

The Proportionality Principle under European Merger Remedies

A Critical Analysis of the Commission's Practice on Remedies,
with a Special Focus on the Energy Sector

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INTRODUCTON

Mergers and acquisitions contribute to a company's internal and external growth by enabling it to obtain a number of benefits¹, ranging from economies of scope and scale to access to information and licences². They are indeed motivated by the desire of the parties to increase their efficiency. More broadly, they generate many advantages for the market itself; namely low prices, high-quality products, a wide selection of goods and services³, enhanced efficiency and innovation and an increase in consumer welfare⁴.

But mergers and acquisitions can also have adverse effects on the market⁵, since transactions may reduce competition by providing a means to fragment markets or to achieve significant market power⁶. Consequently, these transactions may result in increased concentration, decreased innovation, reduced economic efficiency, higher prices, lower quality and a decline in consumer welfare⁷. The costs of anti-competitive mergers are high, not only for consumers but also for the European economy and industry⁸.

Therefore, the key challenge of merger control in the European Union is to ensure that the positive impact of mergers and acquisitions in terms of investment and

¹ A. JACQUEMIN, « Introduction: Competition and Competition Policy in Market Economies » in W. COMANOR, K. GEORGE, A. JACQUEMIN *e.a.*, *Competition Policy in Europe and North America: Economic Issues and Institutions*, Chur, Harwood Academic Publishers, 1990, pp. 1-6.

² A. EZRACHI, *EU Competition Law. An Analytical Guide to the Leading Cases*, 3d ed., Oxford, Hart Publishing, 2012, p. 338.

³ F. JENNY, « Droit européen de la concurrence et efficience économique », *Revue d'Economie Industrielle*, 1991, n°63, p. 193.

⁴ T. WINSLOW, « Prévention des abus sur le marché et promotion de l'efficacité économique et de la croissance », *Revue de l'OCDE sur le droit et la politique de la concurrence*, Vol. 6, 2004, n°1-2, pp. 18-123.

⁵ ARISTOTLE already condemned monopolies for their excessive pricing policies: M.I. FINLEY, *Studies in Ancient Society*, New York, Routledge Revivals, 2013, p. 37; V. RUGGIERO, *The Crimes of the Economy. A Criminological Analysis of Economic Thought*, New York, Routledge, 2013, p. 170.

⁶ G. VALLINDAS, *Essai sur la rationalité du droit communautaire des concentrations*, Bruxelles, Bruylant, 2010, p. 6.

⁷ T. DUSO, K. GUGLER and F. SZÜCS, « An Empirical Assessment of the 2004 EU Merger Policy Reform », *The Economic Journal*, Vol. 123, 2013, n° 572, p. 598.

⁸ See: C. ESTEVA MOSSO, « EU Merger Control: The Big Picture », *6th Annual GCR Conference*, Brussels, 12 November 2014.

restructuring is preserved to the greatest extent possible and that the negative effects on the competitive structure of the markets concerned are minimised⁹.

Before the latter half of the 1980s, there was no systematic regime for the control of mergers and acquisitions at European level¹⁰ and the European Commission had to rely on articles 81 and 82 of the EC Treaty^{11 12 13}. However, it soon became evident that the existing legal framework did not suffice anymore¹⁴ and that changes had to be brought in order to effectively control concentrations that risked bringing anti-competitive effects on the European markets.

The original Merger Regulation was adopted on 21 December 1989¹⁵. Its purpose was to regulate changes in market structure in the European Union. This Regulation was regarded as highly successful and the Commission gained the reputation of handling cases in an efficient and timely manner¹⁶. The Regulation underwent a major and comprehensive reform in 2004, when the Council of Ministers adopted the new Merger Regulation, incorporating the numerous amendments that had been made

⁹ C. ESTEVA MOSSO, *Ibidem*.

¹⁰ The 1951 Treaty establishing the European Coal and Steel Community (ECSC Treaty) contained a limited *ex ante* system of merger control. See: art. 66.

¹¹ Today art. 101 and 102 TFEU.

¹² J. FAULL & A. NIKPAY, *The EU Law of Competition*, 3d ed., Oxford, Oxford University Press, 2014, p. 540, pts. 5.01 and 5.02.

¹³ In 1973, the European Court of Justice confirmed the Commission's ability to apply art. 82 of the EC Treaty (today TFEU, art. 102) to acquisitions by a dominant company (Case 6/72, *Europemballage and Continental Can Co Inc v. Commission* (1973) ECR 215, § 26). In the years that followed, the Commission increasingly applied this article to acquisitions. In the course of the 1980s, the Commission also started to apply art. 81 of the EC Treaty (today TFEU, art. 101) to concentrative operations. The European Court of Justice confirmed this possibility in 1988: Joined Cases 142 and 156/84, *BAT and Reynolds v. Commission* (1987) ECR 4487, § 36-39; M. FURSE, *The Law of Merger Control in the EC and the UK*, Oxford, Hart Publishing, 2007, pp. 4-6.

¹⁴ In particular, art. 81 of the EC Treaty required the existence of an agreement, which was not always possible to establish in cases of acquisition of control. In turn, art. 82 of the EC Treaty could only be applied when the undertaking already held a dominant position before the concentration. Finally, the *ex post* nature of both instruments was not well suited to the control of structural operations: A. JONES and B. SUFRIN, *EC Competition Law: Text, Cases and Materials*, Oxford, Oxford University Press, 2008, pp. 949-952.

¹⁵ Council Regulation (EEC) N° 4064/89 of 21 December 1989 on the control of concentrations between undertakings, *O.J.* No L.395/1, 30.12.1989.

¹⁶ J. FAULL & A. NIKPAY, *op. cit.*, p. 540, pt. 5.04.

since 1989¹⁷. One of the goals of this merger policy reform was to achieve a more « economic approach » on merger control¹⁸.

Today, the European Merger Regulation¹⁹ (hereafter the « Merger Regulation ») is the main instrument for the control of mergers, acquisitions and other concentrations under European competition law. It aims to distinguish between harmful and pro-competitive transactions. It applies throughout the European Economic Area (hereafter the « EEA ») and is based on a system of notification prior to implementation²⁰.

The Merger Regulation provides for a « one-stop-shop » system that increases legal certainty and removes obstacles to pan-European restructuring²¹. Thanks to the Merger Regulation, parties do not longer have to comply with different national legal systems, which can be a source of uncertainty²². They only have to notify their operation to the Commission, which deals with notifications quickly and efficiently and provides a clearance decision that is valid throughout the EEA²³.

The Merger Regulation declares incompatible with the common market « concentrations »²⁴ with an « EU dimension »²⁵, which would « significantly impede effective competition²⁶ in the common market or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position »²⁷. Where the Commission identifies a « significant impediment to effective competition », the notifying parties may avoid an adverse decision as to the compatibility of their

¹⁷ I. LYNCH FANNON and K. CUDDIHY, *Corporations and Partnerships in Ireland*, AH Alphen aan den Rijn, Kluwer Law International, 2010, p. 135.

¹⁸ T. DUSO, K. GUGLER and F. SZÜCS, *op. cit.*, p. 596.

¹⁹ Council Regulation (EC) N° 139/2004 of 20 January 2004 on the control of concentrations between undertakings, *O.J.* N° L.24/1, 29.1.2004.

²⁰ *Bellamy & Child: European Law of Competition*, 7th ed., V. ROSE and D. BAILEY (ed.), Oxford, Oxford University Press, 2013, p. 514, pt. 8.001.

²¹ C. ESTEVA MOSSO, *op. cit.*, p. 3.

²² A. EZRACHI, *op. cit.*, p. 340.

²³ K. MIDDLETON, B. RODGER, A. MACCULLOCH *e.a.*, *Cases and Materials on UK & EC Competition Law*, 2nd ed., Oxford, Oxford University Press, 2009, p. 509.

²⁴ Merger Regulation, *op. cit.*, art. 3.

²⁵ Merger Regulation, *op. cit.*, art. 1(2) and (3).

²⁶ A proper definition of « competition » is not offered in the EC Treaty, but can be found in the legal doctrine: G. GOYDER, *EC Competition Law*, 4th ed., Oxford, Oxford University Press, 2003, p. 8.

²⁷ Merger Regulation, *op. cit.*, art. 2(3).

operation with the common market by submitting « remedies »²⁸. The purpose of merger remedies is to annihilate the potential competitive harms of a concentration in order to obtain a clearance decision from the Commission²⁹.

The Implementing Regulation³⁰ and the Notice on Remedies³¹ are part of the legal basis of remedies.

In its practice, the Commission must always respect the proportionality principle³². This general principle of European law requires that « the content and form of the action of the European Union shall not exceed what is necessary to achieve the objectives of the Treaties »³³. The proportionality principle works as a constraint on public authorities³⁴. This implies that the Commission may only accept remedies that eliminate competition concerns « entirely and proportionately »³⁵.

Amongst all the European Union's policies, building an integrated and competitive « European Energy Union » is one of the Commission's key priorities³⁶. Reliable energy supply at reasonable prices for businesses and consumers and with the minimum environmental impact is indeed crucial to the European economy and for the achievement of consumer welfare³⁷. The creation of a competitive internal energy market will enable the European Union to face its three energy objectives:

²⁸ N. PETIT, « Remedies for Coordinated Effects under the EU Merger Regulation », *Competition Law International*, 2010, p. 36.

²⁹ Cf. *infra*.

³⁰ Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings and its annexes (Form CO, Short Form CO, Form RS and Form RM), *O.J. L.133*, 30.04.2004, as amended by Commission Regulation (EC) No 1033/2008, *O.J. L.279*, 22.10.2008 and by Commission Implementing Regulation (EU) No 1269/2013 of 5 December 2013, *O.J. L.336*, 14.12.2013.

³¹ Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, *O.J. C.267/1*, 22.10.2008.

³² TEU, art. 5(4).

³³ P. CRAIG, *EU Administrative Law*, Oxford, Oxford University Press, 2006, Chapter 19.

³⁴ P. KENT, *Law of the European Union*, 4th ed., Essex, Pearson Longman, 2008, p. 78.

³⁵ W. WANG and M. RUDANKO, « EU Merger Remedies and Competition Concerns : An Empirical Assessment », *European Law Journal*, Vol. 18, 2012, n°4, p. 555.

³⁶ M. BAHA KARAN and H. KAZDAGLI, « The Development of Energy Markets in Europe », in A. DORSMAN (ed.), *Financial Aspects in Energy*, Berlin-Heidelberg, Springer-Verlag, 2011, pp. 11-32.

³⁷ J. FAULL & A. NIKPAY, *op. cit.*, p. 1582, pt. 12.03.

competitiveness, sustainability and security of supply. These objectives are best achieved through a common framework and joint action at European level³⁸.

The general benefits of competition, in particular allocative efficiency, innovation, cost reduction and progress³⁹, are others factors lying behind this European program for energy market reform, initiated in the 1990s⁴⁰. In the gas and electricity sectors, liberalization and enforcement of competition rules go together, since liberalization is a necessary prerequisite for the introduction of effective competition⁴¹. That is why the European Union has sought to integrate these national markets into a single liberalized and competitive European market.

The European Union has adopted three Liberalization Packages for the gas and electricity sectors⁴². The First Liberalization Package⁴³ gradually abolished State supply monopolies. The Second Liberalization Package⁴⁴'s aim was to widen market opening and to accelerate its pace. The core elements of the Third Liberalization Package⁴⁵ include ownership unbundling, the establishment of a National regulatory authority for each Member State, as well as the Agency for the Cooperation of Energy Regulators that allows National regulatory authorities to work together. The Energy Sector also includes oil and derivative products, as well as waste management, whose concentrations are intensely controlled by the Commission.

³⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, « Energy 2020. A strategy for competitive, sustainable and secure energy », Brussels, 10.11.2010.

³⁹ M. LORENZ, *An Introduction to EU Competition Law*, Cambridge, Cambridge University Press, 2013, pp. 1-3.

⁴⁰ P. D. CAMERON, *Competition in Energy Markets : Law and Regulation in the European Union*, 2nd ed, Oxford, Oxford University Press, 2007, p. 6, pt. 1.06.

⁴¹ P. D. CAMERON, *Ibidem*, p. 29, pt. 1.75.

⁴² P. D. CAMERON, *op. cit.*, p. 11, pts. 1.22.

⁴³ Directives 96/92/EC concerning common rules for the internal market in electricity and 98/30/EC on common rules for the internal market in natural gas.

⁴⁴ Directives 2003/54/EC concerning common rules for the internal market in electricity and 2003/55/EC concerning common rules for the internal market on natural gas.

⁴⁵ Directives 2009/72/EC concerning common rules for the internal market in electricity and 2009/73/EC concerning common rules for the internal market in natural gas. The package also comprises three Regulations: Regulations N° 714/2009 on conditions for access to the network for cross-border exchanges in electricity; N° 715/2009 on conditions for access to the natural gas transmissions networks and N° 713/2009 establishing an Agency for the Cooperation of Energy Regulators.

Given the importance of effective competition in the Energy Sector, the Commission has been extremely vigilant when controlling energy mergers, paying particular attention to the objective of the realization of a competitive internal energy market. Remedies have proven to be useful tools to reach this goal⁴⁶.

The objective of this study is to analyse the Commission's practice on remedies, which contrasts with the parties' interest to merge and their general expectation of rationality towards the Commission's decisions. Because of its particular importance for the European economy and the interesting reflexions it can bring to, this study focuses particularly on the Energy Sector.

Law enjoys a « presupposed intrinsic rationality » and is therefore supposed to apply following a logic model excluding any subjective act of will⁴⁷. Rationality allows for respect of the fundamental principles of legal certainty, predictability and transparency. It is a crucial concept, because it encourages citizens and economic operators to respect the law, while being able to conceive its meaning and the way it is implemented by the competition authorities. But this general and abstract model is no longer appropriate for dealing with concrete situations, which are unique, changing and of increasing complexity⁴⁸. This is especially true for European merger control and even truer for the Energy Sector. The appraisal of a concentration requires an analysis on a case-by-case basis and finding the best solution for a given operation depends on the particular circumstances of that case⁴⁹. This is where the principle of proportionality is of crucial importance.

The Commission has to guarantee proper enforcement of the law and must ensure that the competitive market structure is not affected post-merger. Besides, as regards energy mergers, the Commission tries to create a competitive internal energy market. The merging parties, on the other hand, try to enhance their efficiency and to maximise their profits. Both parties have conflicting interests and a different approach to the law. This can lead to incomprehension and a waste of time and money.

⁴⁶ Cf. *infra*.

⁴⁷ J. CHEVALLIER, « La rationalisation de la production juridique », in C.-A. MORAND (ed.), *L'Etat propulsif*, Paris, Publisud, 1991, p. 11.

⁴⁸ G. VALLINDAS, *op. cit.*, p. 17.

⁴⁹ Cf. *infra*.

This study starts by introducing merger control and remedies generally and by examining major issues related to remedies (Part I). It then focuses on some relevant decisions to illustrate the Commission's approach towards remedies, which will then be critically analysed (Part II).

PART I. GENERAL ASPECTS

The Merger Regulation applies to any « concentration » with an « EU dimension » (Chapter I)⁵⁰.

When assessing a concentration, the central issue to be addressed by the Commission is to determine whether the envisaged operation would « significantly impede effective competition »⁵¹ on the previously defined geographic and product markets (Chapter II).

In order to dispel the Commission's concerns as to the compatibility of their transaction with the internal market and to obtain a clearance decision, the undertakings may submit « remedies »⁵² (Chapter III).

CHAPTER I. JURISDICTIONAL SCOPE

In order to fall within the scope of the Merger Regulation, two criteria must be fulfilled. The envisaged operation must constitute a « concentration » within the meaning of the Merger Regulation (Section I), with an « EU dimension » (Section II). This means that the planned transaction must involve a change in the control of the undertakings concerned and that certain thresholds must be met, which will be determined by the levels of the parties' turnovers⁵³.

The Commission has exclusive jurisdiction to appraise, under the provisions of the Merger Regulation, any transaction that gives rise to a « concentration » with a

⁵⁰ Merger Regulation, *op. cit.*, art. 1(1).

⁵¹ Merger Regulation, *op. cit.*, art. 2(2) and (3).

⁵² Merger Regulation, *op. cit.*, art. 6(2) and 8(2) and Recital (30).

⁵³ Merger Regulation, *op. cit.*, art 1(1) ; BELLAMY & CHILD, *op. cit.*, p. 515, pt. 8.002.

« Community dimension »⁵⁴. National court authorities are precluded from applying their national merger control rules to such transactions. However, in some limited circumstances, referrals⁵⁵ are possible, as well as the possibility of parallel investigation⁵⁶.

On the contrary, concentrations without an EU dimension are appraised exclusively at the national level, by national court authorities⁵⁷.

Section I. A « Concentration »

The notion of « concentration » is a widely defined concept that covers mergers (1.1) and acquisitions of sole or joint control (1.2).

Many different types of transactions are covered by this concept⁵⁸ since it encompasses all operations bringing about a « change in the control on a lasting basis of the undertakings concerned and therefore in the structure of the market »⁵⁹.

For mergers, the control of formerly independent undertakings comes together. For acquisitions of control, the control of an undertaking is transferred to one or more other undertakings⁶⁰. The qualitative concept of « control » and how it is capable of being exercised is thus central for the identification of concentrations⁶¹. It includes factual and legal considerations rather than quantitative criteria⁶².

⁵⁴ Merger Regulation, *op. cit.*, art. 21(2) and (3) and Recitals (8) and (11); BELLAMY & CHILD, *op. cit.* p. 521, pt. 8.011.

⁵⁵ Merger Regulation, *op. cit.*, art 4, 9 and 22 ; M. KEKELEKIS, *EC Merger Control Regulation : Rights of Defense, a Critical Analysis of DG COMP Practice and Community Courts' Jurisprudence*, AH Alphen aan den Rijn, Kluwer Law International, 2006, p. 76.

