CHAPTER IX. THE REGULATION OF NON-HORIZONTAL CONCENTRATIONS IN THE CONTEXT OF EU ECONOMIC SECURITY

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Abstract*. This paper examines the relationship between the EU's economic security policy, common security policy, and common commercial policy, and the reasons for its development. It also explores the objectives and legal tools available under merger regulation to ensure EU economic security. The remainder of the paper delves into a comprehensive analysis of different issues associated with non-horizontal concentrations, considering the objectives of economic security policy.*

Keywords: *Economic security, security policy, merger, vertical concentration, conglomerate concentration*

Introduction

Each country's approach to regulating concentrations depends on its policy-makers' views on competition. In some countries, the prevailing view is that undertakings become monopolists due to their more efficient operations (Whish, 2001, p. 10): they introduce innovations, create new products, and respond to consumer needs faster than competitors, producing goods or services more efficiently. Therefore, it would be a mistake to regulate and punish them. Some even argue that fierce competition in the market can be harmful, and can lead companies to bankruptcy (Allen, 1968). Others consider the existence of competition

as a necessary condition for the successful development of the state's economy (Dabbah, 2004, p. 2). In a competitive market, a product's price corresponds to demand, while the quality of goods is constantly improving, their supply is increasing, and the efficiency of business entities is on the rise. Thus, a monopoly can reduce the efficiency of economic entities, support the production of lower-quality goods or services, and limit the emergence of innovations. Depending on the state's approach to competition regulation, the goals of concentration regulation also differ.

The regulation of non-horizontal concentrations is even more complex because their effect on competition is not unambiguous. The impact of an undertaking's ability to leverage market or financial power to another market does not become apparent immediately, but only after some time. This effect can be both beneficial and harmful. Regarding benefits, it could be said that non-horizontal concentrations make it possible to: improve the efficiency of merger undertakings faster and cheaper by rationalizing the structure of undertakings, eliminating weak competitors, more efficiently allocating resources for production due to economies of scale, as well as more effectively allocating funds for research, innovation, the distribution of goods, accelerating technical progress, encouraging large-scale, long-term investments, etc. (Cook & Kerse, 2000, p. 165; Lindsay, 2006, p. 375; Craig & Burca, 2003, p. 1035); activate economic activity in a stagnant market; and reduce the risk of bankruptcy due to the acquisition of a diversified business group, the stabilization of income, and the reduction of risk for business mistakes (Turner, 1965, p. 1317). Buying a bankrupt company can be one way to protect the interests of creditors, owners, and employees.

However, considering the negative impact of nonhorizontal concentrations, it could be said that they can increase the merger undertakings' power in the market to the extent that they can: change the "rules of the game" in their favor and influence price; negatively affect the common interests of society; reduce democracy;

infringe the freedoms of persons; and limit the distribution of benefits to society (Jones & Sufrin, 2004, p. 853). Non-horizontal concentrations can make it easier for merger undertakings to weaken competitors or force them out of the market (Sandonis & Fauli-Oller, 2002, p. 2; Comanor & Rey in Kirkwood, 2004, p. 445). If the process of forming non-horizontal concentrations was left unchecked, it would be possible for entire industries to be transferred to the control of several undertakings. This could have a harmful effect not only on the economic development of states, but also on the political situation.

National security policy can influence concentration regulation, as governments can promote the emergence of "national leaders" (Whish, 2001, p. 724), international concentrations, and technical progress (Jones & Sufrin, 2004, p. 974). The transfer of control of national undertakings to foreign entities may be restricted, or business areas of importance to the state, such as energy or media, may be otherwise regulated (Whish, 2001, p. 729).

The situation in the EU is even more complicated, as the regulation of concentrations at the national level is combined with the regulation of concentrations at the EU level, as carried out by the European Commission. Both Member States and the EU itself take care of economic security issues. EU law and policy documents indicate that EU merger regulation contributes to strengthening the internal market, increasing competitiveness, protecting effective competition, and raising living standards in the EU. In 2023, the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy clearly indicated an additional objective – Strengthening European Economic Security. The appearance of this objective was determined by the new reality: "the global pandemic, Russia's war in Ukraine, hostile economic actions, cyber and infrastructure attacks, foreign interference and disinformation, and a global increase in geopolitical tensions." This "has exposed risks and vulnerabilities in EU societies, economies, and companies that did not exist only a few short years ago"

(European Commission, 2023, p. 1).

Merger regulation in the EU was initially dedicated to the protection of effective competition in the common market. Considering that it has had to address economic security issues in recent years with the aim of protecting the EU market, questions arise as to: what place economic security issues occupy in the regulation of competition in the EU; how they are compatible with other objectives; whether the regulatory system surrounding concentrations provides the prerequisites to take economic security issues into account; whether the rules for the assessment of concentrations allow economic security issues to be considered; and whether economic security issues are taken into account in practice.

Considering the questions identified above, this paper aims to determine how economic security issues influence the regulation of non-horizontal concentrations.

To accomplish this goal, the paper examines the relationship between the EU's economic security policy, common security policy, and common commercial policy and the reasons for its development. It also explores the objectives and legal tools available under merger regulation to ensure EU economic security. The remainder of the paper delves into an analysis of different issues associated with non-horizontal concentrations, considering the objectives of economic security policy.

9.1. Non-horizontal concentrations and economic security

9.1.1. The concept of non-horizontal concentrations

Under EU law, Article 3 of the Council Regulation No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (hereinafter – Regulation 139/2004) a concentration arises "where a change of control on a lasting basis results from the merger of two or more previously independent undertakings

or parts of undertakings … or the 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 undertakings."

Economic theory classifies concentrations (mergers) into three categories: horizontal, vertical, and conglomerate.

Horizontal concentrations are formed when the concentration involves competing undertakings producing substitute goods and operating on the same supply level of goods or services. Areeda and Hovenkamp (2017, § 1900) are more concrete: they define horizontal mergers as mergers involving direct competitors that sell identical products or close substitutes in the same geographic market before the merger occurs. Such a concentration can involve two or more wholesalers or two or more retailers. For example, in the Commission case of *JD Sports/Marketing Investment Group* (2023), merger undertakings requested that the European Commission approve a transaction under which JD Group would acquire sole control of MIG. Both companies were active in the retail and wholesale supply of sports goods. The merger group members had overlapping activities in Bulgaria, Croatia, Czechia, Estonia, Germany, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, and Slovenia.

Non-horizontal concentrations, which include vertical and conglomerate concentrations (Guidelines for non-horizontal mergers, § 2), differ from horizontal concentrations. In a vertical concentration, undertakings do not directly compete. Still, one undertaking serves as a supplier of inputs to the other before the concentration (Areeda & Hovenkamp, 2017, § 1900), which means that undertakings operating at different supply levels of goods or services merge. In particular, this can involve a wholesaler merging with a retailer or a manufacturer with a supplier. For example, in the Commission case of *Coca-Cola/Amalgamated Beverages* (1997), Coca-Cola acquired a 51% stake in the UK's largest bottling company, Amalgamated Beverages, from Cadbury Schweppes. In another case,

Tomtom/Tele Atlas (2008), the Commission found that the proposed transaction was purely vertical since it involved two companies operating at different levels in the supply chain. This merger is a case of "upstream" integration in the sense that a producer of a good acquires its leading provider of an important input. In this case, TomTom, a manufacturer of portable navigation devices and a supplier of navigation software for use in navigation devices, wanted to acquire shares of Tele Atlas, a supplier of digital map databases for navigation and other end-uses.

Conglomerate concentrations appear when undertakings that do not compete with each other are combined and operate in different markets that are not horizontally or vertically related. In other words, the conglomerate category encompasses all other types of concentrations. Miller (2019, p. 315) indicates that this "can range from firms with no economic relationship to mixed conglomerates with quasi-vertical or quasi-horizontal relationships, such as firms that sell similar products in different geographic markets." An example of a conglomerate merger is *General Electric/Honeywell* (2001) in which the European Commission indicated that General Electric, a merger undertaking, operated in several markets: the production of jet engines and electric generators, the provision of financial services, the molding of plastic products, the provision of medical therapy, and the provision of information services.

