Paper on the Review of Council Regulation (EEC) No. 4064/ 89, sections 163–164.

[143] Jones, Alison; Sufrin, Brenda: "EC Competition Law. Text, Cases, and Materials", 3rd edition, Oxford University Press, 2008, p. 1006.

food" case[144]. In this case, the US third largest producer of baby food (Heinz) wished to acquire the second largest producer of baby food (Milnot Holding Corporation, whose primary subsidiary Beech-Nut was the producer of baby food) in the US. The merger would have given the merged entity a market share of around 33%, whilst the remainder of the market was taken by the market leader Gerber, which held about 65% market share. The merger would not have given the merging parties a dominant position and it was not clear that the merger would lead to coordinated effects (tacit collusion between Gerber and the merged entity). The FTC was nevertheless concerned that the merger would have caused substantial lessening of the competition on the market since the merging firms competed vigorously to be chosen as the number two supplier in the supermarkets and were active in innovation in terms of product development and differentiation. This competition had also posed competitive pressure on Gerber with respect to both prices and innovation. Following the challenge, the merging parties abandoned the merger.[145] It is argued that the dominance test would not have enabled to block such a merger, which is for a "blind spot" or "gap" was identified in dominance test.[146]

Prior to the change of test from dominance test to the SIEC test in the EU, there were concerns that if the concept of dominance was stretched to fill the gap, this would have meant that a whole new class of entities would have been brought within the scope of Article 82 of the EC Treaty and hence subject to the special responsibility that it imposes on dominant firms.[147] They would have been prevented from engaging in a range of business practices that are perfectly legal for non-dominant firms and would have potentially become subject to enforcement action, including fines, and civil action by competitors.[148]

The Commission was initially rather reluctant with respect to the idea of replacing the dominance test with the SLC test primarily due to the concerns

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[144] Judgment of the United States Court of Appeals for the District of Columbia Circuit of 27.04.2001, *Federal Trade Commission v. H.J. Heinz Co. and Milnot Holding Corporation*.

[145] Bishop & Walker, pp. 310–311.

[146] Jones & Sufrin, p. 1006. Völker, Sven B: "Mind the Gap: Unilateral Effects analysis Arrives in EC Merger Control", in European Competition Law Review, Vol. 25, Issue 7, July 2004, pp. 408–409;

Ehlermann, Claus-Dieter, *et al.*: "Unilateral Effects: The Enforcement Gap under the Old EC Merger Regulation", in World Competition, Vol. 28, Issue 2, 2005, pp. 193–203.

Riesenkampff, Alexander: "The New E.C. Merger Control Test under Article 2 of the Merger Control Regulation", in Northwestern Journal of International Law & Business, Vol. 24, Issue 2, Spring 2004, pp. 715–727.

[147] Fountoukakos, Kyriakos; Ryan, Stephen: "A New Substantive test for EU Merger Control", in European Competition Law Review, Vol. 26, Issue 5, May 2005, pp. 284–286.

[148] Killick, James; Schulz, Axel: "Horizontal and Vertical Mergers in the Reformed EC Merger Control", in EC Competition Law: A Critical Assessment, edited by Amato, Giuliano; Ehlermann, Claus-Dieter, Hart Publishing, Oxford, Portland, Oregon, 2007, p. 494.

about the legal uncertainty following the change. The Commission was also concerned that while the adoption of the SLC test would align the EU substantive test internationally, it would create greater disparity within the EU, as most Member States had aligned their merger control provisions to the dominance test.[149]

The adoption of the new SIEC test instead of the SLC test used by the US, UK and several other important competition law regimes can be seen as a compromise, taking into account the Commission's initial reluctance to amend the test, as well as the fierce debates in the Council of Ministers prior to the amendments.[150] Nonetheless, it is clear now that non-coordinated effects may give rise to prohibition of a merger without necessary creating a dominant position also under the EU merger control regime, as is clearly stated in recital 25 of the Regulation 139/2004: "[t]he notion "significant impediment to effective competition" /…./ should be interpreted as extending, beyond the concept of dominance, only to the anti-competitive effect of a merger resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned". Following the change of the test in the EU, a number of its Member States, which previously applied the dominance test have shifted to the SIEC test.

Looking purely at the test as such, even though the wording of the SLC and SIEC test stays different, it is, in the author's view, hard to see any real remaining substantive differences between the two tests. Therefore, from the perspective of small economies, there is not much difference as to which of the either tests to choose as the applicable test. Even applying dominance test is only rarely prone to lead to differing outcomes. However, because of the "gap", it may be advisable to follow the path of the EU by shifting to SIEC test or choose the SLC test. In fact, a number of EU Member States (including Estonia) have already followed the change of test, and some have respective changes in preparation.[151]

It must be noted that the different tests are sometimes associated with different merger assessment standard – *i.e.*, the differing underlying objective merger control should pursue. While the tests originating from the EU (dominance and SIEC tests) are associated with consumer welfare standard, the test originating from the US (the SLC test) is associated with overall welfare standard; the different standards, in turn diverge with respect to the treatment of efficiencies (see Section 2.5.1). In the author's view, the choice of standard is a value decision which should be carefully considered in all economies, and in

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[149] Commission Green Paper on the Review of Council Regulation (EEC) No. 4064/89, section 161.

[150] Berg, Werner: "The New EC Merger Regulation: A First Assessment of Its Practical Impact", in Northwestern Journal of International Law & Business, Vol. 24, No. 3, Spring 2004, p. 686.

[151] For instance, it is expected that during the course of the pending reform of the Finnish Competition Act the currently applied dominance test will be replaced with the SIEC test from 2010.

particular in small economies; however, this does not necessarily apply with respect to the technical side of the SIEC and SLC tests, as long as the tests as such are seen separately from the standards.

2.4. Elements of competitive assessment

2.4.1. Market shares and market concentration

In assessing whether a merger will realize any of the theories of harm and whether it should therefore be prohibited under the applicable substantive test, competition authorities analyze various market characteristics, such as the market shares of the merger participants, the overall concentration level of the market, the existence of constraining power of buyers or suppliers, existence of potential competition by way of expansion or entry of competitors and the barriers that could hinder such entry.

Once relevant markets have been defined, market shares are usually a starting point to any merger assessment. As noted in the EC horizontal merger guidelines "[m]arket shares and concentration levels provide useful first indications of the market structure and of the competitive importance of both the merging parties and their competitors".[152] According to the European Commission, a merger is unlikely raise competition concerns, where the common market share of the merging firms does not exceed 25%.[153] It is settled in EU case-law that a particularly high market share may in itself be evidence of the existence of a dominant position, especially where the other operators on the market hold only much smaller shares.[154] Nevertheless, the Commission stated

[152] EC horizontal merger guidelines, section 14.

[153] *Ibid.*, section 18. In case of the EU, the importance of market shares can be inferred for example from the fact that market shares are the bases for determining whether there are markets affected by the merger at all. According to Form CO, there are affected markets, where: (i) the merger will lead to a combined market share of 15% or more in the case of horizontal relationships; or (ii) the individual or combined market shares of the parties to a merger or firms which belong to the same group as the parties to the merger is 25% or more in the case of vertical relationships. If there are no markets likely to be affected by the merger, the appraisal of the merger does not need to be as comprehensive as in the cases where affected markets exist. This has also a practical implication on the merging parties, because the amount and level of detail of the market information to be submitted to the European Commission in the merger notification depends on whether there are affected markets – see Form CO Relating to the Notification of a Concentration Pursuant to Regulation (EC) No. 139/2004 of the Commission Regulation (EC) No. 802/2004 of 07.04.2004 implementing Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings, O.J. 133 of 30.04.2004, pp. 9–21, section 6, subsection III).

[154] See *e.g.,* Judgment of ECJ of 13.02.1979, Case 85/76 – *Hoffmann-La Roche/ Commission*, [1979] ECR 461, section 41; Judgment of ECJ of 03.07.1991, Case C-62/86 – *Akzo/Commission* [1991] ECR I-3359, section 60; Judgment of ECJ of 12.12. 1991, Case T-30/89 – *Hilti/Commission* [1991] ECR II-1439, sections 91–92.

in *Tetra Pak/Alfa Laval*, that "market share as high as 90% is, in itself, a very strong indicator of the existence of a dominant position. However, it may be in certain rare circumstances that even such a high market share does not necessarily result in dominance. In particular, if sufficiently active competitors are present on the market, the firm with the large market share may be prevented from acting to an appreciable extent independently of the pressures typical of a competitive market."[155] Frank L. Fine has concluded the European Commission's practice concerning the relationship between market share and finding of dominance in the following table[156]:

Table 5: Summary of the European Commission's practice concerning the relationship between market share and finding of dominance

Combined market share	Assessment
0–25%	Absence of dominance presumed
25–40%	Finding of dominance unlikely
40–70%	Finding of dominance possible, particularly if remaining market shares widely dispersed
70–100%	Finding of dominance highly likely

Source: Fine, section 1.03 [4] [c]

Besides market shares, market concentration measures such as the concentration ratio and Herfindahl-Hirschman Index (HHI) can be used as indicators of the ability of the leading firms in a market to exercise market power collectively. The concentration ratio measures the combined market share of the largest firms in a market (*e.g.,* "the "five firm" concentration ratio (C_5) is the sum of the market shares of five largest firms in the market).[157] The HHI is a somewhat more sophisticated measure which is calculated by summing the squares of the individual market shares of all the firms in the market. The HHI gives proportionately greater weight to the market shares of the larger firms and thus, indicates the possible concentration.

The US, UK and EU guidelines point to various slightly differing assumptions that they draw from the HHI:

[155] Commission Decision of 19.07.1991, Case No. IV/M.068 – *Tetra Pak/Alfa-Laval*, section 3.3.
[156] Fine, Frank L.: "European Union", in European Competition Laws: A Guide to the EC and Its Member States, LexisNexis, 2004, section 1.03[4] [c].
[157] UK merger guidelines, sections 3.7–3.9.

Table 6: Assumptions based on HHI in the EU, UK and US

EU		**US and UK**	
Post-merger HHI	**Assumption**	**Post-merger HHI**	**Assumption**
<1000	A merger is unlikely to raise horizontal competition concerns and normally does not extensive analysis	<1000	Unconcentrated market: – a merger is unlikely to have adverse competitive consequences and ordinarily requires no further analysis
1000–2000	A merger with a delta[158] of <250 is unlikely to raise horizontal competition concerns, except where special circumstances[159] are present	1000–1800	Moderately concentrated market: – a merger with a delta of <100 is unlikely to have adverse competitive consequences and ordinarily requires no further analysis; – a mergers with a delta of >100 potentially raises significant competitive concerns depending on other factors[160]
>2000	A merger with a delta of <150 is unlikely to raise horizontal competition concerns, except where special circumstances are present	>1800	Highly concentrated market: – a merger with a delta of <50 is unlikely to have adverse competitive consequences and ordinarily requires no further analysis; – a merger with a delta of >50 potentially raises significant competitive concerns, depending on other factors; – a merger with a delta of >100 is likely to create or enhance market power or facilitate its exercise. The presumption may be overcome by a showing that other factors make it unlikely that the merger will create or enhance market power or facilitate its exercise

Source: compiled by the author on the basis of EC horizontal merger guidelines, US horizontal merger guidelines and UK merger guidelines

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[158] Delta denotes the increase in concentration as measured by the HHI.

[159] Such special are, for instance, as follows:

(a) a merger involves a potential entrant or a recent entrant with a small market share;

(b) one or more merging parties are important innovators in ways not reflected in market shares;

(c) there are significant cross-shareholdings among the market participants;

(d) one of the merging firms is a maverick firm with a high likelihood of disrupting coordinated conduct;

(e) indications of past or ongoing coordination, or facilitating practices, are present;

(f) one of the merging parties has a pre-merger market share of 50 % of more.

[160] Such other factors are the potential adverse competitive effects of the mergers, entry conditions, efficiency considerations, concerns related to failing firm.

Various differing market share and concentration level thresholds are set forth as presumption of dominance across jurisdictions. For instance, Estonian Competition Act stipulates that "[d]ominant position is presumed if an undertaking accounts or several undertaking operating in the same market account for at least 40 per cent of the turnover in the market".[161] German Act Against Restraints of Competition (ARC) stipulates that a firm is presumed to be dominant if it has a market share of at least 1/3, and several firms collectively are presumed to be dominant if they consist of three or fewer firms reaching a combined market share of 50% percent, or consist of five or fewer firms reaching a combined market share of 2/3.[162] Austrian Cartel Act sets forth even more stringent thresholds – accordingly, dominance is presumed where (i) a firm's market share exceeds 30%, or (ii) a firm's market share exceeds 5% and it is facing competition from no more than two other firms, or (iii) a firm's market share exceeds 5% and it is one on the four largest firms on the relevant market which together hold at least 80% of the market.[163] Such presumptions are generally rebuttable if other market conditions point towards lack of dominance in practice.

In addition to the merging firms' common market share and the market concentration levels, a number of other factors should be considered in relation to market structures, *e.g.,* the market dynamics, cost structures, degree of spare capacities, product differentiation, existence of switching costs, existence of cross-shareholdings, past conduct of market participants, to name a few. Therefore, the market shares and concentration levels are generally treated as rough indicators in the context of a range of other factors.

It was noted in Section 1.4.1 that small economies tend to have more highly concentrated markets than large economies. One could question whether this tendency calls for small economies' merger control to raise the indicative market share and concentration level thresholds, which are used as the assumption of possible competition concerns. In author's view the answer to this question is negative.

It is generally recognized that trade can alleviate potential competition problems caused by high concentration rates of domestic industries by widening the market across jurisdictional boundaries. Therefore, in the case of tradable goods, provided the scope of the geographic market is correctly determined, the fact that a firm is the sole domestic producer of particular specialized goods and has high domestic market share, is not necessarily indicative of a competition

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[161] Estonian Competition Act, Article 13. Similar 40% market share presumption is set out in Polish Act of 16 February 2007 on competition and consumer protection, Article 4(5)10). Available online: http://www.uokik.gov.pl/download/Z2Z4L3Vva2lrL2VuL2RlZmF1bHRfb3Bpc3kudjAvMjkvMS8xL3VzdGF3YV9hbnl0bW9ub3BvbG93YV9lbi5wZGY (last visited 15.05. 2009).

[162] German ARC, Article 19(3).

[163] Austrian Cartel Act (*Kartellgesetz* 2005), BGBI I No. 61/2005. Available online: http://www.bwb.gv.at/BWB/Gesetze/Kartellgesetz/default.htm (last visited 15.05.2009).

problem. Of course, it should be acknowledged that even in the case of the most liberal trade regulations, barriers to trade may still exist. Therefore, an economy's openness to trade cannot fully resolve the problems related to small size in all industries. This is because of the existence of irremovable barriers to trade such as natural barriers (*e.g.,* oceans, mountains, large distances), cultural or language differences, consumer preferences, high transportation costs, etc.[164]

Yet, if there are some large multinational companies present in the small economy, the seemingly high concentration rates might not give the right picture of the competitive situation of the market. It has been noted in the Estonian submission to the OECD Global Forum on Competition that even if the market shares of multi-national companies are low, the competitive constraint they impose on the seemingly dominant domestic firms should not be underestimated.[165] The availability of large corporate resources enables such large multinational companies to engage into active price wars and marketing campaigns in response to abusive behaviour by the domestic firms. Moreover, in the case of tradable goods, the local seemingly dominant companies are likely constrained in their pricing also by potential imports. At the same time, it should of course be recognized that small markets may not be attractive enough for large multi-national companies and therefore, they may not be interested in getting involved in price wars or new entry.

In summary, a variety of factors signify that the widely recognized problem of high concentration rates in small economies may not in fact be as severe, in particular in the case of small, open economies. This is not to suggest that such problems should be fully disregarded, but rather to emphasize the importance of taking into account wider range of factors than merely the number of domestic firms in the market.

In author's view, the above described principles of large merger control regimes regarding market shares and market concentration can be equally applicable in small economies. There is not much substantive difference which market share or concentration level presumptions (if any) are used as the starting point of the competitive assessment, if the market shares and concentration levels are not taken as rigid and decisive criteria.

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[164] Monti, Mario: "Market definition as Cornerstone of EC Competition Policy", speech/01/439 given at Workshop on Market Definition – Helsinki Fair Centre, October 2001. Available online: http://ec.europa.eu/comm/competition/speeches/ (last visited 15.05.2009).

[165] OECD Estonia.

2.4.2. Power of customers and suppliers

In some cases, it may be relevant to take into consideration countervailing customer[166] or supplier power, because the competitive pressure on a firm is not only exercised by competitors but can also come from its customers and in some cases, also from its suppliers.

As concerns customer power, the ability of customers to switch to alternative sources of supply in response to a change in relative prices or other trading conditions may affect the potential that a merger adds significant market power to merging firms. Therefore, even firms with very high market shares might not be in a position to significantly impede effective competition, if the customers enjoy bargaining strength in commercial negotiations due to their size or their commercial significance to the seller and their ability to switch to alternative suppliers.[167]

The EU horizontal merger guidelines mention various factors that may affect the ability of customers to constrain suppliers such as:

– the customers' ability to find alternative sources of supply within a reasonable timeframe in the case of a price rise;
– the ease with which customers can switch supplier;
– the extent to which customers possess a credible threat of setting up their own supply arrangements either by vertical integration into the upstream market or to sponsoring upstream expansion or entry;
– the extent to which customers can credibly threaten to stop purchasing other products sourced from the merging firms;
– the extent to which customers can impose costs on merging firms (for instance by delaying purchases).[168]

It is rather common for the European Commission to take the countervailing customer power into account in the course of assessing mergers, but this consideration has decisively influenced relatively few cases.[169] Still, there are some sectors where the Commission has considered customer power as the main factor countervailing the high market shares of the merging parties, *e.g.*,

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[166] Usually, it is considered that the customers, who may be able to act as competitive restraints, are buyers and mostly such countervailing power is referred to as "buyer power". However, there is no valid reason why this kind of power could not be also exercised by upstream market customers, if the parties to the merger are active in buy-in business or act as middlemen. Some authors have used the term "power of customers" instead of "buyer power" (see *e.g.*, Bellamy & Child, pp. 409–410). In author's view, such term is more appropriate.

[167] EC horizontal merger guidelines, section 64.

[168] *Ibid.*, section 65.

[169] Cook & Kerse, p. 160.

the motor car industry[170] and military industry[171]. At the same time, the Commission has stated, that there are cases were customer power cannot be considered as a countervailing factor, in particular, in the case of some very strong brands, so called "must stock", which a retail buyer simply must display on its shelves.[172]

As regards supplier power, firms in upstream markets may have an appreciable effect on downstream markets subject to a merger investigation. This could be the case if upstream suppliers possess many of the characteristics of customer power outlined above. In some circumstances, suppliers could constrain market power being exercised by the merged entity downstream, for instance by establishing new routes through to consumers to avoid experiencing reduced demand.[173]

The above principles concerning countervailing customer or supplier power are equally appropriate for small economies. For instance, the Estonian experience has shown that customer power is a particularly relevant argument in case of mergers in food industry, as large retail chains tend to have strong negotiating power *vis-à-vis* food producers. Retail chains are constantly seeking for alternative sources of supply and better bargains in terms of price and other contractual terms, and they are able to change suppliers without significant time delays or costs. For this reason food industry experiences fierce competition regardless of limited number of market players and their significant market shares with respect to certain market segments.[174]

At the same time, it may be relevant to bear in mind in case of small economies that for many industries operating in small economies, the suppliers of raw materials are often large multinational companies which enjoy a strong bargaining and negotiating strength with respect to the modest size firms of small economies.[175] In author's view, such supplier power of large multinational companies could, under some circumstances function as a countervailing factor, if they are likely to consider establishing competing arrangements.

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170 See *e.g.*, Commission Decision of 17.08.1992, Case No. IV/M.253 – *BTR/Pirelli*, sections 22; 27; Commission Decision of 02.09.1993, Case No. IV/M.358 – *Pilkington-Techint/SIV*, section 56.

171 See *e.g.*, Commission Decision of 17.07.1993, Case No. IV/M.272 – *Matra/CAP Gemini Sogeti*, section 18; Commission Decision of 02.12.1995, Case No. IV/M.527 – *Thomson CSF/Deutsche Aerospace*, section 29.

172 Commission Decision of 22.01.1997, Case No. IV/M.794 – *Coca-Cola/ Amalgamated Beverages GB*, sections 137–141; 193.

173 UK merger guidelines, section 3.60.

174 See e.g., the Decision of Estonian Competition Authority of 15.07.2008, Case 5.1-5/08-030KO – *AS Valga Lihatööstus/AS Vastse-Kuuste Lihatööstus*. Available online (in Estonian): http://www.konkurentsiamet.ee/public/Koondumised/ 2008/ko2008_15.pdf (last visited 15.05.2009).
Decision of Estonian Competition Authority of 26.09.2008, Case 5.1-5/08-034KO – *AS Kalev Paide Tootmine ja Põlva Piim Tootmine OÜ*. Available online (in Estonian): http://www.konkurentsiamet.ee/public/Koondumised/2008/ko2008_19.pdf (last visited 15.05.2009).

175 Speech by Chris Taylor at Competition Law Forum: "Small Economies and Competition Policy – A Fair Deal?", in Luxembourg, October 2007.

In many cases, though, the bargaining strength of large multinational firms may mean that firms of small economies may not be able to obtain favourable supply terms, which has a tendency to raise costs in small markets.[176] Under such circumstances, a merger could help the merging firms to improve somewhat their negotiating power *vis-à-vis* large multinational firms. Such considerations could be assessed under assessment of countervailing benefits of the merger.

2.4.3. Entry and expansion

High market shares and the absence of customer or supplier power may not be indicative of significant restriction of competition, if the merging firms must take into account potential competition by way of entry or expansion of competitors.

Entry and expansion might take a number of forms including, for example, new firms building new capacity, existing firms within the market building new plants or capacity, forward or backward integration, the entry of new firms into the market taking over existing capacity and using it in new, or more productive, ways, or new technology facilitating new production methods, potentially increasing entry possibilities.[177] For the entry to be considered a sufficient competitive constraint on the merging firms under the EC merger regime, the entry must be shown to be likely, timely (occur sufficiently swiftly) and sufficient in magnitude to deter or defeat any potential anti-competitive effects of the merger.[178]

The likeliness of entry depends much on the risk involved. For instance, the existence of high costs, which are unlikely to be recovered in case of unsuccessful entry, increase the risks and are likely to deter entry by raising the costs of leaving the market.[179] Of the above named ways of entries, the expansion by competitors seems the most powerful source of potential competition. Such expansion may take place either by making use of excess capacity to increase output or by developing new product lines. These kinds of entries to the market are sometimes called "hit-and-run" entries, because they can occur relatively quickly with no, or very low, sunk costs. The entry barriers here are much lower than in the case of entry of new firms, because the investments into equipment are likely to be lower and there are existing relationships with potential distributors.[180]

The most significant sunk costs are involved in the cases of new entry. That is why such an entry is usually carried out by firms who aim to remain on the

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176 *Ibid.*
177 UK merger guidelines, section 3.46.
178 EC horizontal merger guidelines, section 68.
179 UK merger guidelines, section 3.47.
180 Bishop & Walter, page 298.

market for a long-term. The likeliness, timeliness and sufficiency of such an entry require thorough analysis in order to find out whether new entrants face barriers, how the barriers can be overcome, which risks are involved, and so forth.

In broad terms, conditions that constitute entry barriers may be structural or strategic.[181] Structural barriers relate to basic industry conditions such as cost and demand rather than with tactical actions taken by the existing market participants. Structural barriers may exist due to conditions such as economies of scale and scope and network effects[182]. Strategic barriers, in contrast, are intentionally created or enhanced by the existing market participants, possibly with the purpose of deterring entry.[183] These barriers may arise from behaviour such as exclusive dealing arrangements. Some types of impediments can fall into either one of these categories, depending on the particular facts of the case. For instance, regulatory barriers could be considered either structural or strategic depending on whether existing market participants played a role in persuading the government to create them. Similarly, sunk costs are typically structural but could be considered strategic if the existing market participants are responsible for creating or enhancing them, such as by integrating vertically and thereby forcing potential entrants to do the same thing.[184]

Smallness of an economy could constitute a factor raising entry barriers for potential market participants.[185] Since the demand in small size markets is limited, certain kinds of entry barriers such as economies of scale and scope are likely to be more important in small economies than in large economies. This is

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[181] It should be noticed that there are many ways to define entry barriers. As noted in OECD Policy Brief referred to above, some scholars have argued that an impediment should not be considered an entry barrier if the existing market players faced it when they entered the market. Others posit that an entry barrier is anything that hinders entry and has the effect of reducing or limiting competition. A number of other definitions have been proposed, but none of them has emerged as a clear favourite. The debate remains unsettled, but the various definitions continue to be used as analytical tools.

[182] Network effects cause current users of a good or service to gain when additional users adopt it. Significant network effects have been evidenced in many areas including, for example, telecommunications, radio and TV, computer hardware and software, applications software and operating systems, securities markets and exchanges, and credit cards. The effects create fierce competition between incompatible networks which often create biases and inefficiencies (see more: Klemperer, Paul: "Network Effects and Switching Costs", New Palgrave Dictionary of Economics, 2nd edition, edited by Durlauf, Steven N. and Blume, Lawrence E. Available online: http://www.paulklemperer.com/ (last visited 15.05.2009)).

[183] OECD Policy Roundtables: "Barriers to Entry", best practices guideline, DAF/ COMP(2005)42, 2005, pp. 9–10. Available online: http://www.oecd.org/dataoecd/ 43/49/36344429.pdf (last visited 15.05.2009), (OECD Barriers to Entry).

[184] OECD Policy Brief: "Competition and Barriers to Entry", January 2007. Available online: http://www.oecd.org/dataoecd/9/59/37921908.pdf (last visited 15.05.2009); OECD Barriers to Entry, p. 10;

[185] Gal 2001, p. 1447.

because an entrant with plants of less than minimum efficient scale would face cost disadvantages *vis-à-vis* firms with minimum efficient scale plants.[186] It has been reasoned that if minimum efficient scale is large relative to demand and if the cost-penalties for operating below minimum efficient scale are substantial, a new firm would have to enter the market at such a large scale that the combined output of all the firms operating in the market could be sold only at substantially reduced prices, perhaps even below average total cost, unless one of the firms exits the market.[187]

Small size may also create more competition problems if the existing competitors control concentrated, vertically-linked markets. In particular, the existence of high minimum efficient scale levels in one market might limit entry into a vertically-linked market if it requires a new entrant to enter into more than one market in the chain of manufacturing and distribution, or if it significantly raises its costs relative to the costs of its rivals.[188] Such impediment can be both structural and strategic in nature.

Leaving aside minimum efficient scale considerations, limited human resources can also constitute an entry barrier, since small population size often constrains the availability of human capital, especially skilled labour. Furthermore, most small economies are also small in geographic size, which tends to entail a limited and less diversified supply of natural, irreproducible resources.[189]

At the same time, it should also be recognized that smallness of an economy may have dual effect on entry – besides constraining entry, it may also serve as a factor decreasing the costs of entry and thus, encourage entry. In some cases, entering in a small market could be easier than entering into large markets, because the required amount of investments into marketing is likely lesser in small economies. This is because there are less people to be reached out to in small economies. Moreover, the word of mouth is a powerful marketing tool in small economies, where news tend to travel much faster than in large economies due to so called "everybody knows everybody" phenomenon.

Furthermore, entering into small market entails less risk than entering to large economy, since the cost of failure is lower due to small investment requirements. It could be argued that large multinational companies can in some cases enter into a small market with the existing production facilities. For example, probably none of the major European car manufacturers would have to invest into additional production facilities if they would try to gain or increase their market share in Estonia. The risk of failure is hence less fatal for firms starting business in a small economy than in a large economy, and at least large multinational companies can survive losses in a small market.[190] Therefore,

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186 *Ibid.*

187 Gal 2002, p. 309

188 Gal 2001, p. 1448.

189 *Ibid*, p. 1447.

190 OECD Estonia, p. 4.

small markets are sometimes used as test markets for new products, but also as a ground for expansion for existing product lines.

Hence, even though the smallness of an economy can constitute a factor that increases entry barriers in some industries, it would be wrong to consider it automatically and solely as a factor constraining entry, as in some cases the smallness may in fact promote entry. In case of each particular merger, the conditions of the market in question and the effects of smallness to entry into the market should be assessed together with other aspects of entry analysis alike in larger merger control regimes.

The high entry barriers in some sectors of small economies could be exacerbated to the extent that domestic regulations inhibit rather than enhance competition (*e.g.,* the existence of country-specific distribution regulations could constrain market entry).[191] Therefore, it is of particular importance for small economies to ensure the openness of distribution systems[192] and not maintain regulations favouring the existing market participants. In sectors where competition is severely limited, regulation targeted to loosening the existing ties between various existing market participants may be needed to limit the potential costs imposed by the presence of market power.[193] In author's view, these considerations have only a limited bearing in a merger control assessment, as the essence of merger control is case specific rather than of general regulatory nature. However, it should still be borne in mind that mergers should not facilitate creation of strategic entry barriers by the post-merger market players.

2.5. Countervailing benefits of mergers

2.5.1. Efficiencies

The underlying economic principles on which merger control is based apply in the same manner regardless of the size of economy. It is generally recognized that smallness of an economy may have certain implications to its markets, but in author's view these implications do not call for a different framework as compared with the EU merger control, or specific choice of a substantive test for the appraisal of whether a merger can be permitted or should be prohibited due to its anti-competitive effects.

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[191] OECD Global Forum on Competition: "Ireland – Special Aspects of Competition Policy in Small Economies", CCNM/GF/COMP/WD(2003)18, January 2003, p. 4. Available online: http://www.oecd.org/dataoecd/58/8/2485758.pdf (last visited 15.05. 2009), (OECD Ireland).

[192] *Ibid*; OECD Switzerland, p. 4; OECD Denmark, p. 2, OECD Malta, p. 7.

[193] OECD Global Forum on Competition: "New Zealand – Competition Policy in Small Economies: Issues arising", CCNM/GF/COMP/WD(2003)29, January 2003, p. 7. Available online: http://www.oecd.org/dataoecd/57/53/2486698.pdf (last visited 15.05. 2009), (OECD New Zealand).

Of course, performing this appraisal requires good vision and understating of the market conditions and mechanisms, as well as of the theories of harm. Moreover, systematic and careful consideration of competitive pressure coming from foreign markets is important, particularly in small economies which are likely to be more affected by such influences than large economies.[194] The problem of limited human resources in small economies may pose hurdles for mastering this task, but gradually growing experience and knowledge of both competition law enforcers as well as practitioners could alleviate these concerns.

The source of actual differences with regard to the substantive merger control assessment is the extent to which the various countervailing factors can be taken into account to clear an otherwise anti-competitive merger or to prohibit a merger that does not raise competitive concerns. Such countervailing factors may include efficiencies, but also industrial policy considerations.

The role of efficiencies in merger cases is a highly controversial issue which has been a platform for debates among economist for decades.[195] It is generally acknowledged that mergers can create significant efficiencies, for instance by way of enabling firms to achieve economies of scale and scope, reduce production, distribution or transaction costs, or combine research and development efforts. Through such increased efficiencies, the market can become more competitive and consumers can benefit from higher-quality goods at fairer prices if gains from efficiencies are passed on the consumers. There are also opposing opinions which cast doubt as to whether mergers yield efficiencies at all.[196] According to some, empirical evidence suggests that mergers have very modest average effects on the profitability of the merging firms and that a large proportion of mergers reduce profitability. This indicates that one should not make a general presumption that mergers create efficiencies but rather analyze efficiency effects on a case-by-case basis.[197]

Many merger control regimes allow taking efficiencies into account when deciding on whether a merger should be allowed or prohibited. Efficiency considerations can be taken into consideration in various stages of merger assessment. Firstly, efficiencies could serve as evidence against the likelihood that a merger has anti-competitive effects. For instance, if a merger creates a

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194 Stoffel, p. 326.

195 Monti, Giorgio: "Efficiencies, Failing Firms and Industrial Policy", in EC Competition Law: A Critical Assessment, general edited by Amato, Giuliano; Ehlermann, Claus-Dieter, Hart Publishing, Oxford, Portland, Oregon, 2007, pp. 521;
Camesasca, Peter D.: "European Merger Control: Getting the Efficiencies Right", Intersentia-Hart, Antwerp, Groningen, Oxford, 2000, p. 33.

196 Camesasca, p. 33.

197 Ilkovitz, Faienne; Meijklejohn, Roderick: "European Merger Control: Do We Need an Efficiency Defence?", in European Merger Control: Do We Need an Efficiency Defence?, edited by Ilkovitz, Faienne and Meijklejohn, Roderick, published on behalf of the European Commission, Edward Elgar Publishing, Cheltenham, UK, Northampton, MA, USA 2006, p. 43.

more efficient firm, then the firm may have less incentive to coordinate its behaviour with other(s), as it may wish to use the efficiencies to extend its market position; so efficiencies could reduce the probability that the merger would bring about coordinated effects.[198] Efficiencies could also dent the incentives to foreclose and hence reduce the likelihood of foreclosure effects.[199]

Secondly, and perhaps more importantly, efficiencies could serve as a defence which could be used for justifying the clearance of an otherwise anti-competitive merger. In such case, it is usually required that the efficiencies must be merger specific, which means that they must be likely to be accomplished by the proposed merger and unlikely to be accomplished in the absence of either the proposed merger, or other means with lower anti-competitive effects. The magnitude of the efficiencies should be substantial so as to outweigh the anti-competitive effects produced by the merger (the extent to which the efficiencies should outweigh the anti-competitive effects depends on whether consumer or overall welfare is pursued). The EU merger regime, as well as many other regimes based on it, also require that positive effects derived from the efficiencies would be passed on to consumers. It is up to the merging parties to prove that these requirements are met.[200]

The European Commission has referred to various types of efficiency gains that mergers may bring about. For instance, cost savings in production may enable the merged entity to lower prices following the merger. In this respect the Commission has expressed that cost efficiencies related to reductions in variable or marginal costs are more likely to be relevant to the assessment of efficiencies than reductions in fixed costs, as the former are, in principle, more likely to result in lower prices for consumers. At the same time, cost reductions, which merely result from anti-competitive reductions in output, are not considered as efficiencies benefiting consumers.[201] However, even if likely cost efficiencies through to reductions in variable or marginal costs could be demonstrated by the merging firms, it is still rather difficult prove that such efficiencies will indeed be passed on to consumers.[202]

In practice, this means that significant evidence needs to be adduced by the parties to satisfy the requisite criteria. The European Commission has indicated that the evidence relevant to the assessment of efficiency claims may include internal documents that were used by the management to decide on the merger, statements from the management to the owners and financial markets about the expected efficiencies, historical examples of efficiencies and consumer benefit,

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[198] Monti, G., p. 525.

[199] *Ibid.*; pp. 526–527.

[200] Horn & Stennek, p. 94; author's conclusion on the basis of Getting the Deal Through: Merger Control 2008.

[201] EC horizontal merger guidelines, section 80.

[202] Pitofsky, R.: "Efficiency Consideration and Merger Control Enforcement: Comparison of U.S. and EU Approaches", in Annual Proceedings of the Fordham Competition Law Institute, International Antitrust Law & Policy, edited by Hawk, Barry E., Fordham Competition Law Institute, Juris Publishing, Inc., 2007, p 295.

and pre-merger external experts' studies.[203] Yet, such evidence cannot provide full certainty about the future conduct of merging parties. In fact, it is close to impossible that mergers to monopoly or strong dominance could ever credibly satisfy the "pass on criterion".[204] However, without satisfying this criterion there is nothing to prevent the merged entity from reaping monopoly profits after the merger, which would mean that consumers would be worse-off as a result of the merger.