⁵⁶ This will be the case if States have to protect legitimate interests, others than competition : Merger Regulation, *op. cit.*, art 21(4) ; J.-F. BELLIS, « Le Régime des Concentrations », in A. PUTTEMANS (dir.), *Aspects récents du droit de la concurrence*, Bruxelles, Bruylant, 2005, pp. 59-63.

⁵⁷ BELLAMY & CHILD, *op. cit.*, p. 521, pt. 8.011.

⁵⁸ BELLAMY & CHILD, *op. cit.*, pp. 522-523, pt. 8.012.

⁵⁹ L. RITTER and W. D. BRAUN, *European Competition Law : A Practitioner's Guide*, 3d ed., The Hague, Kluwer Law International, 2004, p. 512.

⁶⁰ BELLAMY & CHILD, *op. cit.*, p. 523, pt. 8.015.

⁶¹ L. RITTER and W. D. BRAUN, *op. cit.*, p. 512.

⁶² K. MIDDLETON, B. RODGER ANGUS, A. MACCULLOCH *e.a.*, *op. cit.*, p. 502.

The notion of « concentration » also covers the creation of full-function joint ventures (1.3).

1.1. Mergers

Article 3(1)(a) of the Merger Regulation covers mergers between two or more previously independent undertakings. While it does not explicitly define the concept of a « merger »⁶³, the Regulation excludes purely internal restructurings and presupposes a position of parity between the merging parties⁶⁴.

Practically, all undertakings concerned by the merger have to submit the notification and will be treated as « notifying parties »⁶⁵.

Overall, mergers do not give rise to any complexity in terms of establishing European jurisdiction⁶⁶.

1.2. Acquisitions of Control

Within the meaning of the Merger Regulation, a concentration also occurs in the case of an acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, of direct or indirect control of the whole or parts of one or more other undertakings⁶⁷.

It is irrelevant whether control is acquired by « rights, contracts or any other means which, either separately or in combination, confer the possibility of exercising

⁶³ The Jurisdictional Notice, however, provides for a detailed definition of a merger. A merger is described as « the amalgamation of two or more independent undertakings into a new one, as a result of which either: the pre-existing companies cease to exist as separate legal entities; one undertaking is absorbed by another and ceases to exist as a legal entity, while the company that has absorbed it retains its legal identity; or the combination of the activities results *de facto* in the creation of a single economic unit »: Commission Consolidated Jurisdictional Notice (hereafter the « Jurisdictional Notice ») under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, *O.J. C.95/1*, 16.4.2008, Section I, § 9 and 10.

⁶⁴ J. FAULL & A. NIKPAY, *op. cit.*, p. 552, pt. 5.47.

⁶⁵ J. FAULL & A. NIKPAY, *op. cit.*, p. 552, pt. 5.47.

⁶⁶ BELLAMY & CHILD, *op. cit.*, p. 525, pt. 8.020.

⁶⁷ Merger Regulation, *op. cit.*, art. 3(1)(b) ; BELLAMY & CHILD, *op. cit.*, p. 523, pt. 8.014.

decisive influence over an undertaking »^{68 69}. Decisive influence is the key element. It arises where a party acquires the possibility⁷⁰, on a *de jure* or *de facto* basis, to determine an undertaking's commercial strategy⁷¹.

Where a single undertaking has the possibility to exercise decisive influence over the whole or part of another undertaking, a transaction gives rise to « sole control ». This generally happens where an undertaking acquires a majority of the voting rights of a company⁷². « Joint control » will be acquired where two or more undertakings together acquire the ability to exercise decisive influence over another undertaking⁷³.

Acquisition of control also occurs where there is a « durable change in the quality or nature of control of an undertaking ». Therefore, there will be a concentration where a party with joint control of an undertaking moves to a position of sole control⁷⁴.

1.3. Establishment of a Full-Function Joint Venture

The notion of « concentration » also covers full-function joint ventures, which is a concept that encompasses a broad range of commercial operations, ranging from « fully-fledged merger-like operations » to co-operation limited to particular functions such as distribution, production or research and development⁷⁵.

The Merger Regulation only applies to joint ventures that are of a « full-function » nature⁷⁶. This means that the joint venture must perform « on a lasting basis all the functions of an autonomous economic entity, which does not give rise to coordination of the competitive behaviour of the parties amongst themselves or between them and

⁶⁸ Merger Regulation, *op. cit.*, art. 3(2).

⁶⁹ For further guidance, see Jurisdictional Notice, *op. cit.*, Section II.

⁷⁰ Jurisdictional Notice, *op. cit.*, Section II, § 16. However, this possibility must be *effective*: K. MIDDLETON, B. RODGER ANGUS, A. MACCULLOCH *e.a.*, *op. cit.*, p. 503.

⁷¹ Jurisdictional Notice, *op. cit.*, Section II, § 62; BELLAMY & CHILD, *op. cit.*, p. 527, pt. 8.024.

⁷² D. CAMPBELL, *Mergers and Acquisitions in Europe: Selected Issues and Jurisdiction*, AH Alphen aan den Rijn, Kluwer Law International, 2011, p. 181.

⁷³ M. LORENZ, *op. cit.*, p. 255.

⁷⁴ J. FAULL and A. NIKPAY, *op. cit.*, p. 398, pt. 4.29.

⁷⁵ M. P. BROBERG, *The European Commission's Jurisdiction to Scrutinize Mergers*, 3d ed., AH Alphen aan den Rijn, Kluwer Law International, 2006, pp. 26-36.

⁷⁶ L. RITTER and W. DAVID BRAUN, *op. cit.*, p. 510.

the joint venture »⁷⁷. The joint venture must be able to carry on all the normal functions of an independent business, for example because it has its own management team and access to resources such as finance, staff and assets⁷⁸.

Section II. An « EU Dimension »

Only concentrations with an « EU dimension » are caught by the Merger Regulation⁷⁹. Therefore, the transaction must meet the turnover thresholds set in article 1 of the Merger Regulation, since the « EU dimension » of a concentration depends on the « objectively quantifiable criteria of the respective turnovers of the undertakings concerned, assessed at the date of the transaction or its notification »⁸⁰. The « undertakings concerned » are the undertakings acquiring control and the undertakings over which control has been acquired⁸¹.

These objective criteria, which relate to the economic size of the undertakings concerned and are not linked to the substantive impact of the transaction⁸², ensure that only large undertakings, with significant activities in the European Union and which are not mainly active in only one Member State, fall under the scope of the Merger Regulation⁸³. Since they are purely jurisdictional in nature⁸⁴, these criteria ensure that the Merger Regulation can be applied to concentrations that take place outside the European Union and regardless of the nationality of the parties⁸⁵.

The Merger Regulation provides for two alternative sets of thresholds: the original thresholds (2.1) and the lower thresholds, introduced in 1998 (2.2). The European Commission had noticed that many transactions fell outside her investigation power,

⁷⁷ Merger Regulation, *op. cit.*, art. 3(4).

⁷⁸ L. RITTER and W. DAVID BRAUN, *op. cit.*, p. 518.

⁷⁹ W. SAUTER, *Coherence in EU Competition Law*, Oxford, Oxford University Press, 2016, pp. 199-200.

⁸⁰ BELLAMY & CHILD, *op. cit.*, p. 546, pt. 8.061.

⁸¹ A. EZRACHI, *op. cit.*, pp. 339-340.

⁸² BELLAMY & CHILD, *op. cit.*, pp. 546-547, pt. 8.061.

⁸³ J. FAULL & A. NIKPAY, *op. cit.*, p. 548, pt. 5.35 ; K. MIDDLETON, *Blackstone's UK and EU Competition Documents*, Oxford, Oxford University Press, 2011, p. 515.

⁸⁴ I. LIANOS and D. GERADIN, *Handbook on European Competition Law. Enforcement and Procedure*, Cheltenham, Edward Elgar Publishing Limited, 2013, p. 281.

⁸⁵ BELLAMY & CHILD, *op. cit.*, p. 546, pt. 8.061.

because the required thresholds were too high⁸⁶. By introducing these lower thresholds, the purpose of the Commission was to bring more transactions with cross-border elements to its knowledge. It also allows for a broader application of the « one-stop shop » principle⁸⁷.

In both alternatives, an EU dimension is not met « if each of the firms achieves more than two thirds of its EU-wide turnover in one and the same Member State »⁸⁸.

2.1. The Original Thresholds

According to these thresholds, that date back from 1989, the Commission has competence in cases where « (i) the undertakings involved in the merger have realized a combined global turnover exceeding €5 billion and (ii) at least two of the undertakings have each separately realized a turnover within the European Union exceeding €250 million »⁸⁹

2.2. The Alternative Thresholds

If these original thresholds are not met, there is still an EU dimension where « (i) the combined aggregate global turnover of all of the undertakings is more than €2,5 billion; (ii) in each of at least three Member States, the combined aggregate turnover of all the undertakings involved is more than €100 million; (iii) in each of at least three Member States included for the purpose of (ii), the aggregate turnover of each of at least two of the undertakings involved is more than €25 million; and (iv) the aggregate global turnover of at least two of the undertakings involved is more than €100 million »⁹⁰.

⁸⁶ I. VAN BAEL, *Competition Law of the European Community*, The Hague, Kluwer Law International, 2005, p. 753.

⁸⁷ V. LANDES, « Merger Control », in C. JONES (ed.), *EU Energy Law : Vol. II, EU Competition Law and Energy Markets*, 3d ed., The Netherlands, Claeys & Casteels Publishing, 2011, p. 401, pt. 4.40.

⁸⁸ Merger Regulation, *op. cit.*, art. 1(2) and (3) *in fine*.

⁸⁹ Merger Regulation, *op. cit.*, art 1(2).

⁹⁰ Merger Regulation, *op. cit.*, art. 1(3).

Acting on a proposal from the Commission, the Council may revise these thresholds⁹¹.

CHAPTER II. PROCEDURE

Concentrations with a EU dimension must be notified⁹² to and cleared by the Commission before being put into effect⁹³. During the proceedings, the concentration has to be suspended⁹⁴.

Once a merger has been notified, a two-stage procedure follows: a short Phase I analysis and, sometimes, a longer Phase II investigation (Section I).

The test used by the Commission when assessing concentrations is seeking whether they restrict *de facto* competition significantly⁹⁵. The central question will be to determine whether there remains enough competition after the merger to provide consumers with sufficient choice. The creation or strengthening of a dominant position is therefore an important element, but not the only possible cause of restriction⁹⁶. The Commission has to define the relevant product and geographic markets before determining the competitive effects of the concentration on these markets (Section II).

Section I. A Two-Steps Assessment

There are two steps in the Commission's assessment: Phase I (1.1) and Phase II (1.2). In both stages of the proceedings, where the Commission has serious doubts as to the compatibility of the transaction with the internal market, the notifying parties may, at any moment, propose remedies so as to avoid an adverse decision from the Commission. The aim of such remedies is usually to reduce the market power of the

⁹¹ P. D. CAMERON, *op. cit.*, p. 373, pt. 14.12.

⁹² Merger Regulation, *op. cit.*, art. 4(1).

⁹³ Merger Regulation, *op. cit.*, art. 7(1).

⁹⁴ Merger Regulation, *op. cit.*, art. 7.

⁹⁵ Merger Regulation, *op. cit.*, art. 2(2) and (3), which must be read together with Recitals (25)-(29), which elaborate on their applicability.

⁹⁶ V. LANDES, *op. cit.*, pp. 408-409, pt. 4.62.

concerned undertakings⁹⁷. Remedies are the outcome of the vast majority of merger cases that raise competition concerns⁹⁸.

However, as a first step, confidential pre-notification discussions between the notifying parties and the Commission⁹⁹ are highly encouraged, even in cases that, at first sight, do not seem problematic¹⁰⁰. These pre-notification contacts are especially interesting for the notifying parties since they will be informed of possible concerns raised by the operation. Consequently, they are enabled to address these concerns in the notification by considering changes to their transaction or by proposing remedies in order to avoid ulterior problems, time delays and additional costs¹⁰¹. Parties are highly encouraged to submit remedies before notification¹⁰².

1.1. Phase I: « Serious Doubts »

a. Timetable and Deadlines

The Commission has 25 working days to conclude its Phase I investigation from the first working day following the date of receipt of the notification¹⁰³. If the notifying parties submit commitments to render the concentration compatible with the common market¹⁰⁴, this period will be extended by an additional 10 working days to a total of 35 working days¹⁰⁵.

Commitments must be offered no more than 20 working days following the date of the notification¹⁰⁶.

⁹⁷ P. D. CAMERON, *op. cit.*, p. 375, pt. 14.15.

⁹⁸ BELLAMY & CHILD, *op. cit.*, p. 598, pt. 8.166; A. LINDSAY and A. BERRIDGE, *The EU Merger Regulation : Substantive Issues*, London, Sweet & Maxwell, 2012, p. 547.

⁹⁹ Implementing Regulation, *op. cit.*, Recital (11).

¹⁰⁰ BELLAMY & CHILD, *op. cit.*, p. 572, pt. 8.109 ; D. CAMPBELL, *op. cit.*, p. 194 ; C. SMITHERMAN, *Transatlantic Merger Cases : United States- European Community Merger Review Cooperation*, London, Cameron May, 2007, p. 336.

¹⁰¹ BELLAMY & CHILD, *op. cit.*, p. 573, pt. 8.110 ; D. LIAKOPOULOS and A. MARSILIA, *The Regulation of Transnational Mergers in International and European Law*, Leiden-Boston, Martinus Nijhoff Publishers, 2010, p. 47.

¹⁰² D. HOEG, *European Merger Remedies. Law and Policy*, Oxford, Hart Publishing, 2014, p. 46.

¹⁰³ Merger Regulation, *op. cit.*, art. 10(1) and Implementing Regulation, art. 7.

¹⁰⁴ Merger Regulation, *op. cit.*, art. 6(2).

¹⁰⁵ Merger Regulation, *op. cit.*, art. 10(2) ; P. D. CAMERON, *op. cit.*, p. 375, pt. 14.14.

¹⁰⁶ Merger Regulation, *op. cit.*, art. 6(2) and 9(2).

b. Investigation by the Commission

During Phase I, the Commission examines the concentration with the objective of assessing whether or not it raises « serious doubts » as to its compatibility with the internal market¹⁰⁷, which is a broad concept¹⁰⁸.

This first Phase of the procedure can be described as a « fact-finding » procedure¹⁰⁹. The Commission must indeed verify the essential facts contained in the notification and disposes therefore of important investigation powers¹¹⁰.

The Commission must maintain close contacts with the notifying parties and, where the market investigation reveals competition concerns, give sufficiently early warning to the undertakings concerned¹¹¹ in order to allow them to react appropriately¹¹². If the parties decide to submit remedies, they must be sufficient to clearly rule out « any serious doubt » about the concentration, since the Commission has not yet carried an in-depth market investigation. This means that the parties need to demonstrate that the competition concerns identified by the Commission will be entirely eliminated by the proposed remedies¹¹³.

Since Phase I remedies must eliminate in a clear and direct way any serious threat to competition, this may have an impact on the nature and importance of the commitments submitted¹¹⁴. The possibility to avoid an in-depth investigation of their

¹⁰⁷ J. FAULL & A. NIKPAY, *op. cit.*, p. 638, pt. 5.417.

¹⁰⁸ D. HOEG, *op. cit.*, p. 36.

¹⁰⁹ J.-F. BELLIS, *op. cit.*, p. 67.

¹¹⁰ Merger Regulation, *op. cit.*, art. 11, 13(1), 14(1) and 15(1).

¹¹¹ Implementing Regulation, *op. cit.*, Recital (11).

¹¹² J. FAULL & A. NIKPAY, *op. cit.*, p. 640, pt. 5.427.

¹¹³ S. PAPON, « Structural versus Behavioural Remedies in Merger Control : A Case-by-Case Analysis », *E.C.R.L.*, Vol. 30, 2009, n°1, p. 36.

¹¹⁴ A. LINDSAY and A. BERRIDGE, *op. cit.*, p. 619, pt. 20-004.

transaction may also incite the notifying parties to submit more than they would have submitted following a Phase II investigation, and more quickly¹¹⁵.

c. Possible Outcomes at Phase I

The Commission must adopt one of the following three alternative decisions at the end of the Phase I investigation.

The Commission can conclude that the notified transaction does not fall within the scope of the Merger Regulation and that, as a matter of consequence, it has no jurisdiction to assess it¹¹⁶.

If the Commission finds that the concentration does not give rise to any serious doubts about its compatibility with the internal market, it will issue a clearance decision¹¹⁷. If this decision has been reached following the acceptance of remedies offered by the parties, they will be attached to the Commission's Phase I clearance decision as conditions or obligations¹¹⁸.

However, if the Commission is of the opinion that the concentration gives rise to « serious doubts as to its compatibility with the internal market », it will « initiate proceedings » and launch an in-depth Phase II investigation¹¹⁹.

1.2. Phase II: An « In-Depth Investigation »

a. Timetable and Deadlines

Where an in-depth investigation is deemed necessary, the Commission has 90 working days from the initiation of proceedings to render a decision. This time limit

¹¹⁵ L. FRENEAUX, « L'efficacité du recours aux engagements en matière de contrôle des concentrations », *Revue internationale de droit économique*, Vol. 21, 2007, n°1, p. 53.

¹¹⁶ Merger Regulation, *op. cit.*, art. 6(1)(a).

¹¹⁷ Merger Regulation, *op. cit.*, art. 6(1)(b).

¹¹⁸ Merger Regulation, *op. cit.*, art. 6(1)(b), read in conjunction with art. 6(2).

¹¹⁹ Merger Regulation, *op. cit.*, art. 6(1)(c).

will be extended to 105 working days if the parties propose remedies, unless these remedies are proposed before 55 working days from the beginning of the Phase II investigation, in which case the standard time limit of 90 working days continues to apply¹²⁰.