Depending on whether merger undertakings produce or sell complementary or unrelated products, conglomerate concentrations can be divided into mergers in complementary product markets, mergers in neighboring product markets, and mergers in unrelated product markets (Church, 2006, p. 2). Markets are considered complementary when markets' products complement each other (where one product increases the value or functionality of the other product). For example, in the Commission case of *General Electric/Honeywell* (2001), one of the merger undertakings, General Electric, produced engines for large aircraft, while the other, Honeywell, produced auxiliary parts and electronic equipment.

Products complement each other when a price increase in one product reduces the demand for the other. For example, staple machines and staples, shavers and razor blades, or printers and printer cartridges: if the price of staple machines, shavers, or printers increases, the use of staple machines and staples, shavers and razor blades, or printers and printer cartridges decreases respectively (Regulation (EU) 2023/914, Annex I).

Unrelated goods in neighboring product markets do not have this effect on each other, although they may be distributed similarly. They can involve products with a common set of buyers (Proctor, 2015b). For example, banking and financial intermediation services are not necessarily considered substitutes or complementary to each other, but the same consumer group may use them. They may be provided using the same distribution channels or a similar promotion strategy. A "pure" conglomerate merger involves acquiring products unrelated to demand or supply (Church, 2006, p. 3).

Sometimes, the concentration consists of multiple divisions (Guidelines for non-horizontal mergers, § 7; Miller, 2019, p. 315) when undertakings in the concentration are connected with the undertakings of one market horizontally and with the undertakings of other markets by vertical or conglomerate ties. For example, in *Skanska/Scancem* (2001), the Commission examined the horizontal and vertical ties of the undertakings in the concentration with other undertakings.

Some authors argue that categorization into horizontal, vertical, and conglomerate mergers is often less obvious "in the age of digital platforms operating entire ecosystems of interrelated product and services" (Witt, 2022, p. 2). Witt suggested considering Microsoft as an example (*Microsoft/LinkedIn*, 2016). Microsoft is a global technology company offering various products and services, including PC operating systems, servers, mobile devices, productivity applications, software solutions, hardware devices, cloud-based solutions, and online advertising. At the time when Microsoft acquired LinkedIn, a professional social network,

and considered pre-installing LinkedIn on its Windows PC operating system, the question arose as to whether LinkedIn should be considered an input for the Microsoft ecosystem, making the merger vertical. Or would this be a conglomerate merger, as Microsoft had not previously offered professional networking services and is now entering a new market? The answer to this question hinges on how one defines the relevant market (Witt, 2022, p. 2). Witt indicates that "multi-sided, multi-product digital platform mergers will commonly present horizontal, vertical and conglomerate features all at once" (p. 3).

The impact of non-horizontal concentrations on the market is different from that of horizontal concentrations. In the case of horizontal concentrations, the merger of competitors may directly reduce competition in the market and increase the prices of goods or services. Alternatively, it may keep prices the same or even reduce them because the concentration allows the productivity or efficiency of the undertakings in the concentration to be increased (Bishop et al., 2005, p. i).

In the case of non-horizontal concentrations, undertakings that are related vertically or in complementary, neighboring, or completely unrelated product markets are combined, so competition in the market is not directly reduced. Usually, such a concentration reduces the prices of goods or services because a reduction in one good increases the demand for other goods if the goods are sold together (Bishop et al., 2005, p. 119). For example, reducing the distribution cost of goods would increase the number of goods sold by the manufacturer; reducing the price of a car would increase the sales volume of additional products (e.g., tires).

Experts in competition law and economics disagree on whether vertical concentrations are harmful and should be restricted or whether they are beneficial and should be allowed. Some believe that such concentrations are useful and do not harm competition, as they: create the conditions to increase the productivity (Whish, 2001, p. 724; Craig & Burca, 2003, p. 1036) and technical progress

(Cook & Kerse, 2000, p. 165) of an undertaking due to economies of scale; encourage large-scale, long-term investments (Guidelines for non-horizontal mergers, § 14); accelerate the implementation of research and innovations; improve access to loans for undertakings in the concentration (Whish, 2001, p. 724; Craig & Burca, 2003, p. 1036); and allow operating costs to be reduced and the product development, production, and distribution processes to be better coordinated. For example, a merger between seller and distributor may reduce distribution costs, while the merger of a manufacturer with a supplier of raw materials ensures the supply of raw materials necessary for production. The vertical integration of production and distribution is particularly significant in markets where the trade mark is important, as it allows the trade mark holder to maintain full control over the product's development, promotion, and marketing (*Guinness/GrandMetropolitan*, 1997, § 36). Vertical concentrations can also reduce competitors' market power (Lindsay, 2006, p. 375) and improve inter-brand competition (Craig & Burca, 2003, p. 1035).

Other experts disagree with the above notion. According to their view, vertical concentrations have a harmful effect on competition in the market (Sandonis & Fauli-Oller, 2002, p. 2; Salop, 2018, p. 1975; King et al., 2023, p. 1080; Weinstein, 2022, p. 1089) as they enable monopolists in the vertical upstream of the market to make better use of their market power (Comanor & Rey in Kirkwood, 2004, p. 445). They may then seek to eliminate competitors or limit their activities in the downstream market to fully enjoy the market power available in the upstream market (Comanor & Rey in Kirkwood, 2004, p. 443). Furthermore, competition in the market can decrease even when undertakings in the concentration do not have power in the market, allowing them to "close" the market to competitors. Sandonis and Fauli-Oller express the most radical approach to this issue. According to them, vertical concentrations should never be allowed because those that benefit society are not profitable for undertakings in the concentration, and

therefore, they are not created (Sandonis & Fauli-Oller, 2002, p. 16).

The third group of experts take an intermediate view. They admit that concentrations can have a negative effect on competition (Bishop et al., 2005, p. ii; Nouel, 2001, p.1), but posit that vertical concentrations increase business productivity more than they reduce competition in the market. According to these experts, when evaluating concentrations, it is necessary to consider both the harmful effects of the concentration on competition and the benefits obtained from improving the efficiency of the undertaking (Comanor & Rey in Kirkwood, 2004, p. 456).

Assessing the impact of conglomerate concentrations on competition is even more difficult than assessing the impact of vertical concentrations. Their impact on the market structure is not unambiguous (Craig & Burca, 2003, p. 1035), as the goals and effects of such mergers may benefit the market or not affect competition.

If merging undertakings are located in related markets, the prices of goods are usually reduced. As a result of a conglomerate concentration, the undertaking's production efficiency increases due to economies of scale. The undertaking can reduce the costs of implementing individual business decisions (production, sales, etc.), set optimal prices, and/or preserve profits (Bishop et al., 2005, section 4). Merged undertakings selling goods belonging to the same group of goods or selling to the same group of consumers create conditions for consumers to buy goods from one seller (Guidelines for non-horizontal mergers, § 14).

On the other hand, conglomerate concentration can also have a detrimental effect on competition in the market when the concentration strengthens a merger undertaking's ability to weaken or eliminate competitors by leveraging the power it has or would gain as a result of concentration from one market to another. Using the techniques of mixed bundling and customer-based price discrimination, predation, and exclusion can be a powerful strategy in a conglomerate merger

(Proctor, 2015a, p. 11). When an undertaking leverages its power from one market to another, the prices of competitors' goods are not directly increased. However, the merger group's lower prices and a wider portfolio of products encourage consumers to buy the products of the partners in the concentration. The concentration partners may also gain better conditions than the competitors regarding access to the capital market, or may use the cash funds accumulated inside the merged structure (Church, 2006, p. 260). Such actions result in competitors' profits decreasing and weakening, before they are finally eliminated from the market. In addition, it should be noted that the concentration partners may reduce the prices of goods (Bishop et al., 2005, p. ii) or expand the assortment of goods only for a short period of time until competitors are removed from the market. After eliminating competitors, prices may increase, even resulting in price discrimination (Lindsay, 2006, p. 376).