It is much debated whether the "pass-on to consumers" criterion which pursues the goal of consumer welfare should be dropped, and instead, overall welfare should be prioritized. Under consumer welfare model, wealth gained from efficiencies as a result of a merger should be redistributed from producers to customers who suffer from the loss of competition. As a consequence, this model requires that gainers compensate losers.[205] Total welfare model rejects the view that merger enforcement should require merged firms to pass on efficiencies directly to consumers as this is unnecessary, because the aggregate social welfare is already increased by the very act of achieving efficiencies within the firm.[206] Merger control maximizing total welfare would consider the full cost of prohibiting the merger (represented by the efficiencies that would not be realized in the relevant market as well as other markets), against the full costs of permitting the merger to proceed (represented by the deadweight loss[207] in the relevant market). This model accepts that instead of maximizing consumer surplus[208] and producer surplus[209], the monopolist would be afforded a portion of consumer surplus, but additionally, certain portion of overall welfare loss would be generated in such situation, as long as this loss is less than the gain received as a result of the efficiency. This model hence only requires that gainers gain more than losers loose.[210]

The most obvious reason why competition policy would focus more on consumer welfare than on firms' profits is that the policy makers care for the distribution of wealth between different individuals in the economy, combined

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[203] EC horizontal merger guidelines, section 88.

[204] Monti, G., pp. 522–524.

[205] Camesasca, pp. 40–42.

[206] Hovenkamp, Herbert, J.: "Federal Antirust Policy. The Law of Competition and its Practice", 2nd edition, Hornbook Series, West Group, St. Paul, Minnesota, 1999, pp. 501–503.

[207] Deadweight loss is a concept used to describe loss of economic efficiency that can occur when equilibrium for products is not Pareto optimal, i.e. where people who would have more marginal benefit than marginal cost are not buying the product.

[208] Consumer surplus is a concept used to describe the difference between the price consumers are willing to pay for a product and the price the consumers actually pay when buying it.

[209] Producer surplus is a concept used to describe the difference between the price producers receive for their products and the producers' marginal costs at each level of output.

[210] Camesasca, p. 42–44.

with the idea that investors are typically wealthier than consumers. At the same time, many “ordinary” consumers are also shareholders, at least indirectly through pension funds. Likewise, investors are also consumers (if they are big on shares they are probably also big on consumption).[211] In this light, it is irrelevant that firms rather than consumers capture the surplus produced by achieving the efficiencies, as the monopoly overcharge paid by purchasers to investors (firms’ shareholder) as a result of the post-merger market is treated as transfer from one member of society to another and so is ignored in the balance.[212] However, if the shareholders of the merged entities are located outside the jurisdictions, as they often are in the case of firms of small economies, the cost savings and profits from the merger may in fact accrue elsewhere and the small economy would not benefit from the merger.[213]

Michal S. Gal advocates for the wider use of efficiency defence and adoption of overall welfare rather than consumer welfare in small economies.[214] According to her, small economies cannot afford a competition policy that is prepared to sacrifice economic efficiency for broader policy objectives – pursuit of wealth dispersion and small size of firms is costly because inefficient firms would be preserved in the market.[215] At the same time, it should not be disregarded that a variety of consumer preferences exists in a market regardless of the size of the market. For instance, even in small countries people want to have the choice of TV programs, albeit the fact the ratio of domestic TV channels per population might seem irrational (there are currently ten different national TV channels for a population of about 1.3 million in Estonia, which could be considered economically too much). In this case, the lower level of concentration in a market would be caused by the variety in consumer demand.[216] In such situation, the aggregate production costs are higher and the efficiency of the producers is lower than in the large economies, but if the consumer welfare is the priority and not efficiency and overall welfare, then this situation should not be considered problematic.

Hence, there are several controversies related to the choice of the underlying goal of merger control, which should determine how efficiencies are treated in small economies. The author is in favour of consumer welfare standard together with a flexible approach to the use of behavioural remedies. Let us imagine a situation where a small economy faces two adverse choices – on the one hand, having firms that are unable to achieve minimal efficient scale and therefore, higher price level due to high production cost, or on the other hand, mono-

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211 Horn & Stennek, pp. 11–12.

212 Roberts, Gary L.; Salop, Steven C.: “Efficiencies in Dynamic Merger Analysis”, in World Competition, Vol. 19, No. 4, 1995/1996, p. 5.

213 Ross, Stephen F.: “Did the Canadian Parliament really permit mergers that exploit Canadian consumers so the world can be more efficient?”, in Antitrust Law Journal, Vol. 65, 2007, p. 641.

214 Gal 2001, Gal 2002, Gal 2003, OECD Gal.

215 Gal 2001, p. 1451.

216 OECD Estonia.

polistic market, which can operate efficiently, but can also charge high monopolistic prices. In such situation, permitting the merger subject to remedies obliging the merged entity to pass on their gains to consumers is the best option available, even if enforcing the remedies is difficult.[217]

The choice between consumer welfare standard and overall welfare standard is again a value question to be decided on political level, but it is important to clearly manifest the approach to efficiencies in a given jurisdictions.

As long as there is no clear vision what the goals of the merger control are and how efficiencies are treated, there is a risk that efficiencies could serve as an offence rather than defence. In practice, this is because by invoking the efficiency defence the merging firms may risk that the competition authorities would use the argument as an indication of increased market power, as the efficiency gains will make competition even more difficult for competitors that do not benefit from similar efficiencies.[218]

2.5.2 Industrial policy concerns

Among different fields of competition policy, merger control is probably the most sensitive one. Significant lay-offs, substantial new investments and national pride are only a few of the politically sensitive considerations that mergers may affect.[219] Therefore, whether expressly or impliedly, industrial policy considerations tend to have implications on merger control.

While non-competition grounds are not generally acknowledged as relevant factors under the EU and US merger control regimes, such considerations nevertheless seem to have some impact on their merger control from time to time.[220] At the same time, in various merger control regimes, the decision of a competition authority, which is based on the competitive effects of the merger in question, is subject to approval or challenge by some political body such as the government or a designated minister on the grounds of public benefits.[221] In some regimes, it is the competition authority itself who can take such considerations into account either on its own initiative or under the directions of a

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217 See more on remedies in Chapter 4.

218 See *e.g.,* Gallot, p. 2; Bergmann, Helmut; Röhling, Frank: “Germany”, in Getting the Deal Through: Merger Control 2008, Global Competition Review, Law Business Research Ltd, p. 149; Kofmann, Morten, *et al.*: “Denmark”, in Getting the Deal Through: Merger Control 2008, Global Competition Review, Law Business Research Ltd, p. 113.

219 Broberg, Morten P., “The European Commission’s Jurisdiction to Scrutinise Mergers”, 3rd edition, Kluwer Law International, 2006, p. 1, (Broberg 2006).

220 *Ibid.*, Cook & Kerse, pp. 175–178, Monti, G, pp. 542–545.

221 For instance, in Belgium, France, Germany, Greece, Italy, the Netherlands, Portugal, Spain – author’s conclusion on the basis of Getting the Deal Through: Merger Control 2008.

political body.[222] The following considerations are most commonly regarded to constitute public (or general) benefits grounds – competitiveness of the relevant sector on EU or international level, modernization of business or branch of economy as a whole, employment issues, attraction of investments, interests of consumers, national security.[223] In some cases, special considerations are applicable to certain sectors such as media, energy, transportation services and financial services.

In author's opinion, whether policy involvements into merger control should be allowed, and if so, its extent, is dependent on the goals merger control is chosen to pursue in the given society. This is a political value decision. If merger control should only thrive to maintain efficient competition on the market, such involvements cannot be justified be it a small or large economy. If merger control is chosen to be a tool to pursue also some other, possibly sometimes conflicting aims, then various objectives and benefits need to be balanced. However, for the sake of transparency and legal certainty, the possibility of resorting to such additional considerations should be made clear in legal acts or policy guidelines.

If ensuring the international competitiveness of domestic firms is chosen as one of the goals of merger control, more anti-competitive domestic mergers might be cleared than otherwise to create so called "national champions". According to national champions doctrine, domestic market should be a "safe harbour" for domestic firms in order to be able to expand to foreign markets. This means that a merger should be permitted even if it is detrimental to domestic consumers' interests through its market power implications, if it reduces the variable costs sufficiently for the increase in profits reaped abroad to be large enough to increase national income.[224] There have been opinions that due to the problems of achieving the minimal efficient scale as well as due to the relatively high concentration of political elite, politicians and authorities in small economies could be particularly tempted to apply more lenient standards to domestic mergers.[225]

There are various reasons why this policy should be treated with caution. Firstly, allowing firms to consolidate freely in their domestic markets would likely lead to creation of oligopolies and/or monopolies, who could charge higher prices and/or provide lower quality goods in domestic markets than in competitive foreign markets where they face more competition. Hence, the domestic clients of the national champions would have to subsidize the expansion of their champions without being guaranteed any return for this, nor

[222] For instance, in Austria and Bulgaria – author's conclusion on the basis of Getting the Deal Through: Merger Control 2008.

[223] Author's conclusion on the basis of Getting the Deal Through: Merger Control 2008.

[224] Horn & Stennek 2005, p. 12.

[225] Stoffel, p. 324; OECD Background Paper, Section 2.2, authored by Matti Purasjoki

would there be any guarantees that monopoly profits would be used for expansion to foreign markets.

Secondly, it has been suggested by the US economist Michael Porter and acknowledged by various authors subsequently that firms that operate on very competitive national markets are likely to be competitive in international markets further to their expansion, as the discipline earned by intense competition in the domestic market serves as a good stimulus to success abroad.[226] A good example of such success story is Ryanair's expansion to European markets after successful start in UK-Ireland market.[227]

Thirdly, Paul Geroski, the former chairman of UK Competition Commission, has posited that one of the problems related to affording protection to national champions is the choice of the right champions. It would be detrimental to afford protection as a result of lobbying by large domestically powerful firms that are going through a period of poor performance or are operating in mature or declining markets. Closing down such firms may have major employment implications, which is for there is likely to be political pressure on competition authorities to allow for consolidation of such firms. However, if such consolidation leads to rise of monopolists, the consumers would ultimately be made to bear the costs of keeping such "dinosaurs" alive.[228]

Furthermore, supporting national champions can have adverse consequences globally, because the support given in one country usually generates the pressure for support to be given in other countries. Thus, this would likely lead to race to the bottom kind of situation and would again harm consumers globally.[229]

Besides, there are various alternatives to domestic mergers which can help the firms from small economies to overcome the problems of achieving minimal efficient scale and become competitive abroad.

Firstly, competition laws do not prohibit internal growth of firms and/or becoming dominant by way of competitive behaviour. Capital markets are a more efficient source of funds for investment abroad and are likely to result in more sound investment than monopoly profits gained from domestic clients. Unlike monopoly profits, funds raised on capital markets, either via bonds or equity, impose obligations, controls and incentives on the shareholders and management of firms.[230] Of course, it should be borne in mind that mergers take less time than internal growth and enable to achieve efficiencies that internal growth cannot provide – *e.g.,* better management, use of complementary know-how and intellectual property.[231]

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[226] Porter, Michael E.: "Competitive Advantage of Nations", Free Press, New York, 1990, p. 662; Geroski, p. 7; OECD Ireland, p. 3; Monti 2001, p. 12, Gal 2003, p. 202.

[227] OECD Ireland, p. 3.

[228] Geroski, p. 5.

[229] Geroski, pp. 5–6.

[230] OECD Ireland, p. 3.

[231] Gal 2003, p. 200.

Secondly, firms can expand also by way of international mergers, which are often less likely to raise competition concerns even in the case of existence of geographically limited national markets. In particular, if the firms where not competing prior to the merger, international mergers could facilitate new entry or at least the introduction of new products and hence, intensify the competition in the small economies.[232]

The effects of international mergers may be manifold though. It has been suggested that international mergers may lead the merged entity to consolidate its facilities and re-locate its establishment to larger economies, which could cause higher costs for the clients in small economies as the goods provided in small states would be subject to trade costs. Nevertheless, Henrik Horn and Johan Stennek are rather uncertain about the actual effects of locational implications of international mergers.[233] Therefore, there seems little ground for objecting international mergers solely due the locational effect. Furthermore, there are other means besides competition policy available for small economies for attracting head offices or production facilities to be established in their territory, such as favourable tax regimes, provision of adequate infrastructure, liberal trade regulations, etc.[234]

In summary, it should be understood that the choice of pursuing industrial policy considerations tends to entail certain trade-offs on the account of domestic markets and may not be the most efficient alternative. Hence, a balancing of pros and cons should always be undertaken in the context of the merger and markets in question. For instance, if in case of a domestic merger involving several markets only one domestic market would be negatively affected by the merger, but if the merger otherwise would be highly beneficial, industrial policy concerns could proportionally outweigh the negative effects to that particular market (so to say that market would have to be sacrificed). At the same time, if problems are created in more than one market, less anti-competitive alternatives should be preferred.

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[232] Monti 2001, p. 11.
[233] Horn & Stennek, p. 1–38.
[234] OECD Ireland, p. 3

CHAPTER 3
JURISDICTION AND ENFORCEMENT

3.1. The concept of merger for the purposes of merger control

3.1.1. General principles regarding the concept of merger

In general, merger control rules are directed to business transactions in which two or more previously independent economic entities are combined in some manner that involves a lasting change in the structure or ownership of one or more of the firms concerned. The types of qualifying business transactions typically include some form of merger between two or more previously independent firms by

- an acquisition of control (or some degree of influence) by one firm over the whole or part of another firm, or
- combination of all or part of the business operations of two or more firms to create a new business entity (*e.g.*, consolidations, amalgamations and joint ventures).

The term “merger” in this context, hence, refers to various types of acquisitions and business combinations comprising “covered transactions” for merger control purposes,[235] as opposed to a specific transactional merger structure under applicable company laws.[236] This is so, because from the perspective of merger control, the central question in determining the range of covered transactions is whether there is a structural change in the market.

The degree of economic integration between the parties and the duration of the relationship are often used to distinguish qualifying transactions from mere collaborative arrangements, which have temporary nature and do not bring about lasting changes in market structure, and which are normally reviewed under competition laws that are primarily directed at anti-competitive agreements between independent firms (such as Section 1 of the Sherman Act in the US and Article 81 of the EC Treaty).[237]

The understanding of what constitutes a merger for the purposes of merger control has settled over time. In the US, Section 7 of the Clayton Act, which

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[235] The transactions covered by merger control are termed “concentrations” under the ECMR and the German ARC, and in several other jurisdictions. In the UK, such transactions are referred to as a “relevant merger situation” in which two or more enterprises “cease to be distinct”.

[236] ICN Merger Working Group: “Defining Merger Transactions for Purposes of Merger Review”, paper to the ICN annual conference, Moscow 2007, p. 1. Available online: http://www.internationalcompetitionnetwork.org/media/library/conference_6th_moscow_2007/23ReportonDefiningMergerTransactionsforPurposesofMergerReview.pdf (last visited 15.05.2009).

[237] *Ibid.*, pp. 1–2.

was adopted as early as in 1914 to tackle anti-competitive share acquisitions, does not refer to asset acquisitions or statutory mergers.[238] This triggered discussion and litigation regarding the scope of Section 7 over time,[239] and lead to the adoption of the Cellar-Kefauler Antimerger Act[240] in 1950, which expanded the coverage of Section 7 to asset acquisitions.[241] In 1976, the HSR Act established pre-merger notification requirement.[242] This act contains clear references to acquisitions of "assets" or "voting securities", and can, thus, apply to any kind of transactions – acquisitions of a majority or minority interest, a joint venture, a merger or any other transaction that involves an acquisition of assets or voting securities, subject to prerequisite that a change in the market structure occurs.

In the EU, the concept of merger has been defined rather widely and flexibly already since the adoption of the first version of the ECMR in 1989, and the definition has remained relatively unchanged during the course of further reforms. According to the Article 3(1) of the ECMR a "concentration" is defined as follows:

> "A concentration shall be deemed to arise where a change of control on a lasting basis results from:
> (a) the merger of two or more previously independent undertakings[243] or parts of undertakings, or
> (b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings."

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238 Clayton Act, ch. 323, 38 Stat. (1914), (current version at 15 U.S.C. §§ 12–44 (1982). Available online: http://www.globalcompetitionforum.org/regions/n_america/USA/The%20Clayton%20 Antitrust%20Act.pdf (last visited 15.05.2009).

239 Wilson, Joseph: Globalization and the Limits of National Merger Control Laws, International Competition Law Series, Vol. 10, Kluwer Law International, The Hague, London, New York, 2003, pp. 74–84.

240 Cellar-Kefauler Antimerger Act, ch. 1184, 84 Stat. 1125 (1950), (current version at 15 U.S.C. §§ 18, 21(1988), amended by Pub.L.No. 46–349, § 6(a), 94 Stat. 1980).

241 American Bar Association, Section of Antitrust Law: "Competition laws outside the United States", Vol. 1, edited by Harris, Jr, Stephen H., et al., Illinois, Chicago, 2001, p. 10.

242 Hart-Scott-Rodino Antitrust Improvements Act, Pub.L. No. 94–435, 90 Stat. 1983 (1976).

243 In the EU competition law parlance, the term "undertaking" stands for firms and any forms of business activities. The term is interpreted rather broadly, including all kind of economic activities regardless of legal status or form. As noted by Korah the term "covers any collection of resources to carry out economic activities" (see Korah, Valentine: "An Introductory Guide to EC Competition Law and Practice", 7th edition, Hart, Oxford, 2000, p. 36).

By now, merger control regimes across the world cover almost universally company law specific mergers, as well as outright acquisitions of one firm by another, whether the transaction is structured as an acquisition of 100% of the seller's shares or 100% of the seller's assets. Likewise, merger review regimes almost universally cover acquisitions of shares or assets falling short of the 100% threshold where the transaction nevertheless results in an acquisition of "control" of a business enterprise. Qualifying transactions may include both acquisitions of "sole control" by one firm over another, and acquisitions of "joint control" of a firm by two or more firms, if these bring about change of control. Many jurisdictions also cover acquisitions of minority interests, which may fall short of a controlling interest, but nevertheless give rise to the potential ability of the acquiring firm to exert some degree of influence over the acquired entity.[244]

It should be questioned from the perspective of small economies, whether, due to the special attributes caused by smallness, the range of events triggering significant changes in market structure may be wider and hence, whether a wider range of transactions be subjected to merger control than in the EU. The analysis below therefore examines the types of transactions qualifying as mergers in more detail, looking first at the EU approach and contrasting it with examples from other competition law regimes. Based on the main differences between various systems, conclusions on the appropriate range of qualifying transactions for small economies can be made.

3.1.2. Company law specific and de facto mergers

Company law specific mergers include typically transactions 1) whereby one or more companies are wound up without liquidation and all its/their assets and liabilities are transferred to another (amalgamation); or 2) whereby several companies are wound up without liquidation and all their assets and liabilities are transferred to a company that they set up (fusion).

The EU merger control practice has established that the understanding of the term "merger" in Article 3(1)(a) of the ECMR should be extended so as to include, in the absence of a statutory merger pursuant to company law procedures, also the combining of the activities of previously independent firms which in fact results in the creation of a single economic unit. Such a *de facto* merger may arise in particular where two or more firms, while retaining their individual legal personalities, establish contractually a common economic management[245] or the structure of a dual listed company, which leads to amalga-

[244] ICN Merger Working Group: "Defining Merger Transactions for Purposes of Merger Review", p. 2.

[245] This could apply for example in the case of a "*Gleichordnungskonzern*" in German law mentioned in the Stock Corporation Act (*Aktiengesetz*), Article 18 Abs.2, BGBl I 1965, 1089, and the amalgamation of partnerships.

mation of the firms concerned into a single economic unit. Factors referring to occurrence of a *de facto* merger are, for example, the existence of a permanent, single economic management, internal profit and loss compensation as between the various firms within a group, and their joint liability externally.[246]

The recognition of both statutory mergers pursuant to company law procedures as well as *de facto* mergers as transactions covered by merger control rules is rather universal across merger control regimes. In jurisdictions, where such transactions are not separately mentioned, these situations are covered under other types of transactions such as asset or share acquisitions.[247]

3.1.3. Asset acquisitions

Transactions in which one firm acquires all or substantially all of the other firm's business assets are almost universally viewed as qualifying transactions for merger control purposes. Many jurisdictions also cover asset purchases even where the acquired assets do not constitute all or substantially all of the seller's assets. With this respect, the decisive question is whether the acquired assets have sufficient economic significance to merit merger control.[248]

Under the ECMR, an acquisition of assets is only considered a "concentration" if such assets constitute the whole or a part of an entity to which a market turnover can be attributed.[249] It is typically not necessary, however, that the acquired assets represent an actual going concern or otherwise comprise a stand-alone business enterprise.[250] Hence, under the ECMR, the transfer of the client base of a business or intangible assets (*e.g.*, brands, patents or copyrights) may qualify as a concentration if such assets constitute a business with a market turnover. The transfer of licenses for brands, patents or copyrights, without additional assets, can only meet this criterion if the licenses are exclusive at least in a certain territory and the transfer of such licenses transmits the turnover-generating activity.[251] Moreover, transfer of economic relationships (*e.g.*, long-term supply agreements or credits provided by suppliers or customers, which can create the situation of economic dependence) could constitute a concentration.[252] Conversely, franchising agreements or purely financial agree-

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[246] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings, section 10; (EC Jurisdictional Notice).

[247] Author's conclusion on the basis of in Getting the Deal Through: Merger Control 2008.

[248] ICN Merger Working Group: "Defining Merger Transactions for Purposes of Merger Review", p. 4.

[249] EC Jurisdictional Notice, section 24.

[250] ICN Merger Working Group: "Defining Merger Transactions for Purposes of Merger Review", p. 4.

[251] EC Jurisdictional Notice, section 20.

[252] *Ibid*.

ments, such as sale-and-lease-back transactions with arrangements for a buy-back of the assets at the end of the term, do not normally constitute a concentration as they do not change control over the management and the resources.[253]

Likewise, under the German ARC, asset acquisitions may qualify as concentrations whenever the assets have independent competitive significance in connection with production or distribution in some relevant market. Qualifying transactions, thus, include the acquisition of a single business establishment (*e.g.*, a single food chain outlet), an unincorporated business unit (*e.g.*, a manufacturing division), or intellectual property rights.[254]

In the UK, a "relevant merger situation" arises whenever "two or more enterprises cease to be distinct." The term "enterprise" is defined as the activities, or part of the activities, of a business. This does not mean that the enterprise in question needs to be a separate legal entity, but that the activities in question should be carried out for gain or reward. At the same time, there is no requirement that the transferred activities generate a profit or dividend for shareholder – the transferred activities may be loss making or conducted on a non-profit basis. An enterprise may comprise any number of components, most commonly including the assets and records needed to carry on the business, together with the benefit of existing contracts and/or goodwill, but such considerations are to be assessed in their relevant context. Thus, enterprises may also "cease to be distinct" if only part of the seller's business is acquired.[255]

In the US, acquisitions of "assets", within the meaning of the HSR Act, include acquisitions of both tangible and intangible assets (*e.g.,* exclusive patent licenses). An acquisition of interests in a non-corporate entity (*e.g.,* partnerships) which confers the right to 50% or more of the profits or liquidation distributions is also considered to be an acquisition of the underlying assets of the entity.[256] The HSR Act and Rules generally cover asset transactions whenever the acquired assets are valued in excess of $50 million (as adjusted) but then exempt from notification various categories of asset acquisitions that are likely to lack competitive significance. Therefore, acquisitions of assets "in the ordinary course of business" are exempted, and this exempts most acquisitions of new goods, current supplies and used durable goods. Acquisitions of "all or substantially all of the assets of an operating unit,"

[253] *Ibid*., section 19.

[254] German Federal Cartel Office, Competition Policy Division: "Information leaflet on the German control of concentrations", July 2005, p. 13. Available online: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter_englisch/06MerkblattzurDeutschenFusionskontrolle_e.pdf (last visited 15.05.2009)

[255] UK Office of Free Trading: "Mergers – Jurisdictional and Procedural Guidance", draft guidance consultation document, March 2008, sections 3.6–3.11. Available online: http://www.oft.gov.uk/shared_oft/consultations/oft526con.pdf (last visited 15.05.2009), (OFT Jurisdictional and Procedural Guidance).

[256] Harty, Ronan P.: "United States", in Getting the Deal Through: Merger Control 2008, Global Competition Review, Law Business Research Ltd, p. 361.

however, are excluded from the definition of "ordinary course" transactions and are therefore subject to the HSR Act if the $50 million threshold is met. Similarly, acquisitions of certain real property assets, such as undeveloped land, and office or residential property are also exempted under the HSR rules, as the agencies view such transactions as unlikely to raise competitive issues.[257]

3.1.4. Share acquisitions

Acquisitions of shares (or other equity interests) are typically considered as qualifying transactions for merger control purposes whenever they result in an acquisition of control of the target. Moreover, in many jurisdictions also changes in the nature of control, such as from joint to sole control and *vice versa*, qualify as mergers for the purposes of merger control.[258]

Under the ECMR, control is defined as the possibility of exercising decisive influence over a firm.[259] Hence, the term "decisive influence" is central for an understanding of control in the EU. On the one hand this requires that there must be influence of certain weight, which means that merely the company law protection of minority shareholders which exists in the Member States' national laws is not sufficient influence. On the other hand, this does not require absolute control, which means that acquisition of negative control, such as the possibility of vetoing important decisions relating to business strategy of company, is sufficient.[260]

An acquisition of control presumptively arises whenever the purchaser acquires a majority of the target company's shares, such that the purchaser obtains voting rights that permit it to control the target company's board, management and/or business direction. In the EU, the requisite change in control may also be brought about by acquisitions of shareholdings falling short of an outright majority stake, where such holdings nonetheless enable the acquirer

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[257] Federal Trade Commission's Premerger Notification Office: "Introductory Guide I: What is the Premerger Notification Program?", revised in September 2008, pp. 2–6. Available online: http://www.ftc.gov/bc/hsr/introguides/guide1.pdf (last visited 15.05. 2009).

[258] Furthermore, for instance under the ECMR there is a concentration, if the number of firms which exercise joint control is increased (see *e.g.*, the Commission's decision of 30.07.1998, Case No. IV/M.1251- *Particitel International/Cableuropa*, where the change from the joint control over Cableuropa exercised by two firms prior to the transaction to joint control exercised by three firms after the transaction was considered as concentration). By contrast, reduction in the number of jointly controlling shareholders, without leading to a change from joint to sole control, does not constitute a concentration (EC Jurisdictional Notice, section 90).

[259] Article 3(2) of the ECMR.

[260] Broberg, Morten: "The Concept of Control in the Merger Control Regulation", in European Competition Law Review, Vol. 25, Issue 12, December 2004, p. 742, (Broberg 2004).

alone to block the adoption of strategic decisions. This is in particular the case where the shareholder is highly likely to achieve a majority at the shareholders' meetings, given the level of its shareholding and the evidence resulting from the presence of shareholders in the shareholders' meetings in previous years.[261]

Some jurisdictions examine additional factors in assessing whether minority interests may give rise to the requisite "ability to influence".[262] For instance, Article 37(1) of the German ARC regards as concentration any acquisition of 25% or more of the capital or voting rights of another firm, but also acquisitions falling below the specified 25% threshold to the extent that the transaction would enable the buyer to exercise "a competitively significant influence" over the target company. In a recent case *A-TEC/Norddeutsche Affinerie*, the German Federal Cartel Office (GFCO) found A-TEC's acquisition of 13.75% minority shareholding in Norddeutsche Affinerie and resulting appointment of three members of Norddeutsche Affinerie's supervisory board by A-TEC to constitute a qualifying merger for the purposes of merger control.[263] (See further discussion regarding this case below).

Similarly, under the UK merger control rules, "material influence" may occasionally be found where a shareholding of less than 15% is acquired, where other factors indicating the ability to exercise influence over policy are present.[264] In Austria, a qualifying merger transaction is deemed to occur where

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[261] EC Jurisdictional Notice, section 59. Typically in case of public companies, where share capital is widely dispersed, minority shareholders having significant stake are likely able to exercise decisive influence (see Toth, Akos G., *et al.*: "The Oxford Encyclopaedia of European Community law. Vol. III, Competition Law and Policy", Oxford: Oxford University Press, 2008, p. 513).

[262] ICN Merger Working Group: "Defining Merger Transactions for Purposes of Merger Review", p. 3.

[263] Decision of German Federal Cartel Office of 27.02.2008, No. B5-27442-Fa-198/07 – *A-TEC/Norddeutsche Affinerie*. Available online (in German):
http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion08/B5-198-07.pdf (last visited 15.05.2009).
This approach seems justified under economic theory – as concluded by Struijlaart, economic theory demonstrates that non-control minority holdings can indeed limit competition (see Struijlaart, Robin A: "Minority Share Acquisitions Below the Control Threshold of the EC Merger Control Regulation: An Economic and Legal Analysis", in World Competition, Vol. 25, Issue 2, 2002, pp. 173–204).

[264] OFT Jurisdictional and Procedural Guidance, section 3.16. To be more specific, the question of whether "enterprises have ceased to be distinct" is determined by reference to the existence of control. Distinction is made where there are lower levels of control (ability materially to influence policy or ability to control policy without having a controlling interest) on the one hand; and possession of "control" or a "controlling interest" on the other. The lower levels of control are treated as leading to firms "ceasing to be distinct"; but even if one is so treated, the subsequent movement from ability materially to influence policy to ability to control policy or from either to possession of a controlling interest as leading to enterprises ceasing to be distinct. By contrast, once there is "control" the enterprises cease, once and for all, to be distinct,

participation of 25% or of 50% is reached or exceeded, or at least half the members of the management bodies or the supervisory boards of two or several companies are caused to be identical.[265]

The US merger control system generally requires a pre-merger notification of any share acquisition that is valued in excess of $50 million (as adjusted), irrespective of the resulting percentage of shareholding.[266] Acquisitions of minority stakes of 10% or less are exempt under the HSR Act notification requirements if made "solely for purposes of investment" (*i.e.*, passive investments where the purchaser has no intention to seek to influence the business affairs of the target company). Share acquisitions by securities underwriters "in the ordinary course" of their business are also exempt from HSR notification requirements irrespective of the value of the transaction.[267]

Other jurisdictions also set out special rules for "ordinary course" share acquisitions by financial institutions.[268] For instance, in the EU, acquisitions of securities by a credit or financial institutions with a view to resale within one year in the ordinary course of business benefit from an exemption from the notification requirements, as do any transfers in control of companies to liquidators in connection with insolvency proceedings.[269]

3.1.5. Joint ventures

Most merger control regimes require notification of formation of joint ventures. In general, joint ventures involve some pooling of resources to create a new business unit on a more or less permanent basis. As opposed to mere collaborative arrangements, which are usually subject to scrutiny under anti-competitive agreements' regulation, joint ventures, which qualify as mergers, usually include some economic integration of the parties' business activities (*e.g.*, through a contribution of productive assets to the joint venture), the elimination

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and no further change in the relationship between them or their owners can be treated as leading them again to cease to be distinct (see Lever, Jeremy: ""Control" for the Purposes of Section 26 of the Enterprise Act 2002", in European Competition Journal, Vol., No. 1, March 2005, pp. 51–52).

[265] Austrian Cartel Act 2005 (*Kartellgesetz* 2005), BGBI I No. 61/2005, Articles 7(1)3–4. Available online: http://www.bwb.gv.at/BWB/Gesetze/Kartellgesetz/default.htm (last visited 15.05.2009.)

[266] Grenfell, Michael: "Merger Control – Levels Of "Control"", in European Competition Journal, Vol., No. 1, March 2005, pp. 83.

[267] Federal Trade Commission's Premerger Notification Office: "Introductory Guide I: What is the Premerger Notification Program?", pp. 2–6.

[268] ICN Merger Working Group: "Defining Merger Transactions for Purposes of Merger Review", p. 4.

[269] ECMR, Article 3(5).

of competition between the parties in the joint venture's field of activity, and the relative permanence of the joint business activity.[270]

In the EU, the control of the creation of joint ventures is based on the concept of full-functionality. According to Article 4(3) of the ECMR "[t]he creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity" (so-called full-functional joint venture) constitutes a concentration. The full-functionality criterion therefore delineates the application of the ECMR, irrespective of whether such a joint venture is created as a newly established operation or whether the parties contribute assets to a joint venture which they previously owned individually.[271] Joint ventures that meet full-functionality criterion are not subject to Article 81 scrutiny.

Some jurisdictions have taken a broader view as to what constitutes a qualifying joint venture for merger control purposes. Hence, under the German ARC any entity in which several enterprises hold or acquire 25% or more of the shares or voting rights is deemed to be a joint venture, whereas no differentiation is made between full-function and non-full-function joint ventures. Moreover, the German ARC does not strictly distinguish between joint ventures falling under the merger control provisions and those caught by the anti-competitive agreements' regulation. Therefore, joint venture arrangements may require clearance by the GFCO and at the same time be subject to anti-competitive agreements' provisions, whereas the clearance given to a joint venture by the GFCO does not prevent it from being challenged under the anti-competitive agreements' provisions.[272]

Similarly, the creation of a joint venture may qualify as a relevant merger situation in the UK in circumstances where it does not qualify as a concentration under the ECMR, whenever the operation gives rise to a situation in which two or more enterprises cease to be distinct.[273] Like in Germany, any joint ventures may also be subject to scrutiny under the UK competition rules governing anti-competitive agreements.[274]

In the US, joint ventures are captured by merger control if it involves acquisition of assets or voting securities that meet the general $50 million valuation test.[275]

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[270] ICN Merger Working Group: "Defining Merger Transactions for Purposes of Merger Review", p. 5.

[271] EC Jurisdictional Notice, section 92.

[272] Bergmann &Röhling, p. 144.

[273] OFT Jurisdictional and Procedural Guidance, section 3.6.

[274] Gómez, Luis A; Harrison, Farin: " United Kingdom", in Global Merger Control Manual, 7th edition, edited by Laing, David J., *et al.*, Cameron May, 2007, p. 562.

[275] ICN Merger Working Group: "Defining Merger Transactions for Purposes of Merger Review", p. 5.

3.1.6. Concept of merger for small economies

It could be seen from the above that the range of the transactions that are subject to merger control varies somewhat across different merger control systems. However, it is common to all merger control regimes to seize a broad range of transactions. The differences are revealed primarily with respect to minority acquisitions and joint ventures; in the cases of acquisition of a majority of shares or assets of a firm, most merger control regimes come to the same conclusion and subject such transactions to control.

In case of small economies changes in market structures may be more easily triggered by events that could fall short of "decisive influence" within the meaning of ECMR. Therefore, while the general principles should be applied in small and large economies alike, in borderline cases, small economies should, in the author's view, be able to apply their merger control rules also to minority acquisitions which do not confer decisive influence to the acquirer, because such transactions may facilitate collusion. The previous sections of this thesis have indicated that smallness of an economy tends to result in relatively larger amount of oligopolistic markets than is the case in large economies. Furthermore, small economies tend to be more prone to face collusion problems due to the so called "everybody knows everybody" phenomenon. Therefore, transactions facilitating collusion should be scrutinized with great care.

The above mentioned *A-TEC/Norddeutsche Affinerie* case provides a good example here. Even though the case related to Germany which is not a small economy, it should alert small economies to follow the approach covering broader range of minority acquisitions under merger control than is covered under the ECMR framework.