The merging parties may propose remedies up to 65 working days after the initiation of proceedings¹²¹.

b. Investigation by the Commission

Phase II proceedings are an intensive process. The Commission disposes therefore of reinforced investigation powers¹²². The competition concerns identified in Phase I are intensely probed and the Commission will have recourse to quantitative data, as well as to economic and econometric analyses¹²³. Moreover, information requests are more exhaustive, consumer surveys may be conducted and the Commission may decide to organise site visits in order to get a more accurate picture of the economic reality of the undertakings concerned¹²⁴.

As the rights of defence must be respected, the parties must be informed of all the objections raised by the Commission during this in-depth analysis to be able to respond to them adequately¹²⁵.

While, in Phase I, the establishment of « serious doubts » as to the compatibility of the operation with the internal market suffices to require remedies, in Phase II, the Commission will be more detailed in its analysis of the potential competition concerns before discussing on possible remedies¹²⁶.

¹²⁰ Merger Regulation, *op. cit.*, art. 10(1)-(3).

¹²¹ Implementing Regulation, *op. cit.*, art. 19(2). This deadline may be extended in exceptional circumstances : Implementing Regulation, *op. cit.*, art. 19(2).

¹²² M. CINI and L. McGOWAN, *Competition Policy in the European Union*, 2nd ed., Basingstoke, Palgrave Macmillan, 2009, p. 211.

¹²³ J. FAULL & A. NIKPAY, *op. cit.*, p. 642, pt. 5.438.

¹²⁴ BELLAMY & CHILD, *op. cit.*, p. 587, pt. 8.142 ; D. GORE, S. LEWIS, A. LOFARO *e.a.*, *The Economic Assessment of Mergers Under European Competition Law*, Cambridge, Cambridge University Press, 2013, p. 9.

¹²⁵ Merger Regulation, *op. cit.*, art. 18(1).

¹²⁶ D. HOEG, *op. cit.*, p. 36.

Remedies submitted following a Phase I investigation are expected to provide a straightforward answer to any serious competition threat and to « remove the grounds for serious doubts ». Remedies submitted in a Phase II proceeding have to remove the precise competition concerns that have been identified by the Commission following its in-depth investigation¹²⁷.

c. Possible Outcomes at Phase II

The final decision on the merits of the case must be adopted by the College of Commissioners¹²⁸. It will include one of the following three decisions.

The Commission may issue an unconditional clearance decision¹²⁹ or a conditional clearance decision¹³⁰, attaching conditions and obligations to its clearance decision in order to ensure that the undertakings concerned comply with the remedies they have committed themselves to respect.

Finally, the Commission may also issue a prohibition decision, declaring the concentration incompatible with the internal market¹³¹.

Section II. Examination by the Commission

Defining the relevant product and geographic markets (2.1) outlines the boundaries in which to apply the competitive assessment (2.2).

2.1. The Relevant Product and Geographic Markets

Defining the exact limits of the relevant market, both in its product (a) and in its geographic (b) dimension, is the first step for the application of competition law¹³².

¹²⁷ A. EZRACHI, *op. cit.*, p. 346.

¹²⁸ I. LIANOS and D. GERADIN, *op. cit.*, p. 309.

¹²⁹ Merger Regulation, *op. cit.*, art. 8(1).

¹³⁰ Merger Regulation, *op. cit.*, art. 8(2).

¹³¹ Merger Regulation, *op. cit.*, art. 8(3).

The European Court of Justice has stated that, with specific respect to mergers, « a proper definition of the relevant market is a necessary precondition for any assessment of the effects of a concentration on competition »¹³³.

The analysis of concentrations depends largely on the market shares held by the parties and these market shares depend on the definition of the market concerned¹³⁴.

The risk of a narrow market definition is to prohibit potentially pro-competitive mergers, whereas a too broad market definition risks leaving some anticompetitive effects undetected¹³⁵ since customers have more alternatives at their disposal¹³⁶. A precise market definition is therefore of crucial importance for a proper application of competition law.

The definition of the relevant markets is based on the business reality. It is a factual and empirical analysis undertaken on a case-by-case basis¹³⁷. Moreover, it is essentially a customer-focused exercise, since it focuses on customers in a given area and finds out which alternative suppliers are realistically at their disposal¹³⁸.

a. The Relevant Product Market

The relevant product market includes all products and/or services that are considered as « interchangeable or substitutable by consumers, because of their specific characteristics, prices and intended use »¹³⁹.

¹³² L. O. BLANCO, *Market Power in EU Antitrust Law*, Oxford, Hart Publishing, 2011, pp. 1-3; M. DABBAH, *EC and UK Competition Law. Commentary, Cases and Materials*, Cambridge, Cambridge University Press, 2004, pp. 49-50; M. PIERGIOVANNI, « EC Merger Control Regulation and the Energy Sector: An Analysis of the European Commission's Decisional Practice on Remedies », *Journal of Network Industries*, Vol. 4, 2003, n°3, p. 230.

¹³³ Joined cases C-68/94 and C-30/95, *France and Others v Commission (Kali & Salz)* (1998), ECR I-1375, §143.

¹³⁴ J.-F. BELLIS, *op. cit.*, p. 70.

¹³⁵ A. JONES and B. SUFRIN, *op. cit.*, p. 262.

¹³⁶ J.-F. BELLIS and C. NASSOGNE, « L'application du règlement européen sur le contrôle des concentrations », *J.D.E.*, 2015, n°9, p. 293.

¹³⁷ J.-F. BELLIS and C. NASSOGNE, *Ibidem*, p. 293.

¹³⁸ C. ESTEVA MOSSO, *op. cit.*, p. 4.

¹³⁹ Commission Notice on the definition of the relevant market for the purposes of Community competition law, *O.J. C-372/5*, 9.12.97, § 7 ; A. LINSAY and A. BERRIDGE, *op. cit.*, p. 106 *e.a.*, n°3-005 *e.a.*

For the definition of this market, the Commission takes into consideration numerous factors, in particular the competitive constraints places on the parties by demand-side substitution, supply-side substitution and potential competition¹⁴⁰.

b. The Relevant Geographic Market

The relevant geographic market comprises the areas in which the undertakings concerned are involved in the supply and demand of products or services and in which the conditions of competition are sufficiently homogeneous¹⁴¹.

The Commission will mostly focus on European, national or local markets. The worldwide context is generally not taken into consideration¹⁴².

2.2. Competitive Assessment

Once the relevant product and geographic markets have been defined, the Commission proceeds to the competitive assessment of the notified concentration.

In appraising whether or not a concentration is compatible with the internal market¹⁴³, the Commission must determine if this concentration would « significantly impede effective competition »¹⁴⁴ (the « SIEC » test). This notion goes beyond the concept of « dominance », which was the Commission's tool to assess concentrations until 2004¹⁴⁵. Under the old Merger Regulation, a merger could only be prohibited if it created a dominant position. Today, since the Merger Regulation states that a concentration must be blocked if it « significantly impedes effective competition », all anti-competitive operations are concerned¹⁴⁶.

¹⁴⁰ BELLAMY & CHILD, *op. cit.*, p. 615, pt. 8.195.

¹⁴¹ Commission notice on the relevant market, *op. cit.*, § 8.

¹⁴² BELLAMY & CHILD, *op. cit.*, p. 616, pt. 8.198.

¹⁴³ Merger Regulation, *op. cit.*, art. 2(1).

¹⁴⁴ Merger Regulation, *op. cit.*, art. 2(2) and (3). This has to be read in conjunction with Recitals (25)-(29) which elaborate on its applicability.

¹⁴⁵ 1989 Merger Regulation, *op. cit.*, art. (2) and (3).

¹⁴⁶ A. LINDSAY and A. BERRIDGE, *op. cit.*, pp. 46-47.

In its assessment, the Commission must appraise all anti-competitive effects of the operation resulting in higher prices, less choice or innovation¹⁴⁷. It will therefore examine, amongst others, « the market position of the concerned undertakings, their economic and financial power, the alternatives available to users and suppliers, any legal or others barriers to entry, supply and demand trends for the relevant goods and services and, provided that it is to the consumers' advantage and that it does not impede competition, the development of technical and economic progress »¹⁴⁸.

Because of these factors, the European Court has confirmed that the Commission enjoys a considerable margin of discretion¹⁴⁹.

Overall, the Commission must assess whether or not the concentration has left the consumers with sufficient choice, meaning that there must remain enough competition on the market concerned. This has to be appreciated on a case-by-case basis¹⁵⁰.

Contrary to the repression of cartels or abuses of a dominant position, merger control necessarily means adopting a forward-looking perspective¹⁵¹. The Commission must indeed make a prospective analysis of the effects of a concentration on the market concerned¹⁵². It must anticipate changes in the structure of the market, but also correct *ex ante* the *possible* negative effects of a concentration through the establishment of corrective remedies. This is also a reason why the Commission has been granted a margin of discretion in making its predictions about anticompetitive effects of mergers¹⁵³.

For their part, undertakings also have to anticipate the competition problems that might be raised by the Commission in order to provide for adequate and proportionate remedies so as to avoid an important denaturation of their economic strategy by the

¹⁴⁷ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, *O.J.* C-31/5, 5.2.2004, § 2.

¹⁴⁸ P. D. CAMERON, *op. cit.*, p. 374, pt. 14.13.

¹⁴⁹ Case C-12/03, *Tetra Laval BV v. Commission* (2005) ECR I-987, § 38-39; M. SCHÜTZE, *European Union Law*, Cambridge, Cambridge University Press, 2015, p. 743.

¹⁵⁰ M. HORSPOOL and M. HUMPHREYS, *European Union Law*, 7th ed., Oxford, Oxford University Press, 2012, p. 476, pts. 14.176-178.

¹⁵¹ L. FRENEAUX, *op. cit.*, p. 47.

¹⁵² J. FAULL & A. NIKPAY, *op. cit.*, p. 668, pts. 5.560-61.

¹⁵³ A. LINDSAY and A. BERRIDGE, *op. cit.*, p. 322, pt. 8-004.

control process established under the Merger Regulation¹⁵⁴. It is possible that, because of this prospective analysis, parties offer remedies that are potentially disproportionate to the actual competition concerns¹⁵⁵.

It is therefore an inevitable fact that the practice of remedies comprises an important hazard. By definition, merger control may lead to errors, but the real challenge and requirement for competition authorities is to minimise the consequences of these errors¹⁵⁶.

CHAPTER III. REMEDIES

Merger remedies are modifications to a proposed transaction, submitted by the notifying parties in order to respond to and to resolve competition concerns identified by the Commission in its examination of the operation under the Merger Regulation¹⁵⁷. Their purpose is to stop the infringement and to restore competition¹⁵⁸.

The practice of remedies always has to follow this two-steps reasoning. First, whether it is during Phase I, Phase II or during the pre-notification discussions, the Commission must analyse potential competition harms. It is only when these concerns have been identified and communicated to the parties that they can consider submitting remedies¹⁵⁹.

From an economical point of view, prohibition decisions declaring a concentration incompatible with the internal market constitute drastic measures for consumer welfare and society. Indeed, if it is true that they will prevent the appearance of anti-competitive effects, they will also have as adverse effect to restrict the many possible

¹⁵⁴ G. VALLINDAS, *op. cit.*, p. 434.

¹⁵⁵ M. DE VALOIS TURK, « Merger Remedies Beyond the Competition Concern: When Could You End Up Giving More? », *Journal of European Competition Law & Practice*, Vol. 3, 2012, n°5, p. 495.

¹⁵⁶ G. VALLINDAS, *op. cit.*, p. 431.

¹⁵⁷ Merger Regulation, *op. cit.*, Recital (30); Notice on Remedies, *op. cit.*, § 5; C. McKENNA, « EU Report- Competition Update », *International Journal of Franchising Law*, Vol. 7, 2009, n°3-4, p. 65.

¹⁵⁸ W. WANG, « Structural Remedies in EU Antitrust and Merger Control », *World Competition*, Vol. 34, 2011, n°4, p. 571 ; A. DOUGLAS MELAMED, « The Purposes of Antitrust Remedies », *Antitrust Law Journal*, Vol. 76, 2009, n°1, p. 359.

¹⁵⁹ Case T-310/01 DEP, *Schneider v. Commission*, 22 October 2002, § 442-444.

pro-competitive effects of mergers¹⁶⁰. That is why remedies are crucial to competition law. Thanks to this remarkable tool, the Commission is able to regulate concentrations in a finer level, freeing them from a simple yes/no option. « Through remedies, we seek to restore or maintain competition while permitting the realisation of relevant merger efficiencies and other benefits »¹⁶¹. Remedies aim at relieving competition problems generated by a merger while at the same time preserving its economic efficiencies¹⁶².

The Commission itself has confirmed that structural remedies, in particular divestitures, are preferable because of their effectiveness and ease of implementation¹⁶³. Other remedies will be accepted if the parties are able to demonstrate that they can equally address the Commission's competition concerns¹⁶⁴ (Section I).

An appropriate design of merger remedies is important to obtain the Commission's approval as to the compatibility of the transaction with the internal market. Remedies must meet substantive requirements and must be submitted and implemented in a certain way. It is a delicate process, the initiative of which lying entirely in the notifying parties' hands (Section II).

Remedies are designed and accepted on a case-by-case basis¹⁶⁵. Therefore, there is no clear pattern on the Commission's practice, but there are rules and general guidelines that the Commission must respect when assessing remedies (Section III).

¹⁶⁰ D. GORE, S. LEWIS, A. LOFARO *e.a.*, *op. cit.*, p. 385 ; K. MIDDLETON, *op. cit.*, p. 574 ; U. SCHWALBE and D. ZIMMER, *Law and Economics in European Merger Control*, Oxford, Oxford University Press, 2009, pp. 376-381.

¹⁶¹ ICN Merger Working Group, Analytical Framework Subgroup, MERGER REMEDIES REVIEW PROJECT Report from the fourth ICN annual conference Bonn (June 2005), p. 3, available at : <http://www.internationalcompetitionnetwork.org/uploads/library/doc323.pdf>, last consulted on 11 May 2016.

¹⁶² P. PAPANDROPOULOS and A. TAJANA, « The Merger Remedies Study- In Divestiture We Trust ? », *E.C.L.R.*, 2006, n°8, p. 443.

¹⁶³ Notice on Remedies, *op. cit.*, § 15 and 17; P. PAPANDROPOULOS and A. TAJANA, *op. cit.*, p. 443.

¹⁶⁴ J. FAULL & A. NIKPAY, *op. cit.*, p. 755, pt. 5.981.

¹⁶⁵ J. CLARKE, *International Merger Policy. Applying Domestic Law to International Markets*, Cheltenham, Edward Elgar, 2014, p. 134; I. LIANOS and G. GERADIN, *op. cit.*, p. 419; K. McKENNA, *op. cit.*, p. 65;

The advantages of remedies are put into question by certain authors, who bring up the question of the denaturation of the initial operation as initially envisaged by the undertakings concerned (Section IV).

The last Section of this Chapter focuses on the types of remedies used in the Energy Sector (Section V).

Section I. A Preference for Structural Remedies

The distinction between structural (1.1) and behavioural remedies (1.2) is the most prevalent classification used by the Commission but it has never been precisely defined¹⁶⁶, nor by the Commission, nor by the European Courts¹⁶⁷. However, it is generally accepted that structural remedies affect the control relationship and « bring about a lasting structural change on the market », while behavioural remedies imply that the undertaking resulting from the merger will behave in a particular way or will refrain from certain behaviours¹⁶⁸.

While it is certain that divestitures are structural remedies¹⁶⁹, the difficulty to categorize other commitments has been admitted by the General Court itself, which recognizes that many remedies are not necessarily clear-cut¹⁷⁰, in the sense that they may consist of structural as well as behavioural elements¹⁷¹. This is one of the reasons, together with the uniqueness of each transaction, why the question of which type of remedy is suitable to address a particular competition concern must be approached on a case-by-case basis and cannot be based on a pre-established theoretical framework¹⁷². The Commission has to consider the particularities of the

¹⁶⁶ P. LOWE, M. MARQUIS and G. MONTI, *European Competition Law Annual 2013 : Effective and Legitimate Enforcement of Competition Law*, Oxford, Hart Publishing, 2016, p. 209.

¹⁶⁷ S. PAPON, *op. cit.*, p. 37 ; D. WENT, « The Acceptability of Remedies Under the EC Merger Regulation : Structural Versus Behavioural », *E.C.L.R.*, 2006, p. 455 . Some authors consider the distinction to be irrelevant : F. LEVEQUE, « The Conduct v. Structural Remedies Controversy : an Irrelevant Dichotomy of Antitrust Policy Instruments », CERNA, Working Paper, May 2000.

¹⁶⁸ G. BLANKE and P. LANDOLT, *EU and US Antitrust Arbitration. A Handbook for Practitioners*, Vol. 2, AH Alphen aan den Rijn, Kluwer Law International, 2011, p. 1609, pt. 46-004 ; P. D. CAMERON, *op.cit.*, pp. 406-407, pt. 14.99.

¹⁶⁹ Notice on Remedies, *op. cit.*, § 17.

¹⁷⁰ I. LIANOS and D. GERADIN, *op. cit.*, pp. 418-419.

¹⁷¹ Case T-102/96, *Gencor v Commission* (1999), E.C.R. II-753, § 319, where the Commission says that the distinction between behavioural and structural remedies is « vague and immaterial ».

¹⁷² Notice on Remedies, *op. cit.*, § 16.

sector and its market characteristics affected by the concentration at hand before initiating discussions on possible remedies¹⁷³.

The General Court has recognised that whether commitments are structural or behavioural is irrelevant, as long as they restore a competitive market structure¹⁷⁴.

1.1. Structural Remedies

The Commission particularly favours structural remedies (a), and in particular divestitures (b), to address competition concerns.

a. A Definition of Structural Remedies

Structural remedies are remedies that alter ownership rights. Their aim is to restore the structure of the market as it existed before the concentration by modifying the allocation of property rights¹⁷⁵. They are characterized by their irreversibility¹⁷⁶.