Considering the above, it could be concluded that non-horizontal concentrations can both benefit and harm competition. Concentrations of this type need to be regulated due to their possible harmful effects on competition. However, this must be done as carefully as possible so as not to suppress undertakings' incentives to improve the efficiency of their operations. Any assessment should consider both the benefits and harms resulting from the concentration.

9.1.2. Economic security and concentration policy

The regulation of non-horizontal concentrations in each country depends on the competition policy in that country (Bork, 1993, p. 50) and the acknowledged concept of competition itself (Shelkoplyas, 2003, p. 215). Different jurisdictions give different meanings to the concepts of "competition policy" and "competition." Some believe that competition in the market must be effective or efficient (Clark, 1940; Sosnick, 1958; Bishop & Walker, 1999). For others, market structure is important – in their opinion, the most important thing is that the market in

which undertakings operate should be "contestable" (Baumol et al., 1988), and there must be no high cost to enter or exit the market (Bailey, 1981).

When discussing countries where the main focus is on increasing economic efficiency in the market, it should be underlined that economic efficiency is also understood differently in those countries. Economists disagree on what should be considered to represent economic efficiency.

The theory distinguishes allocative, productive, static, and dynamic efficiencies. Allocative efficiency is ensured when the buyer receives a product or service for the price they agree to pay (Shelkoplyas, 2003, p. 217). Production efficiency occurs when the producer cannot sell goods at either higher (if they do so, consumers will leave immediately) or lower prices (they will work without profit). If prices were to be increased, new competitors would enter the market, which would force them to lower prices. If prices were to be reduced, capital would be removed from the market. Dynamic efficiency is when a manufacturer has to implement innovations and produce new products to stay in the market, and competition has a dynamic effect (Whish, 2001, pp. 3–4).

The importance of a particular concept of efficiency in evaluating the effectiveness of the undertaking depends on the approach to market regulation. At least two approaches can be distinguished. According to representatives of the Chicago School of Economics, the behavior of business entities in the market must be regulated only minimally, so as not to limit the supply of goods or services (Stanikūnas, 2009, p. 33). In this case, the efficiency of the undertaking is evaluated, considering the increase in supply. Harvard School representatives say that the market must be supervised (Amato, 1997, pp. 110–113) and continuously regulated (Shelkoplyas, 2003, p. 217) to protect the common interest. Following these approaches, improved efficiency should be recognized as a harmful effect of a concentration when it could restrict competition in the market.

In addition to the main goal of protecting the competition process and ensuring

efficiency (Willimsky, 1997, p. 54), competition regulation can also pursue other goals such as the rational distribution of resources, prohibiting practices that restrict the activities of competitors, prohibiting market monopolization or the abuse of economic power (Shelkoplyas, 2003, p. 220), protecting small and medium-sized undertakings, and fighting inflation (Stanikūnas, 2009, pp. 19–20).

A different approach to regulating competition leads to a different approach to regulating concentrations. In this vein, governments can promote the emergence of "national leaders" (Whish, 2001, p. 724), international concentrations, and technical progress (Jones & Sufrin, 2004, p. 974). States can also facilitate the withdrawal of undertakings from the market. Selling and exiting a business in one market is easier when a small undertaking with a significant patent or substantial know-how is first acquired. States can consider the detrimental effect of concentrations on the long-term development of undertakings when long-term investments would not be available due to changes in management (Whish, 2001, pp. 724, 729). Employment and regional policy may have implications here, as the rationalization of undertakings' activities stimulated by concentrations may increase unemployment in the region (Easterbrook & Fischel, 1991). The transfer of control of national undertakings to foreign entities may be restricted, or business areas of importance to the state, such as energy or media, may be otherwise regulated (Whish, 2001, p. 729).

Considering that the goals of concentration regulation are not unambiguous and vary among states, it is useful to assess the goals that have been pursued in regulating competition in the EU in recent years.

EU policy on market regulation

The goals of the EU established in the Treaty on the European Union (hereinafter – TEU) and the Treaty on the Functioning of the European Union (hereinafter – TFEU) form the basis for the regulation of EU competition policy.

Article 3(3) of the TEU (2012) indicates that the EU established an internal market and now works for the sustainable development of Europe. This development should be based on balanced economic growth, price stability, and a highly competitive social market economy. It aims at full employment and social progress, a high level of protection and the improvement of the quality of the environment, and the promotion of scientific and technological advancement.

The TFEU (2012) specifies the implementation of the aims indicated in the TEU. In Article 9, the treaty states that the EU, when defining and implementing its policies and activities, takes into account requirements to promote a high level of employment, guarantee adequate social protection, fight against social exclusion, and ensure a high level of education, training, and the protection of human health. Other articles provide additional EU commitments. Article 12 specifies that consumer protection requirements are considered when defining and implementing other EU policies and activities. Article 11 foresees that environmental protection requirements are integrated into defining and implementing the EU's policies and activities, particularly to promote sustainable development. When discussing the EU's economic policy defined in Article 119, it should be noted that it must be conducted by the principle of an open market economy with free competition.

EU policy, as defined in EU laws, shows that the regulation of concentrations, alongside the regulation of prohibited agreements and the abuse of a dominant position, forms a unified EU competition regulation system. The regulatory objectives of concentrations align with the regulatory objectives of other areas of competition. The regulation of non-horizontal concentrations also does not pursue specific objectives. When determining whether concentrations are compatible with the common market, it is essential to consider the provisions of Regulation 139/2004 and the EU's common goals outlined in the EU's founding treaties. The wide range of objectives specified in the EU constitutional treaties indicates

that competition regulation does not operate in isolation. The objectives of competition regulation must align with the aims of social protection, employment, education, consumer protection, environmental protection, and others.

According to § 2 of the Preamble of Regulation 139/2004, the regulation is dedicated to achieving the aims of the treaties – in particular, the requirement to ensure that competition in the internal market is not distorted. It further specifies that to ensure effective competition in the internal market, all activities of the EU Member States and the EU itself must be conducted considering the principle of an open market economy with free competition. Following that, Regulation 139/2004 distinguishes three objectives of concentration regulation: "increasing competitiveness," "protecting effective competition," and "raising living standards."

The objective of "increasing competitiveness" is found in § 4 of the preamble, which states that reorganizations capable of increasing the competitiveness of European industry are welcomed.

The objective of "protecting effective competition" is reflected in more than one preamble paragraph: § 5 indicates that EU law must regulate concentrations that may significantly impede effective competition; § 23 shows that the European Commission must evaluate the concentration's compatibility with the common market, considering the need to maintain and develop effective competition in the common market; and § 25 stresses the need to maintain effective competition in an oligopolistic market. In addition, several paragraphs provide guidance on what "effective competition" means: § 4 talks about "dynamic competition," whereas § 24 about "free competition."

Finally, the objective of "raising living standards" is found in § 4 of the preamble, which states that reorganizations capable of improving growth conditions and raising the standard of living in the EU are welcomed.

Considering the variety of goals and regulatory areas, it is reasonable to discuss

the goals that are being pursued at the implementation level and the areas that are given more attention. This can be determined by examining the policy documents of the European Commission, which oversees compliance with competition rules in the EU and allows or prohibits concentrations at the EU level.