The case concerned the acquisition by the Austrian copper manufacturer A-TEC of 13.75% shareholding in its German rival Norddeutsche Affinerie in June 2007. Further, A-TEC notified the GFCO of its intent to appoint three of the 12 members of Norddeutsche Affinerie's supervisory board in July 2007. The GFCO prohibited the share acquisition and board appointments in February 2008. The Office's decisions contained two main parts: (i) whether the share acquisition and board appointment constituted a concentration and hence, triggered the GFCO's competence to review the transaction under its merger control regime;[276] and (ii) whether the transaction had such anti-competitive effects that it should be prohibited.[277]

First, with respect to its competence, the GFCO found that the share acquisition and the board appointment fell under Section 37(1) of the German ARC, which defines as concentrations any "combination of undertakings enabling one or several undertakings to directly or indirectly exert a competitively significant influence on another undertaking". The GFCO noted that A-TEC's 13.75% shareholding in Norddeutsche Affinerie was practically

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276 *A-TEC/Norddeutsche Affinerie*, sections 26–47.
277 *Ibid.*, sections 48–164.

the same as a blocking minority, because in the preceding years the Norddeutsche Affinerie's annual general meetings had been represented only by 33–37% of the voting capital. Under these circumstances, the A-TEC's shareholding would have given it *de facto* more than 25% of the votes at the general meeting which in turn, would have enabled A-TEC to influence Norddeutsche Affinerie's conduct on the market, because it could jeopardize Norddeutsche Affinerie's access to capital markets.[278] The GFCO also pointed out that A-TEC was by far the largest shareholder in Norddeutsche Affinerie, while two other larger shareholders held around 5% each and the remaining shares were widely dispersed. Therefore, the relative strength of A-TEC compared to other shareholders would reinforce the competitively significant influence conferred to A-TEC by way of its *de facto* blocking minority.[279] Furthermore, the GFCO found that the appointment of three board members by A-TEC would further strengthen its competitively significant influence over Norddeutsche Affinerie, because, especially on account of its superior industry knowledge, A-TEC could influence the decision-making process of the supervisory board according to its own commercial interests.[280] Thus, the GFCO concluded that it could be expected that competition between the firms would be reduced to such extent that the firms would no longer act independently of each other on the market. A-TEC would be able to influence Norddeutsche Affinerie's conduct and the latter would passively adapt its conduct on the market to A-TEC's interests.[281]

Second, as regards the anti-competitive effects of the transaction, the GFCO found that the share acquisition and board appointment would lead to the creation of dominant position in the EEA-wide market for production and distribution of oxygen-free copper billets to third parties. The GFCO noted that A-TEC and Norddeutsche Affinerie would have a combined market share of 85–95% in the relevant market. As a consequence of the competitively significant influence of A-TEC over Norddeutsche Affinerie, both firms would take each other's conduct into account when taking commercial decisions. This would allow both firms to operate unconstrained by any competitive forces.[282] The firms had heavily invested into equipment to diversify their portfolios and viably compete with each other prior the transaction. Such incentives to invest into development would likely drop as a result of the transaction.[283] The increased market power of the firms would not be counterbalanced by potential competitors, because the firms producing oxygen-free copper billets for in-house needs are unlikely to enter into merchant market due to comparatively lower margins achieved by the sale, and new entries are unlikely due to high entry barriers.[284] The GFCO also found that the customers of the transaction

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278 *Ibid.*, section 36.
279 *Ibid.*, sections 28 and 37.
280 *Ibid.*, section 30.
281 *Ibid.*, section 43.
282 *Ibid.*, section 109.
283 *Ibid.*, section 110.
284 *Ibid.*, sections 110–128.

parties would not have countervailing buyer power to outweigh the market power of A-TEC and Norddeutsche Affinerie.[285] Therefore, the GFCO prohibited the transaction and required the share acquisition to be reversed.

One could be tempted to criticize the GFCO's approach in widening the scope of merger control to such minority acquisitions as being superfluous. The main argument of the GFCO appears to have been that the transaction could have enabled A-TEC and Norddeutsche Affinerie to collude their market behaviour. It is true that coordinated practices can be scrutinized also under the framework of Article 81 of the EC Treaty (and its German equivalent), but not every form of coordination between a minority shareholder and the firm in which it holds its interest takes the form of illegal cooperation under Article 81.[286] Hence, where the coordination takes the form of mere respect of the other firm's anticipated business decisions and rational unilateral decisions which are influenced by inside knowledge of the other firm's intentions, it does not amount to an infringement of Article 81, but could nevertheless cause competition concerns in an oligopolistic market, as was demonstrated by the *A-TEC/Norddeutsche Affinerie* case.[287]

In addition to being mindful of minority acquisitions, small economies should also be aware of the interlocking directorships. It has been recognized that interlocking directorships may act as a conduit for anti-competitive transfer of price and strategic information.[288] Hence, these could be liable to facilitate collusion, which may prove hard to tackle by the competition authorities. Furthermore, interlocking directorship could be used by firms which would be unlikely to obtain a permit for an acquisition to circumvent merger control. As mentioned above, where at least half the members of the management bodies or the supervisory boards of two or several firms are caused to be identical, interlocutory directorships qualify as transactions scrutinized under merger control under Austrian merger control rules.[289] Author is of the opinion that this approach deserves to be followed in small economies, where the business elite tends to be concentrated and is therefore, more prone to result in competition concerns caused by interlocutory directorates.[290]

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[285] *Ibid.*, section 129.

[286] Leupold, Henning; Haans Joost: "Minority Shareholdings and Merger Control after Ryanair/Aer Lingus – "No worries, mate?"", in European Competition Law Review, Vol. 29, Issue 11, November 2008, pp. 630–631.

[287] *Ibid.*

[288] Moavero Milanesi, Enzo; Winterstein, Alexander: "Minority shareholdings, interlocking directorships and the EC Competition Rules – Recent Commission practice", in EC Competition Policy Newsletter, No. 1, February 2002, p. 15.

[289] Austrian Cartel Act 2005, Articles 7(1)3–4.

[290] Some authors have suggested that the possibly detrimental effects of acquisition of minority participation interests in competing firms should also be recognized and taken into account in the EU merger control (see *e.g.*, Russo, Francesco: "Abuse of Protected Position? Minority Shareholdings and Restriction of Markets' Competitiveness in the European Union", in World Competition, Vol. 29, Issue 4, 2006, pp. 607–633).

Evading from the concept of concentration used under the ECMR by its Member States could cause a situation where minority acquisitions or board nominations by firms, whose turnover meets the Community dimension thresholds, would escape merger control according to Article 21(3) of the ECMR.[291] At the same time, similar actions by firms, whose turnover does not meet the Community dimension thresholds, could be subject to merger control by Member States (which may have special rules allowing for scrutiny of minority acquisitions).[292] In other words, where the ECMR thresholds are met, minority acquisitions or board nominations would be exempted from the review by Member States' authorities by the effect of the one-stop-shop principle. Hence, this could result in unequal treatment of mergers of small and larger firms. This should not discourage small economies from exercising scrutiny of minority acquisitions and board nominations. After all, mergers involving firms from small economies only rarely meet the ECMR thresholds. Therefore, mergers that are able to escape merger control by virtue of Article 21(3) of the ECMR are likely to be rather exceptional.

3.2. Choice of merger notification system and jurisdictional thresholds

3.2.1. General principles regarding merger notification systems

Merger control laws typically involve a procedure where the firms involved into the merger are to notify a competition authority of their transaction. The authority then analyzes the effects of the transaction to the competitive situation and decides whether to permit or prohibit the transaction. Additionally, as will be seen below, in problematic situations, competition concerns could be addressed by introducing some modifications to the circumstances related to the transaction and its parties – in such cases a competition authority could make the merger permission conditional upon the parties' compliance with certain commitments.

The design of merger notification system is of great importance for all economies, but in particular for small economies. It is clear that merger control is expensive, as it imposes costs on both the business community, which has to comply with notification requirements, undergo lengthy investigations and suffer delays in consummating mergers, and on the competition authority,

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[291] Article 21(3) of the ECMR stipulates that "[n]o Member State shall apply its national legislation on competition to any concentration that has a community dimension". This principle is known as one-stop-shop principle (see more on this under Section 3.4.3).

[292] Weitbrecht, Andreas: "Ryanair and More – EU Merger Control in 2007", in European Competition Law Review, Vol. 29 Issue 6, June 2008, pp. 342–434.

which must expend scarce resources in reviewing mergers.[293] Small economies which tend to suffer from the scarcity of resources more than large economies should therefore be especially careful in designing the merger notification to reduce the costs both for businesses and competition authority. Below, a general overview of various merger notification systems is given and thereafter, the pros and cons of various merger notification systems will be considered to seek for the best alternative for small economies.

Most merger control regimes have put in place a pre-merger notification procedure, whereby the competition authority controls the merger transaction prior to its implementation (normally within the time span between signing the share or assets purchase agreement and the closing of the transaction).[294] Obtaining the competition authority's permission to the transaction, which is subject to merger control, is often set as the condition precedent to the closing of the transaction in such cases. Pre-merger system is used in the EU,[295] US,[296] in almost all EU Member States that have merger control,[297] Australia,[298] Japan[299] and many other countries.

Pre-merger notification systems can be divided into mandatory and voluntary systems. In the case of mandatory pre-merger notification system, the firms involved must notify to competition authority prior to the implementation of the merger if certain conditions are met. The thresholds for mandatory notification vary widely between jurisdictions. Most commonly, the worldwide or local turnovers of the firms involved constitute the decisive thresholds, but in some jurisdictions combinations of other criteria are relevant – market shares, value of worldwide or local assets of the firms involved or value of transaction. Mandatory merger notification systems are used in most merger control regimes.[300]

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293 Inter-American Development Bank and OECD: "Merger Control Laws and Procedures in Latin America and the Caribbean", discussion paper, 2005, p. 7. Available online: http://www.oecd.org/dataoecd/41/57/38835612.pdf (last visited 15.05.2009); OECD Background Paper, sections 32–34.

294 Author's conclusion on the basis of Global Merger Control Manual 2008 and the Deal Through: Merger Control 2008.

295 ECMR, Article 4(1).

296 HSR Act, 15 U.S.C., § 18a.

297 Out of 27 EU Member States, only Luxembourg does not have formal merger control in place (author's conclusion on the basis of Global Merger Control Manual 2008).

298 Australian Competition and Consumer Commission: "Merger Guidelines", June 1999, part 4. Available online: http://www.accc.gov.au/content/item.phtml?itemId=304397&nodeId=a0adea340fc03710a12cf14b7e4fd803&fn=Merger%20guidelines%201999.pdf (last visited 15.05.2009).

299 Act on Prohibition of Private Monopolization and Maintenance of Fair Trade, Act No. 54 of 14.04.1947, revised 2005. Available online: http://www.jftc.go.jp/e-page/legislation/ama/amended_ama.pdf (last visited 15.05.2009).

300 Author's conclusion on the basis of Global Merger Control Manual 2008 and the Deal Through: Merger Control 2008.

In the case of voluntary notification system, the firms involved have the discretion to decide whether to notify their transaction to the competition authority and thus, seek clearance or authorization[301] for their transaction. If the firms decide not to obtain the competition authority's approval, they face the risk of subsequent legal challenge, which could lead to full or partial dissolution order or significant fines, if the merger is consequently found to be anti-competitive.

A few countries have post-merger notification systems, where a merger is controlled after its implementation. This is the case for example in Indonesia.[302] In the Greece[303] and Republic of Korea,[304] some transactions are subject to post-notification notification, whereas the other transactions are subject to pre-merger notification. Post-merger notification system generally creates significant legal uncertainty for the firms involved and possibly also damage to competition. Therefore, post-notification systems are not wide-spread.[305]

Some jurisdictions that do not have merger notification system in place, nevertheless, prohibit mergers that may have anti-competitive effects. For instance, in Luxemburg the competition authority may take any measures which it believes are necessary if it is of the opinion that the merger will prevent, restrict or distort competition.[306] Similarly, in Costa Rica, the competition authority has wide powers to react to anti-competitive mergers, including ordering total or partial break up or modifications, and imposing heavy fines.[307]

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301 Clearance is given, where the merger does not raise competition concerns; authorization could be given, where the merger raises competition concerns, but is nevertheless allowed for certain reasons, *e.g.,* on public benefit grounds.

302 Bakker, Theodoor; Husein, Zacky Z: "Indonesia", in Getting the Deal Through: Merger Control 2008, Global Competition Review, Law Business Research Ltd, p. 176;

303 Economou, Aida: "Greece", in Getting the Deal Through: Merger Control 2008, Global Competition Review, Law Business Research Ltd, p. 154.

304 Insoo Pyo; Gun Chul Do: "Korea", in Getting the Deal Through: Merger Control 2008, Global Competition Review, Law Business Research Ltd, p. 210.

305 Inter-American Development Bank and OECD.

306 Even though there is no merger control system in place in Luxembourg, the law prohibits companies from entering into agreements, taking decisions, or undertaking any practice being capable of preventing, restricting, or distorting competition within a market. Hence, a contemplated merger may fall under this law, if it is susceptible of having such anti-competitive consequences. Law of 17.05.2004 Relating to Competition, *Journal Officiel du Grand-Duché de Luxembourg*, No. 76 of 26.05.2004, Article 3. Available online (in French):
http://www.legilux.public.lu/leg/a/archives/2004/0076/a076.pdf#page=2 (last visited 15.05.2009), (see also Schmitt, Alex: "Pre-Merger Notification – Luxembourg", in A Lex Mundi Multi-Jurisdictional Survey prepared by the Lex Mundi Antitrust, Competition and Trade Practice Group, January 2007, p 189. Available online:
https://www.lexmundi.com/images/lexmundi/PDF/PreMerger/premerger_Notification_Survey.pdf (last visited 15.05.2009)).

307 Law No. 7472 on Promotion of Competition and Effective Consumer Defense of December 20, 1994. Published in the Federal Register of 19.01.1995, §§ 16; 24–1, 25–1

Conversely, merger notification procedure could be established without substantive control procedures on informative purposes in order to allow the competition authority to gain information on the developments on the markets. Such regime was in place for instance in Estonia between 1998 and 2001;[308] however, such regimes are not common.[309]

As apparent from above, pre-notification systems still tend to be the preferred choice for merger control across the globe. Therefore, the discussion below in Sections 3.2.2 and 3.2.3 provides a deeper look into mandatory and voluntary pre-notification systems to identify the benefits and shortcomings of both. This discussion builds grounds for conclusions of the preferred choice of merger notification for small economies presented in Section 3.2.4.

3.2.2. Mandatory notification system

One of the characteristics of the mandatory notification system is that not all transactions need to be notified, but only those that meet certain pre-defined thresholds. If the notification thresholds are set too low, mandatory pre-merger notification system could overload the competition authority with cases which do not raise any competitive concerns. Besides, this is overly burdensome for firms, because many competitively harmless mergers may have to be notified. At the same time, in the case of high thresholds, there is a risk of overlooking cases that are of local importance.[310] Hence, the primary question is how to define the thresholds to cover the least amount of harmless mergers, while minimizing also the amount of mergers that have anti-competitive effects but escape review.[311]

There are various considerations that should be borne in mind when determining merger notification thresholds. The ICN has adopted Recommended

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Available online (in Spanish):
http://www.globalcompetitionforum.org/regions/n_america/Costa%20Rica/COSTA%20RICA.pdf (last visited 15.05.2009).

[308] Competition Act (*Konkurentsiseadus*), RT I 1998, 30, 410, chapter 7; declared invalid by Competition Act adopted on June 5, 2001, since October 1, 2001, RT I 2001, 56, 332.

[309] Author's conclusion on the basis of Global Merger Control Manual 2008.

[310] In the case of EU Member States, cases involving large companies would fall subject to control by the European Commission, which looks on the effects of the transaction in the affected Member State(s). Hence, the very aim of national merger control regimes is to focus on cases with local importance only.

[311] ICN Merger Notification and Procedures Subgroup "Setting Notification Thresholds for Merger Review", report to the ICN annual conference Kyoto, April 2008, p. 4. Available online:
http://www.internationalcompetitionnetwork.org/media/library/mergers/Merger_WG_2.pdf (last visited 15.05.2009).

Practices for Merger Notification Procedures, which lay out the following guiding principles for the choice of thresholds:

- Merger notification thresholds should incorporate appropriate standards of materiality as to the level of "local nexus" required for merger notification;
- Determination of a transaction's nexus to the jurisdiction should be based on activity within that jurisdiction, as measured by reference to the activities of at least two parties to the transaction in the local territory and/or by reference to the activities of the acquired business in the local territory;
- Notification thresholds should be clear and understandable, and based on objectively quantifiable criteria and information that is readily accessible to the merging parties. [312]

It would seem most apparent that there is a material local nexus where a merger is likely to have anti-competitive effects in the markets of the state of the competition authority concerned. As could be seen from the previous section of this thesis, the probability of a merger having anti-competitive effects depends on range of market characteristics and the firms themselves, such as market concentration, market shares of merging firms, entry barriers, likelihood of collusion, etc. However, all these factors are difficult to objectively measure *ex ante* in order to use them as a condition to notify a merger.[313] For instance, in case of market share based threshold the merging firms' market shares are not always easily observed because they depend on the definition of the relevant market. However, market definition is a subjective, fact-intensive and economics-intensive process – the absolute opposite of what business needs to ascertain legal obligations in time-constrained situations.[314] Thus, the market share based thresholds do not meet the last of the three above cited criteria. Therefore, it is no surprise that market share based thresholds are widely condemned and that several jurisdictions that have initially applied such thresholds (such as Belgium[315] and Latvia[316]) have changed their thresholds by now.

[312] ICN Merger Working Group: "Recommended Practices for Merger Notification Procedures", sections I and II. Available online:
http://www.internationalcompetitionnetwork.org/media/archive0611/mnprecpractices.pdf (last visited 15.05.2009)

[313] Gonzalez, Aldo; Benitez, Daniel: "Pre-merger Notification Mechanisms: Incentives and Efficiency of Mandatory and Voluntary Schemes", September 2008, p. 6. Available online:
http://lawprofessors.typepad.com/antitrustprof_blog/files/merger_notification_oct22.pdf (last visited 15.05.2009).

[314] Rowley, William J., *et al.*: "Streamlining International Merger Control", paper presented at EC Merger Control 10th Anniversary Conference, Brussels, Belgium, 14.09.2000, p. 4. Available online: http://www.mcmillan.ca/Upload/Publication/Streamlining%20International%20Merger%20Control_Sept%202000.PDF (last visited 15.05.2009).

[315] From 1991 till 1995, the Belgium thresholds required notification of mergers where: (i) the combined worldwide turnover of the parties exceeded BEF 1 billion (€ 25

Turnover of the merging firms appears a wide-spread basis for determining the notification requirement in the EU and most of its Member States. As noted above, whether a merger falls subject to control by the European Commission depends on whether the merger has a Community dimension, which is defined in two set of thresholds (one consisting of world-wide and Community-wide turnover of the merging firms, the other consisting additionally of turnover in Member States). The appropriateness of the ECMR thresholds has been a heavily debated.[317] For instance, Morten Broberg points to several problems related to the EU thresholds. Firstly, he demonstrated various ways which can be used to avoid becoming within the scope of ECMR without significantly altering the underlying transaction.[318] Secondly, he posits that the thresholds catch a number of transactions with no effects within the EU, *e.g.*, creating or acquiring a joint venture with no sales or activities in the EU by large international firms.[319] Statistics show that out of the 2,471 cases notified to the European Commission during the period 2000–2007, 46.3% were resolved through the simplified procedure (*i.e.,* a procedure for mergers that, despite the fact that they have to be notified, are unlikely to harm competition), and only

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million); and (ii) the combined market share of the parties exceeded 20%. From 1995 to 1999, the Belgium thresholds required the notification where: (i) the combined worldwide turnover of the parties exceeded BEF 3 billion (75 million); and (ii) the combined market share of the parties exceeded 25%. An analysis for reform undertaken in 1997 highlighted that the 1991 and 1995 market share thresholds posed various difficulties (and expenses) for merging firms in relation to determining relevant market(s), estimating market shares, determining combined market shares; and the drain on the competition authority's resources consulting with firms on the applicability of the market share and effects tests. The thresholds were therefore replaced with turnover thresholds (see ICN Merger Notification and Procedures Subgroup: "Setting Notification Thresholds for Merger Review", pp. 18–23).

[316] In Latvia, until recently the thresholds required notification where: (i) the aggregate turnover of the merger participants exceeded LVL 25 million (€ 35.6 million); or (ii) the aggregate market share of the merging firms in any relevant market exceeded 40%. The thresholds were recently replaced with only turnover based thresholds according to which notification is required where the combined Latvian turnover of merging firms exceeds LVL 25 million, except where the turnover of one of the merging firms is less than LVL 1.5 million (€ 2.1 million). The amendments took full effect from the beginning of 2009.

[317] See *e.g.*, Broberg 2006, pp. 213–225; Commission Green Paper on the Review of Council Regulation (EEC) No. 4064/89, sections 21–68;
Burnley, Richard: "An Appropriate Jurisdictional Trigger for the EC Merger Regulation and the Question of Decentralisation", in World Competition, Vol. 25, Issue 3, 2002, pp. 263–277, (Burnley 2002).

[318] Brogerg 2006, pp. 213–225.

[319] For instance, in the Commission Decision of 28.09.2000, Case No. COMP/M.2153 – *BHP / Mitsubishi / QCT*, where an Australian firm Broken Hill Proprietary Company Ltd and a Japanese firm Mitsubishi Corporation acquired joint control over an Australian firm QCT Resources Ltd. Similar examples are common in the Commission's practice (see more Broberg 2006, pp. 237–239).

4.1% of notified mergers raised concerns to such the extent as to merit investigation under the second phase.[320] Thirdly, there are cases which do have significant cross-border effects, but escape the ECMR, for instance because of the 2/3-rule contained in Article 1(2)[321] or because of the failure to meet the 2.5 billion worldwide criterion of Article 1(3).[322] The latter reason may in particular deprive the European Commission's scrutiny from the mergers involving firms of several small economies, as their firms' size tends to be smaller.[323] Various different solutions have been suggested to adjust the ECMR thresholds, but none of the solutions has proved problem free.

The quest for appropriate thresholds based on objectively quantifiable and easily determinable criteria poses similar challenges to many jurisdictions. The ICN suggests several general principles for finding an appropriate threshold for a given merger control regime. Accordingly, when reforming existing thresholds, the goals of the reform should be clearly set (*e.g.*, reducing the number of notifications, or increasing the percentage of notifications that raise competition concerns). The benchmarks should be based on past experience of the regime in question. Additionally, the thresholds of similarly situated jurisdictions should be used as examples. Finally, there should be flexibility for future adjustments of the established thresholds.[324] These guidelines are surely reasonable and worth taking into account when shaping or reforming a merger regime, but they provide no clear and groundbreaking solutions.

Various specific rules and exceptions have been used across jurisdictions to eliminate unnecessary notifications and prevent problematic mergers from escaping control. For instance, in Finland a particular "two-year-rule" used be in force since 1998 till 2004 besides the usual turnover thresholds[325]. According

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[320] Gonzalez & Benitez, p. 14.

[321] According to Commission Green Paper on the Review of Council Regulation (EEC) No. 4064/89, section 74, this was the case for instance with the merger between the Chase Manhattan Corporation and Robert Flemmings Holdings Limited. Both of these international financial companies manage assets that are measured in hundreds of billions USD and are active in 40–50 countries worldwide. Still, since both firms earned more than 2/3 of their turnover in the UK, the merger escaped the scrutiny under the ECMR.

[322] Broberg 2006, pp. 245–246.

[323] This could exacerbated where the mergers involve companies from less developed economies, as arguably, the average size of firms is usually smaller in small economies in transition as compared with developed market economies (see Biegański, Lech: "Adoption of European Competition Law by Countries in Transition – Problems and Solutions", in European Competition Law Review, Vol. 28, issue 9, September 2007, p. 502).

[324] ICN Merger Working Group, Merger Notification and Procedures Subgroup "Setting Notification Thresholds for Merger Review", report to the ICN annual conference, Kyoto, April 2008. Available online: http://www.internationalcompetitionnetwork.org/media/library/ mergers/Merger_WG_2.pdf (last visited 15.05.2009).

[325] The thresholds at the time used to be as follows: the combined turnover of the merging firms exceeded FIM 2 billion, the turnover of a minimum of two firms

to this rule, the turnover of the target contained all the turnovers of the entities operating within the same industry in Finland, wherein the acquirer had acquired control during two preceding years.[326] This rule was considered necessary to control the possibility of a firm to increase its sphere of influence on a specific economic sector through series of successive takeovers. In particular, it was aimed at large energy companies taking over smaller local competitors. In practice, the rule led to a large amount of unnecessary notifications especially from venture capitalists.[327] The rule was subsequently abolished and the current notification thresholds were reviewed.[328]

Similar "two-year-rule" is in force in Estonian merger control, where the turnover of the firms operating "within the same sector of economy in Estonia" that have been acquired by the acquirer of control within two preceding years must be added to the target's turnover.[329] It may be interesting to note that the only merger prohibited by the ECA thus far (the acquisition of an apothecary by a major Estonian trader of pharmaceuticals Magnum Medical group) fell subject to control by virtue of this rule. In this case, the impact of the particular acquisition on the competitive situation was rather marginal, but it was the continuing tendency of acquisitions of small market players by Magnum Medical group that the Authority was concerned about.[330] Thus, the "two-year-rule" may indeed have proved necessary. However, its application has not been problem free. Firstly, there is considerable ambiguity as to how broadly or narrowly the "same sector of economy" should be defined. Secondly, the rule can be circumvented by suspending the acquisition until two years has been

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exceeded FIM 150 million, and the target conducted business in Finland (see Finnish Act on Competition Restrictions (480/1992) prior to the amendments of (400/2003), Article 11a(1). Available online: http://www.kilpailuvirasto.fi/cgi-bin/english.cgi?luku=legislation&sivu=act-on-competition-restrictions (last visited 15.05.2009)).

[326] Ibid, Article 11b(5).

[327] Mentula, Arttu; Ruohoniemi, Erkko: "The Reform of Finnish Competition Legislation", in European Competition Law Review, Vol. 25, issue 10, October 2004, p. 644.

[328] Finnish Act on Competition Restrictions (480/1992), including amendment (318/2004). Available online: http://www.kilpailuvirasto.fi/cgi-bin/english.cgi?luku=legislation&sivu=act-on-competition-restrictions-amended (last visited 15.05.2009). According to Article 11a(1), the thresholds are currently as follows: combined turnover of the merging firms exceeds €350 million and the turnover of a minimum of two firms derived from Finland exceeds €20 million. There have been comments that these thresholds raise problems where two foreign firms are considering a full-function joint venture outside the EU have to notify to the Finnish Competition Authority, if their exports to Finland exceed €20 million. This problem is similar to the one in the EU merger control (see Mentula & Ruohoniemi, p. 636).

[329] Estonian Competition Act, Article 22(7).

[330] Decision of Estonian Competition Authority of 18.05.2008, Case No. 3.1-8/08-020KO – *Terve Pere Apteek OÜ/ OÜ Saku Apteek*. Available online (in Estonian): http://www.konkurentsiamet.ee/public/Koondumised/2008/ko2007_32.pdf (last visited 15.05.2009).

passed from the first acquisition – such suspension may not always be possible for firms, but where this is a matter of only a few weeks or month(s), it may well be possible.

The above described "two-year-rule" is only one example of the attempt to customize the mandatory thresholds to best target problematic local mergers. As could be seen, such solution is far from seamless. Therefore, the author is of the view that shortcomings of mandatory notification system are hard to overcome, which is why voluntary system should be seriously considered as an alternative.

3.2.3. Voluntary notification system

3.2.3.1. General principles regarding voluntary notification systems

Under a voluntary scheme, merging firms are not obliged to submit the merger for a review, unless the transaction is likely to pose anti-competitive risk. In the latter case, the merger must be notified to the competition authority which reviews it and either approves (with or without conditions), or prohibits it. Voluntary notification system shifts the compliance risk to the merging firms and hence, reduces the burden of the competition authority. If the firms choose not to notify, authority may launch investigations on its own initiative. In this case, if the authority finds that the merger brings about serious anti-competitive effects, it may apply measures to avoid the implementation of the merger or impose fines or remedies where the merger has been already implemented.[331]

In order to induce the voluntary notifications of mergers which are likely cause competition concerns, a combination of "stick and carrot" mechanisms could be used, including pecuniary fines, costly remedies on transactions already implemented and approval of the merger with negotiated commitments. The first two instruments act as "sticks" since they impose a cost to the firms who, knowing that a notification was required, opted to avoid it. The last mentioned instrument looks like a "carrot" since it offers the firms with the possibility to accommodate the merger to the requirements of the competition authority instead of having it fully reversed.[332] Moreover, obtaining legal certainty in determinable timeframe, as opposed to uncertainty that is remains in case of not notifying, could serve as a "carrot".

Voluntary notification systems are in place for instance in the UK, Australia, New Zealand, Singapore, Chile, Panama and Venezuela. Below the UK and Singapore systems have been described as examples.

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[331] Gonzalez & Benitez, pp. 10–11.

[332] *Ibid.*

3.2.3.2. The UK system as an example of voluntary notification system in a large economy

The UK voluntary notification system is probably the best known among its kind representing one of the EU and world's largest economies. Merger control was introduced in the UK already in 1965 by the Monopolies and Mergers Act 1965, which was replaced by the Fair Trading Act 1973. The entire system was further replaced by the Enterprise Act 2002, which entered into force in June 2003. This current system still represents a considerable degree of continuity between the old and new systems.[333]

In the UK, a merger may be investigated by the Office of Fair Trading (OFT) and referred to the Competition Commission for a detailed investigation if it (i) creates or strengthens a share of supply of more than 25% in the UK or a substantial part of it (the share of supply test[334]), and/or (ii) involves the acquisition of a target company which has a UK turnover of more than £70 million (the turnover test).[335]

Merging firms may choose not to notify a merger which meets the above jurisdictional thresholds, and the fact that a merger was notified does not negatively affect the OFT's substantive evaluation of the competitive effects of a merger. For instance, in cases that constitute a relevant merger situation solely on the basis of the turnover threshold, but where competition concerns clearly do not arise because there is no overlap between the merging firms' activities, the firms may decide that notification to the OFT would be disproportionate or unnecessary.[336] However, in cases that do raise the possibility of competition concerns, merging firms are encouraged to notify, because even if the merger is not notified, the OFT may become aware of it through its own intelligence function from the press, other media or following a complaint.[337]

There are a number of different ways in which merging firms may ask the OFT to consider a merger, including informal advice, pre-notification discussions, statutory voluntary pre-notification using a merger notice, and informal submissions. Informal advice is used to obtain information about the OFT's views of likely competition issues in a future transaction, but does not bind the OFT, and creates no expectations as to the outcome at the public stage of any transaction. Pre-notification discussions are a preliminary stage for all cases where the firms wish to notify the merger. The statutory voluntary pre-notifi-

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333 Whish, Richard: "Competition Law", 5th edition, LexisNexis, London, 2003, pp. 881–882.

334 It is important to note that the term "share of supply" is not synonymous with market share. Compared to market share tests, the share of supply test allows the OFT consider segments of the market that may be considerably narrower than the market would be if it were actually defined (see more OFT Jurisdictional and Procedural Guidance, sections 3.34–3.37).

335 Enterprise Act 2002, Article 23.

336 OFT Jurisdictional and Procedural Guidance, section 4.2.

337 *Ibid*., sections 4.4 and 4.6–4.9.

cation and the informal submission are the two (alternative) forms of making an actual notification of a merger to the OFT.[338]

Regardless of whether a merger was notified by the merging firms or investigated by the OFT on its own initiative, the OFT generally has a duty to refer it to the Competition Commission where there is a reasonable prospect that the situation has resulted, or may be expected to result, in a substantial lessening of competition within any market in the UK.[339] In case of completed mergers, the OFT can make the referral up to four months after the merger completed, unless the merger took place without having been made public and without the OFT being informed of it.[340] Thus, the fact that a merger has been completed does not prevent the OFT from investigating and referring to the Competition Commission for possible remedial action.[341]

In practice, notifications are often made to ensure that the OFT will not decide to refer the transaction to the Competition Commission, because there are various risk factors related completing a merger without clearance. Firstly, the OFT may seek initial undertakings or impose an order to the merging firms preventing them from integrating their businesses until the merger is cleared or remedial action is taken. Secondly, the completed transaction may be ordered to be undone following a reference to and an adverse finding by the Competition Commission.[342] When considering remedies in the context of a completed merger, the Competition Commission does not normally consider the costs of divestment to the parties.[343] Thirdly, by notifying the merging firms may reduce the time available to the OFT to review the transaction. In complex cases, this limitation can impact materially the OFT's ability to conclude within the available time that the test for reference to the Competition Commission is met, so that the transaction may be cleared unconditionally without the need for a Competition Commission investigation (which in turn can take up to 32 weeks).[344]

Still, according to the chairman of the Competition Commission, Peter Freeman, a rather significant number of merger investigations in the UK have concerned completed mergers which have not been notified to the OFT (nearly 40% of mergers referred to the Competition Commission).[345] According to Freeman, investigating completed mergers tends to be more resource-intensive

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338 *Ibid.*, Sections 4.22–4–63.

339 Enterprise Act 2002, Article 22.

340 In such case the four month period only starts from the earlier of the date on which material facts about the merger were made public or the time the OFT was informed of it.

341 OFT Jurisdictional and Procedural Guidance, section 4.19.

342 This has occurred in a number of cases.

343 UK merger guidelines, section 4.10.

344 OFT Jurisdictional and Procedural Guidance, section 4.21.

345 Freeman, Peter: "Competition Policy – A Process of Constant Renewal", speech given at CCS Distinguished Speaker Series, Singapore, 15.012008. Available online: http://www.competition-commission.org.uk/our_role/speeches/pdf/freeman_singapore_150108.pdf (last visited 15.05.2009).

and risky than investigating anticipated mergers. This is so on the one hand, because of the difficulties related to imposing interim measures to the merging firms to prevent them from taking actions that might prejudice the outcome of the investigation;[346] and on the other hand, because of the increased difficulties of implementing a prohibition or structural remedies in the event of an adverse finding. The first problem is caused by the time delays and efforts related obtaining the interim order in case of resistance by the merging firms. There are hopes that this problem will be relieved as the court practice confirming the authorities' powers with respect to interim orders develops. The second problem tends to be more a public opinion problem, as firms claim that post-closing unwinding or divestiture orders are disproportionately burdensome. This argument can hardly be justified, as the Competition Commission has clearly stated in its guidelines that "[s]ince the cost of divestment was, in essence, avoidable, the Commission will not, in the absence of exceptional circumstances, accept that the cost of divestment should be considered in the setting of remedies"[347]. It is unlikely that the Competition Commission will change its policy with this respect and such remedial actions of the Competition Commission will have to be recognized by the public over time.[348]

3.2.3.3. The Singapore system as an example of voluntary notification system in a small economy

Singapore is a relatively small economy which introduced merger control only from 1 July 2007. Even though Singapore does not have a long experience with respect to competition law, as its first Competition Act[349] was passed only in October 2004, its Competition Act seems well-considered and is based on a review of best practices in various jurisdictions, including the US, UK, EU, Australia and Ireland.[350]

In choosing voluntary merger notification system, the Competition Commission of Singapore (CCS) argued that "some degree of market rationalisation, especially given Singapore's small and open economy, is necessary to enable businesses to reap efficiencies of scale and scope. The CCS expects that only a minority of mergers will raise competition concerns, and will focus its efforts on these."[351] Hence, the CCS found a voluntary system to be appropriate for

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[346] Examples of prejudicial action may include dismissal of employees and sharing of information about customers and sales.

[347] UK Merger Guidelines, section 4.10.

[348] Freeman, pp. 11–13.

[349] Singapore Competition Act, adopted on 19.10.2004, Chapter 50B of Singapore Statutes. Available online: http://statutes.agc.gov.sg/ (last visited 15.05.2009).

[350] Kin, Lim Chong; Clements Scott: "Singapore: Competition Law Update 2008", in Asia-Pacific Antitrust Review 2008, Global Competition Review, p. 75.