The Commission generally prefers structural remedies¹⁷⁷. The objective of merger control and related remedies is indeed to preserve the market structure prevailing before the merger. Structural remedies, because of their lasting effects on the structure of the relevant market, are best suited to reach this objective¹⁷⁸. Besides, they resolve competition concerns « once and for all » and do not require long-term supervision¹⁷⁹.

It can therefore be said that the preference for structural remedies has practical and policy driven foundations¹⁸⁰.

¹⁷³ Notice on Remedies, *op. cit.*, § 12 ; S. PAPON, *op. cit.*, p. 36.

¹⁷⁴ Case T-102/96, *Gencor v Commission* (1999), ECR II-753, § 319.

¹⁷⁵ S. PAPON, *op. cit.*, p. 37.

¹⁷⁶ S. DAVIES and B. LYONS, *Merger and Merger Remedies in the EU : Assessing the Consequences for Competition*, Cheltenham, Edward Elgar, 2007, p. 13.

¹⁷⁷ European Commission, *Merger Remedies Study*, October 2005, published online: http://ec.europa.eu/competition/mergers/legislation/remedies_study.pdf.

¹⁷⁸ L. VOGEL, *European Competition Law*, Brussels, Bruylant, 2015, p. 567.

¹⁷⁹ L. VOGEL, *Ibidem*, p. 568 ; D. HOEG, *op. cit.*, p. 170.

¹⁸⁰ P. KËLLEZI and C. RAPIN, « Merger remedies and competition law : An overview of EU and national case law », February 2012, *e-Competitions*, n°43382, p. 1, available online at www.concurrences.com.

However, structural remedies also have negative aspects, such as unnecessary transaction costs, potential harm caused to neutral third parties and a reduction in the incentive to compete vigorously¹⁸¹.

b. Divestitures

Divestitures must have essential characteristics before the Commission will be able to approve them (1). They may take different forms (2) and show some variations (3) in order to fully address the Commission's competition concerns.

Finally, if divestitures are considered to be the most effective and efficient remedies, they also present some weaknesses and negative aspects that need to be mentioned (4).

1. Essential Characteristics of Divestitures

Divestitures¹⁸² are considered by the Commission to be the benchmark in terms of effectiveness and efficiency¹⁸³. They allow for the creation, on a lasting basis, of a new or a stronger competitor on the market¹⁸⁴. They have an immediate structural effect on competition and do not require extensive monitoring once they are implemented. The Commission favours them because they can generally be relied upon to fully address its competition concerns¹⁸⁵.

They often address competition concerns raised by horizontal overlaps¹⁸⁶.

¹⁸¹ K. HÜSCHEL RATH, *Competition Policy Analysis. An Integrated Approach (ZEW Economic Studies)*, Berlin-Heidelberg, Physica-Verlag, 2009, p. 140.

¹⁸² *i.e.* the « sale of assets or an existing business to a suitable purchaser »: Notice on Remedies, § 17.

¹⁸³ Notice on Remedies, *op. cit.*, § 13.

¹⁸⁴ Notice on Remedies, *op. cit.*, § 22; G. FEDERICO, M. MOTTA and P. PAPANDROPOULOS, « Recent Developments at DG Competition : 2014 », *Review of Industrial Organization*, Vol. 47, 2015, n°3, p. 413 ; L. VOGEL, *op. cit.*, p. 567.

¹⁸⁵ Notice on Remedies, *op. cit.*, § 22-57.

¹⁸⁶ D. HOEG, *op. cit.*, p. 44 ; J. FAULL & A. NIKPAY, *op. cit.*, p. 773, pt. 5.1058.

Divestitures must, in order to effectively address the Commission's competition concerns, result in the creation of a new competitive force, or the strengthening of an existing competitor, « which will be capable of exerting competitive pressure on the merged entity on a lasting basis »¹⁸⁷.

The divested business must therefore be viable and has to be transferred to a suitable purchaser, independent from the merging parties and having both the capacity¹⁸⁸ and the incentive to develop the divested business into a competitive force on the market¹⁸⁹. It is only when these conditions are met that the merger will not produce anticompetitive effects¹⁹⁰.

The Commission needs to be able to conclude with the requisite degree of certainty¹⁹¹ that it will be possible to implement the divestiture and that « it will be likely that the new commercial structures resulting from the implementation will be sufficiently workable and lasting to ensure that the significant impediment to effective competition will not materialize »¹⁹² before clearing the merger.

It is indispensable to clearly identify the business that has to be transferred¹⁹³ and that all necessary assets are included in the divestment package¹⁹⁴.

A trustee will be charged with the implementation of the divestiture. He is responsible to maintain the business separate from the merging parties until the final scission¹⁹⁵. If necessary, he will sell the business if the parties fail to divest the activities within the given deadline¹⁹⁶.

¹⁸⁷ Notice on Remedies, *op. cit.*, § 23.

¹⁸⁸ *i.e.* the financial resources and the proven expertise : L. VOGEL, *op. cit.*, p. 568-569.

¹⁸⁹ Notice on Remedies, *op. cit.*, § 47 ; D. HOEG, *op. cit.*, p. 283.

¹⁹⁰ J. GATTI, « The European Commission clears, subject to divestment, the acquisition of a vendor of videoconferencing products with dual headquarters in Norway and in the US by US company (Cisco/Tandberg) », 29 March 2010, *e-Competitions*, n° 37503, available online at www.competition.com.

¹⁹¹ Notice on Remedies, *op. cit.*, § 11. The General Court is stricter and uses the words « with certainty » : Case T-210/01, *General Electric v Commission* (2005) ECR II-5575, § 612 and 615.

¹⁹² Case T-210/01, *General Electric v Commission* (2005) ECR II-5575, § 555 and 612.

¹⁹³ Notice on Remedies, *op. cit.*, § 27.

¹⁹⁴ Notice on Remedies, *op. cit.*, § 25.

¹⁹⁵ A. LINDSAY and A. BERRIDGE, *op. cit.*, p. 678, pt. 20-073.

¹⁹⁶ P. KËLLEZI and C. RAPIN, *op. cit.*, pp. 2-3.

2. Different Forms of Divestitures

The divested business may take the form of a stand-alone entity or a carve-out. It may also consist in the divestment of individual assets or certain licences¹⁹⁷.

The divestiture of a stand-alone business should be the first choice of remedy¹⁹⁸ because it is the most straightforward and low-risk commitment¹⁹⁹. Alternatively, the Commission may accept the divestiture of a business that needs to be carved out because it has existing strong links or is partially integrated with businesses detained by the undertakings²⁰⁰. The Commission may also accept the divestiture of individual assets or of a combination of assets, which did not constitute a uniform and viable business before²⁰¹. These assets are more limited in scope than carve-outs²⁰².

Finally, if the divestiture of a business is not feasible, the Commission may also accept licence arrangements²⁰³ as well as the severance of links between the parties to the merger and their competitors²⁰⁴, which will be used where the competitors cannot compete freely with the parties as a result of the merger²⁰⁵.

3. Variations on the Usual Divestiture Process

Sometimes, the Commission requires variations on the usual divestiture process so as to ensure the viability and attractiveness of the divested business.

¹⁹⁷ Notice on Remedies, *op. cit.*, § 32-38 ; R. WHISH and D. BAILEY, *Competition Law*, 7th ed., Oxford, Oxford University Press, pp. 887-890.

¹⁹⁸ Notice on Remedies, *op. cit.*, § 32.

¹⁹⁹ D. HOEG, *op. cit.*, p. 286.

²⁰⁰ Notice on Remedies, *op. cit.*, § 35 ; D. HOEG, *op. cit.*, p. 288 ; A. LINDSAY and A. BERRIDGE, *op. cit.*, p. 647, pt. 20-037.

²⁰¹ Notice on Remedies, *op. cit.*, § 37.

²⁰² D. HOEG, *op. cit.*, p. 290.

²⁰³ Notice on Remedies, *op. cit.*, § 60 ; D. HOEG, *op. cit.*, p. 291 ; M. OINONEN, *Does EU Merger Control Discriminate against Small Market Companies ? Diagnosing the Argument with Conclusions*, AH Alphen aan den Rijn, Kluwer Law International, 2010, p. 342.

²⁰⁴ I. LIANOS and D. GERADIN, *op. cit.*, p. 318.

²⁰⁵ Notice on Remedies, *op. cit.*, § 58.

It may happen that the Commission requires an « up-front buyer » clause, by which the parties undertake not to implement the transaction until they have entered into a binding sale agreement with a purchaser approved by the Commission²⁰⁶.

Where the identity of the purchaser is crucial for the effectiveness of the remedy, a « fix-it-first » remedy may be required, whereby the parties identify and enter into a legally binding agreement with a purchaser, outlining the essential elements of the purchase during the Commission's administrative procedure. The Commission will then decide whether the proposed divestment to the identified purchaser fully addresses its competition concerns²⁰⁷.

4. Weaknesses and Negative Aspects

The difficulties relating to the implementation of an effective divestiture commitment are numerous. For example, it is not because the divested business is operating in the market that the purchaser is effectively competing²⁰⁸. The choice of a right purchaser is therefore crucial²⁰⁹.

But the most serious threat to the effectiveness of a divestiture is the fact that its scope is often defined insufficiently and/or inadequately²¹⁰. This is partially due to the fact that, since it is not mandatory to disclose information on what are the essential elements for the business' viability, it often happens that the parties omit to mention key elements²¹¹.

Besides, the Commission frequently refers solely to the overlap in the parties' activities for the definition of the scope of the business that has to be divested. Too

²⁰⁶ Notice on Remedies, *op. cit.*, § 53 ; D. HOEG, *op. cit.*, p. 320, A. LINDSAY, A. BERRIDGE, *op. cit.*, p. 720 ; G. BLANKE and P. LANDOLT, *op. cit.*, p. 1589, pt. 45-097.

²⁰⁷ Notice on Remedies, *op. cit.*, § 56-57; D. POUNCEY, K. FOUNTOUKAKOS and J. TEW, « EU Merger Control in 2013/2014 : Tough but Fair ? », *The European Antitrust Review*, 2015, p. 29 ; D. HOEG, *op. cit.*, p. 324 ; G. BLANKE and P. LANDOLT, *op. cit.*, p. 1589, pt. 45-098.

²⁰⁸ S. DAVIES and B. LYONS, *op. cit.*, p. 26.

²⁰⁹ P. PAPANDROPOULOS and A. TAJANA, *op. cit.*, p. 446.

²¹⁰ S. DAVIES and B. LYONS, *op. cit.*, p. 26.

²¹¹ G. FEDERICO, M. MOTTA and P. PAPANDROPOULOS, *op. cit.*, p. 415.

much weight is given to market structure and market shares, while the ability of the divested business to restore effective competition is not probed intensely enough²¹².

Finally, while the parties have the obligation to preserve the activities and the value of the assets, and to hold separate assets during the divestiture process, they have sometimes actively contributed to their degradation, for example « through the retention of key know-how or the adoption of front-leading strategies or the practice of price promotions prior to the divestiture of the business »²¹³.

1.2. Behavioural Remedies

Behavioural remedies are usually adopted either if a divestiture is not possible or where the infringement to competition caused by the transaction does not have a structural origin²¹⁴. They are often used to address competition concerns raised by vertical concentrations²¹⁵.

The main purpose of behavioural remedies is to control the effects of the changes that have occurred on the structure of the market. Behavioural remedies thus allow for intervention on the conduct of the merged entity by obliging it to behave in a certain way²¹⁶. Typically, they result in on-going contractual relationships between the merger entity and the beneficiary and/or the Commission²¹⁷.

Behavioural remedies, such as a commitment to refrain from a particular market conduct, are less likely to eliminate competition concerns than structural remedies and their implementation monitoring may require significant resources, which is the reason why the Commission does not often have recourse to them²¹⁸. They are to be assessed on a case-by-case basis and are only acceptable if they will be effectively

²¹² P. PAPANDROPOULOS and A. TAJANA, *op. cit.*, p. 446.

²¹³ P. PAPANDROPOULOS and A. TAJANA, *op. cit.*, p. 447.

²¹⁴ L. VOGEL, *op. cit.*, p. 569.

²¹⁵ I. LIANOS and D. GERADIN, *op. cit.*, p. 420.

²¹⁶ M. CHATELIN and S. SCHIPPERS, « Netherlands: Merger Control », *The European Antitrust Review, Global Competition Review*, 2009, p. 155.

²¹⁷ D. HOEG, *op. cit.*, p. 44.

²¹⁸ M. LORENZ, *op. cit.*, p. 301; M. OINONEN, *op. cit.*, p. 344.

implemented and if they do not cause distortive effects²¹⁹. They must be at least equivalent in their effects to a divestiture²²⁰ and must be limited in their duration²²¹.

It often happens that behavioural commitments accompany structural remedies. This will notably be the case if the envisaged operation occurs on an emerging market, whose access to future competitors needs to be ensured. If structural remedies are the only remedies used in this case, they may create entry barriers or monopolise scarce resources²²².

Some authors advocate for a more frequent use of behavioural remedies. In some cases, they are indeed more effective and proportionate than structural remedies²²³, for example when dealing with small markets and when it is likely that the potential purchaser of a divested business will not really invest in the relevant product. In these cases, structural remedies would be very interventionist and ineffective with regard to the preservation of competition on the market²²⁴.

The Commission's reluctance towards behavioural commitments may deprive it from a flexible instrument, adapted to all types of market situations and providing for a target response to competition problems raised by a merger operation. Economists consider them particularly adapted to emerging markets, to small national markets and to the problem of entry barriers²²⁵. Therefore, a solution could be to combine more frequently structural and behavioural commitments²²⁶.

Section III. Remedies Practically

Once the Commission has identified competition concerns and has communicated them to the parties, it is entirely up to them to decide whether or not they wish to

²¹⁹ A. ITALIANER, « Legal certainty, proportionality, effectiveness: the Commission's practice on remedies », *Charles River Associates Conference*, 5 December 2012, Brussels, p. 6.

²²⁰ Notice on Remedies, *op. cit.*, § 61.

²²¹ Notice on Remedies, *op. cit.*, § 70.

²²² G. VALLINDAS, *op. cit.*, p. 425.

²²³ K. HÜSCHEL RATH, *op. cit.*, pp. 204-205.

²²⁴ G. VALLINDAS, *op. cit.*, p. 433.

²²⁵ A. EZRACHI, « Behavioural Remedies in EC Merger Control- Scope and Limitations », *World Competition*, Vol. 29, 2006, n°3, pp. 459-479.

²²⁶ K. BACHOUR, G. CONTE, P. EBERL *e.a.*, « Gaz de France/Suez: Keeping energy markets in Belgium and France open and contestable through far-reaching remedies », *Competition Policy Newsletter*, 2007, n°1, pp. 83-91.

address these concerns by submitting remedies²²⁷. The submission of commitments is voluntary, but if parties decide to do so, they must, within the relevant time limit, put forward remedies that are comprehensive and effective from all points of view²²⁸. The Commission cannot unilaterally propose remedies and is not allowed to impose any conditions or obligations that have not been offered by the parties²²⁹.

However, practice has demonstrated that the Commission often suggests, directly or indirectly, the type of remedies that must be used, leaving the parties with little space for manoeuvre²³⁰.

The notifying parties are responsible for the submission of all the necessary information to assess whether or not the remedies will be effective and sufficient to eliminate the competition concerns identified²³¹. The Commission cannot be held responsible for any technical or commercial gap²³².

Once remedies have been offered, it is the Commission's role to assess whether or not they address the competition concerns that have been identified²³³. The Commission will have to prove whether or not the concentration, as modified by the commitments validly submitted, can be declared compatible with the international market²³⁴. The Commission must reason and publish its conclusions « in a comprehensive and satisfactory way »²³⁵.

Merger remedy design is a negotiation process²³⁶. Accepted remedies are the result of a compromise between the Commission and the undertakings concerned, with

²²⁷ Notice on Remedies, *op. cit.*, § 6.

²²⁸ Case T-210/01, *General Electric v. Commission* (2005), ECR II-5575, § 52.

²²⁹ J.-F. BELLIS, P. ELLIOTT and J. VAN ACKER, « The Current State of the EU Merger Control System : Ten Areas Where Improvements Could Be Made », *International Antitrust Law and Policy, Fordham Competition Law 2011*, New York, Juris Publishing, 2012, p. 345.

²³⁰ C. BREUVART and E. CHASSAING, « Post-clearance modification and waiver of EU merger remedies: When the hardest may be yet to come », *Concurrences*, 2014, n°3, p. 62, pt. 68.

²³¹ Notice on Remedies, *op. cit.*, § 7; Case T-87/05, *EDP-Energias de Portugal v. Commission* (2005) ECR II-3745, § 64 and 105.

²³² D. HOEG, *op. cit.*, p. 55 ; A. JONES and B. SUFRIN, *op. cit.*, p. 970.

²³³ Notice on Remedies, *op. cit.*, § 8.

²³⁴ Notice on Remedies, *op. cit.*, § 8; J. FAULL & A. NIKPAY, *op. cit.*, p. 757, pt. 5.986.

²³⁵ D. HOEG, *op. cit.*, p. 39.

²³⁶ C. DECKER, *Economics and the Enforcement of European Competition Law*, Cheltenham, Edward Elgar, 2009, p. 127.

different agendas. The Commission has an explicit favour for structural remedies, especially for divestitures²³⁷, while the parties want to preserve their market power as much as possible. It is therefore not easy to find a right balance between the Commission's expectations and the maximum of what the parties are willing to give up²³⁸.

If the remedies address the competition concerns identified by the Commission, the Commission has to approve the concentration. This approval is conditional upon the remedies, which will be attached to the clearance decision as conditions and obligations²³⁹. These conditions and obligations are nothing else than a translation of the commitments offered by the notifying parties²⁴⁰. Since the approval is conditional upon the agreed remedies, failure to comply with them may result in the clearance decision rendered void or being revoked and/or the concentration being dissolved²⁴¹.

Section IV. Rules and General Guidelines

Merger remedies must be able to preserve competition effectively. The principle of effectiveness may offer some discretion to the Commission in assessing merger remedies²⁴² (4.1).