The Commission Work Programme 2023 (European Commission, 2022b) is the most recent publicly available policy document clarifying the aims of the European Commission's actions. The Programme was influenced by the outcomes of the Conference on the Future of Europe (European Commission, n.d.; Council of the European Union, 2022), which succeeded in developing an ambitious and inspiring vision for our Union. The report on the final outcome (Council of the European Union, 2022) indicates that EU citizens are calling for stronger EU action. "Outstanding transnational challenges, such as inequalities, competitiveness, health, climate change, migration, digitalization, or fair taxation, call for proper European solutions" (p. 53). Citizens need a comprehensive strategy to ensure better well-being for European citizens in the different aspects of their lives. Indicators showing progress in Sustainable Growth and innovation should address the new European priorities, such as the European Green Deal or the European Pillar of Social Rights, and better reflect the ecological and digital transitions and the well-being of people. There is also a need for a strong functioning market economy in order to facilitate the vision of a more social Europe (pp. 53–55).

In the Communication from the European Commission (2022a), which was prepared considering the outcomes (proposals) of the "Putting Vision into Concrete Action" Conference on the Future of Europe, the Commission drew up the first lines of action on proposals falling into its competence. Four out of five new initiatives announced in the Commission Work Program 2023 are part of the Commission's follow-up on the Conference on the Future of Europe.

The Commission Work Programme 2023 (European Commission, 2022b, p.

1) indicates that the European Commission's actions have been influenced by the collision of crises that Europe and the world have confronted over the last year. The Russian invasion of Ukraine and the energy crisis have compounded an already escalating cost of living squeeze, which has dented Europe's strong post-pandemic recovery.

The actions provided in the Commission Work Programme 2023 (European Commission, 2022b, p. 1) are framed by three cornerstones indicated by the European Commission. The Commission is sure that these challenges can only be tackled collectively as one Union. These crises underline the need for Europe to continue to accelerate radical transformations to tackle climate and natural crises, make EU economies and democracies more resilient, make EU industries more competitive, make EU societies fairer, and strengthen the EU geopolitical stature. Finally, the Commission thinks that the EU must find new ways to deal with this unique set of crises; a business-as-usual approach is not enough.

The Commission Work Programme 2023 indicates that the Commission's first priority in dealing with future challenges is responding to the most pressing needs – reducing energy prices, securing the crucial supplies needed for EU industrial competitiveness and food security, strengthening the EU social market economy, and continuing measures against the COVID-19 pandemic that is still present across the Union.

In the competition regulation area, the European Commission addressed the energy crisis and aimed to implement measures to safeguard and strengthen the resilience of the EU Single Market, safeguard a high level of employment, and foster social justice in the labor market. It also put forward measures to reinforce EU competitiveness. The Commission indicated that it is taking measures to strengthen EU competitiveness and the resilience of the Single Market while fostering social justice in the labor market. The Commission stressed that its work will continue to be guided by the implementation of the United Nations

Sustainable Development Goals in all policy areas (European Commission, 2022b, pp. 2–3).

The program also underlines the need to make digital solutions accessible and available to all Europeans and ensure that Europe becomes the leading force for ethical, transparent, and safe digital transformation (European Commission, 2022b, p. 6).

Finally, the Commission stresses that Russia's war of aggression against Ukraine is testing Europe's economic and social resilience at a time of profound transformations. Therefore, the EU needs to develop a strong set of strategic trade and investment controls to strengthen our economic security while also working to diversify value chains (European Commission, 2022b, p. 7) and reinforce our European social market economy model (p. 8).

The EU's vision of market regulation can also be found in EU institutions' policy documents. The mission of the Directorate-General for Competition, which implements EU competition policy in practice under the name of the European Commission, can be found in its Strategic Plan 2020–2024 (European Commission, 2020). The Strategic Plan explains that the Directorate's mission is to enable the Commission to make markets deliver more benefits to consumers, businesses, and society as a whole by protecting competition in the market and fostering a competition culture in the EU and worldwide. While enforcing competition rules, the Directorate considers other public policy interests. The Directorate acknowledges that competition policy is an indispensable element of a functioning internal market, ensuring that all companies compete equally and fairly on their merits, thereby making markets more competitive and resilient while generating higher productivity and growth (p. 8). The Strategic Plan emphasizes that the main beneficiaries of the EU competition policy are European citizens, businesses operating in the EU, and society as a whole (p. 9).

The Strategic Plan also underlines that the COVID-19 outbreak affected

merger control. To mitigate the influence of this outbreak, the Commission takes measures to ensure business continuity but does not forget to control the undertaking's compliance with legal obligations. The Commission is committed to helping and supporting businesses at this difficult time while, at the same time, continuing to enforce the EU merger control rules to the benefit of businesses and consumers (European Commission, 2020, p. 5). The Commission thinks that the relaxation of mergers could lead to a delayed recovery from the COVID-19 crisis.

In addition, the Strategic Plan makes it clear that vigilance in merger control areas is also justified in view of signs of weakened competition in the EU following the financial crisis. The Commission states that merger rules have built-in flexibility, allowing for the assessment of the economic context in each case when applying them (European Commission, 2020, p. 7)

Finally, the Directorate-General for Competition, in its Strategic Plan 2020–2024, indicates that it focuses on three headline ambitions: "A European Green Deal," "A Europe fit for the digital age," and "An Economy that works for people," as indicated in the European Commission's Work Programmes.

Addressing the European Green Deal objective, the European Commission underlined that merger control, together with other EU competition policy instruments, can significantly contribute to the European Green Deal by enabling a cost-effective, fair, and green transition for companies, regions, and people to a climate-neutral EU by 2050. Sound merger control also contributes to the circular economy (European Commission, 2020, p. 10).

Addressing the "Europe fit for the digital age" objective, the Commission stressed that it needs powers and rules that are fit to promote competition in an economy that is becoming more and more digital (European Commission, 2020, p. 21). Discussing the strengthening of competition enforcement in support of "A Europe fit for the digital age," the Commission indicated that it allows smooth

market restructuring by assessing non-harmful mergers in a streamlined manner and prohibits changes in the market structure, which lead to significant impediments to effective competition. It acknowledges that industry consolidation can harm competition, considering the merging companies' degree of market power and other market features (p. 21).

Addressing the "An economy that works for people" objective, the Commission stressed that merger control, together with other branches of EU competition policy, ensures fair and competitive outcomes for EU citizens and businesses as well as society and the economy as a whole. They contribute to a well-functioning internal market where companies compete on their merits, and efficiencies are passed on, resulting in lower prices, better quality, and new products and services. EU competition policy thus underpins the competitive social market economy as one of the EU's foundations (European Commission, 2020, p. 25).

The analysis of EU law and policy documents allows us to distinguish four pillars that should be considered the basis of the EU's merger policy: strengthening the internal market, increasing competitiveness, protecting effective competition, and raising living standards in the EU. These pillars are analyzed below.

Strengthening the internal market

Article 3(3) of the TEU (2012) states that the internal market is established in the EU. It shows that the EU's aim to create an internal market that existed in earlier versions of EU treaties has changed because it has already been achieved. Now, the EU focuses on improving the internal market. The meaning of this change can be explained by the opinion of the former commissioner of competition policy, Neli Kroes, who states that the increased number of cross-border mergers "shows that the Single Market is a reality, that it is working and that our businesses are taking advantage of it" (Kroes, 2006). Such changes allow us to state that the internal market in the EU is considered established, and the EU

has moved to the next stage of market development, which aims not to create the internal market but to strengthen it.

The TFEU (2012) specifies how the internal market will continue to be developed. Article 119 indicates that under the EU's economic policy, the internal market will be developed in accordance with the principle of an open market economy with free competition, considering other aims indicated in the EU law and policy.

The European Commission's (2022b) Work Programme 2023, "A Union standing firm and united," confirms the importance of protecting the Single Market in an energy crisis situation. The document states that to "address the energy crisis, we need to protect the fundamentals of our economy, and in particular safeguarding our Single Market and a high level of employment" (p. 2).