[351] Competition Commission of Singapore: "Public Consultation on Proposed Merger Regime", October 2006, section 5. Available online:

Singapore, as most mergers in Singapore are unlikely to raise competition concerns, which is for a mandatory system could impose undue business costs.[352]

Compared with the UK system, Singapore notification system is simpler and involves only one assessing authority, the CCS. Article 54(1) of the Singapore Competition Act simply prohibits mergers which may result in substantial lessening of competition. The CCS has indicated so called "safe harbour" thresholds, below which it is unlikely to intervene and find an infringement: (i) the merged entity will have a market share of 40% or more; or (ii) the merged entity will have a market share of between 20% to 40% and the post-merger combined market share of the three largest firms (CR_3) is 70% or more.[353]

There is no mandatory requirement, but merging firms are allowed to notify their merger situations to the CCS and apply for a decision as to whether the Article 54 prohibition has been or will be infringed by the merger situation.[354] The CCS may also investigate a merger on its own initiative.[355]

The application can be made either with respect of an anticipated or a completed merger. Merging firms intending to make an application may approach the CCS for pre-notification discussions, to facilitate preparing their application and expedite the review process.[356] Unlike in the UK system, the Singapore system does not entail a non-binding informal guidance procedure. Such guidance procedures were initially planned, but left out, as according to the CCS "[t]he experience of competition authorities in Australia and the UK indicates that confidential guidance provides minimal added-value to businesses, as third party views cannot be sought due to the confidential nature of guidance. Such guidance is unlikely to meet the needs of businesses for certainty, as the merger can be re-assessed if there is a third-party complaint."[357]

Where the CCS finds that the merger infringes the Article 54 prohibition, it may require that the anticipated merger be stopped or that the completed merger be unwound.[358] The CCS has rather wide powers of enforcement. Firstly, it can impose interim measures, *i.e.,* directions as it considers appropriate, to prevent the merger parties from taking any action that might prejudice the CCS's ability to consider the merger situation further and to impose the appropriate remedies. Interim measures may, for example, comprise of directions that impose obligations as to the carrying on of any activities or as to the safeguarding of any assets; require supervision over any activities, prohibit proceeding with the

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http://www.ccs.gov.sg/NR/rdonlyres/5C5EF8CB-51AA-445C-A55B-87971D837FEA/11773/ConsultDoc_Merger_20102006.pdf (last visited 15.05.2009).

352 *Ibid.*, section 9.

353 Competition Commission of Singapore: "Guidelines on Merger Procedures" July 2007, section 3.4 Available online: http://www.ccs.gov.sg/Guidelines/index.html (last visited 15.05.2009), (CCS Guidelines on merger procedures).

354 *Ibid.*, section 2.3.

355 Singapore Competition Act, Article 62.

356 CCS Guidelines on merger procedures, section 3.7.

357 CCS: "Public Consultation on Proposed Merger Regime", section 13.

358 CCS Guidelines on merger procedures, section 2.5.

transaction. These interim measures may be imposed as soon as the CCS has reasonable grounds for suspecting that a merger is likely to infringe the prohibition, however, the fact that the CCS has imposed interim measures does not rule out eventual clearance of the merger situation.[359] If a direction imposing interim measures has not been complied with, the CCS may apply to register the direction with a court, whereas failure to comply with a registered direction may be found to be in contempt of court with respect to which sanctions such as fines and even imprisonment may be applied.[360]

Secondly, where the CCS finds that a merger infringes the Article 54 prohibition, it may, at any time before making a final decision, accept commitments that remedy the SLC arising from the merger on the proposal of the merging firms. In this case, the CCS will clear the merger.[361] However, where no such negotiated remedies are agreed, the CCS may issue following directions:

– prohibiting of an anticipated merger or requiring a merger to be dissolved or modified in such manner as the CCS may direct;
– requiring the merging firms to enter into such legally-enforceable agreements as may be specified by the CCS to prevent or lessen the anti-competitive effects which have arisen;
– requiring the merger parties to dispose of such operations, assets or shares of a firm in such manner as may be specified by the CCS; and
– providing a performance bond, guarantee or other form of security on such terms and conditions as the CCS may determine.[362]

The enforcement of such directions can be ensured in a similar manner as in the case of interim measures.[363]

Finally, the CCS may impose also a financial penalty if a merger has infringed the prohibition and the infringement was committed intentionally or negligently.[364] The financial penalty may amount up to 10% of the turnover of

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[359] *Ibid.,* 3.50–3.54. Before giving a direction imposing interim measures, the CCS must give written notice to the persons to whom it proposes to give the direction, indicating the nature of the direction it proposes to give and the reasons for deciding to give it. Such persons may make representations to the CCS and appeal against the CCS' directions.

[360] *Ibid.*, sections 3.56–3.58.

[361] Singapore Competition Act, Article 60A.

[362] CCS Guidelines on merger procedures, sections 3.68 and 5.14.

[363] *Ibid.*, section 5.17–5.19.

[364] Infringement is intentional if the merging firms were aware, or could not have been unaware, that the merger infringed the prohibition; infringement is negligent if the merging firms ought to have known that the merger would, or was reasonably likely to, infringe the prohibition. This may be the case for instance, where after having received a prohibition decision from the CCS in respect of an anticipated merger, the merging parties proceed with an allegedly different merger which is simply a sham restructuring of the anticipated merger (see CCS Guidelines on merger procedures, section 5.23).

each relevant merger party in Singapore for each year of infringement for a maximum period of three years.[365]

The CCS's practice after more than a year of controlling mergers has shown that the notification procedure is relatively straightforward and, in most cases, the CCS is able to review notified merger fairly quickly.[366] By autumn 2008, altogether 11 mergers had been notified, all of which were cleared by the CCS as having no adverse impact on competition in Singapore. However, two cases were cleared after the merging firms had accepted commitments *vis-à-vis* overseas competition authorities (European Commission and the US DOJ), as the CCS considered these commitments sufficient to remedy its concerns.[367] However, the CCS has indicated that not all commitments given to overseas competition authorities will automatically address the competition concerns in future cases, as the issues in each jurisdiction will have to be assessed based on its own merits.[368]

3.2.4. Choice of a notification system for small economies

Vast majority of mergers are non-problematic, therefore mandatory merger notification system appears to impose huge and possibly unnecessary costs on the merging firms in competitively neutral or pro-competitive transactions. Based on these considerations, merger control should not impose onerous burdens on businesses or authorities charged with assessing mergers.[369] Several studies have suggested that voluntary notification systems may achieve objectives similar to those achieved by mandatory systems at lower costs to the merging firms and authorities.[370] This should be borne in mind particularly in small economies where resources are more limited than in large economies.

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[365] Singapore Competition Act, Article 69.

[366] Riswi, Wun: "Relevant Factors on Notified Mergers in Singapore", in Singapore Law Watch, issue 4, October 2008, p. 5.

[367] Decision of Competition Commission of Singapore of 23.05.2008, Case No. CCS 400/007/07 – *Thomson Corporation / Reuters Group*. Available online: http://www.ccs.gov.sg/NR/rdonlyres/30094F78-DCA8-43A2-98DC-AB66A5DB67C9/21314/Thomson_ReutersGD_080714Redacted.pdf (last visited 15.05.2009)
Decision of Competition Commission of Singapore of 29.09.2008, Case No. CCS 400/002/08 – *Manitowoc Company / Enodis*. Available online: http://www.ccs.gov.sg/NR/rdonlyres/30094F78-DCA8-43A2-98DC-AB66A5DB67C9/22213/redactedGD_091008.pdf (last visited 15.05.2009).

[368] Riswi, p. 8.

[369] Rowley, William J., *et al.*, pp. 8–10.

[370] *Ibid.*; Choe, Chongwoo; Shekhar, Chander: "Compulsory or Voluntary Pre-merger Notification? A Theoretical and Empirical Analysis", August 2006. Available online: http://www.iss.u-tokyo.ac.jp/~matsumur/CCNote68.pdf (last visited 15.05.2009).

In a voluntary system the competition authority has the flexibility to select the mergers to investigate. Besides the transactions voluntarily submitted by the merging firms, the authority may scrutinize non-notified mergers, where there are valid presumptions about the anti-competitive risk without being restrained by pre-established thresholds. In contrast, under the mandatory system, the authority must follow the notification thresholds, which do not always convey sufficient information about the dangers of a merger. Hence, irrelevant mergers from the competitive point of view will not be notified nor submitted to an investigation by the competition authority under the voluntary regime. On the contrary, in the mandatory system, there is a set of mergers that classify to be notified and investigated by the competition authority, due to their magnitude above the threshold, despite of having a low competitive risk.[371]

It should of course be borne in mind that once a merger has occurred, it is very costly, if not impossible, to bring back the market structure to the pre-merger situation, because during a merger, firms combine assets, technologies, and redesign their organization and management making it unfeasible to undo the process once consolidated. Even though some anti-competitive effects of a merger can be controlled *ex post*, the competition authorities may not be able to implement sufficient remedies to solve all the competitive problems that a merger may cause. These reasons explain why it is generally preferable to control mergers *ex ante* prior to their implementation.[372]

Voluntary merger notification systems are not in contradiction with this principle. As could be seen from above, merging firms are induced to apply for a clearance before completing a merger, where the merger could potentially raise competition concerns. In order to increase the deterrent effect, but also to enable the competition authority to timely react to problematic cases where merging firms have not notified or suspended the completion of their merger, it is crucial that the authority has the necessary tools to act vigorously in order to avoid or suspend mergers with a high competitive risk. The regulatory framework should therefore provide clear and easily enforceable interim measures available for the competition authority to act against unlawful avoidance of revision by the competition authority. Singapore serves are a good example in this respect.

The risk that firms avoid merger control and implement a merger, which should be controlled, exists also in a mandatory system. Merging firms may decide not to notify even though the transaction size is above the thresholds defined by the law, and go on with the process. Still, this risk is likely lower in mandatory systems as compared with voluntary systems, because it is easier for a competition authority to show before a court that firms acted illegally when the requirement to notify is determined by well-defined and easily-verifiable parameters, than when the conditions are more difficult to prove like the anti-competitive potential of a merger in case of voluntary system. This difference in

[371] Gonzales & Benitez, p 14.

[372] *Ibid.*, pp. 2–3.

the clarity of the rule hence makes it easier to prove the illegal action in a mandatory system.[373]

It has been argued that one of the shortcomings of voluntary system is that it reduces the flow of information to the competition authority.[374] While it may indeed reduce the amount of market information that merging firms may have to submit in merger notifications in case of non-problematic mergers, the reduction of the amount of information about the fact of transactions taking place can be overcome. On the one hand, there have been opinions that such problem is of low significance in small economies, as the competition authorities there are more likely to learn of important mergers by public means.[375]

On the other hand, it would be possible introduce a system, whereby the competition authority should be informed of any share transactions leading to change of the ownership of at least 10% of shareholding. Sending such information should be a necessary precondition for registering the change of ownership, but meeting this requirement should be swift and require no significant resources. For instance, it should not require more than simply submitting the names of the transaction parties and the number of shares through some electronic register kept by competition authority, which would automatically confirm the receipt of the data. This requirement could effectively be made mandatory only with respect of domestic share acquisitions, leaving aside asset acquisitions and foreign transactions. Nevertheless, this task would still facilitate the competition authority's ability to constantly keep its eye on local transactions, while not putting excessive burdens to business community. In order to provide more certainty for merging firm, a deadline (*e.g.,* four months as in the UK) could be set for the competition authority to open an investigation with respect to mergers registered through the system. In this way, foreign transactions and asset acquisitions would be induced to register as well.

In order for the voluntary system to function, firms should have a good understanding of the criteria followed by the competition authority is assessing the effects of a merger when they decide whether to notify a given transaction or not.[376] Thus, it is important that such criteria are clearly laid out in regulations or competition authority's guidelines. Furthermore, the practice of the competition authority could serve as guidance. Therefore, it may be preferable to introduce merger control first with a mandatory notification system and replace it with voluntary system after some practice and guiding principles have been developed.

In summary, voluntary notification system has significant appeal as compared to mandatory system. There are certain complications that related to voluntary system, which could be surmounted or at least alleviated by proper

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[373] *Ibid.*, p. 13.

[374] Taylor, Martyn D.: "International Competition Law – A New Dimension for the WTO?", Cambridge University Press, Cambridge, 2006, p. 86.

[375] Inter-American Development Bank and OECD, p. 7; Freeman, p. 11.

[376] Gonzalez & Benitez, pp. 10–11.

design of the deterrent mechanisms and enforcement measures, and by coupling the voluntary system with some light mandatory informational obligations. In the author's view, for small economies voluntary notification system (as opposed to conventional mandatory notification system) is therefore preferable.

The question of choice of notification system and hence the scope of jurisdiction claimed over mergers is an important one. However, it is equally important to be able to enforce its merger control decisions in practice. While the success of domestic enforcement tends to be the matter of domestic administrative and judicial system, extraterritorial enforcement may pose more hurdles. Therefore, the thesis continues with the analyzing the issues related to extraterritoriality.

3.3. Extraterritorial application of merger control

3.3.1. General principles regarding extraterritorial application of competition laws

The limits upon a state's jurisdictional competence and thus, upon its ability to apply its competition laws to foreign firms, belongs to the realm of public international law. There are two elements to a state's jurisdictional competence. On the one hand, under what is known as prescriptive (or legislative or subject-matter) jurisdiction, a state has jurisdiction to make laws and regulate. On the other hand, under what is known as enforcement (or prerogative) jurisdiction, a state has jurisdiction to enforce its laws.[377]

The limits of prescriptive and enforcement jurisdiction are not always the same – claiming prescriptive jurisdiction by one state over the individuals or firms in another state may not lead to a conflict, while the endeavours to enforce

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[377] Brownlie, Ian: "Principles of Public International Law", 5th edition, Oxford University Press, 1998, p. 301.
Some authors have additionally distinguished a third form of jurisdiction – judicial (or adjudicative) jurisdiction – which concerns a state's power to receive, try and determine cases in which foreign factors are present in its courts (see *e.g.*, Shaw, Malcolm N.: "International Law", 4th edition, Cambridge University Press, 1997, p. 457). According to Lowe, it is doubtful whether it necessary to separate this type of jurisdiction. If parties submit to the jurisdiction of a national court, there can be no cause for complaint, unless one or more parties is subject to an order made under the law another state obliging them not to submit to the foreign court. Where such anti-suit order made, there is a clash of prescriptive jurisdiction, as there is two (or more) courts to hear the same case and issue conflicting orders. At the same time, all this can be analyzed in terms of prescriptive and enforcement jurisdiction. Therefore, it appears unnecessary to distinguish judicial jurisdiction as a separate category (see Lowe, Vaughan: "Jurisdiction", in International Law, edited by Evans, Malcolm D, 1st edition, Oxford University Press, 2003, p. 333).

its laws in another state could more likely trigger conflicts.[378] Even if prescriptive jurisdiction exists in relation to certain conduct of someone in another state, it is generally considered improper for a state to attempt to enforce its national laws in another state's territory without its consent.[379] Where prescriptive legislation is beyond lawful limits, then any consequent enforcement jurisdiction is definitely unlawful.[380]

In the context of competition law, public international law generally recognizes a state's power to make laws affecting conduct within its territory (so called territoriality principle) and to regulate the behaviour of its citizens (both individuals and firms) abroad (so called nationality principle). The territoriality principle has been extended so as to include a state's power to regulate both acts originating within its territory (so called subjective territoriality) and acts originating abroad, but which are completed, at least in part, within the state's territory (so called objective territoriality).[381] It is controversial whether it is legitimate to apply the objective territoriality principle merely to "effects" of an agreement entered into or an anti-competitive act committed in another state.[382]

The discussion below looks at the extraterritoriality issues in more detail. First the problems experienced by large economies have been identified, followed by the discussion on the special challenges experienced by small economies.

3.3.2. Effects doctrine

According to effects doctrine a state may assert jurisdiction simply on the basis that foreign firms produce commercial effects in its territory, even though they are not present there and have not committed any act there.

The US courts have rather long history of applying effects doctrine to anti-competitive acts of foreign firms. The doctrine was initially laid out in *Alcoa* case in 1945 by the famous judge Learned Hand who argued that "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders which has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize".[383] Since this test was developed, the US Supreme Court has approved it, and consistently grants jurisdiction in cases where qualifying effect on US commerce is found.[384]

Some refinements to this approach have been made by the US courts and authorities over time limiting the jurisdiction over foreigners' actions to such

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[378] Whish, pp. 428–429.
[379] Brownlie, p. 310.
[380] *Ibid.*, p. 313.
[381] Broberg 2006, p. 229.
[382] Whish, p. 429.
[383] Judgment of United States Circuit Court of Appeals, 2nd Circuit of 1945, *United States v. Aluminium Co. of America*, 148, F.2d, section 416.
[384] Hovenkamp, p. 752.

conduct which could be seen to have a direct, substantial and foreseeable effect on US commerce.[385] Furthermore, some US courts have required in applying the effects doctrine that the interests of the US in asserting jurisdiction and of other states which might be offended by such assertion should be weighed against one another.[386] This so called "jurisdictional rule of reason" which supports comity between states has been further set out in FTC's Enforcement Guidelines for International Operations.[387] The guidelines state that the authorities will not bring an action unless they have weighed up the enforcement against comity issues and decided that the former outweigh the latter. The guidelines also set out various factors to be considered within such comity analysis.

Other states have reacted unfavourably to the US claims of extraterritorial jurisdiction based on the effects doctrine. In particular, problems have arisen where the US has wished to take enforcement action on this basis. Without going into too much detail, there have been several cases where the UK authorities have denied taking enforcement actions with respect to the orders issued by the US authorities. Moreover, the UK passed the Protection of Trading Interests Act 1980 directed largely towards blocking the enforcement of the US antitrust laws. Other states have also passed such blocking statutes.[388] Hence, the effects doctrine has not been universally recognized.

3.3.3. EU approach to extraterritoriality

In the EU, effects doctrine has never been recognized to the extent that it is recognized in the US. Deciding over extraterritoriality issues could be avoided by using single economic entity theory,[389] which allows claiming jurisdiction over foreign parent company where it has a subsidiary in EU by virtue of treating firms belonging to a group as a single economic entity. This theory has been recognized and applied by most EU Member States.

However, the single economic entity theory is not sufficient to cover all cases in which a state may wish to assume jurisdiction over foreign firms. For instance, where a Japanese firm mergers with a US firm, both exporting large quantities into, but having no subsidiaries in the EU, the merger may have significant effect on the market in EU, but it is hard to assert any conduct there. Moreover, where the subsidiary in the EU is being wound down or has

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385 Goyder, Daniel G.: "EC Competition Law", 4th edition, Oxford University Press, 2003, p. 498.

386 Shaw, p. 485.

387 US Department of Justice and Federal Trade Commission: "Antitrust Enforcement Guidelines for International Operations", April 1995. Available online: http://www.usdoj.gov/atr/public/guidelines/internat.htm (last visited 15.05.2009).

388 Jones & Sufrin, pp. 1362–1363; Whish, pp. 430.

389 The single economic unit concept was initially laid out in the judgment of ECJ of 14.07.1972, Case 48/69 – *ICI v. Commission (Dyestuffs)*, [1972], ECR 619.

insufficient assets to satisfy a judgment against it, taking enforcement actions against its foreign parent company could be problematic.

The European Commission and courts decided on extraterritoriality issues in *Wood Pulp* case which concerned price-fixing agreement between several firms acting in non-EC countries. The Commission fined the firms on the ground that the effects of the concerted practice were felt within the Community. The ECJ did not confirm the effects doctrine, but held that the decisive factor was that the agreement had been implemented within the Community.[390] This implementation criterion could be regarded as an elegant way of avoiding taking a position on the controversial effects doctrine, as it appears in compliance with the universally recognized territoriality principle.[391] The implementation criterion is likely to cover most situations where purely foreign firms engage in anti-competitive conduct that affect competition in the EU, but it is much more problematic to argue that mergers between foreign firms could produce such effects. Therefore, the implementation criterion is not suited for asserting jurisdiction for foreign mergers.[392]

With respect to merger control, the scope of the EU prescriptive jurisdiction appears to have been expressed in Article 1 of the ECMR which defines the Community dimension in terms of sales within the EU. Article 5(1) further specifies that Community turnover consists of "products sold or services provided to undertakings or consumers in the Community or in a Member State". As such, no distinction is made between sales made directly, or through a branch, agent, subsidiary or a distributor. Defining business activity in this manner avoids any admission that what is really going on is the extraterritorial application of EU law to foreign firms.[393] In fact, as noted above, the Community dimension thresholds catch also countless numbers of transactions involving firms located outside the EU with only few assets inside it, and transactions which have minimal impact inside the EU.[394] Claiming so broad jurisdiction has not caused many problems so far, because in most cases such mergers are clearly not incompatible with the common market under Article 2 of the ECRM and are cleared by the European Commission within a month. However, non-EU firms could in principle object to the EU's jurisdiction.[395]

The limits of the EU's jurisdiction to scrutinize foreign mergers under the ECMR were questioned before the CFI in the *Gencor* case. The Commission had prohibited a merger between the South African firms, alleging that the merger would have lead to the creation of a dominant duopoly in the platinum and rhodium markets as a result of which competition would have been

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[390] Judgment of ECJ of 27.09.988, Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85 – *A. Ahlström Osakeyhtiö and others v Commission (Wood Pulp)* [1988] ECR 5193, sections 16–17.

[391] Broberg 2006, p. 231; Whish, pp. 436–437.

[392] Broberg 2006, p. 232.

[393] Goyder, p. 503.

[394] Broberg 2006, pp. 230–245; Jones & Sufrin, p. 1378; Whish p. 439.

[395] Broberg 2006, p. 240; Jones & Sufrin, p. 1378.

significantly impeded in the common market.[396] Gencor appealed to the CFI, *inter alia*, on the ground that the Commission did not have jurisdiction to prohibit the activities in South Africa, which the government there had approved. The CFI rejected Gencor's argument on two different bases – implementation criterion and the compatibility with public international law. With respect to the former, the CFI found that the implementation criterion was satisfied by mere sale within the Community.[397] With respect to the latter, the CFI ruled that the application of the ECMR was "justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community".[398] In the court's view these criteria were satisfied. Nevertheless, the court went on to consider whether the exercise of jurisdiction in this case violated the principles of non-inference and proportionality.[399] Hence, the court acknowledged that comity analysis should be undertaken when applying the ECMR.[400] In court's view neither of these principles were violated either.

It is arguable whether the court actually adopted an effects doctrine as a matter of EU law in this case.[401] Nevertheless, the case is of considerable significance as it demonstrates yet another move towards broadening the limits of EU jurisdiction. It should be noted, however, that the Commission could have great problems in enforcing the prohibition against non-EU firms which are unwilling to cooperate and which are protected by their national governments.[402]

3.3.4. Position of small economies

In the light of the above, it is apparent that recognition of state's extraterritorial jurisdiction, in particular its enforcement jurisdiction, depends, after all, on the good will of the firms concerned by the state's enforcement actions and of their

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396 Commission Decision of 24.04.1996, Case No. IV/M.619 – *Gencor/Lonrho*.

397 Judgment of CFI of 25.03.1999, Case T-102/9 – *Gencor v Commission* [1999] ECR II-753, section 87 (see also comment by Ezrachi, Ariel: "EC Competition Law. An Analytical Guide to the Leading Cases", Hart Publishing, Oxford, Portland, Oregon, 2008, p. 276).

398 *Ibid*, section 90.

399 *Ibid*, section 102.

400 Whish, p. 440.

401 According to Whish, the court did not adopt effects doctrine, since it determined its prescriptive jurisdiction on the basis of the turnover thresholds defined in the ECMR and equated them to the implementation doctrine of the *Wood Pulp* case; rather the CFI considered the effects of the merger, and the possible comity objections to jurisdiction, as a matter of public international law (see Whish, p. 440). At the same time, Broberg is of the view that the judgment implies the adoption of the effects doctrine by the CFI (see Broberg 2006, p. 236).

402 Whish, p. 440.

home state's willingness to recognize the enforcement action of the other state. Therefore, a state may in principle require the notification of whichever foreign merger, or prohibit the same, and take enforcement actions, such as the seizure of any assets of the foreign firms in its own territory, but its orders will remain numb abroad, where no mechanism for the enforcement can be taken. Hindrance of the activities of foreign firms disregarding the merger prohibition or failing to comply with the notification requirements is unlikely to provide satisfactory outcome for small economies.

The main problem is that small economies can rarely make a credible threat to prohibit a merger of foreign firms. Given that trade in the small economy is usually only a small part of the foreign firm's total world operation, if the small jurisdiction is to place significant restrictions on the merger, the foreign firm would most likely choose to exit the small economy and trade only in other jurisdictions. That is, the foreign firm would exit the small economy if its loss of revenues from terminating its trade there is smaller than the increase of revenues it anticipates as a result of the proposed merger elsewhere. Also, the negative welfare effects of the foreign firm's exit from the small economy may well be greater than the welfare effects from the continued operation of the merged entity within its borders. Accordingly, a small economy usually does not have an incentive to prevent the firm from trading within its borders if it did merge. The foreign firms, acknowledging this, are unlikely to take into account in its merging decision the effect of that decision on the small economy. They rather consider only the effect of the merger on their own profits in such market.[403]

Of course, where a large merger has significant anti-competitive effects in various countries, including for instance the neighbouring larger countries, it is likely to be prohibited by other countries' authorities, and the merger will not take place in the small economy either. In this sense, small economies can rely to the merger control of larger economies to certain extent. However, this can only provide partial solution, because the larger economies focus on the effects of the merger to their markets, and the effects of the merger to the small economies may be adversely different. Moreover, the enforcement focuses of various jurisdictions may differ. For instance, merger control regimes could pursue various, somewhat differing, goals; and efficiency or industrial policy considerations could be taken into account to differing extent. Furthermore, where the merger control of a larger neighbour favours "national champions" and permits an otherwise anti-competitive merger on this basis, there is little gain for the small economy which would suffer from the anti-competitive effects of such merger to its markets.

Hence, different states claiming jurisdiction over a merger may have different or even competing goals. Where a larger jurisdiction hosting the merging firms clears a merger, which should be prohibited from small economy's perspective, there is little left for the small economy to regulate.

[403] Gal 2003, pp. 242–243.

Depending on the circumstances of the case, local remedies could perhaps be applied to alleviate the situation, but claiming for assistance of the larger economy, which has cleared the merger, in enforcing the small jurisdiction's prohibition would not be likely to give any results. The situation could also be the opposite, *i.e.*, a merger could be prohibited by large jurisdiction, but cleared in a small jurisdiction. In such case, the small economy's clearance would either be stay unused by the merging parties, if the decide to freeze the merger after large jurisdiction's prohibition, and the pre-merger situation would remain; or the merging parties could decide to implement the merger only in limited scope relating to the activities in the small economy.

There have been voices among practitioners, that small economies could be "over paranoid" about their inability to enforce their merger regimes. Large firms are generally not prepared to run the reputational risk, if nothing else, of being found to have breached a regulatory requirement. Therefore, companies follow the notification requirements of various competition regimes, be they small or large states, equally.[404] The author's experience generally confirms the same. However, while complying with the notification requirements does not appear to pose significant problems, in particular where the merger is unlikely to cause competition problems, the situation could prove different in truly problematic cases.

The following section will therefore analyze the ways that can be used to overcome enforcement problems, first by looking at the issues from the large-scale international perspective, followed by the discussion of the same issues within the EU system.

3.4. Means to enhance extraterritorial enforcement of merger control rules

3.4.1. International cooperation and comity

Faced with the globalization of the economy and with the problems of the application and enforcement of merger control rules as depicted above, international cooperation is gaining increased attention. In pursuance of this aim, currently mainly bilateral agreements are in place between major trading partners, but there has also been some activity at the level of international organizations.[405]

In 1991, the EC and the US entered into an agreement in relation to the application of their competition laws.[406] The agreement provides for the

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[404] Speech by James Webber, at Competition Law Forum: "Small Economies and Competition Policy – A Fair Deal?", in Luxembourg, October 2007.

[405] Jones & Sufrin, pp. 1387–1388.

[406] Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws, O.J. L 95, 27.04.1995 pp. 47–52.

reciprocal notification of cases under investigation (Article II); exchange of information on general matters relating to the implementation of the competition rules (Article III); cooperation and coordination of the actions by the authorities (Article IV). Most importantly, the agreement also envisages the "traditional comity" procedure by virtue of which each party is to take into account the important interests of the other party when enforcing its competition rules (Article VI); and the "positive comity" procedure by virtue of which one party may request the other to take enforcement action (Article V). The positive comity provisions were further elaborated in 1998, when the EC and the US signed the Positive Comity Agreement.[407] The agreement clarifies both the mechanics of the positive comity cooperation instrument,[408] and the circumstances in which it can be made use of. However, the agreement expressly excludes merger control rules from its sphere of application (Article II(4)).

Since 1991, many bilateral antitrust co-operation agreements have been concluded between various states across the globe. Such agreements mostly adopt similar formats, with roughly the same length and are also analogous in terms of content.[409]

Even though it is generally considered that the cooperation agreements have worked well,[410] these have still not been sufficient to prevent some sharp controversies between jurisdictions. The best known examples of such controversies are two mergers of US firms – *Boeing/McDonnell Douglas*[411] and *General Electric/Honeywell*[412]. Both cases were approved by the US authorities. The former was cleared by the European Commission only at the "last minute" after heavy discussions with the US government and acceptance of commitments by the merging firms; the latter was prohibited by the European Commission. Following that, in 2002, a set of non-binding best practices on cooperation in merger investigations was agreed between the EU and the US

[407] Agreement between the Government of the United States of America and the European Communities on the application of positive comity principles in the enforcement of their competition laws, O.J. L 173, 18.06.1998, pp. 28–31.

[408] Article III, entitled "Positive comity", provides the following: "The competition authorities of a Requesting Party may request the competition authorities of a Requested Party to investigate and, if warranted, to remedy anticompetitive activities in accordance with the Requested Party's competition laws. Such a request may be made regardless of whether the activities also violate the Requesting Party's competition laws, and regardless of whether the competition authorities of the Requesting Party have commenced or contemplate taking enforcement activities under their own competition laws."

[409] Galloway, Jonathan: "Moving Towards a Template for Bilateral Antitrust Agreements", in World Competition, Vol. 28, Issue 4, 2005, pp. 589–614.

[410] Jones & Sufrin, p. 1391.

[411] Commission Decision of 30.07.1997, Case No. IV/M.877 – *Boeing/McDonnell Douglas*.

[412] Commission Decision of 03.07.2001, Case No. COMP/M.2220 – *General Electric/Honeywell*.

antitrust authorities.[413] The best practices set an advisory framework for inter-agency cooperation for mergers which require approval on both by the EU and the US, yet even under this framework controversies cannot be excluded.

Bi- and multilateral agreements adopt positive comity principles targeted tackle a common evil when there is a pre-existing disposition to cooperate and to overcome the problem of non-enforcement or discriminatory enforcement by foreign jurisdictions. While these agreements may amount to legally binding instruments under international law, these are nevertheless constrained by agreed parameters, notably to the extent consistent with the parties' national laws and regulations.[414] Hence, comity principles have limited effect when the merger policy principles adopted by the cooperating jurisdictions differ from one another[415] (as is demonstrated by the *General Electric/Honeywell* case) or where merger control principles do not take into account the effects of the proposed merger on foreign jurisdictions. Positive comity thus does not reduce the concerns with regard to all extraterritorial mergers. This is especially the case for small economies respect to the extraterritorial mergers with negative effect on their territories, because, as noted above, small economies lack bargaining power *vis-à-vis* large foreign firms.[416]

In addition to bilateral cooperation agreements, there have been initiatives within various international platforms aimed at formulating mechanisms for increasing cooperation in the field of competition law. For instance, the United Nations Conference for Trade and Development (UNCTAD) adopted the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices in 1980[417] and the Organisation for Economic Cooperation and Development (OECD) adopted Recommendations and Best Practices in 1965 (revised in 1995)[418]. Both these sets of rules are only voluntary and non-binding. Furthermore, there were attempts to establish an international competition law regime within the World Trade Organisation (WTO). However, after years of unsuccessful negotiations, the General Council of the WTO abandoned these attempts in 2004.[419] In 2001, various competition

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413 US-EU Merger Working Group: "Best practices on cooperation in merger investigations". Available online: http://ec.europa.eu/competition/mergers/legislation/eu_us.pdf (last visited 15.05.2009).

414 Galloway, p. 610.

415 Andenas, Mads; Papadopoulos, Anestis: "Antitrust Law and International Companies"; in European Business Law Review, Vol. 12, Issue 3, 2002, p. 201.

416 Gal 2003, p. 244.

417 UNCTAD: "Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices", TD/RBP/CONF 10/Rev. 2. Available online: http://www.unctad.org/en/docs/tdrbpconf10r2.en.pdf (last visited 15.05.2009).

418 OECD: "Revised recommendation of the Council Concerning Cooperation between Member countries on Anticompetitive Practices affecting International Trade", C(95) 135 /FINAL. Available online: http://www.oecd.org/dataoecd/60/42/21570317.pdf (last visited 15.05.2009).

419 See more on WTO web page:

authorities from across the globe established the International Competition Network (ICN), which "provides competition authorities with a specialized yet informal venue for maintaining regular contacts and addressing practical competition concerns", which "allows for a dynamic dialogue that serves to build consensus and convergence towards sound competition policy principles across the global antitrust community".[420] As such, the ICN is a good forum to work towards soft law harmonisation; however, it does not amount enforcement cooperation in specific cases.[421] Hence, at this stage the multilateral platforms do not provide solution to small economies' merger control enforcement problems.

3.4.2. Enforcement within the EU

3.4.2.1. Enforcement by the European Commission

The ECMR provides to the European Commission a rather extensive tool kit for enforcing merger control rules. It may declare a merger "incompatible with the common market" (or, put in simpler language, prohibit a merger) under Article 8(3). It may also attach to its decision conditions and obligations intended to ensure that the firms concerned comply with the commitments they have entered into *vis-à-vis* the Commission with a view to obtaining clearance from the Commission under Articles 6(2) and 8(2).

Furthermore, where the Commission finds that a merger has already been implemented and such merger is prohibited, or has been implemented in contravention of a condition attached to a clearance decision, it may, under Article 8(4), order the merger to be dissolved, so as to restore the situation prevailing prior to its implementation. In circumstances where restoration of the situation prevailing before the implementation is not possible through dissolution, the Commission may take any other measure appropriate to achieve such restoration as far as possible.

In addition, Articles 14 and 15 of the ECMR lay down two types of administrative sanctions of economic nature which the European Commission may impose on firms in case of various merger control related infringements.[422] Firstly, Article 14 sanctions infringements that have already taken place, such as failure to notify, early implementation, implementation of a transaction prohibited by the Commission, failure to comply with obligations and conditions

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http://www.wto.org/english/tratop_e/comp_e/comp_e.htm (last visited 15.05.2009).

[420] ICN web page: http://www.internationalcompetitionnetwork.org/index.php/en/about-icn (last visited 15.05. 2009).

[421] For more detailed discussion on the search for international competition law see *e.g.,* Wilson 2003 or Taylor 2006.

[422] Ortiz Blanco, Luis, *et al.*: "European Community Competition Procedure", 2nd edition, Oxford University Press, 2006, p. 695.

imposed by the Commission, and obstructing the investigation of the Commission. In such cases, the Commission may impose a fine of up to 10% of the total turnover of the firms concerned.[423]

Secondly, Article 15 entitles the Commission to impose periodic penalty payments aimed at forcing firms to comply with obligations such as responding to requests of information, agreeing to and cooperating with an inspection, and complying with the obligations imposed by the Commission (*e.g.*, with a dissolution order imposed under 8(4)). The amount of the periodic penalty may be up to 5% of the average daily aggregate turnover of the firms concerned for each working day of non-compliance.

The enforcement of the Commission decisions imposing pecuniary sanctions is envisaged and secured by the Article 256 of the EC Treaty, which provides the following:

> "Decisions of the Council or of the Commission which impose a pecuniary obligation on persons other than States, shall be enforceable.
> Enforcement shall be governed by the rules of civil procedure in force in the State in the territory of which it is carried out. The order for its enforcement shall be appended to the decision, without other formality than verification of the authenticity of the decision, by the national authority which the government of each Member State shall designate for this purpose and shall make known to the Commission and to the Court of Justice.
> When these formalities have been completed on application by the party concerned, the latter may proceed to enforcement in accordance with the national law, by bringing the matter directly before the competent authority.
> Enforcement may be suspended only by a decision of the Court of Justice. However, the courts of the country concerned shall have jurisdiction over complaints that enforcement is being carried out in an irregular manner."