However, if the principle of effectiveness may reinforce the discretionary power of the Commission when implementing European competition law²⁴³, discretion to adopt effective remedies cannot be unlimited. There are important principles that guide the Commission's action (4.2).

All decisions and procedural conduct of the Commission are subject to review by the General Court and ultimately by the Court of Justice (4.3).

²³⁷ Notice on Remedies, *op. cit.*, § 15.

²³⁸ W. WANG and M. RUDANKO, *op. cit.*, p. 557.

²³⁹ Merger Regulation, *op. cit.*, art. 6(1)(b) and (2) as regards decisions in Phase I and art. 8(2) as regards decisions in Phase II.

²⁴⁰ F. BLANC, J.-S. BRUECKNER and C. RAKOVSKY, « Claude Rakovsky : EC Merger Remedies », *Concurrences*, 2009, n°1, p. 3.

²⁴¹ J. FAULL & A. NIKPAY, *op. cit.*, p. 754, pt. 5.980 ; P. D. CAMERON, *op. cit.*, p. 375, pt. 14.15.

²⁴² I. LIANOS, « The Principle of Effectiveness, Competition Law Remedies and the Limits of Adjudication », *CLES Research Paper Series*, 2014, n°6, pp. 1 and 26.

²⁴³ D. HOEG, *op. cit.*, p. 58.

4.1. The Principle of Effectiveness

Remedies must be effective, in the sense that they must « re-establish the competitive situation, *i.e.* the competitive process that would have prevailed but for the infringement »²⁴⁴. However, it is important to note that « restoring competition » does not mean reaching perfect competition, which is practically unattainable²⁴⁵.

The Notice on Remedies does not elaborate the elements of effectiveness of acceptable remedies, but it does provide some basic conditions.

First of all, remedies must be « comprehensive and effective from all points of view »²⁴⁶. Remedies must be self-contained in the sense that they do not need to be complemented by for example the Commission taking action under art 101 and 102 of the TFEU²⁴⁷. It is the parties' entire responsibility to ensure that their commitment proposal contains all necessary provisions addressing all possible eventualities²⁴⁸.

Secondly, it is important to note that the eventual impact of any remedy is, to some extent, uncertain. Therefore, competition authorities must try to implement effective remedies that generally have low levels of risk of not adequately addressing competition detriments²⁴⁹. A « requisite degree of certainty » of addressing competition concerns is an important element for the assessment of the effectiveness of a remedy. The new market structure resulting from the concentration must be sufficiently lasting and workable to ensure that no significant impediment to effective competition will materialize²⁵⁰.

²⁴⁴ P. HELLSTRÖM, F. MAIER-RIGAUD and D. WENZEL BULST, « Remedies in European Antitrust Law », *The Antitrust Law Journal*, Vol. 76, 2009, n°1, p. 58.

²⁴⁵ N. ECONOMIDES and I. LIANOS, « A Critical Appraisal of Remedies in the E.U. Microsoft Cases », *Columbia Business Law Review*, 2010, p. 352.

²⁴⁶ Notice on Remedies, *op. cit.*, § 9 ; Case T-87/05, *EDP v. Commission*, (2005), ECR II-3745, § 105 ; Case T-210/01, *General Electric v. Commission*, (2005), ECR II-5575, § 52.

²⁴⁷ D. HOEG, *op. cit.*, p. 55 ; I. LIANOS and D. GERADIN, *op. cit.*, p. 416 ; G. BLANKE and P. LANDOLT, *op. cit.*, p. 1573, pt. 45-027.

²⁴⁸ Case T-210/01, *General Electric v. Commission*, (2005), ECR II-5575, § 52.

²⁴⁹ P. ANGELOV, S. ROSENKRANZ and H. SCHENK, « Competitive Effects of Merger Remedies in Europe's High-Tech Industry », *Discussion Paper Series/ Tjalling C. Koopmans Research Institute*, Vol. 12, 2012, n°16, p. 13.

²⁵⁰ Notice on Remedies, *op. cit.*, § 11 ; D. HOEG, *op. cit.*, p. 57 ; K. MIDDLETON, *op. cit.*, p. 588.

Thirdly, remedies must be able to be practically implemented and to be effectively monitored²⁵¹. The proposed remedies cannot be more complex than the competition concerns they try to address²⁵². Monitoring should be as effective and easy as possible and proportionality is therefore an important concept²⁵³. Remedies must also be capable of being implemented effectively within a short period of time²⁵⁴ to ensure that the merger will not lead to anticompetitive conditions on the market and that antitrust concerns will be quickly eliminated²⁵⁵.

The Commission has to interpret and apply these elements in individual cases, whereby it inevitably enjoys a considerable margin of discretion²⁵⁶.

4.2. General Principles and Guidelines

In its practice, the Commission must respect the principles of proportionality (a) and of freedom of commercial activity (b) as well as the *due process* rights (c).

*a. The Principle of Proportionality*²⁵⁷

Merger remedies must be proportionate to the competition problem identified during the course of the administrative procedure and entirely eliminate it²⁵⁸. When assessing the adequacy of remedies, these two conditions are complementary²⁵⁹.

The requirement that the competition problem should be entirely eliminated means that post-decision the remedy should restore the conditions of effective competition prevailing pre-decision²⁶⁰. But the Commission must also take into consideration the

²⁵¹ Notice on Remedies, *op. cit.*, § 13 and 14 ; A. LINDSAY and A. BERRIDGE, *op. cit.*, p. 697 ; K. MIDDLETON, *op. cit.*, p. 589 ; N. PETIT, *op. cit.*, p. 36.

²⁵² D. HOEG, *op. cit.*, p. 58.

²⁵³ A. ITALIANER, *op. cit.*, p. 9.

²⁵⁴ Notice on Remedies, *op. cit.*, § 9.

²⁵⁵ A. ITALIANER, *op. cit.*, p. 9.

²⁵⁶ L. SENDEN, *Soft Law in European Community Law*, Oxford, Hart Publishing, 2004, p. 151.

²⁵⁷ This Section provides for a brief introduction to the principle of proportionality. It will be thoroughly analysed in Part II, Chapter II.

²⁵⁸ Merger Regulation, *op. cit.*, Recital (30) and Notice on Remedies, *op. cit.*, § 1 and 9.

²⁵⁹ Case T-282/02, *Cementbouw Handel & Industrie v. Commission* (2006), § 307 ; Case C-202/06, *Cementbouw Handel & Industrie v. Commission* (2007), § 54.

²⁶⁰ D. HOEG, *op. cit.*, p. 54.

principle of proportionality, which is a general principle of European law²⁶¹, applying as such to all measures adopted by the European Union institutions²⁶². It constitutes an important limit to the use of the European Union's powers, including the Commission's discretion in imposing merger remedies.

A general principle of law represents an ideal of reason and/or of justice, « which is presumed to form the basis of the very institution of law »²⁶³. It makes part of the Court's reasoning and forms the basis of the parties' expectations as to how similar cases will be dealt with in the future²⁶⁴.

The common understanding of the imperative of proportionality²⁶⁵ means that, when faced with several alternatives, the Commission must choose the one that is least onerous, provided it entirely resolves the identified competition concerns²⁶⁶. Besides, the disadvantages caused must not be disproportionate to the aims pursued²⁶⁷. Indeed, settled case law requires that measures adopted by European institutions should not exceed the limits that are appropriate and necessary in order to attain the legitimate objective pursued^{268 269}. The principle of proportionality requires that there is an inherent link between the nature of the infringement and the remedies available to the Commission²⁷⁰.

²⁶¹ TEU, art. 5(4).

²⁶² N. ECONOMIDES and I. LIANOS, *op. cit.*, p. 413 ; N. EMILIOU, *The principle of proportionality in European law : A Comparative Study*, London-Cambridge, Kluwer Law International, 1996, p. 115.

²⁶³ N. EMILIOU, *Ibidem*, p. 115.

²⁶⁴ N. EMILIOU, *op. cit.*, p. 115.

²⁶⁵ However, the principle of proportionality varies in its intensity of application and is sometimes employed as a flexible instrument: P. CRAIG and G. DE BURCA, *EU Law: Text, Cases and Materials*, 4th ed., Oxford, Oxford University Press, 2007, pp. 546-547. *Cf. infra*.

²⁶⁶ D. HOEG, *op. cit.*, p. 55.

²⁶⁷ T.-I. HARBO, « The Function of the Proportionality Principle in EU Law », *European Law Journal*, Vol. 16, 2010, n° 2, p. 159.

²⁶⁸ Case C-347/03, *Regione autonoma Friuli-Venezia Giulia and ERSA* (2005) ECR I-3785, § 131; Case T-43/98 *Emesa Sugar v. Council* (2001) ECR I-3519, § 119; Case C-331/88, *R v. Minister of Agriculture, Fisheries and Food*, ex parte *Fedesa* (1990), ECR I-4023, § 12-13.

²⁶⁹ T. TRIDIMAS, *The General Principles of EU Law*, 2nd ed., Oxford, Oxford University Press, 2006, pp. 142-173; F. G. JACOBS, « Recent Developments in the Principle of Proportionality in European Community Law », in E. ELLIS (ed.), *The Principle of Proportionality in the Laws of Europe*, Oxford/Portland, Hart, 1999, pp. 3-8 ; J. SCHWARZE, *European Administrative Law*, London, Sweet & Maxwell, 1992, pp. 726-773.

²⁷⁰ W. WANG, *op. cit.*, p. 575.

In order to know which remedy the Commission would accept as the least onerous one, the notifying parties may enter into informal discussions with the Commission²⁷¹. Parties may also offer alternative remedies, among which the Commission can choose the one that it estimates to be the most appropriate, so as to avoid future administrative back-and-forth with the Commission²⁷².

To respect the proportionality principle, the Commission has to assess the ability of the remedy to eliminate the competition problem, in light of its size, degree or intensity in relation to the competition concern²⁷³.

The principle of proportionality does not oblige the Commission to reject remedies that go further than strictly required to remove competition concerns. Overreaching remedies may be accepted when they are the only suitable remedies submitted by the parties to entirely eliminate the competition concerns identified²⁷⁴, but Advocate General Kokott stated that « extraordinary circumstances would have to exist before it would be accepted that a Commission decision based on voluntary commitments given by the undertakings concerned was not compatible with the principle of proportionality »²⁷⁵. In practice, it is not exceptional that the Commission accepts remedies that go beyond those that would strictly be required in the abstract to remove competition concerns²⁷⁶.

In any case, the proportionality requirement implies that the Commission may not accept remedies that are entirely unnecessary, or remedies that do not address the competition concerns²⁷⁷.

b. Freedom to Conduct a Business

²⁷¹ J. FAULL & A. NIKPAY, *op. cit.*, p. 761, pt. 5.1002.

²⁷² J. FAULL & A. NIKPAY, *op. cit.*, p. 761, pt. 5.1002.

²⁷³ E.T. SULLIVAN, « Antitrust Remedies in the US and EU: Advancing a Standard of Proportionality » Vol. 48, *The Antitrust Bulletin*, 2003, n°2, p. 414.

²⁷⁴ Case C-202/06, *Cementbouw Handel & Industrie v. Commission* (2007), § 308-312.

²⁷⁵ Opinion of Advocate General Kokott on Case C-202/06, *Cementbouw Handel & Industrie v. Commission*, 26 April 2007, § 69.

²⁷⁶ J. FAULL & A. NIKPAY, *op. cit.*, p. 761, pt. 5.1004.

²⁷⁷ D. HOEG, *op. cit.*, p. 57.

The freedom of commercial activity is a freedom underlying the European treaties²⁷⁸. It is an important freedom that encompasses not only the principle of proportionality but also the freedom to pursue a trade or profession, the freedom from unfair competition and, more generally, the freedom to act where no legal prohibition applies²⁷⁹.

The European Court has confirmed that the freedom to conduct a business also includes the freedom to choose with whom to do business²⁸⁰ and the freedom to determine the price of a service²⁸¹.

c. Due Process Rights and Fundamental Rights Jurisprudence

Due process rights must be respected during the whole procedure (1) but also during the so-called « market tests » (2).

1. During the Proceedings

Legal certainty is one of the general principles of European law. This principle requires « rules of law to be clear, precise and predictable in their effects, in particular where they may have negative consequences on individuals and undertakings »²⁸².

Legal certainty increases the credibility of the authorities, fosters accountability and allows the undertakings concerned to better understand the merger review process²⁸³.

Legal certainty is linked to transparency and consistency. Transparency implies that the policies and major issues of the acceptance of merger remedies should be « clear, obvious and understandable without doubt or ambiguity »²⁸⁴. It implies amongst others access to and consultation of documents, knowledge of who made the decisions

²⁷⁸ Charter of Fundamental Rights of the European Union, *O.J.* C-364/3, 18.12.2000, art. 16 ; H.-J. BLANKE and S. MANGIAMELI, *The European Union after Lisbon. Constitutional Basis, Economic Order and External Action*, Berlin-Heidelberg, Springer-Verlag, 2012, p. 394.

²⁷⁹ P. KENT, *op. cit.*, p. 78.

²⁸⁰ Case C-240/97, *Spain v. Commission* (1999) ECR I-6571, § 99.

²⁸¹ Case C-283/11, *Sky Österreich GmbH v. Österreichischer Rundfunk*, 22 January 2013, § 43.

²⁸² Case C-158/07, *Förster* (2008) ECR I-8507, § 67.

²⁸³ T. DUSO, K. GUGLER and F. SZÜCS, *op. cit.*, p. 9.

²⁸⁴ Opinion of Advocate General Ruiz-Jarabo Colomer on case C-110/03, *Kingdom of Belgium v. Commission of the European Communities*, 16 December 2004, § 44.

and how they were made, simplification of the legal process and a duty to give explanations²⁸⁵. Consistency is one of the best means to guarantee predictability, which in turn facilitates the realisation of legal certainty. When accepting merger remedies, the Commission is required to act consistently in order to provide a reliable basis for the undertakings' decisions and expectations²⁸⁶.

The procedure of the assessment of merger remedies is based on transparency, allowing the parties to react where the Commission notes competition concerns²⁸⁷. However, the extent of this transparency is dependent on the goodwill of the team handling the case. Sometimes, the parties are left in the dark for a certain period before being informed of competition concerns. While Phase I does not imply any real right to be informed about the investigation proceedings or to be given access to the case file, in Phase II, access to the case file is only given at a late stage of the proceedings²⁸⁸.

If the team handling the case is not sufficiently transparent, this can lead to an uneasy situation, where parties do not know exactly what kind of remedies they have to offer. In such a situation, they may be obliged to offer more than is strictly necessary to address the Commission's competition concerns. More transparency during the Commission's investigation is thus certainly welcome. More transparency would also avoid much back-and-forth with the parties and would allow the Commission to receive remedy proposals that exactly meet its expectations²⁸⁹.

2. During the « market tests »

Another lack of transparency and legal certainty is visible in the so-called « market tests ». In the context of merger control, a « market test » refers to the invitation to interested third parties to make observations, by way of questionnaires or other direct

²⁸⁵ L.L. GORMSEN, *A Principled Approach to Abuse of Dominance in European Competition Law*, Cambridge, Cambridge University Press, 2010, p. 154.

²⁸⁶ E. HERLIN-KARNELL and T. KONSTADINIDES, « The Rise and Expressions of Consistency in EU law: Legal and Strategic Implications for European Integration », *Cambridge Yearbook of European Legal Studies*, Vol. 15, 2013, p. 148.

²⁸⁷ A. ITALIANER, *op. cit.*, p. 4.

²⁸⁸ J.-F. BELLIS, P. ELLIOTT and J. VAN ACKER, *op. cit.*, p. 343.

²⁸⁹ J.-F. BELLIS, P. ELLIOTT and J. VAN ACKER, *op. cit.*, pp. 343-344.

contacts, on the proposed remedy²⁹⁰. Market-tests allow for the anticipation of problems that could arise in the implementation phase²⁹¹.

Market tests conducted with respect to merger remedies are conducted « when considered appropriate » by the Commission²⁹².

Based on its overall obligation of transparency and effective consultation and on the right of interested third parties to be heard²⁹³, the Commission generally considers market tests « appropriate » and will thus systematically reach out to third parties to « test » whether a proposed remedy sufficiently addresses the competition law issues raised by a transaction²⁹⁴.

The problem is that the Commission publishes little guidance on how market tests have to be conducted. Even though the published decisions make reference to the results of the market test, they usually say very little about the process that has been followed or the questions that have been asked and the responses that have been received. This situation has to be revised in order to improve legal certainty²⁹⁵.

4.3. Judicial Review

All decisions on procedural conduct of the Commission are subject to review by the General Court and ultimately by the Court of Justice²⁹⁶. This guarantees an independent judicial oversight and ensures that all rights of defence available to the parties are fully respected. However, judicial review of mergers is relatively rare²⁹⁷.

²⁹⁰ The Commission is not bound by the results of the market test : D. HOEG, *op. cit.*, pp. 192-196.

²⁹¹ A. ITALIANER, *op. cit.* p. 9.

²⁹² Notice on Remedies, *op. cit.*, pt. 80.

²⁹³ Merger Regulation, *op. cit.*, § 30, 35 and 37.

²⁹⁴ O. BRETZ and K. SCHALLENBERG, « Market tests of Remedies : A practitioners' view », *Concurrences*, 2013, n°1, p. 8, pt. 2.

²⁹⁵ O. BRETZ and K. SCHALLENBERG, *Ibidem*, p. 8, pt. 4.

²⁹⁶ TFEU, art. 263.

²⁹⁷ A. RENSHAW and J. BLOCKX, « Judicial review of mergers in the EU », *The Antitrust Bulletin*, Vol. 58, 2013, n°2-3, p. 499.

The undertakings and all other parties demonstrating an interest can appeal within two months of the decision²⁹⁸.

The grounds for annulment are lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule relating to their application or misuse of powers²⁹⁹.