Protecting effective competition and increasing competitiveness

Regulation 139/2004 also aims to preserve the market structure that facilitates effective competition in the market, as concentration may affect the market structure in such a way as to distort competition. The concepts of "effective competition" and the "distortion of effective competition" are not provided in either the EU treaties or Regulation 139/2004. In *Metro SB v. Commission* (1977, § 20), the ECJ defined the concept of "workable competition." This court decision allows us to assume that "effective competition" is a "workable competition" that refers to the degree of competition in the market which is necessary to ensure the observance of the basic requirements and the attainment of the objectives of the Treaty establishing the European Economic Community (1957). The court also noted that "the nature and intensiveness of competition may vary to an extent dictated by the products or services in question and the economic structure of the relevant market sectors."

The question arises as to what economic criteria the European Commission

considers when evaluating effective market competition. One criterion is undoubtedly clear: "consumer welfare."

Mario Monti, the former Commissioner for Competition Policy, rigorously supports the use of the consumer welfare criterion. According to him, "the goal of competition policy, in all its aspects, is to protect consumer welfare by maintaining a high degree of competition in the common market. Competition should lead to lower prices, a wider choice of goods, and technological innovation, all in the interest of the consumer" (Monti, 2001). "When competitive forces are at play, producers make greater efforts to attract customers by offering them lower prices, higher quality and better service than when the market is controlled by a monopolist or a handful of companies" (Monti, 2002a). "Consumers are the beneficiaries of a properly conducted enforcement policy, enjoying lower prices and a wider choice of products and services as a result" (Monti, 2002b). Another former Member of the European Commission, Neelie Kroes, even declared that consumer welfare "is now well established as the standard the Commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies." She emphasized that "Our aim is simple: to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources" (Kroes, 2005).

In the Commission's assessment, the criterion of economic efficiency is also important, although in most cases, it is associated with the value of benefits to the consumer. When applying the economic efficiency criteria to assess the effectiveness of competition, attention is paid to: production efficiency; the promotion of innovation; the optimal, economically rational distribution of resources; restrictions of undertakings' abuse; the presence of effective suppliers; and the easy entry of new market participants (McDonnell, 2005, p. 167).

In some of the Commission's decisions and statements, in cases such as *Mannesmann/Valourec/Ilva*, 1994; *Aérospatiale-Alenia/de Havilland*, 1991; *Boeing/*

McDonnell Douglas, 1997; *General Electric/Honeywell*, 2001), the Commission encouraged "national leaders" who are able to compete effectively at the global level.

Analyzing the provisions of EU treaties and the practice of the CJEU and the European Commission, it can be said that neither the protection of consumer welfare nor the efficiency created are considered separate or sole objectives of EU competition policy. The effectiveness of competition is assessed considering not only the maximum provision of consumer welfare and the optimal distribution of resources but also the implementation of the goals set out in the TEU and the TFEU, which aim for a "highly competitive social market economy" and seek to ensure "the economic and social progress of their States."

The goals established by the TEU and the TFEU indicate that the concept of effective competition is not solely dedicated to protecting consumers. However, it is claimed that "when multiple assessment criteria are applied, a large amount of fish are unnecessarily caught and must be returned to the sea at the cost of considerable effort and uncertainty" (Neven et al., 1998, p. 37). Moreover, there is a danger that the Economic Community competition process can be compared to Russian roulette: no one knows which competition theory will be applied in the next economic assessment (Hildebrand, 2002, p. 428), but the structure of the EU and its aims do not support a different approach. When applying the criterion of common welfare, priority can be given to the welfare of consumers, but it would be completely unjustified not to take into account other efficiency criteria. This is especially true considering the current challenges facing the EU, such as third countries' pressure on the EU economy, barriers for the supply of necessary raw materials, the war in Ukraine, the recovery of businesses after the COVID-19 pandemic, and more.

The European Commission's (2020) Strategic Plan 2020–2024 shows that the Commission, when implementing the EU merger policy, undoubtedly considers

the common welfare of all market participants when assessing competition in the market. In the Strategy plan, the Commission indicated that EU merger control contributes to making the EU industry more competitive and ensuring that consumers and businesses have access to high-quality, innovative goods and services at competitive prices. It also presented examples of recent decisions in the pharmaceutical sector, illustrating how merger control helps to protect innovation. The Commission has prevented transactions that could compromise research and development efforts to launch new medicines or to extend the therapeutic use of existing medicines (p. 21).

Addressing the current situation in Europe and around the world, the Commission underlined in the Strategic Plan that, more generally, merger control has a central role in speeding up recovery through corporate restructuring. It also specified that merger control needs to control and deter efforts by players with strong market positions to engage in transformative acquisitions in already concentrated sectors, which may be particularly harmful to society. Discussing this issue, the Commission indicated the need to facilitate the activities of small and medium-sized enterprises (SMEs). The Commission underlined that the EU has many competitive SMEs that can only continue to thrive if they remain part of competitive value chains with access to high-quality, innovative, and competitively priced inputs. The Commission thinks that anticompetitive mergers could damage such value chains, as it already observed a decrease in competition over the last two decades. Therefore, the Commission will pay particular attention to the merger area in concentrated industries with high barriers to entry (European Commission, 2020, p. 21)

However, it should be noted that the Commission pays particular attention to customers' benefits when applying the common welfare criterion. The Strategic Plan 2020–2024 (European Commission, 2020) indicates that the results of its implementation will be assessed considering the estimate of customer benefits

resulting from merger interventions (p. 31). Following the Commission, intervention means a merger prohibition, a merger approval subject to conditions, or a withdrawal of a merger notification in Phase II due to preliminary concerns identified by the Commission (p. 41). Estimating the customer benefits from interventions, the Commission will take into account: 1) the likely price increase avoided (3% and 5% for the lower and upper boundary of the estimated customer benefits, respectively); 2) the total size (by value) of the product market affected; and 3) the expected duration of the price increase avoided (p. 43).

Raising living standards

As mentioned above, the final objective indicated in Regulation 139/2004 is "raising living standards." This objective is broad enough to facilitate the implementation of the social aims indicated in the TEU. The TEU indicates in Article 3 that the EU aims to promote the well-being of its people and specifies that the EU works for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. The EU promotes scientific and technological advances, economic, social, and territorial cohesion, and solidarity among Member States. Article 9 indicates that the EU promotes a high level of employment, guarantees adequate social protection, fights against social exclusion, and ensures a high level of education, training, and protection of human health. Article 12 specifies consumer protection, and Article 11 foresees environmental protection and the promotion of sustainable development. All of these aims contribute to rising living standards in the EU.

The case law of EU courts confirms that social objectives are important in EU competition regulation. For example, the ECJ, in *Albany v. Stichting Bedrijfspensioenfonds Textielindustrie* (1999, § 54), recognized that safeguarding competition

also considers social policy. In another case, *Vittel v. Commission* (1995, § 38), the Court of First Instance (hereinafter – CFI) indicated that, in assessing whether a concentration is compatible with the common market, in certain circumstances, its detrimental impact on social objectives (in this case, employment issues) might be taken into account more than the creation or preservation of effective competition. Some authors assert that employers generally have considerable labor market power due to a concentration, and such transactions can raise difficulties in searching for a job. For example, US empirical data shows that employers' considerable labor market power has significantly diminished the bargaining power of U.S. workers in recent years (Meese, 2024, p. 167).

Environmental protection should be given particular attention. The European Commission (2020), in the Strategic Plan 2020–2024, paid attention to the European Green Deal in EU merger policy. The Commission indicated that in merger control, in assessing notifications involving renewable electricity generation, it will be particularly vigilant in ensuring that mergers do not create excessive market power, eliminate promising emerging entrants, or lead to foreclosure in areas that are central to the green transition, such as renewables and infrastructure essential for recycling and other aspects of the circular economy. Such attention is paid considering the recent sustained pattern of investments in such assets by non-energy companies, including investment funds, and by energy companies not previously involved in renewables (p. 14).