Hence, the Commission's decisions imposing pecuniary sanctions are to be enforced in the same way as national judgments in the Member State where the Commission seeks enforcement. Therefore, the enforcement of the Commission's decisions imposing sanctions is relatively straightforward and does not require any further recognition or other procedures.

There is no mechanism to directly enforce a dissolution order imposed under Article 8(4) through the Member States' procedure rules, but the severity of the periodic penalty payment together with efficient enforcement opportunities should be sufficient to induce firms to obey the order.

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[423] Article 14 refers to Article 5, which in conjunction with Article 3(1) with defines the firms "concerned" as the parties who merge, or acquirers in their totality (i.e., the entire group of firms where relevant) and the target (be it a group of firms, a single separate firm or a part of a firm). See also Ortiz Blanco, Luis, *et al.*, p. 696.

3.4.2.2. Enforcement by the Member States

Various steps have been taken to facilitate the enforcement of court decisions both in civil and criminal matters within the EU and beyond.

With respect to recognition and enforcement of judgments in civil and commercial matters, so called Brussels Regulation is in force and applicable within the EU.[424] The regulation provides for an automatic enforcement in one Member State of a judgment given in another Member State without special proceedings being necessary unless recognition is actually contested.[425] However, the regulation does not cover administrative or criminal matters, and hence does not provide solutions with respect to the enforcement of merger control rules.

The Council of European Union has adopted a number of framework decisions aimed at fostering cooperation between Member States and facilitating enforcement in criminal matters. These concern European arrest warrants,[426] orders freezing property or evidence,[427] financial penalties,[428] confiscation orders[429] and confiscation of crime-related proceeds, instrumentalities and property,[430] and exchange of information and intelligence[431]. These decisions require Member States to introduce in their national legal orders the system whereby a judicial authority of one Member State (the issuing judicial

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[424] Council Regulation (EC) No. 44/2001 of 22.12.2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. L 12, 16.01.2001, pp. 1–23

[425] By the Council Decision 2007/712/EC of 15.10.2007 on the signing, on behalf of the Community, of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. L 339, 21.12.2007, pp. 1–2 (known as the Lugano Convention), the same level of circulation of judgments between the EU Member States and Switzerland, Norway and Iceland was achieved.

[426] Council Framework Decision 2002/584/JHA of 13.06.2002 on the European arrest warrant and the surrender procedures between Member States, O.J. L 190, 18.07.2002, pp. 1–18.

[427] Council Framework Decision 2003/577/JHA of 22.07.2003 on the execution in the European Union of orders freezing property or evidence, O.J. L 196, 02.08.2003, pp. 45–55.

[428] Council Framework Decision 2005/214/JHA of 24.02.2005 on the application of the principle of mutual recognition to financial penalties, O.J. L 76, 22.03.2005, pp. 16–30.

[429] Council Framework Decision 2006/783/JHA of 06.10.2006 on the application of the principle of mutual recognition to confiscation orders, O.J. L 328, 24.11.2006, pp. 59–78.

[430] Council Framework Decision 2005/212/JHA of 24.02.2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, O.J. L 68, 15.3.2005, pp. 49–51.

[431] Council Framework Decision 2006/960/JHA of 18.12.2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union, O.J. L 386, 29.12.2006, pp. 89–100.

authority) can require the execution of its order by a judicial authority of another Member State (the executing judicial authority) with minimum formalities. In most cases "double criminality rule" applies, which means that for criminal acts other than certain acts listed in the framework decision (*e.g.,* terrorism, murders, corruption, etc.), the enforcement in the executing state may be subject to the condition that the act for which enforcement is requested constitutes an offence under the law of executing Member State. Furthermore, in most cases the framework decisions concern only criminal offences and judicial procedures, as opposed to administrative or quasi-criminal violations and non-judicial procedures.

In most jurisdictions, merger control related infringements constitute administrative or quasi-criminal violations, but usually not criminal offences. The framework decisions concerning mutual recognition of financial penalties provides for the mutual recognition of financial penalties imposed by both the judicial and administrative authorities of another Member State. However, the "double criminality rule" applies, which is for the executing state may make the recognition and execution of a decision of an issuing state subject to the condition that the decision is related to conduct which would constitute an offence under the law of the executing state, if the offence is not covered by the framework decision. Article 5(1) of the framework decision covers "offences established by the issuing State and serving the purpose of implementing obligations arising from instruments adopted under the EC Treaty or under Title VI of the EU Treaty". This would enable an issuing state to require the recognition and enforcement of financial penalties imposed on firms for competition law violations infringing Articles 81 and 82 of the EC Treaty, even if such violations do not constitute qualifying offences in the executing state. However, since the EC Treaty or any instruments adopted under it do not require Member States to establish national control regime, infringements of national merger control rules are not covered by the framework decisions.

Therefore, the framework decisions do not appear to provide simple solutions to enforcement problems in merger control cases. Hence, where a Member State is seriously concerned with the effects of a merger in its territory and finds it difficult to be enforced against firms of another EU Member State, the enforcement could be effectively ensured if such merger is controlled by the European Commission, whose decision can be enforced by virtue of Article 256 of the EC Treaty. The division of jurisdiction between the Commission and national authorities and referral possibilities are therefore considered below.

3.4.3. Division of jurisdiction between the Commission and national authorities

3.4.3.1. The division of jurisdiction and referral mechanisms under the ECMR

As noted above, Article 21 of the ECMR establishes the "one-stop-shop" principle according to which mergers with a "Community dimension", *i.e.,* those above the turnover thresholds set out in Article 1 of the ECMR, fall within the exclusive jurisdiction of the Commission, whereas Member States are precluded from applying national merger control rules to such mergers. Determining jurisdiction exclusively by reference to fixed turnover-related criteria in this context serves first and foremost the aim of providing legal certainty for merging firms.[432]

The general division of jurisdiction between the Commission and national competition authorities is an expression of the subsidiarity principle, which in primary law is embodied in Article 5 of the EC Treaty.[433] According to the subsidiarity principle, the Community is allowed to be active in areas which do not fall in within its exclusive competence only if and in so far as the objective of the measures being considered cannot be sufficiently achieved at the level of the Member States, but due to their scope or their effects, they can be better realized at the Community level. In accordance with subsidiarity principle, the Commission's competence is presumed when the turnover figured set out in Article 1 of the ECMR are exceeded. The high level of the thresholds is meant to imply that the intended transaction will have an effect in several Member States and therefore can be most appropriately assessed in a uniform way by the Commission.[434] This presumption is not rigid, as the possibility of re-attributing jurisdiction by using referral mechanisms provides some flexibility in this respect.

As demonstrated in Section 1.3, merger transactions of involving firms from small economies only rarely subject to control by the Commission. This does not mean, however, that the mergers between firms from small economies do not have effect in several (small) Member States. The Commission seems to have recognized this and therefore, while reforming the ECMR, adjusting of the Community dimension thresholds was debated.[435] While the thresholds for Community dimension remained unchanged, the referral mechanisms were

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[432] Commission Notice on Case Referral in respect of concentrations, O.J. C 56, 05.03.2005, pp. 2–23, section 3, (EC case referral notice).

[433] Furse, Mark: "The Law of Merger Control in the EC and the UK", Hart Publishing, Oxford, Portland, Oregon, 2007, pp. 51–52.

[434] Säcker, Franz J., *et al.*: "Competition Law: European Community Practice & Procedure", Sweet & Maxwell, London, 2007, pp. 2300–2301.

[435] Commission Green Paper on the Review of Council Regulation (EEC) No. 4064/89, section 29; EC case referral notice, section 4;
Díaz, Fransisco, E.G.: "The Reform of European Merger Control: *Quid Novi Sub Sole*?", in World Competition, Vol. 27, Issue 2, 2004, p. 178.

revised – pre-notification mechanisms were introduced and the existing post-notification referral conditions were loosened.[436]

As a result of the reforms the current ECMR contains four case referral mechanisms, in Articles 4(4), 4(5), 9 and 22. Table 6 summarized the distinctive features of mechanisms envisaged in each of the mentioned articles:

Table 7: Summary of referral mechanisms under the ECRM

ECMR Article:		**4(4)**	**4(5)**	**9**	**22**
Timing	Pre-notification	×	×		
	Post-notification			×	×
Referral applicant	Merging firms	×	×		
	Commission or Member State			×	×
Direction	From Commission to Member State	×		×	
	From Member State to Commission		×		×

Source: compiled by the author

Articles 4(4) and (5) allow merging firms to apply for a referral either of a merger which is subject to merger control by the Commission to one or several Member States' control (Article 4(4)) or of a merger which is merger subject to control by one or several Member States to the Commission's control (Article 4(5)). The application for such referral can be made prior to the notification of the transaction to the authority (or authorities) having the original jurisdiction. Thereafter, the authorities concerned may either approve or disapprove the referral. These referral mechanism appear to have been quite popular among merging firms – since entry into force of the mechanisms in 1 May 2004 until 30 April 2009, 46 Article 4(4) referral requests had been submitted, of which 44 had been approved; and 165 Article 4(5) referral requests had been submitted, of which 156 had been approved.[437]

Articles 9 and 22 provide for a post-notification referral which can be applied for either by the Commission or Member States, but not by merging firms. Under Article 9(2), the Commission may refer a merger to a Member States where is finds that the merger "affects significantly competition in a market within that Member State, which presents all the characteristics of a distinct market", or "affects competition in a market within that Member State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market". It is possible to refer the whole transaction or only part of it to Member State(s).[438] Member States may

[436] Berg, p. 683.
[437] European Merger Control, Council Regulation 139/2004 – Statistics (21.09.1990–30.04.2009). Available online: http://ec.europa.eu/competition/mergers/statistics.pdf (last visited 15.05.2009).
[438] ECMR, Article 9(3).

request the referral also on their own initiative. Having received the referral request from the Commissions, Member State(s) may either approve or reject the request.[439]

Under Article 22(1), one or more Member States may request the Commission to examine any merger that does not have a Community dimension within the meaning of Article 1 of the ECRM but "affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request". The request can be made a Member State alone or jointly, whereas after one Member State has made such request, any other Member State may join the initial request.[440] If the Commission accepts the request, the Member State(s) having made the request no longer apply their national legislation on the merger, whereas Member State(s) that have not joined with the request can continue controlling the merger under their national rules.[441]

The post-notification referral requests have been used less than pre-notification referrals. Prior to the reform of 2004, 58 Article 9 referral requests had been made and only seven Article 22 referral request had been made. From 2004 until November 2008, 24 Article 9 referral requests had been made and 14 Article 22 referral request had been made.[442] It is possible to notice the increase in the number of Article 22 referrals per year. The low number of Article 22 referrals prior to the reform is likely at least partially due to the more stringent conditions that needed to be met before a case could be referred under the old ECMR,[443] which constituted a significant impediment to the referral of competences.[444]

In the author's view, Article 22 referral mechanism in its reformed form could provide some solution to small EU Member States where the competition authority is concerned about its enforcement possibilities in case of a merger with significant anti-competitive effects. Therefore, the conditions of resorting to Article 22 referral are analyzed in more detail below.

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[439] ECMR, Article 9(6).

[440] ECMR, Article 22(2).

[441] ECMR, Article 22(3), EC case referral notice, section 50.

[442] European Merger Control, Council Regulation 139/2004 – Statistics (21.09.1990–30.04.2009).

[443] Under the old ECMR, Article 22(3), Member States had to demonstrate that the proposed merger would lead to the creation or strengthening of a dominant position to make a referral (see Council Regulation (EEC) No. 4064/89 of 21.12.1989 on the control of concentrations between undertakings, O.J. L 395, 30.12.1989, pp. 1–12).

[444] Díaz, p. 181; Säcker, *et al*., p. 2449.

3.4.3.2. Opportunities under Article 22 of the ECMR

The Commission has indicated two categories of cases which it considers most appropriate for referral to the Commission pursuant to Article 22:

- cases which give rise to serious competition concerns in one or more markets which are wider than national in geographic scope, or where some of the potentially affected markets are wider than national, and where the main economic impact of the merger is connected to such markets,
- cases which give rise to serious competition concerns in a series of national or narrower than national markets located in a number of Member States, in circumstances where coherent treatment of the case (regarding possible remedies, but also, in appropriate cases, the investigative efforts as such) is considered desirable, and where the main economic impact of the merger is connected to such markets.[445]

In such cases the Commission's powers of investigation and remedial and enforcement action are more appropriate than the more limited means available to the Member States. In such occasions, Commission's competence would be in line with the subsidiarity principle as it represents the most effective means of avoiding the creation of obstacles to further European integration.[446]

In practical terms, in order to establish whether a case is suitable for a referral to the commission, the following range of aspects should be borne in mind. Firstly, the transaction under consideration must qualify as a "concentration" within the meaning of Article 3 of the ECMR and it should not have a Community dimension.[447] Hence, the minority acquisitions falling short of control do not qualify. At the same time, it is not a requirement that the merger must be subject to control under the national merger control thresholds, as long as other conditions of Article 22 are satisfied.[448] Moreover, a Member State may apply for a referral even in circumstances where the merger, though not cleared under national law, has been lawfully implemented, because the merger did not meet the national notification thresholds, but nevertheless has significant effect on trade between Member States.[449]

Secondly, the merger should affect trade between Member States.[450] According to the standard test developed by the European Courts, the notion "may affect" implies that it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the matter may have an influence, direct or indirect, actual or potential, on the

[445] EC case referral notice, section 45.

[446] Commission Green Paper on the Review of Council Regulation (EEC) No. 4064/89, sections 17–19.

[447] ECMR, Article 22(1).

[448] Säcker, *et al.*, pp. 2452–2453.

[449] *Ibid.*, pp. 2457–2458.

[450] ECMR, Article 22(1).

pattern of trade between Member States.[451] Even though such court practice is developed with respect to application of Articles 81 and 82 of the EC Treaty, it can be applicable to the interpretation of the referral conditions of Article 22 of the ECMR by way of analogy.[452]

Thirdly, the merger should threaten to significantly affect competition within the territory of the Member State(s) making the request.[453] The referring Member State(s) should in essence demonstrate that, based on a preliminary analysis, there is a real risk that the transaction may have a significant adverse impact on competition, and thus that it deserves close scrutiny.[454] After preliminary assessment, the existence of a risk that competition will be negatively affected will be considered sufficient to satisfy this criterion.[455]

Fourthly, the referral request must be made within 15 working days of the date on which the merger was notified, or if no notification is required, otherwise made known to the Member State concerned.[456] While, it is not difficult to determine the date of notification, there is no clear definition as to what constitutes "making known".[457] In practice thus far, direct communication merging firm and national government,[458] as well as press releases issued by merging firms[459] have been considered as "making known".

Finally, the Commission has indicated that it will also balance various interests – as the referral may entail additional cost and time delay for the merging firms, the referrals should normally be limited to those cases which appear to present a real risk of negative effects on competition and trade between Member States, and where it appears that these would be best addressed at the Community level.[460]

Thus far, the Commission has only rarely rejected Article 22 referral requests. In the case of the proposed takeover of Endesa by Gas Natural (both Spanish companies), the Community threshold was not met due to the 2/3-rule (both the merging firms accrued more 2/3 of their turnover from Spain). The merger was subject to control in Spain, Portugal and Italy. The Portuguese and

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451 Commission Notice: Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, O.J. C 101, 27.04.2004 pp. 81–96, section 23.

452 EC case referral notice, section 43, note 35.

453 ECMR, Article 22(1).

454 EC case referral notice, section 44.

455 Säcker, *et al.*, p. 2459; Soames, Trevor; Maudhuit, Sylvie: "Changes in EU Merger Control: Part 1", in European Competition Law Review, Vol. 26, Issue 1, January 2005, p. 63.

456 ECMR, Article 22(1)

457 Säcker, *et al.*, p. 2453.

458 Commission Decision of 17.02.1993, Case No. IV/M.278 – *British Airways/Dan Air*, section 8.

459 Commission Decision of 20.09.1995, Case No. IV/M.553 – *RTL/Veronica/ Endemol*, section 1;
Commission Decision of 20.11.1996, Case No. IV/M.784 – *Kesko/Tuko*, section 1.

460 EC case referral notice, section 45.

Italian competition authorities requested the Commission to take jurisdiction over the case, but the Spanish authorities did not join with the referral request. In this case the Commission decided that it was not better placed than the Portuguese and Italian competition authorities to examine the effects of the transaction without providing much further reasoning.[461] At same time, numerous Article 22 referrals have lead to rather heavy scrutiny of by the Commission. For instance, in *Kesko/Tuko* case, an already consummated merger consummated between two Finnish firms operating mainly in the daily consumer goods sector, Finnish competition authorities referred the transaction to the Commission at the time when no merger control was in place in Finland. The Commission found that as a result of the transaction Kesko would acquire a dominant position on the Finnish markets for retail of daily consumer goods and cash & carry sales of daily consumer goods, which would significantly impede effective competition on these markets. The Commission also found that the operation would affect inter-state trade through its influence on the importation of daily consumer goods into Finland and the creation of barriers to entry for potential competitors from other Member States. Therefore, the Commission declared the merger incompatible with the common market and required its dissolution.[462]

In the author's view, the Article 22 referral conditions are in principle not overly burdensome for Member States seeking for a referral, provided that the Commission is in fact willing to take jurisdiction in practice (unlike as was the case in *Gas Natural/Endesa*). Proving cross-border effects should not pose many hurdles where the merger involves foreign firms, but has significant effects in the small economy. Showing such effects may be more problematic, where the merger involves domestic firms, but in such occasion the enforcement is not problematic, at least due to extraterritoriality problems and no referral is necessary. Hence, for mergers having effects within the EU, small economies' enforcement problems can be somewhat mitigated by Article 22 of the ECMR. Of course, this is not likely to solve problems for small economies outside the EU.

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461 EU Press release of 27.10.2005, No. IP/05/1356, "Mergers: Commission declines Portuguese and Italian requests to consider effects of proposed Gas Natural/Endesa merger on their markets". Available online: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/05/1356&format=HTML&aged=1&language=EN&guiLanguage=en (last visited 15.05.2009).

462 Commission Decision of 20.11.1996, Case No. IV/M.784 – *Kesko/Tuko*. Similarly, the Commission found that the acquisition by Blokker, a major retail operator in the Netherlands, of the Dutch operations of Toys "R" Us, one of the world's biggest toy retailers, strengthened a dominant position on the market for specialized toy retail outlets in the Netherlands, as a result of which effective competition is significantly impeded, and declared the transaction incompatible imposing divestiture orders to the merging firms (see Commission Decision of 26.06.1997, Case No. IV/M.890 – *Blokker/Toys "R" Us*). In addition, a number Article 22 referral cases have been authorized by the Commission only subject to commitments.

CHAPTER 4
REMEDIES IN THE CASE OF ANTI-COMPETITIVE MERGERS

4.1. General remarks on merger remedies

Whenever a merger would have serious anti-competitive effects, it is usually deemed illegal in all jurisdictions where merger control is in force. Depending on the procedural arrangements (either pre-merger notification system or post-merger assessment) the competition authority investigating such a merger is to prohibit the merger or declare its illegality in order to avoid harm to competition.[463]

Alternatively, most jurisdictions allow modifications to be made in the merger in order to remove or at least mitigate the competition concerns raised by the merger. Such modifications constitute commitments by the merging parties to obey certain obligations or achieve certain outcomes, *e.g.,* to divest some assets or businesses, or to act in a specified manner.[464] The competition authority's approval of the merger could be made conditional on the compliance with such obligations or a fine could be determined for the case of non-compliance.[465]

The aim of commitment remedies is to avoid prohibiting the merger transaction as a whole while at the same time remedying the loss of free competition and to diminishing the potential harm to competition. As it is in the interests of the merging parties to avoid prohibition of their contemplated merger, it is usually up to them to propose adequate modifications. Depending on the procedural rules, such modifications can be made as amendments to the merger notification submitted by the merging parties, as additional proposals by the merging parties, or as a result of negotiations between the merging parties and the competition authority.[466] For instance, under the structure of the ECMR, it is the responsibility of the Commission to show that a merger would significantly impede competition. The Commission communicates its competition concerns to the merging firms to allow them to formulate appropriate and corresponding remedies proposals. It is then for the merging firms to put forward commitments; the Commission itself is not in a position to impose unilaterally any conditions to a clearance decision, but only on the basis of the firms'

[463] Author's conclusion on the basis of the data available in Global Merger Control Manual 2008 and Getting the Deal Through: Merger Control 2008.

[464] For a more detailed overview of commitment remedies, please refer to Section 4.2.

[465] Author's conclusion on the basis of the data available in Global Merger Control Manual 2008 and Getting the Deal Through: Merger Control 2008.

[466] Author's conclusion on the basis of the data available in The Global Merger Control Manual 2008 and Getting the Deal Through: Merger Control 2008.

commitments.[467] Similar principles are applied in Estonia and many other countries. In some jurisdictions, however, the competition authority enjoys rather wide discretion to impose the remedies it sees appropriate (for instance in Bulgaria).[468]

Where the enforcement of commitment remedies imposed in a merger authorization requires monitoring, independent trustees or experts are sometimes used in some jurisdictions to oversee the merging firms' compliance with the imposed obligations. The costs of hiring the trustees are normally born by the merging firms, as it is in their best interests, in order to avoid the prohibition the merger, to provide the competition authority enough assurance that the commitments would be complied with and to minimize the competition authority's monitoring cost.[469]

In EU, mergers have been subject to control since 1990. Since the entry info force of the first ECMR until 30 April 2009, the European Commission had been notified of 4090 mergers. Out of these cases, 20 mergers (0.5%) had been prohibited, whereas in 271 cases (6.6%) mergers had been cleared subject to commitment remedies. Furthermore, out of all the decisions taken under merger control, 188 decisions (4.6%) had been taken in Phase II proceedings, meaning that these cases were problematic and required thorough investigation. Out of all Phase II cases, 89 mergers (47%) had been cleared with commitment remedies.[470] In Estonia, 252 mergers had been notified to the ECA since October 2001, when full merger control was introduced, until 30 April 2009. Out of these cases, only one had been prohibited, whereas commitment remedies had been used in five cases (2%). Phase II had been initiated in 11 cases (4.4%) and out of these cases, commitment remedies had been used in four cases (36.4%). These figures show the crucial role of commitment remedies in solving competition problems in the course of merger control proceedings both in large and small economies.

There are different aspects that the competition authorities bear in mind when clearing a merger subject to commitment remedies. In the EU, Recital 30 of the ECMR requires remedies to be proportionate to the competition problem

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[467] Commission notice on remedies acceptable under Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004, O.J. C 267, 22.10.2008, pp. 1–27, section 6, (EC notice of remedies).

[468] Law on Protection of Competition of 08.05.1998, Article 28(3), cited through Gouginski, Nikolai: "Bulgaria – Merger Control", in Competition Cases from the European Union, edited by Kokkoris, Ioannis, Sweet & Maxwell, London, 2008, section 4–039.

[469] See *e.g.,* ICN Merger Working Group, Analytical Framework Subgroup: "Merger Remedies Review Project", report for the fourth ICN annual conference, Bonn, June 2005, section 4, pp. 14–15. Available online: http://www.internationalcompetitionnetwork.org/media/library/conference_4th_bonn_2005/Remedies_Study.pdf (last visited 15.05.2009).

[470] European Merger Control, Council Regulation 139/2004 – Statistics (21.09.1990–30.04.2009). Available online: http://ec.europa.eu/competition/mergers/statistics.pdf (last visited 15.05.2009).

and entirely eliminate it. The previous European Commissioner for Competition Policy Mario Monti has said that “[r]emedies must be clear-cut to entirely remove our competition concerns”.[471] Richard Parker and David Balto, the former directors of the FTC Bureau of Competition, have provided more elaborated list of aspects to be taken into consideration when choosing appropriate remedies:

(i) Remedies should effectively and fully preserve competition in order to ensure that consumers are able to benefit from the same degree of competition after a merger as before a merger;

(ii) Remedies should preserve competition with as much certainty as possible;

(iii) Remedies should still preserve the efficiency-enhancing potential of a merger, at least to the extent that is possible without compromising the competition authorities’ obligation to preserve competition. This is especially important criterion when choosing between more than one alternative remedies, which are equally likely to achieve their objective, but with different implications for preserving cognizable merger efficiencies.[472]

Such general considerations are relevant for small economies alike. However, due to the special attributes related to smallness, in particular, such as enforcement concerns, greater sensitivity to efficiency issues, and limited recourses, small economies may have to be more susceptible to using remedies that might not be considered sufficient in large economies. Below, various types of commitment remedies and the principles of choice thereof are discussed, followed by analysis of the specific considerations that small economies should take into account when shaping their policy towards commitment remedies.

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[471] Monti, Mario: “The Commission notice on merger remedies – one year after”, speech given at the conference “Guidelines for Remedies – Prospects and Principles”, organised by Ecole des Mines de Paris, Cerna and University of California at Berkeley, School of Law, Paris, January 17–18, 2002. Available online: http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/02/10&format=HTML&aged=0&language=EN&guiLanguage=en (last visited 15.05.2009), (Monti 2002). Other commenting on European merger remedies have pointed to similar aspects, see *e.g.*: Holmes, Simon; Turnbull, Sarah: “Remedies in Merger Cases: Recent Developments”, in European Competition Law Review, Vol. 23, Issue 10, October 2002, p. 500; Mederer, Wolfgang: “Remedies in Merger Cases”, speech given at the Fifth Annual Competition Conference, IBA, Fiesole, Florence, Italy, 21.09.2001, p. 2. Available online: http://ec.europa.eu/competition/speeches/text/sp2001_044_en.pdf (last visited 15.05.2009).

[472] Parker, Richard G.; Balto, David A.: “The Evolving Approach to Merger Remedies”, Antitrust Report, May 2004. Available also at: http://www.ftc.gov/speeches/other/remedies.htm (last visited 15.05.2009).

4.2. Types of commitment remedies

As apparent for above, there are a lot of relevant considerations that remedies must address. Therefore, the range of different remedies must be also wide. There is no singe remedy or even single type of remedy which would be appropriate to cure all competition problems raised by different mergers.

Commitment remedies are typically classified into two broad categories – structural and behavioural. Structural remedies are those that are designed to make changes to the structure of the market, whereas behavioural remedies regulate the conduct of the merging parties after the merger.

The most typical structural commitment remedy is divestiture of a business, set of assets or productive capacity. The aim of such remedy is to create or strengthen a source of competition to the merged entity in order to restore or maintain competition in the relevant market after the merger. In addition to divestiture, long term and exclusive licensing of IP rights and removal of links with competitors may affect market structures and hence be considered structural. Some authors have labelled such remedies "quasi-structural", because, while being of contractual nature, these nevertheless change the structure of the market to some extent.[473]

Other commitment remedies are typically considered behavioural. Such remedies may be targeted to deal with varying competition concerns. Firstly, there are measures aimed at facilitating horizontal rivalry. Such remedies may be designed to

(i) prevent the merged entity from using its horizontal market position to foreclose the market and lessen competition (*e.g.*, commitments not to engage in tying, predatory pricing or exclusive and long term agreements);

(ii) prevent the merged entity from using its vertical integration to distort or limit horizontal rivalry (*e.g.*, commitments to grant access to key infrastructure upon regulated price and terms);

(iii) change buyers' behaviour in order to encourage competition (*e.g.*, commitments to provide information to buyers and facilitate for them the switching of providers).[474]

Secondly, there are measures aimed at preventing the exploitative behaviour of the merged entity after the merger by controlling its outcomes. Such remedies include price caps, service level agreements, and supply or purchase commitments.[475]

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[473] See e.g. Ersbøll, Niels C.: "Commitments under the Merger Regulation", in European Competition Law Review, Vol. 24, Issue 9, September 2001, p. 363;
Motta, Massimo: "Competition Policy. Theory and Practice", Cambridge University Press, 2004, p. 268.

[474] ICN Merger Working Group: "Merger Remedies Review Project", pp. 11–12 and 17–18.

[475] *Ibid*., pp. 12 and 18–19.

Some of the behavioural commitment remedies may entail some structural effect to the market (*e.g.,* granting access to infrastructure), while others are purely behavioural and may not in fact amount to more than a promise not to abuse market power. Often packages of different types of commitment remedies are used. For instance, behavioural commitments may be necessary to supplement structural commitments in the interim period between the adoption of the decision to authorize the merger and the completion of the divestiture. Similarly, there can be a package of various behavioural commitments.

It should be noted that behavioural commitment remedies can be grouped in differently from the above ICN Merger Working Group approach. For instance, Massimo Motta, Michele Polo and Helder Vasconcelos divide behavioural remedies into three groups: (i) purely behavioural remedies requiring granting access and/or non-discriminatory treatment of competitors; (ii) contractual type remedies requiring licensing or termination of existing exclusive agreements; (iii) "vertical firewalls" requiring prevention of information exchange.[476] At the same time, Alistair Lindsay categorises commitment remedies according to the aspect of market operation which is addressed in order to ensure that the remedy prevents the harm to competition, namely: (i) the market position of the merged entity (divestitures); (ii) barriers of entry; (iii) assurance of supplies to third parties; (iv) assurances of purchases from third parties; (v) specific concerns about the elimination of potential competition; (vi) specific oligopoly concerns; or (vii) specific conglomerate concerns.[477] However, as the choice of categorisation has little relevance for the discussion below, these categorisations are not considered in more detail here.

As apparent from above, the range of remedies is rather wide. However, legal rules and principles of individual legal systems, as well as declared enforcement policies may pose conditions and limits as to the range of commitment remedies available to the merging firms in a particular competition regime. An overview of such considerations is given below.

4.3. The principles of choice of commitment remedies

Under the ECMR, the European Commission has clearly declared their preference for structural remedies. The Commission's notice on remedies indicates that "commitments which are structural in nature, such as the commitment to

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[476] Motta, Massimo, *et al.*: "Merger Remedies in the European Union: An Overview", paper presented at the conference Guidelines for Remedies – Prospects and Principles, organized by Ecole des Mines de Paris, Cerna and University of California at Berkeley, School of Law, Paris, 17–18.01.2002, p. 3. Available online: http://www.cerna.ensmp.fr/cerna_regulation/Documents/ColloqueMetR/Motta.pdf (last visited 15.05.2009).

[477] Lindsay, Alistair: "The EC Merger Regulation: Substantive Issues", Sweet & Maxwell, London, 2003, pp. 455–456.

sell a business unit, are, as a rule, preferable from the point of view of the [ECMR], inasmuch as such commitments prevent, durably, the competition problem which the Commission considers would be caused by the merger as notified, and do not, moreover, require medium or long-term monitoring measures. Nevertheless, the possibility cannot automatically be ruled out that other types of commitments may also be capable of preventing the significant impediment of effective competition".[478] The Commission has stated its willingness to accept remedies that do not amount to more than purely behavioural promises only in exceptional circumstances, such as in respect of competition concerns arising in conglomerate structures.[479]

Likewise, it is stated in the US DOJ Antitrust Division "Policy Guide to Merger Remedies" that "[s]tructural remedies are preferred to conduct remedies in merger cases because they are relatively clean and certain, and generally avoid costly government entanglement in the market".[480] Structural remedies are generally considered preferable also in German[481] and UK[482] merger control systems.

Similarly to large merger control systems, various smaller systems give preference to structural remedies. For example, in New Zealand the Commerce Commission can only accept structural commitments to divest assets or shares and cannot accept behavioural commitments.[483] In Slovenia, the standards for commitment remedies are such that even though behavioural remedies are not expressly excluded, they are unacceptable in practice.[484] The working group set up by the Nordic competition authorities (including Finland, Sweden, Denmark and Norway) has also expressed preference to structural remedies.[485] However,

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478 EC notice of remedies, section 15.

479 EC notice on remedies, section 69.

480 US Department of Justice Antitrust Division: "Policy Guide to Merger Remedies", October 2004, section 3.A. Available online: http://www.usdoj.gov/atr/public/guidelines/205108.htm (last visited 15.05.2009). Similarly, the FTC: "Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies", April 2, 2003 (available online: http://www.ftc.gov/bc/bestpractices/bestpractices030401.shtm (last visited 15.05.2009)) sets forth a similar principle.

481 German ARC, Article 40(3), (see also Bergmann & Röhling, p. 151).

482 UK merger guidelines, section 4.15.

483 Peterson, Andrew; Keene, Sarah: "New Zealand", in Getting the Deal Through: Merger Control 2008, Global Competition Review, Law Business Research Ltd, p. 257.

484 Judgment of Administrative Court of Republic of Slovenia, Case No. U 1286/2003 of 18.06.2004 in *Interbrew Central European Holding B.V., Pivovarna Laško d.d. and Pivovarna Union d.d. v Competition protection Office*, cited through Pensa, Pavle: "Slovenia – Merger Control", in Competition Cases from the European Union, edited by Kokkoris, Ioannis, Sweet & Maxwell, London, 2008, sections 25–042 and 25–051.

485 Nordic Working Group: "Commitments Concerning Concentrations between Undertakings", Summary of a Report from a Nordic Working Group 2003. Available online: http://www.kkv.se/upload/Filer/ENG/Publications/koncentration_utsidan.pdf (last visited 15.05.2009).

as will be seen from some case studies below, they are still willing to have a flexible view towards behavioural remedies.

Conversely, there are several small economies where behavioural commitment remedies are considered as the preferred remedy. Paul Gorecki, Director of Mergers Division of the Irish Competition Authority, has expressed that "if there is a choice between a behavioural and a structural remedy the former is preferred".[486] Similarly, it has been indicated that the Latvian Competition Council considers purely behavioural remedies as the most effective type of remedies, because this kind of remedies are less burdensome for merging parties and are also easier to control from the side of the Council.[487] Behavioural commitments have so far played the primary role also in the merger control practice of Austria,[488] the Czech Republic,[489] and Greece.[490] Below, a few examples of cases where behavioural commitments have been used in some of these jurisdictions have been described.

In *Latvijas Mobilais Telefons/ZetCOM* (2007), concerning the merger of two Latvian mobile communication services providers, the Latvian Competition Council approved the merger subject to a range of behavioural commitments by the merging parties, including obligations to inform the customers about the merger, to maintain existing legal entities and brands until 2009, and to abstain from carrying out marketing measures especially aimed at attracting ZetCOM customers to the services of Latvijas Mobilais Telefons.[491]

In *Airport Bratislava/Wien Flughafen AG* (2006), concerning the merger of the two airport operators, the Austrian Federal Competition Authority authorized the merger after the parties undertook certain behavioural commitments pertaining price caps, capacity of and slots available in the Vienna airport, and the unbundling (in accountancy terms) of airport infrastructure services vertically (with respect to other airport businesses) as well as horizontally (with respect to the two airports). The compliance with the commitments was to be

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[486] E-mail of Ms. Kathryn MacGuill, Economist of the Irish Competition Authority to the author, dated 14.03.2008, forwarding the views of Mr. Gorecki.

[487] E-mail of Mr. Jānis Amols, Senior Desk Officer of the Latvian Competition Council, to the author, dated 29.02.2008.

[488] Vartian Claudine: "Austria – Merger Control", in Competition Cases from the European Union, edited by Kokkoris, Ioannis, Sweet & Maxwell, London, 2008, section 2–078 (see also Reidlinger, Axel; Zellhofer, Andreas: "Austria", in Getting the Deal Through: Merger Control 2008, Global Competition Review, Law Business Research Ltd, p.47).

[489] Author's conclusion on the basis of Annual Reports 2000, 2001, 2002, 2003, 2004, 2005 and 2006 of Czech Office for the Protection of Competition. Available online: http://www.compet.cz/en/information-centre/annual-reports/ (last visited 15.05.2009), (see also Bányaiová, Alena: "Czech Republic", in Getting the Deal Through: Merger Control 2008, Global Competition Review, Law Business Research Ltd., p. 109).

[490] Economou, Aida: "Greece", in Getting the Deal Through: Merger Control 2008, Global Competition Review, Law Business Research Ltd, p. 156.