Section V. Critics to Remedies

Critics denounce the fact that the Commission often heavily influences the content of the parties' commitments³⁰⁰. This argument has to be tempered because remedies are, by their very nature, a response to a competition concern identified by the Commission. Therefore, the Commission inevitably has a certain influence over the type, scope and scale of the proposed remedies³⁰¹. By nature, remedies present an interventionist aspect. They distort the parties' initially envisaged strategy in order to obtain a clearance decision from the Commission³⁰².

But since remedies are commitments offered by the notifying parties, proposed to resolve competition concerns raised by the transaction in its original form, they constitute counterparts to an authorization³⁰³. The fact that competition authorities are able to modify the structure of the market by requiring remedies brings merger control close to regulation³⁰⁴. It is indeed characterized by an *ex ante* intervention and by the choice of a market structure that is optimal in the eyes of the Commission³⁰⁵.

²⁹⁸ TFEU, art. 263.

²⁹⁹ TFEU, art. 263.

³⁰⁰ D. HOEG, *op cit.*, p. 38 ; R. CLARKE and E. J. MORGAN, *New Developments in UK and EU Competition Policy*, Cheltenham, Edward Elgar, 2006, p. 265. This has been confirmed by the EU Court : « it must be acknowledged that the Commission may have exercised a certain influence on the terms of the commitments proposed by the parties » : Case T-282/02, *Cementbouw Handel & Industrie v Commission* (2006), § 314.

³⁰¹ D. HOEG, *op. cit.*, p. 38.

³⁰² G. VALLINDAS, *op. cit.*, p. 423.

³⁰³ P. REY, « Economic Analysis and the Choice of Remedies », in F. LEVEQUE and H. SHELANSKI (ed.), *Merger Remedies in American and European Union Competition Law*, London, Edward Elgar Publishers, 2003, p. 130.

³⁰⁴ G. VALLINDAS, *op. cit.*, p. 423.

³⁰⁵ G. VALLINDAS, *op. cit.*, p. 438.

If it is true that merger remedies have as their effect to authorize concentrations that would otherwise be prohibited and that they lead to the clearance of the vast majority of merger operations, this calls for some nuance.

Indeed, the intended merger operation, part of a development strategy of the undertakings concerned, often ends up to be denatured in order to fulfil the conditions required by the Commission for the operation to be authorized³⁰⁶. If this is an almost inevitable fact, it is also one of the adverse effects of merger remedies.

Besides, certain operations are abandoned when the Commission expresses its will to initiate an in-depth Phase II-investigation. Parties are indeed afraid that their operation will be substantially denatured and will lose its strategic interest³⁰⁷, but also that the company's stock market valuation will be diminished³⁰⁸.

This trend illustrates how sensitive the practice on remedies is and how important it is to properly regulate it.

Section VI. Remedies in the Energy Sector

Thanks to merger control, the Commission is able to contribute to the market opening of the Energy Sector. The Commission has been recognized an important discretionary power in this field of competition law³⁰⁹, since concentration operations are also a factor of integration³¹⁰. Mergers and acquisitions can thus be said to be a way to realize the internal energy market.

Therefore, remedies are also used by the Commission to reach other objectives than the sole reestablishment of effective competition, such as an internal market where

³⁰⁶ Cf. *supra*.

³⁰⁷ P. LOWE and M. MARQUIS, *European Competition Law Annual: 2010. Merger Control in European and Global Perspective*, Oxford, Hart Publishing, 2013, p. 108.

³⁰⁸ G. VALLINDAS, *op. cit.*, pp. 428-429.

³⁰⁹ A. PERROT, « La frontière entre régulation sectorielle et politique de la concurrence », *Revue française d'économie*, Vol. 16, 2002, n°4, pp. 81-112.

³¹⁰ R. LECOURT, « Concentrations et fusions, facteurs d'intégration », *Revue du marché commun*, 1986, p. 6.

energy would circulate without illegal impediment³¹¹. It can be said that the acceptance of remedies in the Energy Sector pursues a double objective: a reduction of the market power of the undertakings concerned and the strengthening or the creation of access to the market³¹². The Commission makes its choice of remedies with a view to contribute to the liberalization process positively³¹³.

The context of the creation of an internal energy market is thus an essential element to take into account when analysing Commission's decisions concerning remedies.

An analysis of the Energy case law since 2004 demonstrates the Commission's clear preference for divestitures. They can take different forms, but they are all designed to achieve a reduction in the market power. For example, in *Veolia/ Cleanaway*³¹⁴, they implied the divestiture of infrastructure assets³¹⁵ while, in *GDZ Suez/ International Power*³¹⁶ they consisted, amongst others, in the divestiture of the companies' respective shareholdings in another undertaking³¹⁷. In *GALP Energia/ Exxonmobil Iberia*³¹⁸ they consisted in the divestment of certain assets and of shareholdings³¹⁹, while in *IPIC/ MAN Ferrostaal AG*³²⁰ and *RWE/ Essent*³²¹ they consisted exclusively in the divestment of shareholdings in another company³²².

In *Vattenfall/Nuon Energy*³²³, the commitment included the carving out of one of the parties' retail businesses³²⁴.

Energy release programs, particularly suitable for gas supply, are designed to resolve the problem of inadequate access to supplies. They do not require divestment of

³¹¹ F. BLANC, J. BRUECKNER and C. RAKOVSKY, *op. cit.*, p. 3.

³¹² P. D. CAMERON, *op. cit.* p. 408, pt. 14.104.

³¹³ P. D. CAMERON, *op. cit.*, p. 408, pts. 14.104 and 14.106.

³¹⁴ Case N° COMP/M.4318, *Veolia/ Cleanaway*, 21.09.2006.

³¹⁵ Case N° COMP/M.4318, *Veolia/ Cleanaway*, 21.09.2006, § 41.

³¹⁶ Case N° COMP/M.5978, *GDF Suez/ International Power*, 26.01.2011.

³¹⁷ Case N° COMP/M.5978, *GDF Suez/ International Power*, 26.01.2011, § 121.

³¹⁸ Case N° COMP/M.5005, *GALP Energia/ Exxonmobil Iberia*, 31.10.2008.

³¹⁹ Case N° COMP/M.5005, *GALP Energia/ Exxonmobil Iberia*, 31.10.2008, § 72 and 73.

³²⁰ Case N° COMP/M.5406, *IPIC/ MAN Ferrostaal AG*, 13.03.2009.

³²¹ Case N° COMP/M.5467, *RWE/ Essent*, 23.06.2009.

³²² Case N° COMP/M.5406, *IPIC/ MAN Ferrostaal AG*, 13.03.2009, § 66; Case No COMP/M.5467, *RWE/ Essent*, 23.06.2009, § 447.

³²³ Case N° COMP/M.5496, *Vattenfall/ Nuon Energy*, 22.06.2009.

³²⁴ Namely Nuon' German subsidiary: Case No COMP/M.5496, *Vattenfall/ Nuon Energy*, 22.06.2009, § 62-66.

assets³²⁵. They are behavioural or quasi-structural remedies. The principle is that the incumbent offers for sale certain quantities of gas or electricity from its overall portfolio to its competitors or customers. He will enter into a contract with a purchaser for these quantities. The aim is to make gas or electricity available to wholesalers and end-users at the wholesale level³²⁶. For example, in *DONG/ELSAM/E2*³²⁷, significant volumes of gas were released³²⁸. This remedy was accompanied by the divestment of infrastructure assets³²⁹.

Finally, in *Total/Gaz de France*³³⁰, the remedies were exclusively behavioural, aiming at improving access to Total's infrastructure facilities³³¹.

PART II. ANALYSIS OF DECISIONS

There are a number of important criteria that the Commission must take into account when assessing remedies: they must be able to eliminate competition concerns entirely, be a permanent solution, capable of ready and effective implementation and should not require onerous monitoring by the Commission³³².

But even where these criteria are met, the Commission enjoys a considerable discretionary power in its duty to guarantee the effective preservation of the competitiveness of the post-merger market structure.

Proportionality is one of the general principles of European law. It serves as a framework for decisions taken by the European institutions, but also as a ground of judicial review³³³. In European law, it is accepted that the proportionality principle is interpreted more flexibly, because the compatibility with the rules of the treaties is at

³²⁵ P. D. CAMERON, *op. cit.*, p. 409, pt. 14.108.

³²⁶ European Federation of Energy Traders, « Implementation of Gas Release Programmes for European Gas Market Development », June 2003, available online at <http://www.efet.org>.

³²⁷ Case N° COMP/M.3868, *DONG/Elsam/Energi E2*, 14.03.2006.

³²⁸ Case N° COMP/M.3868, *DONG/Elsam/Energi E2*, 14.03.2006, § 712-716.

³²⁹ Case N° COMP/M.3868, *DONG/Elsam/Energi E2*, 14.03.2006, § 707-711.

³³⁰ Case N° COMP/M.3410, *Total/ Gaz de France*, 08.10.2004.

³³¹ Case N° COMP/M.3410, *Total/ Gaz de France*, 08.10.2004, § 75.

³³² *Cf. supra*.

³³³ H. HOFMANN, G. ROWE and A. TÜRK, *Administrative Law and Policy of the European Law*, Oxford, Oxford University Press, 2011, p. 129.

stake. The strictness of the test to which European measures are subject depends largely on whether common policies are concerned³³⁴, since « when action is brought against the Community in an area of discretionary policy-making power, a looser form of the proportionality inquiry is generally used »³³⁵. For reaching its common policies, the European Union has frequently employed the proportionality principle as a flexible instrument³³⁶.

There are many decisions that demonstrate the Commission's discretionary power in assessing remedies, in the Energy Sector as well as in other sectors involving common policies (Chapter I).

The main issue to be determined is what the limits to the discretionary power of the Commission are. In the Energy Sector, this is all the more important since it is commonly agreed that the creation of a European internal energy union has still not been realized, more than 20 years after the proceedings have been initiated (Chapter II).

CHAPTER I. ANALYSIS OF RELEVANT DECISIONS

The Commission has often gone beyond the proportionality principle in its classical sense when assessing a remedy's ability to restore effective competition on the market.

There are many examples in the Commission's recent general practice to illustrate this tendency (Section I), but also in the Energy Sector (Section II).

Section I. General Decisions

1.1. *Merck/Sigma-Aldrich*³³⁷

³³⁴C. BARNARD, A. A. LLHORENS, M. EHRING *e.a.*, *The Cambridge Yearbook of European Legal Studies. Vol. 15, 2012-2013*, Oxford, Hart Publishing, 2013, p. 445.

³³⁵G. DE BURCA, « The Principle of Proportionality and its Application in EC Law », *Yearbook of European Law*, 1993, n°13, p. 146.

³³⁶H. HOFMANN, G. ROWE and A. TÜRK, *op. cit.*, p. 129.

³³⁷Case N° COMP/M.7435, *Merck/Sigma-Aldrich*, 15.06.2015.

On 15 June 2015, the Commission approved the acquisition of Sigma-Aldrich by Merck under the European Merger Regulation, following a Phase I investigation. Both parties are active in the life science sector.

Merck and Sigma were market leaders in the supply of many laboratory chemicals in the EEA, in particular solvents and inorganics³³⁸. They were also each other's closest competitors in the EEA in these two areas³³⁹. Therefore, the Commission identified competition concerns in these product markets in the EEA since the merged entity would face insufficient competitive pressure from the remaining market actors³⁴⁰.

Among other remedies, the key brand Fluka³⁴¹ and its associated business were divested on a *global* basis, for brand consistency reasons. The Commission considered that this would mitigate any risk of brand confusion and would thus enhance chances for a long-term viability of the divested business³⁴².

1.2. Lafarge/ Holcim³⁴³

On 15 December 2014, the Commission approved the acquisition of Lafarge of France by Holcim of Switzerland under the European Merger Regulation, following a Phase I investigation. Both parties are active worldwide in the manufacture and supply of cement, ready-mix concrete, aggregates and other construction materials. In April 2014, they agreed to merge to create the world's largest cement producer.

The clearance decision was subject to a substantial remedy package. The Commission had concerns that the transaction, as originally notified, would have had a detrimental effect on competition in a significant number of markets in the EEA, including grey cement³⁴⁴, ready-mix concrete³⁴⁵, aggregates³⁴⁶, asphalt³⁴⁷, contract surfacing³⁴⁸ and

³³⁸ Case N° COMP/M.7435, *Merck/ Sigma-Aldrich*, 15.06.2015, § 140 and 192.

³³⁹ Case N° COMP/M.7435, *Merck/ Sigma-Aldrich*, 15.06.2015, § 148 and 192.

³⁴⁰ Case N° COMP/M.7435, *Merck/ Sigma-Aldrich*, 15.06.2015, § 194.

³⁴¹ The Fluka Business consists of solvents and inorganics sold by Sigma worldwide under the Fluka brand (Case N° COMP/M.7435, *Merck/ Sigma-Aldrich*, 15.06.2015, Schedule, § 7).

³⁴² Case N° COMP/M.7435, *Merck/ Sigma-Aldrich*, 15.06.2015, § 250.

³⁴³ Case N° COMP/M.7252, *Holcim/ Lafarge*, 15.12.2014.

³⁴⁴ Case N° COMP/M.7252, *Holcim/ Lafarge*, 15.12.2014, § 275.

cement additives³⁴⁹. In all these markets, the merged entity would have faced insufficient competitive pressure from the remaining market players.

In order to remove these competition concerns, the companies committed to divest most of the operations where their activities overlapped. Therefore, the decision was conditional upon the divestment of Lafarge businesses in Germany, Romania and the United Kingdom and of Holcim operations in France, Hungary, Slovakia, Spain and the Czech Republic. The divestments consisted of assets as well as services necessary for the viability of these assets. It was also agreed that the deal would only go through after the Commission would have approved the buyer or buyers for these assets^{350 351}.

Competition Commissioner Margrethe Vestager said that « vibrant competitive markets in the construction sector are crucial for the Commission's ambition of boosting investments. The remedy package in this case is very substantial. But that was necessary to allow a clear-cut decision already in Phase I »³⁵². The Commissioner's comment is a clear reflection of the fact that Phase I remedies must be sufficient to clearly rule out any « serious doubt » that the Commission may have as to the compatibility of the transaction with the internal market³⁵³.

However, in light of the Commissioner's declaration, one may wonder whether the remedies offered after a Phase II in-depth investigation would have been narrower in scope.

1.3. *Huntsman Corporation/ Equity Interests Held by Rockwood Holdings*³⁵⁴

³⁴⁵ Case N° COMP/M.7252, *Holcim/ Lafarge*, 15.12.2014, § 320.

³⁴⁶ Case N° COMP/M.7252, *Holcim/ Lafarge*, 15.12.2014, § 377.

³⁴⁷ Case N° COMP/M.7252, *Holcim/ Lafarge*, 15.12.2014, § 398.

³⁴⁸ Case N° COMP/M.7252, *Holcim/ Lafarge*, 15.12.2014, § 409.

³⁴⁹ Case N° COMP/M.7252, *Holcim/ Lafarge*, 15.12.2014, § 433.

³⁵⁰ This is a so-called « up-front buyer arrangement ».

³⁵¹ Case N° COMP/M.7252, *Holcim/ Lafarge*, 15.12.2014, § 482-584.

³⁵² European Commission- Press Release, *Mergers: Commission approves acquisition of Lafarge by Holcim, subject to conditions*, IP/14/2683, Brussels, 15 December 2014, http://europa.eu/rapid/press-release_IP-14-2683_en.htm, last consulted on 11 May 2016.

³⁵³ Notice on Remedies, *op. cit.*, § 18 and 81.

³⁵⁴ Case N° M.7061, *Huntsman Corporation/ Equity Interests Held by Rockwood Holdings*, 10.09.2014.

On 10 September 2014, the Commission approved the acquisition of a number of chemical businesses held by Rockwood Specialties Group, by Huntsman Corporation under the European Merger Regulation, following an in-depth Phase II investigation. Both undertakings are American companies. Huntsman is active in the chemical industry and especially in the markets for pigments, polyurethanes, performance products and advanced materials. Rockwood is active in the sector of specialty chemicals and advanced materials used for industrial and commercial purposes.

The Commission had concerns about the fact that the transaction, as originally notified, would have made it difficult for customers to switch to alternative titanium dioxide suppliers. Indeed, it would have combined the two leading suppliers of titanium dioxide for printing ink applications, leading to the creation of a dominant position in the EEA³⁵⁵. Besides, the entity would not have faced sufficient competition pressure from other titanium dioxide suppliers as they are either more expensive, or do not have the necessary know-how to compete³⁵⁶. Finally, high barriers to entry characterize this market, which is mostly due to know-how and capital expenditure requirements³⁵⁷.

Therefore, the Commission concluded that the transaction was likely to lead to a significant impediment to effective competition in the EEA market for titanium dioxide for printing applications³⁵⁸.

To address these concerns, Huntsman offered to divest its global TR52 titanium dioxide business³⁵⁹, including the TR52 brand, technology and know-how, customer arrangements and some key personnel³⁶⁰. The Commission considered it necessary for the divestiture to be global (rather than EEA-wide) in scope, in order to ensure the

³⁵⁵ Case N° M.7061, *Huntsman Corporation/ Equity Interests Held by Rockwood Holdings*, 10.09.2014, § 206.

³⁵⁶ Case N° M.7061, *Huntsman Corporation/ Equity Interests Held by Rockwood Holdings*, 10.09.2014, § 246-302.

³⁵⁷ Case N° M.7061, *Huntsman Corporation/ Equity Interests Held by Rockwood Holdings*, 10.09.2014, § 303-315.

³⁵⁸ Case N° M.7061, *Huntsman Corporation/ Equity Interests Held by Rockwood Holdings*, 10.09.2014, § 541.

³⁵⁹ TR52 being Huntsman's main titanium dioxide grade used for printing ink applications : Case N° M.7061, *Huntsman Corporation/ Equity Interests Held by Rockwood Holdings*, 10.09.2014, § 106.