Strengthening European Economic Security

The group of pillars mentioned above should include an additional element – strengthening European economic security, which the European Commission recently clearly indicated as a priority.

In its Communication on European Economic Security Strategy, the European Commission (2023) indicated that the need to take measures for Strengthening

European Economic Security is determined by the new reality: "the global pandemic, Russia's war in Ukraine, hostile economic actions, cyber and infrastructure attacks, foreign interference and disinformation, and a global increase in geopolitical tensions." This "has exposed risks and vulnerabilities in EU societies, economies, and companies that did not exist only a few short years ago" (p. 1).

It is welcome that the European Commission is raising the issue of the EU's economic security. Most countries around the world are dealing with problems related to economic security. For example, South Africa works on the protection of public interest, promoting the "adaptability" of the national economy, and expanding opportunities for participation in the global market, while China takes measures to protect national security and safeguard justifiable interests in foreign trade or foreign economic cooperation, as well as the protection of the social public interest (Osti, 2015, pp. 255–256).

It should be noted that in some countries, local agencies' real goals may differ from those laid down in the legislation. Some authors argue that some countries, if not most, "may have been persuaded to adopt competition law regimes by international pressure or as a condition to entry to an international organisation or access to an international financing program" (Osti, 2015, p. 256). Therefore, it could be that the law cannot foresee economic security measures, but that they exist in practice.

Even advanced economies such as Canada, all EU countries, and the UK have provisions in their antitrust legislation for the authorization of mergers on the basis of public interest, national security, or industrial considerations.

Dessie (2021, p. 24) indicates that there is no "universal consensus on what national security means nor what it contains." However, it is understood that it encompasses several goals "beyond the conventional conception of securing national survival" (p. 24). The earlier focus on the military aspect of national security now "has a broad range of facets, all of which connotes the non-military or

economic security of the nation and the values supported by the national society" (p. 24).

Depending on the practices of various countries, economic security can be considered an integral part of national security (Jackson, 2020, p. 102) or a separate issue. Economic security is considered an integral part of national security in the US, China, and other countries. In the 2017 National Security Strategy, the US indicated that "economic security is national security" (Executive Office of the President of the United States, 2017, p. 17), and the 2022 National Security Strategy is essentially based on economic strategy (Executive Office of the President of the United States, 2022). The economic turn in national security has thus become explicit in US policy (Eichensehr & Hwang, 2023, p. 557). In a similar way, under China's broad notion of national security, economic security constitutes an essential dimension (Meirong & Qian, 2023). Some international treaties also indicate this. In particular, the 1948 GATT security exceptions indicate that economic security is closely related to national security, and it is prioritized by countries worldwide (Dessie, 2021, p. 23).

The EU's approach regarding the place of European economic security differs somewhat.

Common Security Policy in the TEU

Part V of the TEU (2012) is exclusively dedicated to defining the agreement of EU Member States on common foreign and security policy. Article 24(1) specifies that the EU's competence covers all EU security questions. However, this section of the treaty does not specify that European economic security is an integral part of the common security policy.

The TEU indicates that EU security policy is subject to specific rules and procedures. Decision-making power is concentrated in the European Council and the Council. The TEU states that the European Council and the Council define

and implement a common security policy. The European Council identifies the EU's strategic interests and objectives related to the common security policy, which can address a specific country or region or may be thematic in approach (Article 22(1)).

Notably, the European Parliament and the Commission have less power in this area than in other EU decision-making areas. However, the role of Member States is higher than in other EU areas. Following Article 31(1), as a general rule, Members States' representatives at the European Council and the Council make decisions unanimously. It should be noted that despite abstaining from voting, the Member State must respect the "spirit of mutual solidarity." The state is not obliged to apply the decision, but it must refrain from any action likely to conflict with or impede Union action based on that decision. When one-third or more of the Member States comprising at least one-third of the EU population abstain from voting, the decision is not adopted. By derogation from the mentioned provisions, the Council can act by a qualified majority when adopting decisions defining an EU action or position following the decision of the European Council or proposal of the High Representative of the Union for Foreign Affairs and Security Policy (Article 31(2)).

To ensure the smooth implementation of the common security policy, a special institution was established – the High Representative of the Union for Foreign Affairs and Security Policy, which, together with EU Member States, is responsible for the implementation of this policy.

Notably, EU institutions cannot make regulations or directives on this issue. The treaty specifies that the adoption of legislative acts is excluded from EU institution's decision-making (Article 31). Article 25 indicates that EU institutions can only: a) define the general guidelines; b) adopt decisions defining (i) actions to be undertaken by the EU, (ii) positions to be taken by the EU, and (iii) arrangements for the implementation of the mentioned decisions; and c) strengthen systematic

cooperation between Member States.

Finally, it should be noted that the CJEU does not have jurisdiction with respect to common economic security provisions, with the exception of when EU action under security policy impacts other fields of EU competence, in which the court is authorized to control the implementation of EU policy and decisions (Article 24(1)).

Analysis of the EU treaty documents suggests that European economic security is not an integral part of the common security policy. EU policy and EU secondary law analysis are required to draw final conclusions on this issue.

EU secondary legislation

Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019, establishing a framework for screening foreign direct investments (FDI) into the Union (hereinafter – Regulation 2019/452) , establishes an FDI screening mechanism. The regulation was adopted under the ordinary legislative procedure.

Article 1(1) of Regulation 2019/452 indicates that this Regulation establishes a framework for Member States to screen foreign direct investments into the EU on the grounds of security or public order and for a mechanism for cooperation between the Member States and the Commission regarding FDI likely to affect security or public order. The Regulation requires Member States to establish national mechanisms for screening FDI following Regulation 2019/452.

Article 4 provides factors to be considered by Member States in determining whether FDI is likely to affect security or public order. In determining the potential effects of FDI, Member States and the Commission may consider the impact on: critical infrastructure (energy, transport, water, health, communications, media, data processing or storage, aerospace, defense, electoral or financial infrastructure, sensitive facilities, and land and real estate crucial for the use of

such infrastructure, etc.); critical technologies and dual-use items (artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defense, energy storage, quantum and nuclear technologies, nanotechnologies and biotechnologies, etc.); the supply of critical inputs (energy or raw materials, food security, etc.); access to sensitive information (personal data, ability to control such information, etc.); and the freedom and pluralism of the media.

Regulation 2019/452 not only identifies vulnerable fields where any influence could trigger the infringement of the State's security or public order, but also provides a list of subjects who can affect those vulnerable fields. Such subjects could include: a foreign investor who is directly or indirectly controlled by the government, including state bodies or armed forces, of a third country, including through ownership structure or significant funding; a foreign investor who has already been involved in activities affecting security or public order in the Member State; or where there is a severe risk that the foreign investor engages in illegal or criminal activities.

Furthermore, § 36 of the Preamble of Regulation 2019/452 indicates that when a foreign direct investment constitutes a concentration falling within the scope of Regulation No 139/2004, this Regulation and Article 21(4) of Regulation 139/2004 should be applied consistently. This means that the grounds for screening set out in Article 1 of Regulation 2019/452 and the notion of legitimate interests within the meaning of the third paragraph of Article 21(4) of Regulation 139/2004 should be interpreted coherently, without prejudice to the assessment of the compatibility of the national measures aimed at protecting those interests with the general principles and other provisions of EU law.

The analysis of Regulation 2019/452 shows that an FDI screening mechanism is directly related to ensuring economic security. Such regulation proves that economic security is not part of the EU security policy. Otherwise, the European Parliament and the Council could not have adopted such legislation. As mentioned

in the analysis of the TEU, EU institutions cannot make regulations or directives on EU security policy issues, and any decision in this field could be taken by the European Council, the Council, and the High Representative of the Union for Foreign Affairs and Security Policy only, but not the European Parliament. In addition, any decisions in the security field could be taken only by voting in unanimity. This regulation was adopted with the ordinary legislative procedure, which means that a qualified majority could adopt it.