[491] Report on the Economic Development of Latvia, December 2007. Available online: http://www.em.gov.lv/em/2nd/?cat=137&lng=en (last visited 15.05.2009).

monitored by trustees (an independent air traffic expert and an independent auditor).[492] In *Moser Holding AG/Oberösterreichische Rundschau* (2007), concerning the Austrian media sector, the same authority approved the merger subject to the merging parties' commitments to terminate their co-operation with one of the biggest players in the Austrian media market, and to abstain from entering in any form of exclusive cooperation relating to the publishing and marketing of newspapers with that company until the end of 2015.[493]

In *Agrofert Holding/Unipetrol* (2002), concerning the Czech market for nitrogen fertilizers, the Czech Office for the Protection of Competition accepted commitments to supply, to maintain certain pricing conditions and to make public announcements of price developments.[494] In *Dalkia Morava/Zásobování teplem Ostrava (ZTO)* (2002), concerning the merger of heat energy providers, the same authority accepted purchase and access commitments.[495] In *Bijouterie Trading Company/Swarovski Bohemia* (2004), concerning the bijouterie markets, the authority accepted commitments to maintain open and fair demand for supplies.[496]

4.4. The benefits of structural commitment remedies for small economies

It is apparent from the above that be it a small or large economy, commitment remedies have a crucial role in merger control. Even though it could be recommendable for small economies to give greater trust to behavioural commitment remedies than is usually given to such remedies in large economies (as will be discussed below), the role of structural commitment remedies in the small economies' merger control as tool for alleviating competition concerns should not be underestimated.

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[492] Annual Report on Competition Policy Developments in Austria 2005–2006. Available online: http://www.bwb.gv.at/NR/rdonlyres/E459F1F0-439B-4B3C-8A8B-19C203B727C7/26202/Annualreport20052006final.pdf (last visited 15.05.2009).

[493] Annual Report on Competition Policy Developments in Austria 2006-2007. Available online: http://www.bwb.gv.at/NR/rdonlyres/F160E0A6-4CFC-46DF-8FA4-47AC5C09BD31/29947/Annualreport20062007final.pdf (last visited 15.05.2009).

[494] Press Release of Czech Office for the Protection of Competition of 04.09.2002: "Agrofert is allowed to acquire Unipetrol". Available online: http://www.compet.cz/en/information-centre/press-releases/competition/agrofert-is-allowed-to-acquire-unipetrol/ (last visited 15.05.2009).

[495] Press Release of Czech Office for the Protection of Competition of 16.12.2002: "Concentration Dalkia Morava /ZTO". Available online: http://www.compet.cz/en/information-centre/press-releases/state-aid/concentration-dalkia-morava-zto/ (last visited 15.05.2009).

[496] Annual Report 2004 of Czech Office for the Protection of Competition, p. 16. Available online: http://www.compet.cz/en/information-centre/annual-reports/ (last visited 15.05.2009).

The most common and logical structural commitment remedies in the European Commission's practice are divestitures whereby the merging firms agree to resell all the activities acquired as a result of the notified operation on the market on which horizontal effects occur and a dominant position may be created. Such commitments remove any doubts about the possible creation or strengthening of dominant position.[497] For instance, in *Repola/Kymmene* case, the merging parties were active in a number of different markets relating to paper products, including the markets of newsprint and magazine paper; distribution of newsprint and magazine paper; industrial wrappings made from paper; sack paper; pulp; sawn timber; and paper sacks. Out of all these markets, the operation raised serious concerns about the last market, paper sacks, due to parties' high market shares related to horizontally overlapping activities. The merger was cleared unconditionally with respect to all the other markets but paper sacks, and the parties undertook to divest the acquired plants engaged in the production of paper sacks. As a consequence the operation was not found to result in an addition of market shares in paper sacks market.[498]

In the cases where the divestiture of the full lines of assets acquired in the market concerned is committed to by the merging firms, the conditional clearance of the merger could in fact seem to be more like partial prohibitions than clearances, given the extent of the commitments.[499] However, besides full line divestitures, various combinations of assets and partial divestitures, as well as hold-separate agreements could be resorted to.

For small economies, structural remedies can be an important tool to alleviate local concerns in case of international or foreign mergers. This is demonstrated by the *Philip Morris Products S.A./Amer-Tupakka Oy, Amer-Yhtymä Oyj and Amernet B.V*[500] case from the practice of the ECA.

From the perspective of the ECA, the case concerned a foreign international merger, whereby an international tobacco production group Philip Morris acquired tobacco related business Amer-Tupakka from Finnish company Amer-Yhtima. Amer-Tupakka was active in producing, marketing, selling and importing tobacco products under its own trademarks, and produced and sold some cigarettes carrying Philip Morris' trademarks under exclusive licenses. Amer-Tupakka had a subsidiary Amer Tobacco in Estonia, the main activities of which were import and wholesale of tobacco products. The merger raised concerns in relation to the market of industrially produced cigarettes, as Philip Morris was dominant in this market in Estonia already prior to the transaction

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[497] NavarroVarona, Edurne; *et al.*: "Merger Control in the European Union: Law, Economics and Practice", Oxford University Press, 2002, pp. 325–326.

[498] Commission Decision of 30.10.1995, Case No. IV/M.646 – *Repola/Kymmene*.

[499] Navarro Varona, *et al*, p. 326.

[500] Decision of Estonian Competition Authority of 25.08.2004, Case No. 28-KO – *Philip Morris Products S.A./Amer-Tupakka Oy, Amer-Yhtymä Oyj and Amernet B.V.* Available online:
http://www.konkurentsiamet.ee/public/Koondumised/Arhiiv/ko200428.pdf (last visited 15.05.2009).

and the market shares of other competitors were widely dispersed, and there were several barriers for entering to this market. The merger was conditionally authorized after Philip Morris agreed to divest Amer-Tupakka's trademarks to a firm not belonging to the same group with Philip Morris.

The ECA further assessed the suitability of the proposed buyer to the assets to be divested. Philip Morris had proposed that the trademarks would be divested to Finnish company JAW Invest, which would own the trademarks, whereas an Estonian firm Tremaco would be the Estonian wholesaler and distributor of the cigarettes produced under these trademarks and of other Amer Tobacco's imported products. Tremaco was to take over Amer Tobacco's know-how, expertise and personnel and continue the trademarks related activities in Estonia. The ECA considered Tremaco as an independent firm, possessing sufficient financial resources and proven expertise and interest to develop its activities as an active rival to merging parties.

The representatives of Tremaco and Gallaher, a competitor of Philip Morris in Estonia, have commented that in their opinion the usage of the divestiture remedy in this case was indeed necessary and justified in this case, and the remedy proved rather successful in preserving effective competition in the market. However, due to the implementation problems in the divestiture process, the viability of the divested business was harmed.[501]

The case clearly demonstrates that structural remedies can be appropriate in small economies as in case of large economies, provided they are properly implemented. Nevertheless, as will be seen below, in many cases such remedies may not be available or justified for small economies.

4.5. Justifications for the wider use of behavioural commitment remedies in small economies

4.5.1. Lack of enforcement power

As noted above, in small economies many sectors are supplied by imported goods, and market participants are often owned by foreign companies. In such cases, the merger of foreign firms importing into or having subsidiaries in a small economy is likely to have effects on the competition conditions also there and would fall subject to control in such small economy. In the cases of cross-border mergers, in particular in the event of the so called foreign or foreign international mergers, it may prove rather difficult for the competition authorities of small economies to take any effective enforcement actions undermining the merger or requiring compliance with burdensome conditions by the merging parties.

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[501] E-mail of Aili Herkel, Manager of OÜ Tremaco, to the author, dated 05.05.2005; E-mail of Urmas Silman, Marketing Manager of Gallaher Sweden AB, to the author, dated 09.05.2005.

The declaration of invalidity of a foreign or foreign international merger would not have effects on the validity of the merger transaction if this transaction is legal in the home jurisdictions of the merging parties and under the laws chosen to by the parties to cover the transaction. Similarly, the threat of penalties would be unlikely to stop the foreign or foreign international merger, because of the lack of adequate enforcement measures. Even if the competition authority controlling a foreign or foreign international merger could impose sanctions on the entities of the merging parties that are active in its jurisdiction or undermine the sales of the goods of the merging parties in its territory, it would risk causing the merging companies to leave the small economy all together, which might render the local consumers worse off.

The *Unilever/Ben & Jerry's* (2000) case from the practice of the Israel Antitrust Authority provides a good illustration of such circumstances. In April 2000, the US company Ben & Jerry's Homemade, Inc. and the Anglo-Dutch company Unilever announced an agreement by which Unilever would acquire control over Ben & Jerry's.[502] The merger was subject to control, *inter alia*, in Israel.

The Israel Antitrust Authority identified competition concerns in the Israeli ice cream market. The merger was cleared conditionally, after the parties undertook to distribute Ben & Jerry's ice cream through an independent distributor who would be free to determine the prices charged for the products. Moreover, the Israel Antitrust Authority also required that the quality and quantity of the products would be at least as high as it had been before the merger, and that any new product would be made available to the independent distributor.[503]

This case shows clearly the difficult trade-offs that the competition authorities of small economies often face in the event of foreign international mergers, as the actual choice of measures is rather limited. Had the merger been prohibited by the Israel Antitrust Authority, there would have been a great risk that instead of withdrawing from the transaction, the merging parties would have simply chosen to cease their activities in Israel. This would have been even more detrimental for the Israeli consumers than the anti-competitive merger. As noted by Michal S. Gal, the small economies are often left only to rely on the assumption that international firms will not change their strategic decisions (such as Ben & Jerry's introduction of new products in the world market in this case) only to reduce competition in the small economy.[504]

In such cases, some local concerns can be mitigated by behavioural commitment remedies. These remedies are less burdensome for the merging

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[502] Press Release of Ben & Jerry's Homemade, Inc. of 16.04.2000. Available online: http://www.benjerry.com/our_company/press_center/press/join-forces.html (last visited 15.05.2009).

[503] Conditions for the approval of the merger between Ben & Jerry's Homemade Inc. and Unilever N.V, cited through Gal 2003, p. 246.

[504] Gal 2003, p. 246.

parties than structural remedies; therefore, the merging parties may be more willing to agree to comply with the former than with the latter. Furthermore, behavioural commitments could be used to address the conduct directly affecting the small economy. Hence, in fact the behavioural remedy could be the only remedy available to the competition authority in a small economy.

4.5.2. Preservation of efficiency gains and other benefits of the merger

Where a merger entails significant efficiency gains or other significant public benefits, the prohibition of the merger could be too stringent remedy, in particular where the anti-competitive effects would be outweighed by the positive effects. In such cases, structural commitment remedies are usually the obvious choice for removing the competition problems. However, when divestitures are applied in small economies they often imply a trade-off between enhancing competition and exploiting the potential cost efficiencies that flow from achieving minimal efficient scale of production. Even if the merging entity could be broken up into smaller parts, market demand may set limits to the number of efficient units so that high concentration rates would prevail. Furthermore, structural remedies may not be effective without costly ongoing regulation after all, because (small) inefficient firms would not survive in a free market and would never grow to sizes large enough to allow them to take advantage of economies of scale.[505]

Moreover, divestitures may not be feasible simply because there is no suitable package to be divested without interfering with the remaining activities of the companies. This may be the case in particular where the total size and the range of business activities of the companies involved are rather limited. This problem is likely to have a greater effect in small economies, particularly in new market economies, where private companies do not yet have a long history and their size is still limited.

The *TV2 Sport* (2007) case from the practice of the Danish Competition Council provides an example of a situation where structural commitments were not available. The case concerned the establishment of a joint venture, the sports channel TV2 Sport, by Modern Times Group MTG A/S (MTG), a privately owned Danish media group, and TV2 Denmark, a state-owned TV broadcaster.[506]

Before the establishment of TV2 Sport, both MTG and TV2 had held important broadcasting rights to Danish and international sports events, but had failed to establish a dedicated Danish sports channel on their own. Therefore,

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[505] Gal 2001, p. 1469.

[506] Decision of April 11, 2007, Establishment of TV2 Sport, cited through Kofmann, Morten: "Denmark – Merger Control", in Competition Cases from the European Union, edited by Kokkoris, Ioannis, Sweet & Maxwell, London, 2008, section 7–041.

they established TV2 Sports and agreed to cease to transmit certain sports events in favour of transmission on the new sports channel. The market position of MTG and TV2 in the Danish TV market was very strong, possibly dominant, and particularly strong on sports transmissions. The Danish Competition Council was concerned that the joint venture could lead to a significant impediment of effective competition not only on the markets related to broadcasting sports events, but also on several TV markets in general, due to the possible co-ordination of their behaviour by the parties with regard to their other channels. The merger was nevertheless authorized after the parties undertook to comply with a package consisting of 17 behavioural commitments, which mainly aimed at ensuring the independence of TV2 Sport from its parent companies by establishing firewalls against exchange of sensitive information and requiring separation of the management and employees of the parties. The remedies were also targeted to solve potential competition problems related to the purchase of broadcasting rights to sports events, the composition of distribution packages, advertising strategies and the rights of printed press. The Danish Competition Council also gave a severe warning that any form of co-operation between TV2 Sport and its parents which was not covered by the remedies would be subject to general competition law rules.[507]

Apart from prohibiting the merger, no other structural remedy would have been available in this case, as there was nothing to divest or license. The prohibition would have deprived the consumers of the opportunity to enjoy the benefit of an additional TV channel, which could not have been created otherwise. Hence, behavioural commitment remedies were the only way to mitigate the competition concerns related to the establishment of the joint venture, while still maintaining the benefits for the consumers.

Even where a suitable divestiture package exists, divestitures may not be a feasible solution because of the difficulty of finding a suitable purchaser with no significant connection to the merging parties and with sufficient resources, expertise and incentives to operate the divestiture package as an effective competitor.[508] In small economies, where the amount of market players is limited, finding such a purchaser may prove rather difficult. In addition, due to particularities of specific market structures, structural remedies may not remedy all concerns.

The *Valio/Kainuu, Maito-Pirkka, Aito Maito* case from the Finnish Competition Authority's practice provides an example of such a situation. The case concerned the acquisition by a major Finnish dairy processor, Valio, of the dairy and marketing businesses of the cooperatives Maito-Pirkka and Kainuu and that of the Aito Maito Fin Oy company.[509]

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507 *Ibid*.

508 See more *e.g.,* from ICN Merger Working Group: "Merger Remedies Review Project", Section 3, pp. 7–13.

509 Decision of Finnish Competition Authority of 20.06.2000, Case No. 1151/81/1999 – *Valio Oy / Dairy and marketing businesses of Kainuu Co-operative, Maito-Pirka Co-*

The Finnish Competition Authority assessed the effects of the acquisition in over 20 product markets and found that the concentration would have resulted in the creation or strengthening of a dominant position in several of them. The main competitive problems related to the purchase of raw milk and its deliveries to the producers of upgraded products, the trade of standardized or skimmed milk and raw cream, the trade of liquid dairy products and the manufacture of domestic milk powder. In the assessment of whether the concentration could be accepted, the central issue was how the purchase of raw material by Valio's competitors could be secured.[510]

The Finnish Competition Authority cleared the merger subject to an extensive package of remedies consisting primarily of behavioural commitments such as Valio's obligations to (i) sell to competitors annually a set amount of raw milk (including skimmed milk, standardized milk or cream) at prices equal the average purchase price of Valio's own dairy industry; (ii) make export purchases of raw milk referred to in point (i) on the basis of market prices and reasonably non-discriminatory export costs; (iii) offer logistical services to competitors and dairy processing and packaging services for the products referred to in point (i); (iv) sell to domestic customers all the usual domestic milk powder brands manufactured by Valio at the market prices of the EU area. In addition, Valio was to sell some of the acquired brands and offer the production plants or the related equipment for sale without any restrictions on use. An independent expert was appointed to monitor the surveillance with the commitments.[511]

Due to the special features of the Finnish dairy market, divestitures of brands and production plants alone would not have remedied the decrease in competition caused by the merger. The main impediment to competition encountered by Valio was the availability of raw milk and not production capacity, since Valio obtained the raw milk from co-operatives, who, in turn, purchase the raw milk from their producer members. As the cooperatives and producers were not parties to the acquisition, it was not possible to oblige them to deliver milk to Valio's competitors. In the case of prohibiting the transaction, the milk producers would have likely switched their supplies to Valio in due course and this would have created even a greater shortage in milk deliveries for the co-operatives to be acquired.[512]

It appeared later that the few structural commitment remedies attached to the merger did not produce the desired outcomes, as no competitor was interested in acquiring the brands or businesses to be divested.[513] However, the competitive concerns could be dealt with by the behavioural commitments – the transfer of

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operative and Aito Maito Fin Oy. Available online (in Finnish): http://www.kilpailuvirasto.fi/cgi-bin/suomi.cgi?luku=yrityskauppavalvonta/yrityskaupparatkaisut&sivu=ratk/r-1999-81-1151 (last visited 15.05.2009).

510 *Ibid*.

511 *Ibid*.

512 *Ibid*.

513 ICN Merger Working Group: "Merger Remedies Review Project", p. 37.

raw milk to Valio's competitors was ensured with Valio's commitment to sell raw milk at Valio's own purchase price to the actual and potential competitors in the domestic market. Hence, Valio's competitors were able to balance out the decreased competition caused by the acquisition in the liquid milk market.[514]

Thus, in the circumstances of limited availability of structural commitment remedies, behavioural commitments can prove invaluable tools for securing the positive effects of otherwise anti-competitive mergers.

4.5.3. Monitoring issues

Both structural and behavioural commitment remedies require a certain degree of monitoring by the competition authority. This requires resources and expertise which in the case of small economies can be particularly limited.[515]

With respect to structural commitment remedies, monitoring involves making sure that the divestiture or licensing is accomplished on time and with all due considerations as envisaged in the merger approval, as well as ensuring the viability of the business to be divested in the interim period between the competition authority's approval of the merger and the completion of the divestiture. As noted above, behavioural commitments could be used for that purpose, but this also requires monitoring resources from the competition authority. Even though the need for such monitoring is only short-term, it may pose more challenges and require more effort on the side of the competition authority than long-term monitoring of behavioural commitments, especially since the need for the intense divestiture monitoring may be more unpredictable than ongoing monitoring of conduct.

Moreover, the mistakes made in the process of divestiture are likely to have more detrimental effects than the mistakes made in the case of behavioural commitments, as divestitures are usually irrevocable and once the viability of a divestiture package has been shaken, its future success can be seriously undermined. At the same time, in the case of behavioural commitments mistakes can in many cases still be fixed by further review of the commitments, as will be seen from the *A le Coq/Finelin* case below.

The help of divestiture and interim trustees can be used to facilitate the divestiture process and alleviate the dangers. However, hiring a trustee can increase the costs of the transaction proportionately unacceptably high for the merging parties, since the transaction values are often lower in small economies as compared to mergers in large ones, while the monitoring costs in the case of a divestiture are not necessarily so significantly lower in the case of the mergers in small economies. Moreover, small economies have often limited human

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[514] Yearbook 2001 of Finnish Competition Authority, pp. 28–30. Available online: http://www.kilpailuvirasto.fi/tiedostot/vuosikirja-2001-englanti.pdf (last visited 15.05. 2009).

[515] OECD Background Paper, sections 32-34.

resources and expertise, as noted above, which is for the know-how necessary for the efficient enforcement of divestitures may be lacking.[516]

In the case of pre-merger notification, the so called "fix-it-first" measures could be used, which means that the merging parties would be allowed to complete their merger only after the completion of the divestiture. This could also add incentives for the merging parties to arrange the divestiture expediently. Yet, the "fix-it-first" measures are not widely used as they are very burdensome to the parties, since they involve delays which can be detrimental for the merger transaction.

Regardless of their straight-forward nature, divestitures may fail to produce desired outcomes if they are not properly designed or implemented, or, as noted above, if they cannot be enforced by the authorities of a small economy. This is demonstrated by the Baltic *MicroLink* (2005) cases which concerned the acquisition of control by the various Baltic subsidiaries of the Scandinavian telecom corporation TeliaSonera over the Estonian IT company MicroLink AS and its Baltic subsidiaries. The merger was subject to control in Estonia, Latvia and Lithuania. All three competition authorities identified competition problems with respect to internet access services, but allowed the merger subject to the commitment to divest in the broadband access network of MicroLink in all three states.[517] Due to the further developments, the effectiveness of this remedy has been questionable. For instance, regardless of the divestiture of the network, MicroLink retained the actual business of internet access and data transmission services in Latvia.[518] In Estonia, the acquiring company Elion Ettevõtted AS divested the network of MicroLink to its competitor Norby Telecom AS, but at the same time acquired a part of business from the same competitor for providing broadband access services on the basis of wireless technology.[519] This casts doubt as to the actual effectiveness of the divestitures.

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[516] OECD Background Paper, sections 32-34.

[517] Decision of Estonian Competition Authority of 21.10.2005, Case No. 47-KO – *Elion Ettevõtted AS/MicroLink AS*. Available online (in Estonian):
http://www.konkurentsiamet.ee/public/Koondumised/2005/ko200547.pdf (last visited 15.05.2009).

Latvian case: Competition Council's decision No. 48 of 30 September 2005 in Case No.1586/06/06/6, *Lattelecom AS/AS MicroLink Latvia*, cited through Annual Report 2005 of Latvian Competition Council. Available online:
http://www.kp.gov.lv/uploaded_files/parskati/2005EN.pdf (last visited 15.05.2009).

Lithuanian case: Resolution No.1S-122 on the issuing permission for *Elion Ettevõtted AS* to implement the concentration by acquiring 100% of the shares of *MicroLink AS*, cited through Annual Report 2005 of Lithuanian Competition Council. Available online: http://www.konkuren.lt/en/anual/2005_eng.pdf (last visited 15.05.2009).

[518] Hartmane, Liga: "Latvia – Merger Control", in Competition Cases from the European Union, edited by Kokkoris, Ioannis, Sweet & Maxwell, London, 2008, section16–028.

[519] Press Release of Norby Telecom AS of 04.12.2006: "*Norby ostis MicroLinkilt Metroo andmesidevõrgu*". Available online (in Estonian):

Taking these considerations into account, the greater reliance on behavioural commitment remedies by some small economies could indeed be justified. However, the concerns related to behavioural commitment remedies, in particular the enforcement difficulties and the need for ongoing long-term monitoring, should be seriously weighted when deciding whether to prohibit a merger or allow it subject to a bulky package of behavioural commitments.

The shortcomings of behavioural commitments are demonstrated by the Austrian *Wrigley/Joyco* case. The case concerned a foreign international merger, whereby the US company Wm. Wrigley Jr. Company, one of the world's leading chewing gum producers, would merge with Joyco Inversiones, S.A., which was part of the Spanish Corporación Agrolimen S.A. Wrigley and Joyco were the two biggest producers of bubble gum in Austria, and Wrigley had a strong dominance in the chewing gum sector. The Austrian competition authorities had serious concerns about predatory portfolio effects related to the merger.[520] Nevertheless, perhaps because it was a foreign international merger, the Austrian Cartel Court approved the merger subject to a behavioural commitment obliging Wrigley to maintain Joyco's brands in the market for bubble gum in Austria for the following two years in order to ensure product diversity. To specify the concerned Joyco brands, Wrigley submitted a product list to the Cartel Court. Two years later, the Austrian authorities found out that Wrigley had not complied with the remedy; moreover, they found that the list of products submitted was flawed, in the sense that some of the products listed were actually not sold at the time. Such non-compliance triggered the initiation of the proceedings for fining Wrigley.[521]

Regardless of the generally recognized enforcement difficulties related to behavioural commitments, it could be argued that in certain respects the small size of an economy could make the monitoring of compliance with behavioural commitment remedies easier, as there are less market players and smaller amount of cases, which makes the deviations from the imposed remedies more easily detectable due to the called "everybody knows everyone" phenomena.[522] At the same time, as noted above, in many cases the resources available for

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http://www.norby.ee/?structure=008002&content=152&articleid=59 (last visited 15.05. 2009).

[520] Annual Report on Competition Policy Developments in Austria 2003–2004, p. 14. Available online: http://www.oecd.org/dataoecd/36/33/34720199.pdf (last visited 15.05. 2009).

[521] Annual Report on Competition Policy Developments in Austria 2005–2006. Available online: http://www.bwb.gv.at/NR/rdonlyres/E459F1F0-439B-4B3C-8A8B-19C203B727C7/26202/Annualreport20052006final.pdf (last visited last visited 15.05. 2009).

[522] Such a view have been supported by Ms. Dijana Markovic-Bajalovic, President of the Serbian Commission for Protection of Competition, in her e-mail to the author, dated 07.03.2008, and by Ms. Victoria Velazquez, Head of the Prevention and Promotion Unit of the Commission for the Promotion of Competition of Costa Rica, in her telephone interview with the author on 04.03.2008.

competition authorities in small economies are also more limited, which in turn poses problems for monitoring.

Hence, the effect of smallness on monitoring can be manifold – much depends on the specific circumstances of any given merger, and, more broadly, also on the market conditions and other particularities of the economy in question.

4.5.4. The use of "just-in-case" commitments

It is important to note that not all behavioural commitments remedies are equal in their effectiveness or with regard to their effects to the market. Depending on the circumstances of a given case, some behavioural remedies may fail to cure the anti-competitive problems of a merger, and furthermore, some may even produce anti-competitive outcomes of their own by interfering with the market.

Some competition authorities impose *inter alia* commitments that do not amount to more than a promise not to abuse. In some cases this seems to be done where the competition authority is not fully convinced whether the merger at hand would restrict competition to the degree that it should be prohibited or not. Therefore, the commitment by the merging parties not to engage in abusive practice seems to be imposed "just in case". Such commitments include obligations to offer goods or services to companies belonging to the same group with the merged entity and to all other customers in non-discriminatory manner, opening supplies to all customers, refraining from bundling or from concluding exclusive agreements, etc.

If the merger will indeed lead to the creation or strengthening of a dominant position (either single or collective), the parties would normally be prohibited from the abusive behaviour by the effect of other provisions of competition law anyway. However, attaching an additional commitment would likely have a disciplining effect to the parties, in particular if the commitment is subjected to a fine, revocation of the merger authorization or fast track arbitration proceedings. If the merger will not lead to dominance, the commitment would subject the merged entity to slightly more stringent regulation than it would face absent the commitment, but it is likely to be considerably less burdensome for the company than the outright prohibition of the merger. In such case, imposing the remedy can facilitate the competition authorities' general market surveillance tasks and improve the competition culture of the merged entity.

An example of such a case can be found in the practice of the ECA in the *Heidelberg Cement/NCC Roads* case, which concerned a foreign merger of firms that had subsidiaries in Estonia. The subsidiaries of both merging parties were active in the market of ready-mixed concrete. In addition, the subsidiary of one of the merging parties was dominant in the Estonian market for cement, which is an upstream market for ready-mixed concrete. The ECA had some concerns with respect to vertical effects of the merger, but did not seem to be of the opinion that such effects were severe enough to cause the merger to be

prohibited. The merger was cleared after the parties committed to provide cement to all customers in non-discriminatory manner.[523] The merged entity would have been bound with such an obligation also by virtue of the clauses of the Estonian Competition Act prohibiting abuse of dominant position. Therefore, the imposition of the obligation was not directly necessary, but it could perhaps have had a disciplining effect on the merging parties, as the breach of the commitments could constitute a ground for revocation of the merger authorization under Estonian law.

"Just-in-case" commitments which interfere with the market conditions more than mere promises not to abuse should be treated with caution and should not be imposed unless there is clear need for that. *A.Le Coq/Finelin*, another case from the practice of the ECA, serves as an illustration in this respect.

The case concerned the acquisition by an Estonian major brewery AS A.Le Coq of an Estonian company OÜ Finelin. The ECA identified competition concerns in the market for production and sale of cider, where the combined market share of merging parties amounted to 54% at the time of the merger. The ECA's investigations showed that there were no substantial barriers for entering into the market and that the competitors of the merging parties had enough capacity to expand their production volumes and to actively compete for their market share. A number of new cider producers had entered into the relevant market in previous years and achieved a notable market share and there were also potential competitors in the neighbouring markets (such as wine or beer producers), who could have entered the market in the short term. Furthermore, many customers (large trading enterprises) were of the opinion that even firms with relatively high market share could not act independently of competitors and customers in the cider market. Based on the foregoing, the ECA found that the merging parties could probably not have been able to substantially restrict the competition on the cider market. [524]

Nevertheless, likely due to the high market shares, "in order to preserve and enhance competition on the cider market", the clearance of the merger was made conditional upon the merging parties' compliance with production volume restrictions for the period of two years after the merger.[525] Since the merger was cleared only after a month from the opening of the phase 2 proceedings,[526] it

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523 Decision of Estonian Competition Authority of 07.08.2003, Case No. KO-26 – *HeidelbergCement Northern Europe AB/part of NCC Roads Holding AB*. Available online (in Estonian):
http://www.konkurentsiamet.ee/public/Koondumised/Arhiiv/ko200326.pdf (last visited 15.05.2009).

524 Decision of Estonian Competition Authority of 11.11.2003, Case No. 22-ko/2003 – *AS A.Le Coq/OÜ Finelin*. Available online (in Estonian): http://www.konkurentsiamet.ee/public/Koondumised/Arhiiv/ko200338.pdf (last visited 15.05.2009).

525 *Ibid.*

526 Under Estonian competition law, phase 2 proceedings are opened after a 30-days' phase 1 if a merger may raise competition concerns. The phase 2 proceedings can last up to 4 months.

seems that such a commitment was proposed by the parties because they wanted to obtain the permission to proceed with their merger as fast as possible and in order to avoid any delay related to more extensive investigations by the ECA.

There was an extremely fast and unexpected growth of 53% (instead of the forecasted 4% growth) in the Estonian cider market in the year following the merger. During the first half of the year 2004, a powerful competitor of A.Le Coq, Saku, became very active in the cider market. At the same time, A.Le Coq was rather passive on the market due to the production volume restriction. This enabled Saku to increase its market share considerably. Since the growth of cider market had been faster than expected, A.Le Coq requested the ECA to reconsider the production volume restrictions, in order not to further lose its market share, which had decreased to 33%. The volume limit was increased and subsequently A.Le Coq introduced new tastes and packaging, being eventually able to grow the market share lost due to the restriction.[527]

This case shows how excessive concerns about post-merger market shares and the imposition of unnecessary remedies interfering with market can lead to obscure and anti-competitive results. At the same time, the case also shows the importance of the availability of review of imposed behavioural commitment remedies, in order to enable expedient modification in case of unexpected market developments.

In summary, behavioural remedies should be used with caution, in particular where the competition authority is not certain about the actual necessity of such remedies. Even though the use of "just-in-case" remedies could be justified as a disciplining measure helping to build competition culture, which may be particularly relevant in countries with a new market economy, the lack of expertise of the competition authority in evaluating the possible outcomes of such remedies can produce undesirable results and market disruption. This is especially the case in the event of measures which may interfere with the actual market conditions more than general competition law rules. Therefore, apply just-in-case remedies should be avoided.

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[527] Simovart, Martin: "Estonia – Merger Control", in Competition Cases from the European Union, edited by Kokkoris, Ioannis, Sweet & Maxwell, London, 2008, section 8–054.

CONCLUSIONS

It should be recognized that even though competition rules around the world tend to be driven largely by the same rationale and are therefore rather uniform as compared to many other areas of law, one size does not fit all. Common-sense flexibility is required in merger control due to the enforcement priorities influenced by the inherent values of a given society and the specific characteristics of a given economy, be it small or large.

Yet. it can be concluded on the basis of the dissertation that smallness of economy tends to have various attributes in the context of competition law. Such special attributes could be grouped under three categories:

(i) Special attributes due to economic factors: smallness of markets, difficulties in achieving minimum efficient scale, high concentration levels, entry barriers, facilitated collusion, limited resources, high importance of trade and high dependence on mergers in other economies;

(ii) Special attributes due to political and cultural factors: concentration of political elite, tendency to favour national champions, "everybody knows everybody" phenomenon, limited human capital, higher administrative costs per capita;

(iii) Special attributes due to enforcement issues: limited enforcement power *vis-à-vis* large multinational firms.

In the author's view, it is not possible to draw a clear dividing line between large and small economies to distinguish the exact range of countries affected by the above attributes. It should be noted though that the smaller the economy, the more the attributes related to smallness are likely to be felt.

The dissertation analyzed the implications of smallness of an economy on various aspects of merger control, including both the substantive assessment of mergers, and the issues of jurisdiction and enforcement. The analysis of substantive assessment looked first at the market definition process, thereafter discussed the theories of harm, substantive test and specific assessment criteria of mergers and finally considered defences that could be applied in case of otherwise problematic mergers.

As regards market definition, it can be concluded on the basis of the dissertation that defining the relevant market is a rather technical process, which should not differ regardless of the size of economy. Therefore, smallness of economy appears to have little bearing on the relevant market defining process and outcomes. However, in respect of defining geographic scope of a market, the end result may diverge from the perspective of the economies concerned due to the size as well as location of an economy. In the author's opinion, this diversion should not be substantive, *i.e.,* it should not be caused by applying diverging principles for market delineation, but practical, *i.e.,* caused by the diverging factual circumstances of any given jurisdiction.

Once relevant markets are defined, mergers are to be assessed in the light of theories of competitive harm. Different types of mergers (horizontal, vertical or

conglomerate mergers) affect competition differently; therefore, also the theories of harm differ. It can be concluded on the basis of the dissertation that in broad terms, the understanding of possible harmful effects of horizontal and vertical mergers is rather universal and the underlying rationale can be applied in the merger control of large and small economies alike. However, the author is of the opinion that the weight given to particular elements and concerns could be the source of divergences. As regards conglomerate mergers, there is a widespread disagreement about whether such competitive concerns should constitute sufficient ground for prohibiting a merger. Such discrepancy appears to be related to the difference in enforcement goals – in competition law regimes, where the primary goal of competition policy is efficiency and overall welfare (*e.g.*, the US) conglomerate mergers are not to be challenged, whereas in regimes that focus more on consumer protection and consumer welfare (*e.g.*, EU) mergers could be prohibited merely due to conglomerate effects. In the author's view, the choice of approach to conglomerate mergers in case of small economies should depend primarily on its chosen goal for merger control policy as such. However, as concluded in the dissertation, small economies should be particularly wary of disguised vertical effects of conglomerate mergers. In order to be able to benefit the most from the market expanding effect of trade, it is of particular importance for small economies to ensure the openness of distribution systems. Therefore, where a conglomerate merger has the effect of foreclosing access to distribution systems for potential entrants or importers, it should not be favoured.

As regards the substantive test of merger control (namely, SLC, SIEC and dominance test), one can notice a clear trend towards unification across merger control regimes. After the switch to the SIEC test in the ECMR, many EU Member States have followed the ECMR example. Looking purely at the test as such, even though the wording of the SLC and SIEC test stays different, it is, in the author's view, hard to see any real remaining substantive differences between the two tests. Therefore, it can be concluded that from the perspective of small economies, there is not much difference as to which of the either tests to choose as the applicable test. Even applying dominance test is only rarely prone to lead to differing outcomes. However, because of the "gap" cases, it may be advisable for the merger regimes still applying the dominance test to follow the path of the ECMR by shifting to SIEC test or choose the SLC test. It must be noted that the different tests are often associated with different merger assessment standard (overall or consumer welfare standard), which, in turn diverge with respect to the treatment of efficiencies. In the author's view, the choice of standard is a value decision which should be carefully considered in all economies; however, this does not necessarily apply with respect to the technical side of the SIEC and SLC tests, as long as the tests as such are seen separately from the standards.

In assessing whether a merger will realize any of the theories of harm and whether it should therefore be prohibited under the applicable substantive test, competition authorities analyze various market characteristics, such as the

market shares of the merging firms, the overall concentration level of the market, the existence constraining power of buyers or suppliers, the existence of potential competition by way of expansion or entry of competitors and the barriers that could hinder such entry. As apparent on the basis of the dissertation, smallness of an economy has a tendency to cause high market shares, concentration and raise entry barriers in many industries. However, in the context of open trade and globalization, such effects of smallness are decreasing. In the author's opinion, such tendencies need to be carefully considered in the course of merger assessment, but in itself such tendencies do not call for specially tailored merger control rules.