³⁶⁰ Case N° M.7061, *Huntsman Corporation/ Equity Interests Held by Rockwood Holdings*, 10.09.2014, § 557, 558 and 597.

divested assets' competitiveness and viability³⁶¹. Furthermore, in a so-called « up-front buyer clause », the parties committed not to close the transaction before the conclusion of a binding agreement for the sale of the divested business to a suitable purchaser approved by the Commission³⁶².

1.4. Unilever/Sara Lee³⁶³

On 17 November 2010, the Commission cleared the acquisition of the body and laundry care businesses of Sara Lee Corp of the US by the Anglo-Dutch consumer goods company Unilever under the European Merger Regulation, following a Phase II-investigation.

The activities of both undertakings overlapped in the personal care sector³⁶⁴. The Commission's investigation showed that the merger would give Unilever a very strong leadership position in a number of non-male deodorant markets by combining the parties' brands, most notably Sara Lee's Sanex brand with Unilever's Dove and Rexona brands, which competed against each other³⁶⁵. The transaction, as originally notified, would have removed an important competitive force and would likely have led to price increases. The Commission's investigation confirmed in particular competition concerns in Belgium, The Netherlands, Denmark, the United Kingdom, Ireland, Spain and Portugal³⁶⁶.

Despite the fact that competition concerns had been identified only in certain markets and in certain countries, the remedy submitted by Unilever consisted in the divestment of the Sanex brand for all products, including the unaffected product markets of shower gels and hand soaps, and in all European countries³⁶⁷. According to the Commission, this was indispensable to create a « viable and effective competitor », since the integrity and coherence of the Sanex brand would be preserved

³⁶¹ Case N° M.7061, *Huntsman Corporation/ Equity Interests Held by Rockwood Holdings*, 10.09.2014, § 557.

³⁶² Case N° M.7061, *Huntsman Corporation/ Equity Interests Held by Rockwood Holdings*, 10.09.2014, § 560.

³⁶³ Case N° COMP/M.5658, *Unilever/ Sara Lee Body Care*, 17.11.2010.

³⁶⁴ Case N° COMP/M.5658, *Unilever/ Sara Lee Body Care*, 17.11.2010, § 14.

³⁶⁵ Case N° COMP/M.5658, *Unilever/ Sara Lee Body Care*, 17.11.2010, § 166 and 361.

³⁶⁶ Case N° COMP/M.5658, *Unilever/ Sara Lee Body Care*, 17.11.2010, § 1066.

³⁶⁷ Case N° COMP/M.5658, *Unilever/ Sara Lee Body Care*, 17.11.2010, § 1414 and 1419.

in all European markets. Moreover, the purchaser of Sanex would be able to continue the success of the brand without being refrained by a « parallel re-branding exercise » of Unilever relating to a significant part of the Sanex portfolio³⁶⁸.

Section II. Decisions in the Energy Sector

Of the 17 merger operations cleared subject to remedies in the Energy Sector since the entry into force of the 2004 Merger Regulation, 12 were cleared following a Phase I investigation and 5 following a Phase II in-depth investigation.

All remedies accepted by the Commission included divestitures, except in the *Total/Gaz de France*³⁶⁹ case, where the remedies were exclusively behavioural.

While most remedies have not given rise to any debates, there are transactions where they were undoubtedly significant, and could even be qualified as far-reaching. This is due to the complexity of the transaction in question but also and more importantly to the Commission's openly admitted objective of creating a « European Energy Union ».

There are five merger operations in the Energy Sector where the remedies submitted by the notifying parties and ultimately accepted by the Commission can be qualified as « far-reaching ».

2.1. *Gaz de France/Suez*³⁷⁰

On 14 November 2006, the Commission approved, following a Phase II in-depth investigation, the merger of Gaz de France and the Suez Group, subject to conditions and obligations. Gaz de France is active in the gas sector at all levels, in electricity

³⁶⁸ Case N° COMP/M.5658, *Unilever/ Sara Lee Body Care*, 17.11.2010, § 1418-1420.

³⁶⁹ Case N° COMP/M.3410, *Total/ Gaz de France*, 08.10.2004.

³⁷⁰ Case N° COMP/M.4180, *Gaz de France/ Suez*, 14.11.2006.

generation and retail, and in energy services. The Suez Group is active in the gas and electricity sectors, in energy services and in water and environmental services. Both companies operate mainly in Belgium and France. This merger has created Europe's second-largest utility and the world's fourth largest energy company³⁷¹.

The Commission found that the envisaged transaction would have anticompetitive effects in the gas and electricity wholesale and retail markets in Belgium³⁷² and in the gas market in France³⁷³ because of the removal of the increasing competitive pressure that Gaz de France and Suez had so far exerted on each other in those two countries. Given the conditions on the market, including the very high barriers to entry, their respective dominant positions would have been considerably strengthened by the merger³⁷⁴.

To address these concerns³⁷⁵, the parties submitted far-reaching³⁷⁶ structural remedies³⁷⁷, including the divestiture of Distrigaz³⁷⁸ and SPE³⁷⁹, the relinquishing of Suez's control of Fluxys³⁸⁰ as well as the divestiture of Cofathec Coriance³⁸¹ and the district heating networks operated by Cofathec Services³⁸². They also submitted a series of additional measures, most notably investments, relating to the gas infrastructures in Belgium and France³⁸³.

Commissioner Neelie Kroes stated « the Commission has insisted on far-reaching remedies in this case so as to ensure effective competition in the Belgian and French

³⁷¹ *OECD Economic Surveys : Belgium 2009*, OECD, 2009, n°1, p. 127; R. SUBIOTTO and R. SNELDERS, *Antitrust Developments in Europe 2006*, AH Alphen aan den Rijn, Kluwer Law International, 2007, pp. 67-68.

³⁷² Case N° COMP/M.4180, *Gaz de France/ Suez*, 14.11.2006, § 932.

³⁷³ Case N° COMP/M.4180, *Gaz de France/ Suez*, 14.11.2006, § 616.

³⁷⁴ Case N° COMP/M.4180, *Gaz de France/ Suez*, 14.11.2006, § 615 and 930.

³⁷⁵ European Commission- Press Release, *Mergers: summary of the remedies offered by GDF and Suez*, MEMO/06/24, Brussels, 14 November 2006.

³⁷⁶ K. BACHOUR, G. CONTE, P. EBERL *e.a.*, « Gaz de France/ suez : Keeping energy markets in Belgium and France open and contestable through far-reaching remedies », *Competition Policy Newsletter*, 2007, n°1, p. 83.

³⁷⁷ Case N° COMP/M.4180, *Gaz de France/ Suez*, 14.11.2006, § 1147.

³⁷⁸ One of Suez's main energy subsidiaries for gas (§ 6) and the incumbent operator in Belgium (§ 106).

³⁷⁹ A company that provided energy services, held by Gaz de France (§ 3).

³⁸⁰ One of Suez's main energy subsidiaries for transport and storage of gas (§ 6).

³⁸¹ Operator in the district heating networks market, belonging to the GDF Group (§ 946).

³⁸² Part of the GDF Group (§ 990).

³⁸³ Case N° COMP/M.4180, *Gaz de France/ Suez*, 14.11.2006, § 1161-1166.

energy markets. Our intervention in this case is part of our action to ensure that there is effective competition in the newly-liberalized energy markets to the benefit of consumers and business »³⁸⁴.

The commitments accepted by the Commission went beyond the removal of the horizontal overlap arising from the merger. However, the Commission considered this indispensable. Indeed, the removal of the competitive pressure that GDF and Suez had exerted on each other, combined with the removal of potential competition in Belgium and France because of the very high barriers to entry, were negative consequences that the Commission wanted to counterbalance³⁸⁵.

2.2. E.ON/MOL³⁸⁶

On 21 December 2005, the Commission approved, following a Phase II investigation, the acquisition of MOL WMT and MOL Storage, two subsidiaries of MOL, the incumbent oil and gas company in Hungary, by E.ON Ruhrgas, a large integrated German energy supplier, subject to conditions and obligations.

The Commission identified anti-competitive effects in the gas and electricity wholesale and retail markets in Hungary, due to the combination of MOL's dominant market position in gas wholesale supply and storage with E.ON's important activities in gas and electricity retail³⁸⁷. However, there was no evidence that E.ON would have effectively obtained a dominant position. The only risk was that competitors in downstream markets would be excluded³⁸⁸.

The undertakings submitted remedies that would result in full ownership unbundling³⁸⁹ of MOL's gas production and transmission activities and the

³⁸⁴ European Commission- Press Release, *Mergers: Commission approves merger of Gaz de France and Suez, subject to conditions*, IP/06/1558, Brussels, 14th November 2006, http://europa.eu/rapid/press-release_IP-06-1558_en.htm, last consulted on 27 April 2016.

³⁸⁵ K. BACHOUR, G. CONTE, P. ÉBERL *e.a.*, *op. cit.*, p. 89.

³⁸⁶ Case N° COMP/M.3696, *E.ON/MOL*, 21.12.2005.

³⁸⁷ Case N° COMP/M.3696, *E.ON/MOL*, 21.12.2005, see in particular § 453, 466, 520, 551, 552-556, 654, 556, 654, 685, 697, 718, 729-733.

³⁸⁸ W. FRENZ, *Handbook of EU Competition Law*, Berlin-Heidelberg, Springer-Verlag, 2016, p. 1180, pt. 3532; G. MONTI, *EC Competition Law*, Cambridge, Cambridge University Press, 2007, p. 267.

³⁸⁹ *i.e.* structural separation in entirely unaffiliated companies.

commercial activities acquired by E.ON³⁹⁰. Access to infrastructure was also provided³⁹¹, as well as contract release³⁹².

The remedies would also improve the liquidity of the Hungarian gas market through the release of *substantial* quantities of gas on the market over a ten-year period³⁹³.

Competition Commissioner Neelie Kroes stated « the Commission's approach to this case reflects its commitment to ensuring that effective competition develops in the newly-liberalised energy markets. The energy sector inquiry has shown that in general these markets are still not working as they should. While the Commission supports European integration and restructuring of the energy sector, it must ensure that any competition concerns are remedied, and that consumers are protected »³⁹⁴

It is the first time in merger control that the Commission has accepted gas and contract release to remedy competition concerns in the Energy Sector. The use of this type of remedy allows smaller rivals or new entrants to acquire or strengthen market share³⁹⁵. With this significant gas release program, the Commission attempted to recreate a competitor to the merged entity.

On 26 February 2007, E.ON Ruhrgas appealed against alleged changes to one of the commitments accepted by the European Commission as a condition for its approval of the acquisition by E.ON of the gas wholesale and storage activities of the Hungarian oil and gas group MOL. However, the European Court of First Instance rejected this appeal, because the alterations had no legal effects³⁹⁶.

2.3. EDF/ Segebel³⁹⁷

³⁹⁰ Case N° COMP/M.3696, *E.ON/MOL*, 21.12.2005, § 735-737.

³⁹¹ Case N° COMP/M.3696, *E.ON/MOL*, 21.12.2005, § 755-757.

³⁹² Case N° COMP/M.3696, *E.ON/MOL*, 21.12.2005, § 749-754.

³⁹³ Case N° COMP/M.3696, *E.ON/MOL*, 21.12.2005, § 741-754.

³⁹⁴ European Commission- Press Release, *Mergers: Commission approves acquisition by E.ON of MOL's gas business, subject to conditions*, IP/05/1658, Brussels, 21 December 2005, http://europa.eu/rapid/press-release_IP-05-1658_en.htm, last consulted on 26 April 2016.

³⁹⁵ D. HARRISON and A. MORDAUNT, « Mergers in the energy sector : An overview of EU and national case law », *e-competitions*, n°49024, p. 9, available online at : www.concurrences.com.

³⁹⁶ Case T-57/07, *E.ON Ruhrgas and E.ON Földgaz Trade v. Commission*, O.J. N° C-95/47, 28.4.2007.

³⁹⁷ Case N° COMP/M.5549, *EDF/ Segebel*, 12.11.2009.

On 12 November 2009, following a Phase I investigation, the Commission cleared the acquisition of Segebel by Electricité de France (EDF), subject to conditions and obligations. Segebel is a holding company whose only asset is a 51% stake in SPE SA, the second largest electricity operator in Belgium³⁹⁸.

The Commission found that incentives for the merged entity to develop new generation capacity in Belgium would be significantly reduced compared to the incentives EDF had pre-merger³⁹⁹.

To address these concerns, EDF committed to divest the assets of one of its companies in charge of the development of one of its planned power station projects. In addition, if, by a certain date, EDF had not taken a final investment decision or had taken a negative final investment decision with regard to the remaining site, EDF committed to divest the assets of the remaining of these two companies⁴⁰⁰.

In relation to the competition issues raised by the transaction, namely an alleged reduction in EDF's incentive to build new power plants in Belgium, the divestment required is very strict. Remedies were considered necessary, although there was no significant overlap. They were based on the future potential impact of the merger⁴⁰¹.

2.4. Total/ Gaz de France^{402 403}

On 8 October 2004, the Commission cleared under the EU Merger Regulation Total's purchase from Gaz de France (GDF) of several gas assets in Southwest and Central France, some of which were already jointly owned by Total and GDF. The decision was rendered following a Phase I-investigation.

³⁹⁸ Case N° COMP/M.5549, *EDF/ Segebel*, 12.11.2009, § 3.

³⁹⁹ Case N° COMP/M.5549, *EDF/ Segebel*, 12.11.2009, § 206.

⁴⁰⁰ Case N° COMP/M.5549, *EDF/ Segebel*, 12.11.2009, § 211.

⁴⁰¹ D. GORE, S. LEWIS, A. LOFARO *e.a.*, *op. cit.*, p. 7; G. FEDERICO, « The Competition Effects of Energy Mergers : Economic Analysis in Europe and in Spain », *IESE Business School- University of Navarra*, 2011, p. 9.

⁴⁰² Case N° COMP/M.3410, *Total/ Gaz de France*, 08.10.2004.

⁴⁰³ This analysis is inspired by E. MORGAN DE RIVERY and V. GUERARD, « Case COMP/M.3410 *Total/ Gaz de France* Merger Control as a Tool to Greater Liberalisation in the Gas Sector », *E.C.L.R.*, Vol. 26, 2005, n° 11, pp. 624-637.

It is probably the first decision that does not refer to the concept of « creation of a dominant position » since the entry into force of the 2004 Merger Regulation⁴⁰⁴.

This decision may be seen as one of the first examples of the possible utilisation of the merger rules to further liberalize the gas market. It reflects the complex relationship between the European merger rules and the gas sector liberalisation provisions⁴⁰⁵. Trying to deal with Total's dominant position and the promotion of further liberalisation in all areas of the French gas sector, the Commission defined the relevant markets in a narrow way, so as to encourage entry into this sector⁴⁰⁶.

The Commission found that, in the South-West of France, the transaction raised vertical competition concerns because Total would acquire a strong position on the market in the supply of gas to eligible customers and a monopoly over all the natural gas transmissions and storage infrastructures⁴⁰⁷.

The Commission established three relevant product markets for gas, namely the markets for transportation, storage and supply to eligible customers⁴⁰⁸. The Commission examined these product markets at both the national and regional levels⁴⁰⁹. This allowed the Commission to examine the structural impact of the concentration on various distinct but nevertheless closely connected markets. The Commission concluded that no dominant position was created or strengthened⁴¹⁰.

However, by defining the relevant markets very narrowly, the Commission raised concerns as to the ability of new entrants to enter these markets⁴¹¹, especially concerning gas transportation and storage facilities, which is one of the Second Gas Directive's objectives⁴¹².

⁴⁰⁴ L. ORTIZ BLANCO, *op. cit.*, p. 221.

⁴⁰⁵ E. MORGAN DE RIVERY and V. GUERARD, *op. cit.*, p. 625.

⁴⁰⁶ E. MORGAN DE RIVERY and V. GUERARD, *op. cit.*, p. 630.

⁴⁰⁷ Case N° COMP/M.3410, *Total/ Gaz de France*, 08.10.2004, § 47, 54, 61, 72 and 73.

⁴⁰⁸ Case N° COMP/M.3410, *Total/ Gaz de France*, 08.10.2004, § 15-22.

⁴⁰⁹ Case N° COMP/M.3410, *Total/ Gaz de France*, 08.10.2004, § 35-72.

⁴¹⁰ Case N° COMP/M.3410, *Total/ Gaz de France*, 08.10.2004, § 49, 56, 63 and 67.

⁴¹¹ Case N° COMP/M.3410, *Total/ Gaz de France*, 08.10.2004, § 53, 60, 70-71.

⁴¹² Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, *O.J.* N° L. 176/57, 15.7.2003, see : art 18.

The Commission cleared the concentration subject to exclusively behavioural remedies. Total undertook to implement a number of measures aimed at ensuring « fair and sufficient third party access » to its natural gas transmission network and storage facilities in the South-West of France⁴¹³.

However, the Second Gas Directive already establishes a non-discriminatory and transparent third party access to gas transmission networks⁴¹⁴ and storage facilities⁴¹⁵. The behavioural remedies were thus not indispensable.

It can be said that this decision reflects the Commission's regulatory approach towards the Energy Sector⁴¹⁶. Indeed, the first, second and third European energy packages were designed to liberalize gas and electricity markets. In that context, it has already been mentioned that the purpose of merger control has not only been the prevention of mergers that would result in undesirable levels of concentration, but also ensuring that these mergers do not prevent the progress of liberalisation⁴¹⁷. This decision is a good illustration of the Commission's practice on the matter.

2.5. *EdF/ British Energy*⁴¹⁸

On 22 December 2008, the Commission cleared the acquisition by EdF S.A. (EdF), incorporated under the laws of France, of British Energy, a UK-based company, following a Phase I investigation.

The activities of EdF and British Energy overlapped on the markets for generation and wholesale supply of electricity as well as on the market for the retail supply of electricity to industrial and commercial customers⁴¹⁹.

⁴¹³ Case N° COMP/M.3410, *Total/ Gaz de France*, 08.10.2004, § 75.