The EU's secondary legislation, which exclusively regulates mergers, also allows us to state that EU economic security is separated from the EU common security policy. Regulation 139/2004, in which Article 21 allows Member States to take measures to protect public security in the Member State, was similarly adopted by the Council under a qualified majority voting mechanism, considering the opinion of the European Parliament.

Even the draft of the EU regulation which is dedicated to controlling foreign subsidies shows that EU economic security issues related to foreign countries' subsidies and mergers are not an integral part of the EU common security policy. The Proposal for a Regulation on Foreign Subsidies Distorting the Internal Market (European Commission, 2021), forwarded to the Council and European Parliament by the ordinary legislative procedure, clarifies that the European Commission considers EU economic security an integral part of the EU's common commercial policy. The Commission indicates that "the proposed regulation falls mainly within the scope of Article 207(2) TFEU, which provides for the adoption of measures defining the framework for implementing the common commercial policy."

EU Economic Security Policy and EU Common Security Policy

The analysis of EU law shows that the European Commission and other EU institutions, while establishing an EU-level legal framework for implementing

the common commercial policy, made decisions in those areas that in non-EU countries are part of the economic security policy, which is an integral part of the national security policy. Considering the place of the common commercial policy, it can be stated that the European Commission has the broad power to adopt decisions allowing or prohibiting mergers. Not all Member States are in favor of such a broad jurisdiction of the European Commission.

In particular, Germany and France ran out of patience when, on 6 February 2019, the Commission announced its decision to prohibit an acquisition in the *Siemens/Alstom* case despite political pressure (Rees & Chan, 2019) from the respective countries to authorize the transaction.

In *Siemens/Alstom* (2019), the European Commission concluded that the concentration by which Siemens AG would acquire sole control of Alstom SA by combining Alstom and Siemens' mobility business, including its rail traction drives business and related activities, was incompatible with the internal market and the functioning of the EEA Agreement.

The participants of the merger explained the economic rationale for such an acquisition, stating that:

> The ... economic rationale for the Transaction is to combine two global railway players with unique customer value and operational potential. The combination of the Parties' experience, complementary product offerings and geographic footprints would enable the Merged Entity to compete effectively at the global level in the future and respond to tomorrow's mobility challenges while addressing the increasing competitive pressure from rapidly growing (Asian) competitors, to the benefit of customers and consumers. (§ 9)

Following this decision, France and Germany were quick to state that "there is an increasing awareness that a reform is necessary" (Rees & Chan, 2019) before

announcing, on February 19, 2019, "A Franco-German Manifesto for a European industrial policy fit for the 21st century," which proposed changing the EU competition merger framework. In this Manifesto, France and Germany called for a more ambitious European industrial strategy with clear objectives for 2030.

In the Manifesto, both countries' governments stressed that "Europe's economic strength in the coming decades will be hugely dependent on our ability to remain a global manufacturing and industrial power." Enabling the EU to compete globally in specific fields, such as carbon-neutral technology, is so important that the EU can only succeed if its undertakings pool funding, skills, and expertise.

They propose three pillars on which European industrial strategy should be built: 1) massive investment in innovation, ensuring access to funds, allowing emerging leaders and cooperation, and creating consortiums; 2) adapting the EU regulatory framework, changing existing competition rules; and 3) the implementation of effective measures for defending EU technologies, companies, and markets.

Further actions of the European Commission show that its approach to economic security issues has changed. It began to consider this issue as a component of national security; therefore, it initiated a procedure foreseen in the TEU, title V, which is dedicated to common security policy issues.

On June 20, 2023, the European Commission and the High Representative of the Union For Foreign Affairs and Security Policy issued a joint communication to the European Parliament, the European Council, and the Council on the "European Economic Security Strategy." The Communication proposed a Strategy which aims to provide a framework for the robust assessment and management of risks to economic security at the EU, national, and business levels while preserving and increasing EU economic dynamism (European Commission, 2023, p. 2).

When reviewing the proposed Strategy, one can observe the messages of the Franco-German Manifesto (2019) and other experts' opinions (Lymperopoulos, 2024). In the proposed Strategy, the European Commission stressed that open and rules-based trade and investment, secure cross-border connectivity, and collaboration on research and innovation will remain critical drivers of European competitiveness and resilience. It also expressed the need to rely on trade and the Single Market to spur competition and ensure that EU undertakings have access to raw materials, technologies, and other inputs, which are crucial for boosting their competitiveness and resilience and sustaining current and future employment and growth. Considering this, the Commission indicated three priorities on which the EU should focus its actions to ensure the achievement of the strategy aims: (1) promoting EU competitiveness, (2) protecting the EU from economic security risks, and (3) partnering with the broadest possible range of countries who share EU concerns or interests in economic security (European Commission, 2023, p. 2).

The proposed Strategy aims to protect the EU's economic security and reinforce the economy's resilience while maintaining and growing the EU's technological edge. This means promoting and investing in EU competitiveness and growth, supporting a strong and resilient economy, diversifying supply chains, fostering the EU's research, technological, and industrial base, and responding to practices such as economic coercion (European Commission, 2023, pp. 2, 6).

However, it should be noted that despite the economic security goals set in the Communication on the European Economic Security Strategy (European Commission, 2023), the European Commission and the High Representative of the Union For Foreign Affairs and Security Policy strongly indicate that the EU does not forget the main goal that led to the creation of the Economic Community that later became the EU. This objective was to create a Single Market in which there is the free movement of goods, persons, services, and capital and

effective competition. As mentioned above, changes implemented by the Lisbon Treaty indicate that the creation of the Single Market is complete, and the EU will strengthen it. The positions of the European Commission and the High Representative of the Union For Foreign Affairs and Security Policy on the Strategy indicate that strengthening the Single Market must remain the basis of economic security policy. They observe that the Single Market is the EU's best asset to keep its economy prosperous, innovative, and resilient. This is most often associated with ensuring economies of scale for cooperating across borders within the EU and maintaining a level playing field (European Commission, 2023, p. 6).

Now, it is up to the European Council to decide whether EU economic security should be considered part of the Common Security Policy or remain under the Common Commercial Policy. If the European Council decides that EU economic security is an integral part of the Common Security Policy, then this means that the powers of the European Commission will be narrowed, and not only the European Council but also the Member States will have to be more active in this field. Considering the unanimity requirement in making decisions on Common Security Policies, this means that decisions on economic security issues may be hindered, especially when the current geopolitical situation shows that the EU Member States do not find consensus on other EU national security issues.

In the area of Common Security Policy, EU Member States that do not agree with the decisions of the European Council or the Council may decide not to comply with them; they are only obliged not to create obstacles for other states to implement those decisions. The integration of the Economic Security Policy into the Common Security Policy may not only weaken the EU's economic security but may also have a detrimental effect on the Single Market. Therefore, it can be concluded that it would be preferable if Economic Security remained an integral part of the Common Commercial Policy. If EU policymakers would like to decide differently and consider that competition regulation falls under economic

security, which is an integral part of EU national security, then EU constitutional treaties should clearly allocate EU institutional responsibilities from EU Member States. The EU treaties should unambiguously show which decisions could be made by EU institutions under the common commercial policy and which decisions can be made only following the EU national security policy implementation procedure.

The support of national leaders to ensure EU economic security

The analysis of the discussions on EU Economic Security shows the efforts of the largest Member States (Germany and France) to push the European Commission toward the more coherent authorization of concentrations creating national leaders. In essence, this means that the EU should facilitate the creation of mega-conglomerates. The arguments of some authors indicate that today, it is already a reality that some industries belong to conglomerates. For example, Hasik (2020, p. 189) states that "the largest defence contractors today are practical conglomerates; more commercially oriented firms do not often span industries from automotive to aerospace to shipbuilding." Witt presents the case where, over the relatively short course of their existence, the five biggest US tech companies, Alphabet (formerly Google), Amazon, Meta (formerly Facebook), Apple, and Microsoft, have collectively acquired in excess of 800 businesses. The targets of these acquisitions are frequently not competitors, but innovative start-ups that have developed technologies complementary to the acquiring tech giant. This type of transaction is traditionally referred to as a conglomerate acquisition (Witt, 2022, p. 1).