The underlying economic principles on which merger control is based apply in the same manner regardless of the size of economy. It is generally recognized that smallness of an economy may have certain implications to markets, but these implications do not call for a different framework as compared with the EU merger control, or specific choice of a substantive test for the appraisal of mergers. Of course, performing merger control appraisal requires a good vision and understanding of the market conditions and mechanisms, as well as of the theories of harm. Moreover, systematic and careful consideration of competitive pressure coming from foreign markets is important, particularly in small economies which are likely to be more affected by such influences than large economies. The limited human resources problem of small economies may pose hurdles for mastering this task, but gradually growing experience and knowledge of both competition law enforcers as well as practitioners could alleviate these concerns.

It can further be concluded on the basis of the dissertation that the source of actual differences with regard to the substantive merger control assessment is the extent to which the various countervailing factors can be taken into account to authorise an otherwise anti-competitive merger or to prohibit a merger that does not raise competitive concerns. Such countervailing factors may include efficiencies, but also industrial policy considerations. In the author's opinion, the degree to which such countervailing factors can be taken into account is a value question to be decided on political level.

Several controversies are related to the choice of the underlying goal of merger control, which should determine how efficiencies are treated in small economies. The author is in favour of consumer welfare standard together with a flexible approach to the use of behavioural remedies. Where a small economy faces two adverse choices – on the one hand, having firms that are unable to achieve minimal efficient scale and therefore higher price levels due to high production cost, or on the other hand, monopolistic market, which can operate efficiently but can also charge high monopolistic prices – permitting the merger subject to remedies obliging the merged entity to pass on their gains to consumers is the best option available, even if enforcing the remedies is difficult.

Mergers may affect several politically sensitive considerations, such as significant lay-offs, substantial new investments and national pride. Therefore, whether expressly or impliedly, industrial policy considerations tend to have

implications on merger control. It should be understood, however, that the choice of pursuing industrial policy considerations tends to entail certain trade-offs on the account of domestic markets and may not be the most efficient alternative.

The foregoing confirms the research hypothesis 1 according to which small economies can and should be lead by the same substantive standards as large economies, but enforcement differences may derive from the choice of goals merger control is destined to pursue in a particular jurisdiction.

With respect to jurisdiction and enforcement, the thesis sought to determine the range of transactions that should be subjected to merger control and considered the most appropriate merger notification system for small economies. The thesis also discussed the extraterritorial enforcement issues and looked for ways to address such issues.

It can be concluded on the basis of the dissertation that as regards the range of transactions to be subjected to merger control, various merger control regimes across the world cover almost universally company law specific mergers, as well as outright acquisitions of one firm by another, whether the transaction is structured as an acquisition of majority of the seller's shares or assets. Qualifying transactions may include both acquisitions of "sole control" by one firm over another, and acquisitions of "joint control" of a firm by two or more firms, if these bring about change of control.

Acquisitions of minority interests, which may fall short of a controlling interest, and creation of interlocutory directorships are not subject to control under EU merger control regime. As apparent from the dissertation, such minority acquisitions may nevertheless give rise to the potential ability of the acquiring firm to exert significant degree of influence over the acquired entity, while interlocking directorships may act as a conduit for anti-competitive transfer of price and other strategic information. These situations could be liable to facilitate collusion, which may prove hard to tackle by the competition authorities. Therefore, the author is of the view that the ability to scrutinize minority acquisitions and interlocutory directorships is particularly pertinent to small economies, which are likely to face collusion issues more often than large economies.

This confirms the research hypothesis 2(a) according to which small economies should adopt a wide approach to the concept of merger and be able to control minority acquisitions and interlocking directorships.

The design of merger notification system is of great importance for all economies, but especially for small ones. It is clear that merger control is expensive, as it imposes costs on both the business community and on the competition authority. Small economies which tend to suffer from the scarcity of resources more than large economies should therefore be particularly careful in designing the merger notification system. As apparent from the dissertation, mandatory notification systems, which are prevalent within the EU, have the benefit of legal certainty and clarity. At the same time, however carefully the notification thresholds are designed, mandatory notification systems always

face the problem of being under-inclusive and over-inclusive. In a voluntary system mergers are generally subject to control based only on their effect to competition. Therefore, in the author's opinion, voluntary notification system has significant appeal as compared to mandatory system. There are certain complications that related to voluntary system, which could be surmounted or at least alleviated by proper design of the deterrent mechanisms and enforcement measures, and by coupling the voluntary system with some light mandatory elements (such basic informational obligations). In the author's view, voluntary notification system is therefore preferable for small economies.

This confirms the research hypothesis 2(b) according to which voluntary notification system is preferred to mandatory systems in case of small economies.

As regards the extraterritorial enforcement of merger control, it can be concluded on the basis of the dissertation that the recognition of a state's extraterritorial jurisdiction, in particular its enforcement jurisdiction, depends mostly on the good will of the firms concerned by the state's enforcement actions and of their home states' willingness to recognize the enforcement action of the other state. Therefore, a state may in principle require the notification of whichever foreign merger, or prohibit the same, and take enforcement actions, such as the seizure of any assets of the foreign firms in its own territory, but its orders will remain numb abroad, where no mechanism for the enforcement can be taken. Hindrance of the activities of foreign firms disregarding the merger prohibition or failing to comply with the notification requirements is unlikely to provide satisfactory outcomes for small economies. Thus, it is apparent that small economies are in a weak position in enforcing their merger control. In some instances, small economies may benefit from the merger control of large economies, but the interests of small and large economies controlling a merger do not necessarily always coincide.

The referral mechanism contained in Article 22 of the ECMR (in its reformed form), which allows for referring a merger lacking Community dimension to Commission's control, could provide some solution to small EU Member States where the competition authority is concerned about its enforcement possibilities in case of a merger with significant anti-competitive effects. In the author's view, the Article 22 referral conditions are in principle not overly burdensome for Member States seeking for a referral, provided that the Commission is in fact willing to take jurisdiction in practice. Proving cross-border effects should not pose many hurdles where the merger involves foreign firms, but has significant effects in the small economy. Showing such effects may be more problematic, where the merger involves domestic firms, but in such occasion the enforcement is not problematic (at least not due to extraterritoriality problems) and no referral is necessary. Hence, for mergers having effects within the EU, small economies' enforcement problems can be somewhat mitigated by Article 22 of the ECMR. Of course, this is not likely to solve problems for small economies outside the EU.

The above confirms the research hypothesis 3 according to which extra-territorial enforcement of merger control rules may pose more problems to small economies than to large economies, but within the EU the re-attribution of jurisdiction between the European Commission and Member States could reduce enforcement problems for small economies.

The last part of the thesis discussed the role of commitment remedies in merger control and analysed the implications of smallness on merger remedies, questioning whether the principles applicable to the use of merger remedies in large economies are appropriate in small economies.

Large competition law regimes (such as the EU merger regime) have strong preference towards structural commitment remedies, using behavioural commitment only exceptionally. It can be concluded on the basis of the dissertation that in small economies, greater flexibility is needed. This is because small economies may face difficulties in enforcing prohibitions or stringent structural commitments due to their weak bargaining position *vis-à-vis* large multinational firms, in particular in the case of foreign and foreign international mergers. Furthermore, structural commitments may not be available or would disproportionately reduce the efficiency gains or other public benefits related to the merger. In addition, even though the enforcement of structural commitments is generally considered easier than the enforcement of behavioural commitments, this may not always be true in the case of small economies. Finally, in some cases behavioural commitments could be used "just in case" as tools for building competition culture, which may be useful particularly in new market economies. In the author's view, the latter argument for the behavioural commitments should be treated with caution though, because if the potential outcomes of imposing behavioural remedies are not adequately evaluated, such remedies could unnecessarily interfere with the market and lead to obscure and anti-competitive results. In general, it can be concluded that the effect of smallness in the context of merger remedies can be manifold; of course, much depends on the specific circumstances of any given merger and more broadly, also on the market conditions and other particularities of the economy in question.

The above broadly confirms the research hypothesis 4 according to which smallness of economy may justify wider use of behavioural commitment remedies.

In summary, the dissertation tested the four research hypotheses set out in the introduction:

1) Small economies can and should be lead by the same substantive standards as large economies, but enforcement differences may derive from the choice of goals merger control is destined to pursue in a particular jurisdiction.
2) Smallness of economy calls for a special design of merger control with regard to jurisdictional and enforcement issues, in particular:

   a. Small economies should adopt a wide approach to the concept of merger and be able to control minority acquisitions and interlocking directorships;
   b. Voluntary merger notification system is preferred to mandatory systems in case of small economies.
3) Extraterritorial enforcement of merger control rules may pose more problems to small economies than to large economies, but within the EU the re-attribution of jurisdiction between the European Commission and Member States could reduce enforcement problems for small economies.
4) Smallness of economy may justify wider use of behavioural commitment remedies.

Based on the above, it can be concluded that the dissteration has confirmed all the set hypotheses.

SUMMARY IN ESTONIAN

Majanduse väiksuse erisustest tulenevad mõjud koondumiste kontrollile

Taust ja teema valiku põhjendus

Konkurentsi kahjustavate kokkulepete keelu ja turgu valitseva seisundi kuritarvitamise keelu kõrval on koondumiste kontroll üheks konkurentsiõiguse kolmest peamisest alustalast. Erinevalt kahest ülejäänud alustalast, on koondumiste kontrolli näol tegemist ette vaatava (*ex ante*) regulatsiooniga. Koondumiste kontrolli algupäraseks teoreetiliseks põhjenduseks on struktuuriökonoomika aluseks olev paradigma, mille kohaselt turumajanduslikus keskkonnas toimiva ettevõtja edukus sõltub tema käitumisest turul, viimane tuleneb aga turu struktuurist. Seega saab täheldada järgmist seosteahelat: turu struktuur – turukäitumine – turul saavutatud tulemus (edukus). Selle seosteahela paikapidavust on kahtluse alla seadnud Chicago koolkonna ökonomistid. Seepärast, kasutatakse selgepiirilist ja pelgalt struktuurilist koondumiste kontrolli analüüsi väga harva ning enamik konkurentsiõiguse režiime võtavad koondumiste hindamisel arvesse oluliselt laiemat asjaolude hulka kui ainult turu struktuur.

Koondumiste kontrolli regulatsioon on jõus enam kui 80 riigis, sh kõigis Euroopa Liidu (EL) liikmesriikides, välja arvatud Luksemburgis. ELi liikmesriikide koondumiste kontrolli reeglid toimivad kõrvuti ELi tsentraliseeritud koondumiste kontrolliga, mida teostab Euroopa Komisjon Nõukogu määruse (EÜ) nr 139/2004, 20. jaanuarist 2004, kontrolli kehtestamise kohta ettevõtjate koondumiste üle (ühinemismäärus) alusel. Kuigi liikmesriikidel ei ole õiguslikku kohustust kujundada oma siseriiklikke koondumiste kontrolli reegleid ELi koondumiste kontrolli reeglite järgi, on enamike liikmesriikide koondumiste kontrolli põhimõtted sarnased ELi reeglitele ja süsteemile. Lisaks kasutavad paljud liikmesriigid Euroopa Komisjoni poolt ühinemismääruse rakendamise kohta välja antud juhiseid oma siseriiklike koondumiste kontrolli reeglite tõlgendamisel allikmaterjalina. Kahtlemata on sellisel suure ja hästi toimiva süsteemi reeglite ja põhimõtete ülevõtmisel eeliseid, nagu näiteks allikmaterjali olemasolu, etteennustatavus jne.

Siiski tekib üldise liikmesriikide poolse ELi koondumiste kontrolli kopeerimise suundumuse (ja laiemalt, ülemaailmsel tasandil, väikeriikide poolt suurte konkurentsiõiguse režiimide nagu USA ja ELi reeglite kopeerimise suundumuse) taustal küsimus, kas üks mudel ikka sobib kõigile. Majanduse väiksus võib põhjustada koondumiste kontrolli kontekstis mitmeid probleeme, eelkõige konkurentsiküsimustega tegeleva asutuse (edaspidi „konkurentsiamet”) piiratud jõustamisvõime ja piiratud ressursside tõttu. Lisaks on üldiselt teada, et väikestes majandustes on turu struktuurid tavaliselt kontsentreeritumad kui suurtes majandustes, kus mastaabi- ja mitmekülgsussäästu on lihtsam saavutada. Võiks väita, et sellistest eripäradest lähtuvalt peaksid ka koondumiste kontrolli reeglid väikestes majandustes olema eripärased.

Käesoleva aastakümne alguses avaldas Michal S. Gal monograafia ja mitmeid artikleid konkurentsipoliitikast väikese majandusega riikidele, viidates erinevatele väiksuse mõjudele turgudele. Käesoleva dissertatsiooni teema on inspireeritud Gali töödest. Siiski ei piirdu käesolev dissertatsioon üksnes tema ideede edasiarendusega, vaid vaatleb väiksuse mõjusid detailsemalt koondumiste kontrolli erinevatele aspektidele, sünteesides paljude autorite ideid ja erinevate koondumiste kontrolli režiimide teooriat ja praktikat.

Konkurentsiõigus on viimaste aastate jooksul muutunud Eestis üha olulisemaks õigusvaldkonnaks. Seepärast on majanduse väiksusest konkurentsiõigusele, sealhulgas koondumiste kontrollile, tulenevate mõjude uurimine Eesti kui väikese majandusega riigi jaoks igati aktuaalne. Ometi ei ole Eestis sel teemal seni avaldatud akadeemilisi uurimusi. Seega on käesolev dissertatsioon selles valdkonnas uudne ning autori andmetel on tegemist esimese konkurentsiõiguse teemalise doktoritööga Eestis.

Siinkohal on oluline selgitada termini „väike majandus" kasutust käesolevas dissertatsioonis. Majandusel kui sellisel ei ole suurust, vaid see hõlmab kaupade ja teenuste tootmist, vahetust ja tarbimist. Suurus on territooriumil, kus majandus aset leiab. Seepärast oleks täpsem kasutada mõistet „majandus väikeriigis". Käesolevas dissertatsioonis on kasutatud mugavuse ja lühiduse huvides terminit „väike majandus", aga ka terminit „väikeriik". Sisulist vahet nende terminite vahel käesolevas dissertatsioonis ei ole.

Eesmärgid ja hüpoteesid

Inspireerituna eeltoodud vastuolust – ühelt poolt ELi koondumiste kontrolli reeglite ülevõtmise eelistest väikeriikide jaoks ja teisalt vajadusest võtta arvesse majanduse väiksusest tulenevaid eripärasid – analüüsib käesolev dissertatsioon majanduse väiksuse mõjusid koondumiste kontrollile. Dissertatsiooni eesmärgiks on otsida vastust küsimusele, kas suurte majanduste poolt rakendatavad koondumiste kontrolli põhimõtted on kohased väikestes majanduses; ning eelkõige, kas ELi koondumiste kontrolli põhimõtted on kohased väikestes liikmesriikides. Kuivõrd dissertatsiooni autor on kõige enam tuttav Eesti koondumiste kontrolli reeglite ja praktikaga, on käesolevas dissertatsioonis kasutatud Eestit ja selle koondumiste kontrolli režiimi peamise näitena väikesest majandusest.

Dissertatsioon testib järgmisi uurimishüpoteese:

1) Väikesed majandused saavad lähtuda ja peaksid lähtuma samadest sisulistest koondumiste hindamise standarditest kui suured majandused, kuid tulenevalt iga konkreetse riigi poolt valitud koondumiste kontrolli aluseesmärkidest võib olla erinevusi jõustamisprioriteetides.
2) Väikesed majandused peaksid jurisdiktsioonilistes ja jõustamisküsimustes võtma arvesse teatud erisusi, eelkõige:
    a. Väikestes majandustes peaks koondumiste mõiste olema defineeritud laiemalt kui suurtes majandustes ning see peaks hõlmama

vähemusosaluste omandamise tehinguid ja juhtorganite liikmete kattuvusi;
   b. Väikestes majandustes on eelistatud vabatahtlik koondumistest teavitamise süsteem.
3) Koondumiste kontrolli reeglite rahvusvaheline jõustamine võib põhjustada väikestele majandustele enam probleeme kui suurtele majandustele, kuid ELis on võimalik jõustamisprobleeme leevendada Euroopa Komisjoni ja liikmesriikide kontrolli pädevuse ümberjagamisega.
4) Majanduse väiksus võib põhjendada laiemat käitumuslike korrektiivmeetmete rakendamist võrreldes suurte majandustega.

Struktuur

Tulenevalt uurimiseesmärkidest ja -hüpoteesidest, koosneb dissertatsioon neljast peatükist. Esimene peatükk selgitab väiksuse olemust ja analüüsib väiksuse eripärasid koondumiste kontrolli kontekstis.

Teine peatükk analüüsib väiksuse mõjusid koondumiste sisulisele hindamisele. Esmalt on arutletud kaubaturu määratlemisega seotud küsimuste üle, kuivõrd kaubaturu määratlemine on koondumiste hindamise lähtealuseks. Seejärel on analüüsitud erinevat liiki koondumiste võimalikke kahjulikke mõjusid, sisulisi hindamiskriteeriume ja hindamise erinevaid elemente. Lisaks on uuritud koondumiste positiivseid mõjusid, mis võivad rääkida muidu konkurentsi kahjustavate koondumiste kaitseks.

Kolmas peatükk keskendub jurisdiktsioonilistele ja jõustamisküsimustele. Esmalt on uuritud erinevat liiki tehinguid, mis on allutatud koondumiste kontrollile. Seejärel on analüüsitud erinevaid koondumistest teavitamise süsteeme, et leida sobivaim väikeste majanduste jaoks. Kolmas peatükk arutleb ka koondumiste kontrolli reeglite rahvusvahelise jõustamisega seotud küsimuste üle, esmalt suurte majanduste perspektiivist üldises rahvusvahelises kontekstis, et tuvastada üldised probleemid, ja seejärel väikeste majanduste perspektiivist. Viimaks on analüüsitud jõustamisküsimusi ELis, vaadeldes erinevaid jõustamismeetmeid ja -mehhanisme, mis võiksid leevendada ELi väikeriikide jõustamisprobleeme.

Neljas peatükk uurib konkurentsi kahjustavate koondumiste puhul kasutatavaid korrektiivmeetmeid. Esmalt on antud ülevaade korrektiivmeetmete olemustest, nende erinevatest liikidest ning valiku põhimõtetest. Seejärel on analüüsitud struktuuriliste korrektiivmeetmete üldiseid eeliseid ja samas põhjendatud mitmete juhtumianalüüside põhjal käitumuslike korrektiivmeetmete laiemat kasutamist väikestes majandustes võrreldes suurte majandustega.

Meetodid ja allikad

Käesolev dissertatsioon kasutab peamiselt analüütilist ja võrdlevat meetodit. Dissertatsioonis on kasutatud ELi koondumiste kontrolli reegleid ja praktikat peamise allikmaterjali ja näitena suurest majandusest, kõrvutades seda teiste suurte majanduste (nagu näiteks USA või Ühendatud Kuningriik) reeglite ja praktikaga. Nagu eelnevalt märgitud, dissertatsioonis on kasutatud Eesti koondumiste kontrolli reegleid peamise näitena väikesest majandusest, kuid lisaks on toodud näiteid ka teistest väikestest majandusest.

Dissertatsiooni kirjutamisel on kasutatud erinevat liiki allikmaterjale – monograafiaid ja artikleid, õigusakte ja rakendamisjuhiseid, rahvusvaheliste organisatsioonide raporteid ja uurimusi, konkurentsiametite aastaaruandeid, kohtute ning konkurentsiametite praktikat.

Alljärgnevalt on pealtükkide kaupa antud ülevaade iga peatüki olulisematest sõlmküsimustest, järgimata seejuures täpselt peatükkide formaalset struktuuri ja jagunemist alampeatükkideks.

I peatükk: Majanduse väiksus koondumiste kontrolli kontekstis

Väikest majandust võib määratleda mitmeti. Majandusteadlased on välja pakkunud erinevad definitsioone, mis põhinevad kas mingil ühel konkreetsel näitajal nagu rahvaarv, pindala või SKP, või erinevaid näitajaid arvesse võtvatest kombineeritud indeksitest. Ei saa välja tuua ühtset seisukohta või piiri, mille kohaselt klassifitseerida riike väikesteks või suurteks. Tavapäraselt võib öelda, et mida väiksem on riik, seda enam ja selgemalt sellised tendentsid avalduvad.

Majanduse väiksust võib lahti mõtestada ka võrdluses suuremate majandustega. Näiteks ELis saab erinevate näitajate alusel (näiteks rahvaarv, SKP, ettevõtete arv ja käive, lisandunud väärtuse kogumaht) eristada selgelt viit suuremat riiki (Saksamaa, Ühendatud Kuningriik, Prantsusmaa, Itaalia ja Hispaania). Nimetatud suurte riikide ja ELi taustal tervikuna võib väikeseks pidada Balti riike, Küprost, Maltalt, Luksemburgi ja Sloveeniat, kelle rahvaarv ja SKP on alla 0,5% kogu ELi vastavatest näitajatest, aga ka märksa suuremaid riike nagu Austria, Belgia, Bulgaaria, Tšehhi, Taani, Soome, Kreeka, Ungari, Iirimaa, Portugal, Slovakkia ja Rootsi. Nimetatud riike on käsitletud käesolevas dissertatsioonis väikeste majandustena.

Koondumiste kontrolli kontekstis avaldub majanduse väiksus muuhulgas koondumise osaliste käibekünnistes, mille alusel määratakse kindlaks, kas koondumisest on vajalik konkurentsiametit teavitada (kohustustusliku teavitamissüsteemi puhul). Näiteks on Eesti koondumiste kontrolli käibekünnised 75 korda väiksemad ELi vastavatest künnistest, samas kui Saksamaa koondumiste kontrolli käibekünnised on vaid viis korda väiksemad ELi vastavatest künnistest.

Majanduse väiksus omab konkurentsiõigusele ja -poliitikale mitut liiki mõjusid. Alljärgnevas tabelis on esitatud kokkuvõte olulisematest väiksusest tulenevatest eripäradest:

Valdkond	Eripärad
Majanduslikud erisused	– Väike turuosaliste arv ja turgude kontsentreeritus – Kõrged sisenemistõkked – Lihtsustatud turukäitumise kooskõlastamine – Kaubanduse kõrge osatähtsus: o kõrgendatud vajadus impordikanalite avatuse tagamiseks o ettevõtete vajadus kriitilise suuruse saavutamiseks rahvusvahelisel tasandil konkureerimiseks o välisriikides toimuvate koondumiste mõju olulisus
Poliitilised ja kultuurilised erisused	– Nö rahvuslike tšempionite eelistamine – „Kõik tunnevad kõiki” fenomen – Piiratud inimressurss – Kallimad halduskulud kodaniku kohta
Jõustamisraskustest tulenevad erisused	– Väikeriikide läbirääkimispositsiooni nõrkus suurte rahvusvaheliste ettevõtete koondumiste puhul

Alljärgneva analüüsi käigus on analüüsitud nende eristuste mõju ettevõtjate koondumiste kontrollimisele nii sisulise hindamise kui juristdiktsioonilisest vaatenurgast.

II peatükk: Koondumiste sisuline hindamine

Kaubaturgude määratlemine

Koondumiste hindamisel võetakse aluseks konkurentsi olukord kaubaturul ning analüüsitakse koondumise võimalikke mõjusid vastavale kaubaturule. Seepärast tuleb iga koondumise hindamisel esmalt määratleda kaubaturg või -turud, mida koondumine mõjutab, ehk asjakohane kaubaturg.

Asjakohane kaubaturg koosneb ühelt poolt toote turust ja teiselt poolt geograafilisest turust. Toote turgude määratlemisel tuvastatakse kaubad, mis konkureerivad või võivad konkureerida koondumise osaliste poolt toodetavate kaupadega. Geograafiliste turgude määramisel tuvastatakse nende geograafiliste piirkondade ulatus, kus koondumise osalised konkureerivad. Kaubaturu piiritlemisel on esmatähtis vaatlusaluste toodete asendatavus ning seda eelkõige nõudlusest ehk ostja huvidest lähtudes. Ostjaks võib siin olla nii ettevõtja kui tarbija. Mõnedel juhtudel on võimalik ja vajalik kaubaturu määratlemisel arvestada ka pakkumise asendatavusega. Sel juhul on põhiküsimuseks, kas pakkujad on võimelised reaktsioonina väikesele pöördumatule hinnatõusule hakkama tootma ning turustama vaatluse all olevaid tooteid lühikese aja jooksul, ilma et see tooks kaasa olulisi täiendavaid kulutusi või riske.

Asjakohaste kaubaturgude määratlemine on võrdlemisi tehniline protsess, kuid hõlmab siiski olulisi hinnangulisi otsuseid. On raske näha, kuidas peaksid need hinnangulised otsused erinema tooteturgude määratlemisel suurtes ja väikestes majandustes. Küll aga tuleb väikestes majandustes geograafiliste turgude määratlemisel võtta suurtest majandustest enam arvesse kaubanduse mõju turgude ulatusele. Kuivõrd väikesed majandused on kaubandusest enam mõjutatud ja sõltuvad kui suured, ei kattu geograafiliste turgude piirid väikeste majanduste puhul sageli riigi piiridega. Samas kipuvad väikeste riikide konkurentsiametid koondumiste kontrollimisel praktikas piiritlema geograafilised turud siiski oma riigi territooriumiga. Sellisel juhul võib koondumiste osaliste turuosa näida tegelikkusest kõrgem ja sellisel juhul võidakse näha konkurentsiprobleemi seal, kus probleemi tegelikult ei ole.

Samas võib geograafiliste turgude määratlemisel tekkida ka vastupidine probleem. Juhul, kui kaubaturgude geograafilised piirid on reaalselt piiratud siiski konkreetse riigiga ja selles riigis tegutseb vastaval turul vähe ettevõtjaid, võib selle põhjuseks olla asjaolu, et tulenevalt turu väiksusest ei mahugi turule tegutsema palju ettevõtjaid ning turud ongi kontsentreeritud. Sellises olukorras võib turul juba tegutsevate ettevõtjate koondumine tekitada konkurentsiprobleeme, kuivõrd täiendav koondumine võib tõenäoliselt viia monopoli tekkeni väikeses majanduses. Koonduvad ettevõtjad väidavad sellises olukorras tõenäoliselt, et koondumine on vajalik selleks, et saavutada kriitiline suurus olemaks võimeline oma tegevust laiendama väljapoole väikest majandust. Koondumist kontrollivale konkurentsiametile võidakse seepärast avaldada ka poliitilist survet, et lubada nö „rahvuslike tšempionide" tekkimist. See võib tekitada vastuolulise küsimuse – kas väikestes majandustes tegutsevate ettevõtjate koondumise puhul ei tuleks geograafiline turg määratleda laiemalt – sel juhul näiksid koondumise osaliste turuosad väiksemad ning koondumine ei näiks tekitavat probleemi. Selline küsimus tõusetus päevakorda eriti seoses Euroopa Komisjoni poolt keelatud Põhjamaadest pärit Volvo ja Scania koondumisega 2000. aastal. Sellega seoses esitati isegi argumente, et ELi koondumiste kontroll ja eelkõige selle kaubaturu määratluse põhimõtted diskrimineerivad väikeste liikmesriikide ettevõtjaid. Siinkohal on oluline aru saada, et kaubaturgude määratlemine on siiski vaid tehniline vahend konkurentsi olukorra hindamiseks. Selleks, et saada adekvaatne pilt koondumise tegelikest mõjudest konkurentsile väikeses majanduses, ei ole põhjendatud kaubaturu määratlemisel kõrvale kalduda tavapärastest turu määratlemise kriteeriumidest. Majanduse väiksusest tulenevaid konkurentsi probleeme võiks arvesse võtta üksnes koondumiste hindamise selles etapis, kus kaalutakse koondumise kasuks ja kahjuks rääkivaid argumente ning otsustatakse konkurentsiväliste asjaolude arvesse võtmise lubatavuse üle.

Kuigi kaubaturgude geograafilise ulatuse määratlemine on tehniline protsess, mis ei peaks sisuliselt oluliselt erinema sõltuvalt majanduse suurusest, võib turgude geograafiline ulatus erineda eri riikide perspektiivist vaadatuna sõltuvalt riigi suurusest ja asukohast. Näiteks Eestis tegutsevate ettevõtjate jaoks võib teatud kaupade puhul geograafiliseks turuks lisaks Eesti territooriumile ka Läti,

osa Lääne-Venemaast ja osa Lõuna-Soomest, samas kui näiteks Soomes tegutsevate ettevõtjate jaoks võib samade kaupade puhul olla geograafiliseks turuks olla Soome ja Rootsi, kuid mitte Eesti ega Läti. Selline erinevus turgude geograafilises ulatuse määratluses ei peaks olema sisuline, st see ei tohiks tuleneda erinevate turu määraltemise printsiipide rakendamisest, vaid praktiline, st see erinevus võiks tuleneda üksnes iga konkreetse riigi faktilistest asjaoludest.

Kui kaubaturud on määratletud, hinnatakse koondumiste mõju kaubaturule. Selleks on vajalik lahti mõtestada, kuidas koondumised üldse konkurentsi kahjustada võivad. Alljärgnevalt ongi käsitletud konkurentsi kahjustamise teooriaid erinevat liiki koondumiste puhul.

Konkurentsi kahjustamise teooriad

Eristatakse kolme erinevat liiki koondumisi:

1) horisontaalsed koondumised – st koondumised samal kaubaturul tegutsevate ettevõtjate (ehk konkurentide) vahel;
2) vertikaalsed koondumised – st koondumised ettevõtjate vahel, kes tegutsevad sama tootmis- või turustamisahela erinevatel tasanditel (näiteks tootja ja edasimüüja koondumine);
3) konglomeraatsed koondumised – st koondumised, kus koonduvad ettevõtjad ei ole konkurendid ega oma vertikaalseid suhteid.

Oluline on tähele panna, et juhul, kui koondumise osalised tegutsevad mitmetel turgudel, võib nende koondumine kuuluda mitme ülalnimetatud liigi alla.

Erinevat liiki koondumised mõjutavad konkurentsi erinevalt, kuid põhimõtteliselt saab kõikide koondumiste liikide puhul täheldada nii võimalikke mitte-koordineeritud mõjusid kui ka koordineeritud mõjusid.

Tüüpiliselt peetakse horisontaalseid koondumisi kõige enam konkurentsi kahjustavateks, kuna need vähendavad konkureerivate ettevõtjate arvu. Horisontaalsete koondumiste mittekoordineeritud mõjud on seotud koondumise tulemusel tekkinud ettevõtja positsiooniga turul – kui koondumine loob koondumiste osaliste turgu valitseva seisundi või tugevdab seda, siis võib see asjaolu iseenesest kahjustada konkurentsi nii oluliselt, et koondumist ei saa lubada.

Vertikaalsete koondumiste mittekoordineeritud mõjud on seotud turu sulgemisega. Koondumise tulemusel tekkinud vertikaalselt integreeritud ettevõtja võib ära lõigata konkurentide juurdepääsu toorainetele (või muudele kaupadele) või tarnekanalitele. Seeläbi võivad vertikaalsed koondumised kahjustada konkurentsi eelkõige konkurentide kahjustamise läbi. Kuigi konkurentsiõiguse eesmärgiks ei ole enamasti konkurentide kaitse, võib konkurentidele turu sulgemine viia konkurentide turult lahkumiseni ja see kahjustaks konkurentsi kui sellist.

Konglomeraatsete koondumiste puhul, sarnaselt vertikaalsete koondumistega, võivad mittekoordineeritud mõjud olla seotud turu sulgemisega. Koondumise osalised võivad oma tugevat positsiooni ühel turul hakata ära kasutama selleks, et hakata konkurente välja tõrjuma teiselt turult ning seeläbi saavutada turgu valitsev seisund ka teisel turul. Konglomeraatsete koondumiste konkurentsi kahjustavad mõjud on võrdlemisi ebaselged ning sellised koondumised on

keelatud üksnes väga harvadel juhtudel; mõnedes riikides, nagu näiteks USAs, ei peeta konglomeraatseid koondumisi üldse konkurentsi kahjustavateks. Oluline on lisaks märkida, et konglomeraatsed koondumised võivad omada varjatud vertikaalseid mõjusid.

Kõikide koondumiste liikide puhul saab välja tuua ka koordineeritud mõjusid – koondumised võivad muuta turustruktuuri selliselt, et koondumise järgselt muutub turule allesjäänud ettevõtjate jaoks käitumise koordineerimine oluliselt lihtsamaks. See on tõenäoline, kui turule jääb vähe ettevõtjaid, kes suudavad ka kartellikokkuleppeid sõlmimata jõuda ühisele arusaamisele, mille kohaselt piiratakse püsivalt konkurentsi näiteks hindade tõstmise, tootmise piiramise või turgude jagamise näol. Sellisel juhul saab rääkida kollektiivse turgu valitseva seisundi tekkimisest.

Eelpool käsitletud majanduslikud teooriad selle kohta, kuidas erinevat liiki koondumised võivad konkurentsi kahjustada, rakenduvad põhimõtteliselt ühtmoodi nii suurtes kui väikestes majandustes. Erinevusi saab välja tuua konglomeraatsete koondumiste puhul, kuid ka nende puhul ei eitata selliste koondumiste mõjude iseloomu, vaid pigem on erinevus selles, kas selliseid mõjusid peetakse piisavaks, et nende alusel koondumine keelata. See aga sõltub oluliselt ka sellest, kuidas on konkreetses jurisdiktsioonis määratletud koondumiste kontrolli eesmärk.

Koondumiste hindamise sisuline test

Eelpool kirjeldatud teooriaid kasutatakse selleks, et selgitada iga konkreetse koondumise võimalikud konkurentsi kahjustavad mõjud. Kui võimalikud mõjud on tuvastatud, hinnatakse neid mõjusid sisulise testi või kriteeriumi (ingl. „*substantive test*") alusel, mille kohaselt otsustatakse, kas koondumine on niivõrd konkurentsi kahjustav, et see tuleks keelata.

Enamik koondumiste kontrolli süsteemidest kasutavad koondumiste hindamiseks üht järgmistest testidest – kas koondumine:

1) vähendab oluliselt konkurentsi (ingl. „*substantial lessening of competition*" ehk „*SLC*" test)? – see test on kasutusel näiteks USAs, Ühendatud Kuningriigis, Austraalias, Kanadas ja Iirimaal;
2) piirab oluliselt toimivat konkurentsi, eelkõige turgu valitseva seisundi tekitamise või tugevdamise läbi (ingl. „*significant impediment to effective competition*" ehk „*SIEC*" test)? – see test on kasutusel näiteks ELis, Belgias, Taanis, Eestis, Prantsusmaal ja Rootsis;
3) tekitab turgu valitseva seisundi, mille tulemusel oleks toimiv konkurents oluliselt piiratud (ingl. „*dominance*" test) – see test on kasutusel näiteks Austrias, Saksamaal, Šveitsis, Soomes ja Itaalias.

Eelkirjeldatud testide valik tekitas suurt diskussiooni ELi koondumiste kontrolli 2004. a reformi kontekstis. Samas tekkis ka küsimus, kas nende testide vahel on üldse mingit sisulist erinevust.

1989. aastal vastu võetud ELi koondumiste kontrolli määrus nägi ette domineerivuse (*dominance*) testi. Kohtupraktika kinnitas aja jooksul, et domineerivuse testi alusel võib keelata koondumisi, mis kahjustavad konkurentsi

koordineeritud mõjude tõttu ja loovad kollektiivse turgu valitseva seisundi. Probleeme nähti aga selliste koondumiste puhul, mis omavad olulisi konkurentsi kahjustavaid mittekoordineeritud mõjusid, aga ei vii siiski turgu valitseva seisundi tekkeni. Selliste koondumiste keelamise lubatavus domineerivuse testi alusel oli küsitav.