⁴¹⁴ Directive 2003/55/EC, *op. cit.*, art. 21(1).

⁴¹⁵ Directive 2003/55/EC, *op. cit.*, art. 19.

⁴¹⁶ E. MORGAN DE RIVERY and V. GUERARD, pp. 634-637.

⁴¹⁷ D. HARRISON and A. MORDAUNT, *op. cit.*, p. 1.

⁴¹⁸ Case N° COMP/M.5224, *EDF/ British Energy*, 22.12.2008.

⁴¹⁹ Case N° COMP/M.5224, *EDF/ British Energy*, 22.12.2008, § 9.

The combined post-merger shares were relatively low. There was thus no creation of a dominant position⁴²⁰. Nevertheless, thanks to the concept of « significant impediment to effective competition », the Commission was able to identify competition concerns in four areas⁴²¹.

The Commission feared that, as concerns the wholesale electricity market, the combined entity would have had the possibility to withdraw capacity in order to benefit from increased prices and would have the ability to reduce liquidity, which would have had negative effects in both the wholesale and the retail supply markets⁴²². The Commission was also concerned that the transaction, as originally notified, would have had a negative impact on the availability of sites for new nuclear build⁴²³ and would have enabled the merged entity to hold important connection agreements, which might have hindered the other generators' ability to develop new power generation plants in Great Britain⁴²⁴.

To address these concerns, the parties committed to divest infrastructure facilities together with related assets, to sell certain minimum volumes of electricity in the British wholesale market, to divest a site that is potentially suitable for building a new nuclear power station and to terminate one of the connection agreements⁴²⁵.

The remedies have been described as significant in relation to the competition concerns raised by the transaction as originally notified⁴²⁶.

⁴²⁰ Case N° COMP/M.5224, *EDF/ British Energy*, 22.12.2008, § 24.

⁴²¹ M. WALOSZYK, *Law and Policy of the European Gas Market*, Cheltenham, Edward Elgar, 2014, p. 183.

⁴²² Case N° COMP/M.5224, *EDF/ British Energy*, 22.12.2008, § 24, 25-37 and 38-82.

⁴²³ Case N° COMP/M.5224, *EDF/ British Energy*, 22.12.2008, § 107-122.

⁴²⁴ Case N° COMP/M.5224, *EDF/ British Energy*, 22.12.2008, § 123-126.

⁴²⁵ Case N° COMP/M.5224, *EDF/ British Energy*, 22.12.2008, § 152, 163, 167-198.

⁴²⁶ J. RICHARDSON, *Constructing a Policy-Making State? Policy Dynamics in the EU*, Oxford, Oxford University Press, 2012, p. 162.

CHAPTER II. CRITICAL ANALYSIS

The abovementioned decisions, whether they relate to the Energy Sector or not, are clear examples of significant, even far-reaching remedies.

The question of the Commission's discretionary power as to the assessment of remedies must be analysed in conjunction with the general principle of proportionality.

As for any area of law, Commission decisions in the context of competition law are subject to the principle of proportionality (Section I)⁴²⁷. However, the proportionality principle is of special significance in competition law, since it is openly admitted that the Commission tries to realize market integration in many common policies⁴²⁸. For the abovementioned reasons, this is even truer for the Energy Sector (Section II).

If it is undeniable that the proportionality principle must be analysed in light of the objective of market integration and in light of the challenges of the Energy Sector, it is important to remember that the primary and most important function of this general principle of law is to guarantee legal certainty and to ensure that individuals are protected from arbitrary decisions⁴²⁹ (Section III).

Section I. The Principle of Proportionality

Under the traditional tripartite test, a measure is proportionate if it meets the requirements of suitability or effectiveness, necessity and proportionality *strictu sensu* to achieve the objectives legitimately pursued by the legislation in question⁴³⁰.

⁴²⁷ W. SAUTER, *Coherence in EU Competition Law*, Oxford, Oxford University Press, 2016, p. 137.

⁴²⁸ K. K. PATEL and H. SCHWEITZER, *The Historical Foundations of EU Competition Law*, Oxford, Oxford University Press, 2013, p. 20.

⁴²⁹ H. HOFMAN, G. ROWE and A. TÜRK, *op. cit.*, p. 143.

⁴³⁰ Case C-331/88, *The Queen v. Minister of Agriculture, Fisheries and Food ex parte Fedesa*, 1990, ECR I-4023, § 13; D. CHALMERS, G. DAVIES and G. MONTI, *European Union Law: Cases and Materials*, Cambridge, Cambridge University Press, 2010, p. 367; E. OSTERUD, *Identifying*

This is the conventional understanding of the proportionality principle, making it a rationality test since it refers to a process of analysis that provides an objective predetermined structure according to which the European institutions should conduct their reasoning⁴³¹. It is strictly speaking not a test, since « it does not, in itself, produce substantive outcomes »⁴³². It is a procedure for the assessment of cases where different factors must be taken into account⁴³³.

The suitability or appropriateness test examines the relationship between the means and the ends and analyses whether the measures chosen are suitable or appropriate to achieve the given aim. The necessity test implies that the measures chosen should be the least restrictive on the given norm. According to the proportionality *stricto sensu* test, the measures will be disproportionate if, although suitable and necessary, they nevertheless impose an excessive burden on the undertakings concerned⁴³⁴. However, the exact content of this last test is difficult to determine, which weakens somewhat the rationality of this conventional understanding of the proportionality principle⁴³⁵.

In the context of competition law, the principle of proportionality forms the basis for the assessment of the Commission's decisions⁴³⁶.

Section II. A Different Approach Towards The Proportionality Principle

Sometimes, the purpose of the proportionality principle understood in its traditional sense, namely ensuring that rational decisions are made, does not suffice where conflicting values need to be balanced. The proportionality principle has not always been interpreted in the same way, neither with the same degree of intensity, because

Exclusionary Abuses by Dominant Undertakings under EU Competition Law. The Spectrum of Tests, AH Alphen aan den Rijn, Kluwer Law International, 2010, p. 267.

⁴³¹ M. KLATT and M. MEISTER, *The Constitutional Structure of Proportionality*, Oxford, Oxford University Press, 2012, p. 7; T.-I. HARBO, *op. cit.*, p. 165.

⁴³² A. STONE SWEET and J. MATHEWS, « Proportionality Balancing and Global Constitutionalism », *Columbia Journal of Transnational Law*, Vol. 47, 2008, n°73, pp. 75-77.

⁴³³ R. NAZZINI, *The Foundation of European Union Competition Law. The Objective and Principles of Article 102*, Oxford, Oxford University Press, 2011, p. 157.

⁴³⁴ D. CHALMERS, G. DAVIES and G. MONTI, *op. cit.*, pp. 367-369; M. KLATT and M. MEISTER, *op. cit.*, pp. 8-10.

⁴³⁵ T.-I. HARBO, *op. cit.*, p. 165.

⁴³⁶ W. SAUTER, *op. cit.*, p. 137.

of the underlying interests and common policies that the European Union, and more specifically the Commission, tries to protect with this principle⁴³⁷.

The European Court has recognised that « the appropriateness of and the need for the contested decision must be assessed in relation to the aim pursued by the institution »⁴³⁸.

The principle of proportionality is interpreted with more flexibility when reviewing decisions where European institutions enjoy a large discretionary power, involving political, economic and social choices, and where they are asked to undertake complex assessments⁴³⁹.

Creating an internal energy market is one of the Commission's priorities. Introducing competition in the Energy Sector allows for reliable energy supplies at reasonable prices for businesses and consumers and with the minimum environmental impact, which is crucial to the European economy⁴⁴⁰. Since liberalisation is a prerequisite for effective competition to be possible, the European Union and the Member States decided, starting from the 1990s, to gradually open the national electricity and gas markets to competition. This happened with the first, second and third liberalisation directives⁴⁴¹. As regards the oil sector, the European Union is a significant importer of oil and derivative products and guaranteeing competition in this sector is essential for the European Union's economy⁴⁴².

But the liberalization of the energy markets through sector-specific regulation is not sufficient to guarantee effective competition in the Energy Sector. An additional way for the Commission to ensure the competitiveness of the energy market is through the

⁴³⁷ S. DOUGLASS-SCOTT, *Constitutional Law of the European Union*, England, Pearson Education Limited, 2002, p. 184.

⁴³⁸ Case T-170/06, *Alrosa Co v. Commission*, 2007, ECR II-2601, § 99.

⁴³⁹ A. KACZOROWSKA, *European Union Law*, 3d ed., Oxon, Routledge, 2013, p. 120.

⁴⁴⁰ European Commission, DG Competition, http://ec.europa.eu/competition/sectors/energy/overview_en.html, last consulted on 28 April 2016.

⁴⁴¹ *Cf. supra*.

⁴⁴² European Commission, DG Competition, http://ec.europa.eu/competition/sectors/energy/oil/oil_en.html, last consulted on 28 April 2016.

control of mergers and acquisitions, and remedies have proven to be a useful tool to achieve this goal⁴⁴³.

When assessing energy mergers, the Commission's underlying goal is to guarantee effective competition so as to ensure the realization of the important and legitimate objectives of competitiveness, sustainability and security of supply. An analysis of the relevant case law has shown that the Commission is therefore not completely neutral when assessing energy mergers. This lack of neutrality is true for the Energy Sector, but has also proven to be true for other sectors, for different reasons.

It is therefore admitted that the proportionality principle can be interpreted in a more flexible way so as to give more weight to the realisation of the Commission's objectives, and thus to the legitimate interests of the European Union as a whole⁴⁴⁴.

Section III. Critics Towards This Different Approach

The proportionality principle, which is a general principle of European law that must guide the action of all European institutions, implies that there is an expectation from the parties that the Commission will deal with issues in a certain manner- an expectation regarding the procedures that guarantees objectivity and legal certainty⁴⁴⁵.

The flexible interpretation of the proportionality principle in order to contribute to the realisation of the Commission's objectives is problematic for a number of reasons.

Firstly, this way of reasoning has undoubtedly a more arbitrary character than the classic proportionality test. It leaves a wide margin of discretion to the Commission, the legal boundaries of which are not clearly defined. On the contrary, the strength of

⁴⁴³ D. HARRISON and A. MORDAUNT, *op. cit.*, p. 8.

⁴⁴⁴ D. CHALMERS, G. DAVIES and G. MONTI, *op. cit.*, p. 369.

⁴⁴⁵ U. BERNITZ, J. NERGELIUS and C. CARDNER, *General Principles of EC Law in a Process of Development. Reports from a conference in Stockholm, 23-24 March 2007, organized by the Swedish Network for European Legal Studies*, AH Alphen aan den Rijn, Kluwer Law International, 2008, pp. 285-286.

the classical proportionality test, which secures legitimacy for the Commission's decisions, is that it has a clear legal structure⁴⁴⁶.

Secondly, the structural reasoning of the proportionality principle implies that the European institutions are bound to take into account a certain number of factors and elements⁴⁴⁷. But if what is decisive for the outcome of a case is dependent on a different rational, the Court is giving greater weight to other factors and elements, which do not offer the same assurance of consistency since their relative weight is left to the Commission and its staff handling the case in question⁴⁴⁸.

Thirdly, if it is true that each merger is unique and has its own specific features, the Commission's way of reasoning makes the outcome of merger assessment less predictable and is thus a source of insecurity and uncertainty⁴⁴⁹. For the parties, this can amount to a waste of time and money. Solutions could be to make a more systematic use of the possibility to have pre-notification dialogues with the Commission and to ensure more transparency from both sides in order to avoid unpleasant surprises for both the Commission and parties at a later stage⁴⁵⁰.

Fourthly, since there is a general agreement on the fact that a European Energy Union has still not been realized⁴⁵¹, the question arises as to whether the Commission, and more broadly the European Union, should not review its way of proceeding. Possible solutions could be to review the existing legal framework or to have a more

⁴⁴⁶ T.-I. HARBO, *op. cit.*, p. 181.

⁴⁴⁷ T.-I. HARBO, *op. cit.*, p. 181.

⁴⁴⁸ D.M. JENSEN, « The Rights and Wrongs of Discretionary Remedialism », *Singapore Journal of Legal Studies*, 2003, p. 179.

⁴⁴⁹ D.M. JENSEN, *op. cit.*, p. 187.

⁴⁵⁰ M. GAVED, « Bonnes pratiques dans le suivi des engagements », *Concurrences*, 2012, n° 3, pp. 9-13.

⁴⁵¹ U. SCHOLZ and T. VOHWINKEL, « The Application of EU Competition Law in the Energy Sector », *Journal of European Competition Law & Practice*, Vol. 7, 2016, N° 1, p. 56; H. JAMES, « Completing the Union: Is the European Energy Union Really Real? », *Swedish Institute for European Policy Studies*, October 2015; M. PIERGIOVANNI, « Competition and regulation in the energy sector in Europe in the post-sector inquiry area », *Competition Law International*, 2009, p. 3.

systematic recourse to behavioural remedies⁴⁵², since the on-going liberalisation process requires remedies to be flexible and adaptable⁴⁵³.

Finally, competition law remedies cannot be transformed into regulatory remedies. The Commission must keep this in mind when assessing commitments. It is indeed forbidden to the Commission to transform itself into a market-regulator⁴⁵⁴. Although the limit between the use of a renowned discretionary power and a prohibited regulatory power is difficult to define, one may wonder if, in light of the abovementioned decisions, the Commission does not try to positively regulate the market.

In order to reach more proportionate remedies, parties could either go through a longer pre-notification stage, which allows for discussions with the Commission, or through Phase II proceedings⁴⁵⁵.

CONCLUSION

Although mergers and acquisitions contribute to a company's external and internal growth by enabling it to obtain a number of benefits, the procedure of merger assessment is a journey strewn with obstacles. The path towards a clearance decision is indeed very uncertain and filled with unforeseen circumstances.

It is very difficult, sometimes even impossible, for undertakings to predict the outcome of a notified transaction, since the Commission's way of reasoning is hard to anticipate.

The Commission's practice is justified by a number of reasons, the first being that competition law is everything but rational and the Commission has to take into

⁴⁵² P. BOUGETTE and F. MARTY, « Quels remèdes pour les abus de position dominante? Une analyse économique des décisions de la Commission européenne », *Concurrences*, 2012, n°3, p. 37.

⁴⁵³ M. ROGGENKAMP, L. BARRERA-HERNANDEZ, D. N. ZILLMAN *e.a.*, *Energy Networks and the Law. Innovative Solutions in Changing Markets*, Oxford, Oxford University Press, 2012, p. 334.

⁴⁵⁴ I. LIANOS and D. GERADIN, *op. cit.*, p. 435; M. PIERGIOVANNI, « EC Merger Control Regulation and the Energy Sector... », *op. cit.*, p. 227.

⁴⁵⁵ C. BREUVART and E. CHASSAING, *op. cit.*, p. 62, pt. 70.

account many changing factors of different natures. Besides, the Commission, in its role of managing and implementing European policies, is responsible for the realisation of these objectives, which benefit the European Union as a whole.

The Commission has used competition law as a tool to pursue market integration in many sectors, notably in the Energy Sector. Market integration, through the opening of fragmented national markets, is a means to promote competition within the European Union, which makes it an economic objective that necessarily involves a certain margin of appreciation⁴⁵⁶. Effective competition, in turn, makes the realisation of the Commission's objectives of low prices, high-quality products, a wide selection of goods and services, enhanced efficiency and innovation as well as an increase in consumer welfare⁴⁵⁷ possible. All those elements are linked and the Commission's practice is therefore difficult to reconcile with the parties' expectation of rationality and neutrality.

However, the Commission's action is governed by an important legal structure, namely the general principle of proportionality, which is a significant limitation to its discretionary power, also regarding the assessment of remedies. It refers to the way in which Commission decisions are assessed and ensures that they have been made following an objectively structured reasoning⁴⁵⁸. If this general principle of law can be modulated so as to give more weight to the realisation of the Commission's objectives, there are important risks associated with a broad interpretation of the proportionality principle⁴⁵⁹. In any case, the Commission's discretionary power cannot amount to market regulation⁴⁶⁰, since law making is the task of a democratically elected legislator⁴⁶¹.

This article has been written from a perspective that adheres to the position that the Commission's decision making should, despite the concrete reality, as far as possible

⁴⁵⁶ M. IOANNIDOU, *Consumer Involvement in Private EU Competition Law*, Oxford, Oxford University Press, 2015, p. 17.

⁴⁵⁷ *Cf. supra.*

⁴⁵⁸ N. EMILIOU, *op. cit.*, p. 160.

⁴⁵⁹ *Cf. supra.*

⁴⁶⁰ *Cf. supra.*

⁴⁶¹ N. EMILIOU, *op. cit.*, p. 162.

be subject to abstract rules, to impose restraint on the Commission⁴⁶². This ensures that decisions are taken in an objective way within a stable a pre-established legal framework. It guarantees predictability and transparency through a widely recognized way of reasoning. It also makes sure that the law is made applicable to all in the same way, which limits arbitrary decision-making. Besides, and most importantly, it secures legitimacy for the Commission's decisions⁴⁶³. It is the reason why individuals trust the whole system and comply with taken decisions. Thus, the Commission's duty is to reconcile as far as possible its discretionary power with the principle of proportionality.

The aim of this analysis was to point out and discuss some important issues with respect to the application of the proportionality principle in European merger remedies in the Energy Sector, but also with respect to remedies in general. However, the debate on the use of the proportionality principle remains open-ended and there are many questions to be answered more thoroughly.

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⁴⁶² T. C. HARTLEY, *The Foundation of European Union Law. An Introduction to the Constitutional and Administrative Law of the European Union*, 5th ed., Oxford, Oxford University Press, 2014, p. 124.

⁴⁶³ N. EMILIOU, *op. cit.*, p. 163.

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- Directive 96/92/EC concerning common rules for the internal market in electricity;
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- Regulation N° 714/2009 on conditions for access to the network for cross-border exchanges in electricity;
- Regulation N° 713/2009 establishing an Agency for the Cooperation of Energy Regulators;
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