Seepärast arutleti, kas ELi testi ei tuleks asendada USAs ja Ühendatud Kuningriigis kasutusel oleva *SLC* testiga. Otsustati siiski luua kolmas test – *SIEC* test, mis pööras ringi seni kehtinud domineerivuse testi sõnastuse selliselt, et koondumisi oleks võimalik keelata ka turgu valitsevat seisundit tuvastamata. Sellisel kujul jäi varasem kohtupraktika domineerivuse testi tõlgendamisel suures osas siiski asjakohaseks.

Sisulist vahet *SLC* ja *SIEC* testi vahel on raske näha. Kuna *SLC* ja *SIEC* test pärinevad erinevatest õigusruumidest, on neid teste seostatud erineva lähenemisega koondumise kasuks rääkivate efektiivsusargumentide arvesse võtmise lubatavusega, kuigi testi sõnastusest sellist erinevust iseenesest ei tule. Seepärast ei ole väikeste majanduste seisukohalt sisulist vahel, kumb neist kahest testist valida. Domineerivuse testi on praeguseks paljud ELi liikmesriigid välja vahetanud just *SIEC* testi vastu.

Koondumiste hindamise elemendid

Selleks, et hinnata, kas koondumise tulemusel võib realiseeruda mõni eelpool kirjeldatud kahjulike mõjude teooriatest ja kas see tuleks kohaldatava sisulise hindamise testi alusel seetõttu keelata, analüüsivad konkurentsiametid erinevaid turu asjaolusid – sh koondumise osaliste ja nende konkurentide turuosi, turu kontsentreerituse astet, ostjate või tarnijate tasakaalustava jõu olemasolu, potentsiaalse konkurentsi olemasolu ja sisenemis- või laienemispiirangute esinemist.

Kui asjakohased kaubaturud on määratletud, vaadatakse tavapäraselt esmalt koonduvate ettevõtjate ja nende konkurentide turuosadele. Mida kõrgemad on koondumise osaliste turuosad ja mida vähem on turul teisi konkurente, seda tõenäolisemad on konkurentsiprobleemid.

Väikeste majanduste puhul, kus turud on väiksemad, mahub turule tegutsema enamasti vähem ettevõtjaid kui turgudele suurtes majanduses, sest suure ettevõtjate arvu korral ei saa turul tegutsevad ettevõtjad väikestes majandustes saavutada kasumlikuks tegevuseks vajalikku minimaalset võimsust. Seetõttu iseloomustab väikeriikide turge väike turuosaliste arv ja kõrge turu kontsentratsioon, mis on konkurentsiõiguse seisukohalt reeglina muret tekitav asjaolu. Vaba kaubandus on oluliselt aidanud turgude piire laiendada ja selliseid probleeme leevendada, kuid teatud kaubad ei ole kergesti kaubeldavad tulenevalt suurtest transpordikuludest või toodete riknevast iseloomust, mistõttu on väikeriikide puhul turgude kontsentreeritus siiski aktuaalne.

Tulenevalt turgude väiksusest, on väikeste majanduste turgudele omased ka sisenemistõkked – selleks, et turuletulekuks vajalik investeering ennast ära tasuks ja oleks võimalik saavutada kasumlikuks tegutsemiseks vajalik võimsus, peaks olema võimalik turul piisavalt ostjaid leida. Kui aga turu maht ja nõudlus on piiratud, ei pruugi see olla võimalik või see tooks kaasa kõigi turuosaliste

jaoks ebaefektiivse tootmismahu. Lisaks on väikestele majandustele omane ka inimressurssi piiratuse probleem, mistõttu võib tekkida probleeme kvalifitseeritud tööjõu hankimisega. Samas võib majanduse väiksus olla ka sisenemistõkkeid vähendavaks asjaoluks – näiteks on väikesele turule sisenemisega seotud kulud ja riskid enamasti väiksemad.

Seega, majanduse väiksus võib tõepoolest omada mõju koondumise sisulise hindamise elementidele. See aga ei tähendada, et väikesed majandused peaksid neid elemente suurtest majandustest erinevalt hindama. Koondumise mõjude välja selgitamine erinevate hinnangu elementide alusel peaks sarnaselt kaubaturgude määratlemisele olema siiski vaid hinnanguid sisaldav võrdlemisi tehniline protsess. Erinevused võivad aga tuleneda koondumise kasuks rääkivate argumentide arvesse võtmise lubatavusest, mida on käsitletud alljärgnevalt.

Koondumise kasuks rääkivad argumendid

Koondumiste kontrolli puhul võivad eelpool mainitud majanduse väiksusega seotud tendentsid tõstatada dilemma – kui hinnata koondumist tüüpiliste konkurentsiõiguse kriteeriumide alusel, viitavad paljud näitajad konkurentsiprobleemile, mistõttu koondumine tuleks keelata. Sellisteks näitajateks on tüüpiliselt kõrged turuosad, turu kõrge kontsentreeritus ning potentsiaalsete konkurentsiallikate puudumine, kuna uute ettevõtjate turuletulekuks esinevad sisenemistõkked. Samas ei pruugi koondumise keelamine olukorda sisuliselt parandada, kuivõrd koondumine võib olla tingitud just asjaolust, et selleks, et oleks võimalik saavutada kasumlikuks tegutsemiseks vajalik võimsus, on ettevõtjad sunnitud koonduma.

Koondumised võivad tekitada olulisi efektiivsusvõite, kuid samas omada konkurentsi kahjustavat mõju. Küsimus, kas efektiivsusargumendi alusel võiks siiski lubada konkurentsi kahjustava koondumise, on tekitanud majandusteadlaste hulgas pikka aega suurt diskussiooni ning üheselt selget vastust sellele küsimusele ei ole.

ELi koondumiste kontrollis ei olnud efektiivsusargumentidel algselt kohta, kuid aja jooksul on Euroopa Komisjon selles osas hakanud oma seisukohta paindlikumaks muutma ning on tunnistanud, et teatud juhtudel võivad efektiivsusargumendid siiski olla asjakohased. ELi konkurentsipoliitika lähtub eelkõige tarbija heaolu tagamise eesmärgist. Seepärast nõuab ELi konkurentsipoliitika, et efektiivsusvõidust saadav kasu antaks edasi tarbijatele näiteks odavamate hindade või paremate toodete näol. Seejuures peab kasu aga olema piisavalt tõestatud ja selle edasiandmine tarbijale peab olema tagatud. Kuna koondumiste kontroll on olemuselt tulevikku vaatav, siis on neile standarditele vastavust äärmiselt raske tõestada, mistõttu ELi koondumiste kontrolli praktikas on efektiivsusargumentide kasutamine võrdlemisi harv.

Mõnede riikide (näiteks USA, Ühendatud Kuningriik, Austraalia) konkurentsipoliitika põhieesmärgiks on üldise heaolu tagamine. Sellisel juhul ei ole oluline, et koondumisest saadav efektiivsusvõit antaks edasi tarbijatele; piisab sellest, et koondumise tulemusel saavutav efektiivsusvõit on suurem kui konkurentsi vähenemisest tekkiv kahju. Selline lähenemine lähtub põhimõttest,

et tegelikkuses ei ole tarbijad ja ettevõtjad üksteisest eraldiseisvad üksused. Tarbijad võivad olla aktsionärid kas otse või läbi institutsionaalsete investorite nagu pensionifondid ja elukindlustusfirmad, kelle liikmed saavad kasu ettevõtte kasumi suurenemisest. Samas on ka ettevõtete omanikud tarbijad. Sellest tulenevalt ei ole üldise heaolu tagamise eesmärgist lähtuva koondumiste kontrolli puhul oluline efektiivsusvõidu ümberjagamine.

Michal S Gal, kelle artiklitest käesolev dissertatsioon oli algselt inspireeritud, on väitnud, et turgude väiksusest tekitatud tendentsidest tulenevalt ei saa väikesed majandused lubada sellist konkurentsipoliitikat, mis on valmis ohverdama efektiivsuse mõne muu eesmärgi nimel. Dissertatsiooni autor on aga seisukohal, et tegemist on pigem väärtusotsusega ning see, millist eesmärki koondumiste kontroll peaks teenima, on iga riigi enda otsustada. Autor toetab tarbija heaolu eesmärgi järgimist, kuid seejuures paindlikku lähenemist käitumuslikele korrektiivmeetmetele, mis võimaldaks tagada efektiivsusvõitude tarbijale edasiandmist madalamat tõendamiskoormist rakendades.

Kas lisaks efektiivsusargumentidele peaks konkurentsi kahjustavaid koondumisi lubama ka mõnel muul kaalutlusel, nagu näiteks ettevõtjate konkurentsivõime tagamine rahvusvahelises plaanis, tööhõive, rahvuslik julgeolek vms, on samamoodi väärtusotsustus. Autor on seisukohal, et selliste kaalutluste arvesse võtmine koondumiste kontrollis ei peaks olema lubatav, kuivõrd selliste kaalutluste teenimine tuleb enamasti vastava riigi enda tarbijate heaolu vähenemise arvelt. Kui selliste argumentide arvesse võtmine on siiski lubatav, peaks see olema selgelt välja öeldud, et tagada koondumiste hindamise läbipaistvus ja õiguskindlus.

III peatükk: Jurisdiktsioon ja jõustamine

Koondumise mõiste

Koondumiste kontrollile on allutatud lai tehingute ring. Koondumistena käsitletakse mis tahes tehinguid, mille käigus kaks või enam eelnevalt iseseisvat majandusüksust konsolideeritakse selliselt, et see toob kaasa püsiva muutuse koondumise osaliste struktuuris või omanikeringis. Seega hõlmavad koondumised lisaks ühinemistele ka tehinguid, millega üks või mitu ettevõtjat omandavad mõju teise ettevõtja üle näiteks vara või osaluse omandamise alusel.

Selleks et eristada koondumiseks loetavaid tehinguid ettevõtjate vahelistest koostöö- või konsortsiumilepetest, mis ei kvalifitseeru koondumisena, vaadeldakse poolte vahelise majandusliku integreerituse taset ja koostöö kavandatavat kestvust. Pelgalt lühiajaline koostöö, mis ei too kaasa püsivaid muudatusi turu struktuuris, ei ole käsitletav koondumisena ning seda reguleeritakse kokkulepete regulatsiooni alusel.

Enamikes koondumiste kontrolli režiimides on koondumise mõistele üsna sarnane lähenemine – vaadeldakse konkreetse tehingu olemust, mitte vormi. Erinevused koondumiste mõiste sisustamisel seonduvad eelkõige nö piiripealsete juhtumitega, kus toimub küll teatud osaluse või mõju omandamine

teise ettevõtja üle, kuid kus ei saavutata valitsevat mõju (näiteks vähemusosaluste omandamine või kattuvate juhtorganite liikmete valimine). ELi koondumiste kontrollis ei loeta selliseid tehinguid koondumisteks ega allutata neid Euroopa Komisjoni kontrollile. Paljud ELi liikmesriigid käsitlevad koondumise mõistet sarnaselt ELiga. Samas võivad sellised tehingud olla allutatud kontrollile näiteks Saksamaa või Austria koondumiste regulatsiooni alusel.

Dissertatsioonis on pikemalt analüüsitud *A-TEC/Norddeutsche Affinerie* juhtumit Saksa koondumiste kontrolli praktikast, mis puudutas Austria vase tootmisega tegeleva ettevõtja A-TEC poolt 13,75%-lise osaluse omandamist Saksa konkurendis Norddeutsche Affinerie ja sellele järgnenud A-TECi kavatsust nimetada kolm 12-st Norddeutsche Affinerie nõukogu liikmest. Saksa konkurentsiamet leidis, et tegemist oli konkurentsi kahjustava koondumisega ja keelas selle, kuna see oleks võimaldanud konkurentidel kooskõlastada oma turu käitumise. Kuigi kooskõlastatud tegevus oleks keelatud ka kokkulepete keelu regulatsiooni alusel, võib sellises olukorras olla väga raske tuvastada seaduse vastast keelatud koostööd.

Kuigi eelkirjeldatud *A-TEC/Norddeutce Affinerie* juhtum leidis aset Saksamaal, mida ei saa pidada väikeseks majanduseks, annab see olulisi suuniseid ka väikestele majandustele, kus ettevõtjate arv turul on sageli väike ja kus osaluse omandamised ja kattuvate juhtorganite valimine võib veelgi enam lihtsustada niigi väheste ettevõtjate turu käitumise kooskõlastamist. Seepärast peab autor väikestes majandustes põhjendatuks sedalaadi tehingute allutamist koondumiste kontrollile.

Koondumistest teavitamise süsteemi valik

Koondumiste kontrolli reeglid näevad enamasti ette koondumistest teavitamise protseduuri, mille kohaselt koondumise osalised peavad kavandatavast koondumisest konkurentsiametit teavitama. Konkurentsiamet analüüsib seejärel koondumise mõjusid ja otsustab, kas lubada või keelata koondumine. Lisaks, võib mõnede probleemsete koondumiste puhul olla keelamise asemel alternatiiviks korrektiivmeetmete kasutamine.

Toimiva koondumisest teavitamise süsteemi loomine on oluline igas suuruses majanduste jaoks, kuid väikesed majandused peavad siinkohal olema eriti hoolikad. Koondumiste kontrollimine nõuab olulisi ressursse. Kontroll tekitab ühelt poolt finants- ja ajakulusid ettevõtjate jaoks, kes peavad reegleid järgima, kuid teiselt poolt ka konkurentsiametile, kes peab suunama ressursse koondumiste sisulisele hindamisele. Väikestes majandustes, kus ressursid on piiratumad kui suurtes majandustes, on seetõttu eriti oluline disainida koondumiste kontrolli süsteem selliselt, et see ei oleks ettevõtetele ega konkurentsiametile üleliia koormav.

Saab eristada koondumise jõustamise eelseid teavitamise süsteeme ja koondumise jõustamise järgseid teavitamise süsteeme. Viimati nimetatud süsteemid ei ole kuigi laialt kasutatud, kuna need võivad põhjustada õiguslikku ebakindlust ja tekitada kahju konkurentsile. Seetõttu on enamikes koondumiste

kontrolli süsteemides kasutusel koondumise jõustamise eelne teavitamise süsteem.

Koondumise jõustamise eelsed teavitamise süsteemid jagunevad omakorda kohustuslikeks ja vabatahtlikeks teavitamise süsteemideks. Kohustuslike teavitamise süsteemide puhul tuleb konkurentsiametit teavitada kõikidest koondumistest, mis üleavad teatud künnised. Sellised künnised varieeruvad oluliselt erinevates riikides, kuid kõige tavalisemad on koondumise osaliste ülemaailmsel või siseriiklikul käibel (või nende kombinatsioonil) põhinevad künnised. Mõnedes riikides on künniste määramise aluseks võetud ka muid näitajaid, nagu turuosad, bilansimaht või tehingu väärtus.

Vabatahtlike teavitamise süsteemide puhul võivad koondumise osalised ise otsustada, kas teavitada koondumisest konkurentsiametit ja taotleda tehingule luba. Kui koondumise osalised otsustavad mitte teavitada, riskivad nad võimalusega, et konkurentsiamet võib hiljem tehingu vaidlustada, nõuda selle tagasitäitmist või kehtestada olulisi trahve, kui ilmneb, et koondumine kahjustab konkurentsi.

Kohustuslike teavitamissüsteemide peamiseks eeliseks on selgus ja õiguskindlus koondumise osaliste jaoks. Kohustuslike süsteemide peamiseks puudukseks on asjaolu, et koondumiste kontrolli künnised rakenduvad kõigile koondumistele ühte moodi sõltumata koondumise mõjudest konkurentsile. Seepärast allutavad kohustuslikud süsteemid kontrollile ühelt poolt suurel hulgal selliseid koondumisi, millel ei ole konkurentsile mingit kahjulikku mõju, ning teiselt poolt jätavad kontrolli alt välja selliseid koondumisi, mis võivad konkurentsi oluliselt kahjustada.

Vabatahtlikud süsteemid jätavad riskianalüüsi suures osas koondumise osaliste endi kanda, sest osalised peavad ise hindama, kas koondumisel on kahjulikke mõjusid. Kui neil tekib kahtlusi koondumise lubatavuses, saavad nad võimalikke tehingu vaidlustamise ja trahvide riske vältida konkurentsiameti teavitamise läbi. Konkurentsiameti seisukohalt tähendab vabatahtlik koondumise süsteem seda, et amet kontrollib eelkõige selliseid koondumisi, mis võivad konkurentsi kahjustada ega pea kulutama ressursse selliste koondumiste menetlemisele, mis mõjusid ei oma. Samas vähendab vabatahtlik teavitamissüsteem konkurentsametile kättesaadava turu informatsiooni mahtu ning konkurentsiamet peaks ka ise aktiivsemalt turul toimuvaid tehinguid monitoorima, et tuvastada selliseid koondumisi, mis kahjustavad konkurentsi ja milleks koondumise osalised ei ole luba küsinud. Kui sellised koondumised on juba jõustatud, võib konkurentsile tekkida kahju, mida ei saa tehingu tagasitäimisega enam heastada ning mõnel juhul ei pruugi olla tehingu tagasi täitmine enam praktiliselt võimalik.

Autor on siiski seisukohal, et väikeste majanduste jaoks on eelistatud vabatahtlikud süsteemid, kuna need võimaldavad piiratud ressursse efektiivsemalt kasutada ning samas on väikeste majanduste turgudel toimuvad tehingud ja turu struktuuri muutused väikeste majanduste konkurentsiametile lihtsamini hoomatavad kui suurte majanduste puhul, kus turu osaliste kogu arv on oluliselt suurem. Selleks et suurendada õiguskindlust ja tagada parem info kättesaadavus

konkurentsiameti jaoks, võib vabatahtlikku teavitamise süsteemi täiendada mõnede kohustuslike elementidega. Näiteks on võimalik sisse seada informeerimissüsteem, mis seisneks pelgalt tehingu üldandmete kohustusliku sisestamisega konkurentsiameti süsteemi. Selliste andmete sisestamise korral võib seada konkurentsiametile piiratud tähtaja (näiteks neli kuud), mille jooksul asjas menetlust alustada. Selliselt suurendataks õiguskindlust ja tagataks infovoog konkurentsiametile ilma, et see nõuaks olulisi ressursse.

Koondumiste kontrolli rahvusvaheline jõustamine

Riikide jurisdiktsioonilise pädevuse piirid ja seega ka nende võime kohaldada oma konkurentsiõiguse norme välismaiste ettevõtjate suhtes kuulub rahvusvahelise avaliku õiguse valdkonda. Riikide jurisdiktsioonilise pädevuse puhul eristatakse kahte peamist elementi – seadlusandlik jurisdiktsioon, mis seisneb riigi õiguses teatud küsimusi õigusaktidega reguleerida, ja täidesaatev jurisdiktsioon, mis seisneb riigi õiguses oma õigusakte jõustada. Seadusandliku ja täidesaatva jurisdiktsiooni piirid ei ole alati samad – seadusandliku jurisdiktsiooni teostamine teise riigi ettevõtjate suhtes ei pruugi tekitada konflikte, samas kui täidesaatva jurisdiktsiooni teostamine võib suurema tõenäosusega põhjustada riikide vahelisi konflikte.

Konkurentsiõiguse kontekstis tunnistab rahvusvaheline avalik õigus üldiselt riigi õigust võtta vastu õigusakte, mis mõjutavad ettevõtjate käitumist riigi territooriumil (nn territoriaalsuspõhimõte) ja õigust reguleerida oma kodanike (nii füüsiliste kui juriidiliste isikute) käitumist väljaspool riigi territooriumi (nn kodakondsuspõhimõte). Territoriaalsuspõhimõtet on laiendatud selliselt, et hõlmata riigi õigus reguleerida ka selliseid tegusid, mis on toime pandud vastavas riigis (nn subjektiivne territoriaalsus) ja väljaspool riiki toime pandud tegusid, mis on vähemalt osaliselt lõpuleviidud vastava riigi territooriumil (nn objektiivne territoriaalsus). Vastuolusid on tekitanud küsimus, kas objektiivset territoriaalsuspõhimõtet saab kohaldada ka mõjude puhul, mida tekitab välisriigis sõlmitud konkurentsi kahjustav kokkulepe või tegevus. Seepärast on konkurentsireeglite rahvusvaheline jõustamine välisriigis paiknevate ettevõtjate tegevuse osas tekitanud vastusolusid isegi suurte riikide poolse piiriülese täidesaatva juristidiktsiooni teostamise püüdluste korral. Seda piiratumad on väikeste riikide võimalused oma konkurentsireegleid jõustada teiste riikide ettevõtjate suhtes. Kui väljaspool väikest riiki aset leidev koondumine kahjustab konkurentsi väikese riigi turgudel, kuid koondumise osaliste koduriigid või mõni muu suur riik seda koondumist ei keela, on väikeste riikide läbirääkimispositsioon ja jõustamisvõimalused võrdlemisi piiratud.

Rahvusvahelise jõustamise lihtsustamiseks on sõlmitud rahvusvahelisi kokkuleppeid, milles on käsitletud konkurentsiõiguse vastastikkuse jõustamise küsimusi, samuti on püütud välja töötada rahvusvahelisi konkurentsiõiguse norme, kuid seni ei ole need meetmed pakkunud piisavat lahendust väikeste majanduste koondumiste kontrolli jõustamisprobleemidele.

ELis on tagatud Euroopa Komisjoni otsuste jõustamine siseriiklikul tasandil EÜ asutamislepingu artikli 256 alusel. Lisaks on vastu võetud määrusi ja raam-

otsuseid liikmesriikide tsiviil- ja kriminaalkohtu otsuste jõustamise lihtsustamiseks teistes liikmesriikides. Koondumiste kontrolli teostatakse aga enamasti haldusmenetluses ning selliste otsuste rahvusvahelise jõustamise osas regulatsioonid puuduvad.

ELi ühinemistemääruse artikli 4 lõiked 4 ja 5 ning artiklid 9 ja 22 võimaldavad koondumiste kontrolli pädevuse ümberjaotamist Komisjoni ja liikmesriikide vahel. Seejuures näeb artikkel 22 ette võimaluse, liikmesriik võib taotleda, et konkreetse koondumise kontrollimise pädevus antaks üle Komisjonile isegi juhul, kui koondumine ei kuulu Komisjoni kontrolli alla käibekünniste alusel, kui see koondumine mõjutab liikmesriikide vahelist kaubandust ja ähvardab oluliselt mõjutada konkurentsi taotleva liikmesriigi territooriumil. Seega, juhul, kui koondumine tekitab mõnes ELi liikmesriigis olulisi konkurentsiprobleeme, kuid koondumise osalised asuvad väljaspool vastavat liimesriiki ja koondumise osaliste koduriigid koondumist ei keela, võiks ELis lahenduseks olla vastava koondumise kontrollimise pädevuse üleandmine Euroopa Komisjonile.

IV peatükk: Korrektiivmeetmed

Et vältida koondumise keelamist on sageli alternatiiviks korrektiivmeetmete kasutamine. Korrektiivmeetmed seisnevad koondumise osalise poolt endale konkurentsiameti ees võetud kohustustes teha teatud toiminguid või käituda turul teatud viisil. Selliste kohustuste eesmärk on kõrvaldada koondumise poolt tekitatav konkurentsiprobleem või vähemalt konkurentsiprobleemi leevendamine.

Korrektiivmeetmed saab jagada kahte suurde rühma – struktuurilised ja käitumuslikud. Struktuurilised korrektiivmeetmed, nagu nimigi ütleb, toovad kaasa muutusi ettevõtjate või turu struktuuris – sellised meetmed hõlmavad ettevõtja teatud äritegevuse võõrandamist või oluliste pikaajaliste litsentside andmist. Sel juhul kõrvaldatakse konkurentsiprobleem turul, kus konkurentsiamet on tuvastanud probleemi. Käitumuslike meetmetega pannakse koondumise osalistele kohustusi teatud viisil käituda – näiteks kõiki ettevõtjaid võrdselt kohelda, tagada ligipääs olulistele vahenditele, hoida hindu teatud tasemel jne.

ELi konkurentsiõiguses on peetud selgelt eelistatuks struktuurilisi meetmeid, sest need ei vaja pikaajalist järelevalvet ja kõrvaldavad konkurentsiprobleemi täielikult ja koheselt. Kuigi ka paljud väikeriigid lähtuvad samast põhimõttest, on käesoleva dissertatsiooni autor seisukohal, et väikestes majandustes on vajalik suurem paindlikkus ja seetõttu on väikeste majanduste praktikas sageli eelsitatumad käitumuslikud meetmed.

Juhul, kui väikeses majanduses tegutsev konkurentsiamet leiab, et suurte rahvusvaheliste ettevõtjate koondumine tekitab probleemi vastava väikese majanduse turul, võiks sellise koondumise keelamine tähendada reaalselt seda, et suurettevõtted ei loobu koondumise plaanist, vaid viivad oma äritegevuse sellest väikesest majandusest üldse välja. Ka struktuuriline meede võib olla sellisel ju-

hul suureettevõtete jaoks liiga koormav. Sel juhul on kompromisslahenduseks käitumuslikud meetmed.

Kuivõrd väikestes majandustes toimuvate koondumiste ajendiks on sageli just konsolideerumise tulemusel efektiivsusvõitude ja kasumilikuks tegutsemiseks vajaliku võimsuse saavutamine, võib kohustus võõrandada äritegevuse osa selle eesmärgi saavutamise võimatuks muuta. Samuti võib tekkida olukord, kus sobivaid struktuurilisi meetmeid ei ole või need ei kõrvalda probleemi.

Struktuurilised meetmed on väga jõulised meetmed, kuid selleks et need konkurentsiprobleemi efektiivselt kõrvaldaksid, tuleb võõrandamise protsessi hoolikalt jälgida, et tagada piisavalt elujõulise äritegevuse võõrandamine ja leida sobiv ostja. Samuti tuleb tagada, et äritegevuse väärtus koondumise loa otsuse ja äritegevuse võõrandamise jõustamise vahelisel perioodil ei väheneks. Kui konkurentsiametil ei ole piisavalt pädevust ega ressursse, et sellist protsessi monitoorida, ei pruugi struktuurilised meetmed oodatud tulemusi anda. Olgugi, et struktuuriliste meetmete rakendamise protsessi on vajalik monitoorida vaid lühikese ajaperioodi jooksul, on sel perioodil monitoorimise vajadus äärmiselt intensiivne ning olulise tähtsusega korrektiivmeetme õnnestumiseks.

Kuigi käitumuslikud meetmed vajavad pikaajalist järelevalvet, annavad need ka suurema paindlikkuse ja võimaldavad teha muudatusi juhul, kui ilmneb, et konkurentsiamet on turuolukorda valesti hinnanud või kui turul on toimunud ootamatud muudatused. Selline paindlikkus on väikestes majandustes vajalik ja põhjendantud. Tulenevalt nö „kõik tunnevad kõiki" fenomenist on väikestes majandustes kõrvalekaldeid korrektiivmeetmetest lihtsam tuvastada.

Järeldused

Kõik käesolevas dissertatsioonis püstitatud uurimishüpoteesid leidsid töös kinnitust. Dissertatsiooni olulisemad järeldused saab kokku võtta järgmiselt:

- Väikesed majandused ei vaja aluspõhimõtetelt suurtest koondumiste kontrolli režiimidest erinevat süsteemi, kuid väiksusest tulenevaid erisusi on oluline arvesse võtta.
- Koondumiste sisulise hindamise erisused väikestes majandustes ei ole vajalikud, kuid eesmärgid peavad olema selged ja läbimõeldud tuginedes väärtusotsustele.
- Väikeste majanduste erisusi tuleks arvesse võtta eelkõige jurisdiktsiooniliste küsimustes, eriti koondumiste kontrollile allutatud tehingute ringi määratlemisel ja koondumistest teavitamise süsteemi valikul.
- Koondumiste kontrolli reeglite rahvusvaheline jõustamine võib põhjustada väikestele majandustele enam probleeme kui suurtele majandustele, kuid ELis on võimalik selliseid jõustamisprobleeme leevendada Euroopa Komisjoni ja liikmesriikide kontrolli pädevuse ümberjagamisega.
- Väikestes majandustes on põhjendatud võrreldes suurte majandustega paindlikum lähenemine käitumuslikele korrektiivmeetmetele.

LIST OF ABBREVIATIONS

ARC	Act against Restraints of Competition (German)
CCS	Competition Commission of Singapore
DOJ	US Department of Justice
EC	European Community
ECA	Estonian Competition Authority
ECJ	European Court of Justice
ECMR	European Community Merger Regulation
ECR	European Court Reports
EEA	European Economic Area
EU	European Union
GDP	gross domestic product
GFCO	German Federal Cartel Office
FTC	US Federal Trade commission
HSR Act	Hart-Scott-Rodino Antitrust Improvements Act
ICN	International Competition Network
OECD	Organisation for Economic Co-operation and Development
OFT	UK Office of Free Trading
O.J.	Official Journal (of the EU)
PPP	purchase power parity
PPS	purchase power standard
SBS	structural business statistics
SIEC	significant impediment to effective competition
SLC	substantial lessening of competition
SME	small- and medium-sized enterprises
SCP	structure-conduct-performance
SSNIP	small but significant non-transitory increase in price
UK	United Kingdom
UNCTAD	United Nations Conference for Trade and Development
US	United States of America
U.S.C	United States Code
WTO	World Trade Organisation

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4. Judgment of ECJ of 13.02.1979, Case 85/76 – *Hoffmann-La Roche v. Commission*, [1979] ECR 461
5. Judgment of ECJ of 27.09.1988, Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85 – *A. Ahlström Osakeyhtiö and others v. Commission (Wood Pulp)* [1988] ECR 5193
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8. Judgment of the ECJ of 31.03.1998, Case C-68/94 – *France and Société commerciale des potasses et de l'azote and Entreprise minière et chimique v. Commission (Kali+Salz)*, [1998] ECR I-1375
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13. Commission Decision of 19.07.1991, Case No. IV/M.068 – *Tetra Pak/Alfa-Laval*
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20. Commission Decision of 02.12.1995, Case No. IV/M.527 – *Thomson CSF/Deutsche Aerospace*
21. Commission Decision of 24.04.1996, Case No. IV/M.619 – Gencor/Lonrho
22. Commission Decision of 20.11.1996, Case No. IV/M.784 – *Kesko/Tuko*
23. Commission Decision of 22.01.1997, Case No. IV/M.794 – *Coca-Cola/ Amalgamated Beverages GB*
24. Commission Decision of 30.07.1997, Case No. IV/M.877 – *Boeing/McDonnell Douglas*
25. Commission Decision of 26.06.1997, Case No. IV/M.890 – *Blokker/Toys "R" Us*
26. Commission's decision of 30.07.1998, Case No. IV/M.1251 – *Particitel International / Cableuropa*
27. Commission Decision of 28.09.2000, Case No. COMP/M.2153 – *BHP / Mitsubishi / QCT*
28. Commission Decision of 03.07.2001, Case No. COMP/M.2220 – *General Electric/Honeywell*
29. Commission Decision of 02.06.2006, Case No. COMP/M.4137 – *Mittal/Arcelor*
30. Commission Decision of 10.03.2008, Case No. COMP/M.4992 – *ArcelorMittal/ Galvex*

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2007–2008 National University of Singapore, Faculty of Law, Master of Laws
2004–2005 University of Helsinki, Faculty of Law, Master of Laws in Contract and Commercial Law
2000–2004 University of Tartu, Faculty of Law, *baccalaureus artium* in Law
1997–2000 Tartu Miina Härma Gümnaasium (honors)

Career

2004– Law Office Lepik & Luhaäär LAWIN, attorney
2009 University of Tartu, Faculty of Law, teaching the course on Competition Law
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2005–2006 European Commission, Legal Service, trainee
2003–2004 University of Tartu, Research and Development Department, contractual advisor
2003 Estonian Competition Authority, Merger Control Department, trainee

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List of Publications

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2. Paas, Katri; Tamm, Elo. The Concept of Dominance in Estonian Competition Law. *Juridica International*, 2007, No. 1, 134–141
3. Paas, Katri. Reform of Estonian Competition Law and the Remaining Problems. *European Competition Law Review*, 2006, No. 12, 678–685
4. Paas, Katri. Non-Structural Remedies in EU Merger Control. *European Competition Law Review*, 2006, No. 5, 209–216
5. Paas, Katri. Mittestruktuurilised korrektiivmeetmed koondumiste kontrollis. *Juridica*, 2006, No. 5, 340–349

Research grants and scholarships

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Teenistuskäik

2004–	Advokaadibüroo Lepik & Luhaäär LAWIN, advokaat
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2003–2004	Tartu Ülikooli teadus- ja arendusosakond, lepinguline õigusnõustaja
2003	Konkurentsiameti koondumiste kontrolli osakond, praktikant

Keelteoskus

Eesti keel: Emakeel
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1. Paas, Katri. Implications of the Smallness of an Economy for Merger Remedies, *Juridica International*, 2008, nr. 2, 94–103
2. Paas, Katri; Tamm, Elo. The Concept of Dominance in Estonian Competition Law. *Juridica International*, 2007, nr. 1, 134–141
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DISSERTATIONES IURIDICAE UNIVERSITATIS TARTUENSIS

1. **Херберт Линдмяэ.** Управление проведением судебных экспертиз и его эффективность в уголовном судопроизводстве. Тарту, 1991.
2. **Peep Pruks.** Strafprozesse: Wissenschaftliche "Lügendetektion". (Instrumentaldiagnostik der emotionalen Spannung und ihre Anwendungsmöglichkeiten in Strafprozess). Tartu, 1991.
3. **Marju Luts.** Juhuslik ja isamaaline: F. G. v. Bunge provintsiaalõigusteadus. Tartu, 2000.
4. **Gaabriel Tavits.** Tööõiguse rakendusala määratlemine töötaja, tööandja ja töölepingu mõistete abil. Tartu, 2001.
5. **Merle Muda.** Töötajate õiguste kaitse tööandja tegevuse ümberkorraldamisel. Tartu, 2001.
6. **Margus Kingisepp.** Kahjuhüvitis postmodernses deliktiõiguses. Tartu, 2002.
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8. **Irene Kull.** Hea usu põhimõte kaasaegses lepinguõiguses. Tartu, 2002.
9. **Jüri Saar.** Õigusvastane käitumine alaealisena ja kriminaalsed karjäärid (Eesti 1985–1999 longituuduurimuse andmetel). Tartu, 2003.
10. **Julia Laffranque.** Kohtuniku eriarvamus. Selle võimalikkus ja vajalikkus Eesti Vabariigi Riigikohtus ja Euroopa Kohtus. Tartu, 2003.
11. **Hannes Veinla.** Ettevaatusprintsiip keskkonnaõiguses. Tartu, 2004.
12. **Kalev Saare.** Eraõigusliku juriidilise isiku õigussubjektsuse piiritlemine. Tartu, 2004.
13. **Meris Sillaots.** Kokkuleppemenetlus kriminaalmenetluses. Tartu, 2004.
14. **Mario Rosentau.** Õiguse olemus: sotsiaalse käitumise funktsionaalne programm. Tartu, 2004.
15. **Ants Nõmper.** Open consent – a new form of informed consent for population genetic databases. Tartu, 2005.
16. **Janno Lahe.** Süü deliktiõiguses. Tartu, 2005.
17. **Priit Pikamäe.** Tahtluse struktuur. Tahtlus kui koosseisupäraste asjaolude teadmine. Tartu, 2006.
18. **Ivo Pilving.** Haldusakti siduvus. Uurimus kehtiva haldusakti õiguslikust tähendusest rõhuasetusega avalik-õiguslikel lubadel. Tartu, 2006.
19. **Karin Sein.** Ettenähtavus ja rikutud kohustuse eesmärk kui lepingulise kahjuhüvitise piiramise alused. Tartu, 2007.
20. **Mart Susi.** Õigus tõhusale menetlusele enda kaitseks – Euroopa Inimõiguste ja Põhivabaduste Kaitse Konventsiooni artikkel 13 Euroopa Inimõiguste Kohtu dünaamilises käsitluses. Tartu, 2008.
21. **Carri Ginter.** Application of principles of European Law in the supreme court of Estonia. Tartu, 2008.
22. **Villu Kõve.** Varaliste tehingute süsteem Eestis. Tartu, 2009.