The research of various authors shows that conglomerates can be beneficial to industry but can also have detrimental effects not only on the market but also on the political situation in different countries.

According to Cheng's in-depth analysis, conglomerates benefit from economies

of scale and scope. They also provide opportunities for internal transactions, which reduces reliance on external parties and minimizes legal and contract enforcement issues. Conglomerates have access to superior financial resources, making market entry and risk sharing easier. By combining the financial resources of their different parts, they can enter markets that might be too costly for independent competitors. Diversified operations allow them to spread operational risks. In addition to offering an internal capital market, conglomerates can also provide an internal market for labor and managerial talent. They also have good access to international capital markets (Cheng, 2016, pp. 41–49).

Cheng also shows that conglomerates have various negative effects, aside from the impact on competition, which is discussed in part 3 of this paper. These include high agency costs, the crowding out of SMEs and entrepreneurs, the distortion of access to financial markets, overall welfare effects, and political economy concerns. The high agency costs of conglomerates are due to their pyramidal structure, which involves a holding company owning subsidiary companies, which in turn own stakes in other companies. This structure can lead to issues such as tunneling, where assets and income are diverted to higher-tiered firms, and entrenchment, which allows the controlling shareholder to enjoy private benefits without fear of a takeover. Additionally, conglomerates can distort the allocation of capital economy-wide due to their internal capital market (Cheng, 2016, pp. 49–55).

In addition, Lande and Vaheesan (2019, p. 87) explain that corporate size often translates to political power. They say that an extensive body of research has found that firm size is correlated with political activity, and larger firms make larger contributions to political campaigns (Gilens & Page and Salamon & Siegfried in Lande & Vaheesan, 2019, p. 87). Campaign contributions may increase the likelihood that the member's votes and other actions are aligned with their interests (Hill et al. in Lande & Vaheesan, 2019, p. 87). Large firms can also wield

political power through lobbying (Chen et al. in Lande & Vaheesan, 2019, p. 89). Lande and Vaheesan even state that US antitrust institutions have shown reluctance and unwillingness to challenge some huge mergers, which could, in part, be caused by the considerable influence those companies have over them and the political environment (p. 89). In addition, conglomerates leverage their power to finance favorable media coverage and academic research (Baum & Zhukov and Fabbri et al. in Lande & Vaheesan, 2019, p. 87), and can even shape the parameters of public debate through a variety of means (p. 89). In such a way, "at a large corporation, a handful of individuals – executives and directors – make decisions that affect entire cities, regions, and even the nation" (p. 90).

Considering the positive and negative effects of large conglomerates, antitrust authorities should be very careful when deciding whether to authorize a proposed concentration. Assessment should be based on considering not only economic issues but also non-economic impacts.

The Regulation of Concentrations for Ensuring EU Economic Security

As the above analysis shows, regulating concentrations contributes to implementing the Economic Security Policy. The practice of both EU and non-EU countries confirms this. For example, the merger control regimes in the US and the UK acknowledge that both competition-economics-based criteria and the public interest (including national security interests) ought to be considered when accepting, conditionally approving, or rejecting takeovers involving a foreign acquirer (Mudzamiri & Osode, 2021, p. 6).

China has developed a three-layer protection framework across foreign investment law and anti-monopoly law, which consists of market access control, national security review, and anti-monopoly merger control. The market access control mechanism is set up as the first layer of protection, which preserves national security by prohibiting and restricting foreign investments' access to

security-sensitive industries. In the next layer, the national security review, a screening mechanism is involved, which allows the prohibition of the transaction on national security grounds and preserves national security by identifying, remedying, and prohibiting foreign investments that affect or may affect China's national security. The third layer is anti-monopoly merger control, which allows the distinction between pseudo-overseas mergers and actual overseas mergers. The prohibition of pseudo-overseas mergers that are de jure between two foreign enterprises but de facto lead to the transfer of actual control over a Chinese domestic enterprise to a foreign enterprise allows the protection of indigenous brands from being controlled by foreign investors, and allows the protection of sensitive industries from inappropriate levels of foreign control (Meirong & Qian, 2023, pp. 496, 506).

Currently, the implementation of the EU's economic security policy can be seen through the application of the principle of extraterritoriality when making decisions on the authorization or prohibition of concentrations and the application of Article 21 of Regulation 139/2004.

Extraterritoriality of the Jurisdiction

Article 1(1) of Regulation 139/2004 clearly shows that it applies to all concentrations with a Community dimension. Article 1(1) explains which concentrations are considered a "Community dimension." The Community dimension is defined by considering undertakings' worldwide and community-wide aggregate turnover, as well as national aggregate turnover in at least three Member States. Article 5(1) explains that aggregate turnover means the annual amounts derived by the undertakings in the concentration from the sale of products and the provision of services to undertakings or consumers in the EU or a Member State.

In addition, § 10 of the Preamble of Regulation 139/2004 clarifies that undertakings in the concentration do not have to have their seat or their principal fields

of activity in the EU. It is enough that they have substantial operations there. The Regulation does not provide any further explanations regarding the meaning of "substantial operations."

Such regulation shows that even concentrations involving undertakings outside the EU must have ex-ante approval from the European Commission when their annual aggregate turnover derived from the EU market reaches the thresholds defined in Article 1. Scott (2014, p. 1343) labelled such a legislative technique "territorial extension."

The European Commission has not once declared that EU merger regulation rules should apply to third-country undertakings when the annual turnover of such undertakings established outside the EU or European Community in planned transactions reaches the thresholds defined in Regulation 139/2004. The EU turnover threshold is met when the undertakings sell the defined amount of goods or provide services within the EU.

For example, the European Commission assessed the concentration of two US corporations in the case of *Boeing/McDonnell Douglas* (1997) based on "territorial extension." Boeing operated in two principal areas: commercial aircraft, and defense and space. McDonnell Douglas operated in four principal areas: military aircraft; missiles, space, and electronic systems; commercial aircraft; and financial services. Under the agreement, McDonnell Douglas would become a wholly owned subsidiary of Boeing. In such a way, the world's largest aerospace company would be established. The European Commission found that the annual aggregate turnover of Boeing and McDonnell Douglas in the common market exceeded threshold levels; therefore, the planned concentration was considered in the Community dimension, and the Commission had jurisdiction to assess such a concentration.

At first, the European Commission did not allow the concentration, despite the US Federal Trade Commission not opposing the merger. The Commission

concluded that "Boeing already enjoys a dominant position on the overall market for large commercial aircraft as well as on the markets for narrow-body and wide-body aircraft," and the "proposed concentration would lead to the strengthening of a dominant position through which effective competition would be significantly impeded in the common market." The European Commission approved this concentration only after a series of commitments undertaken by Boeing.

Ikejiaku and Dayao (2021, p. 84) analyzed discussions on this merger issue in various sources and indicated that "[t]he US suspected that the Commission's criticism of the merger had more to do with general industrial policy fears and an impulse to protect Airbus, so it regarded the European hostility to this venture as little more than knee-jerk protectionism."

The case of *MCI WorldCom/Sprint* (2000) was the first in which the European Commission prohibited the merger of global communications companies MCI WorldCom and Sprint, which were not established in the European Community. In the same way as in the *Boeing/McDonnell Douglas* (1997) case, the Commission found that both companies' aggregate turnover in the European Community indicated that the planned transaction was related to the Community dimension, and found it incompatible with the common market because it would lead to either the creation of a dominant position or the reinforcement of a dominant position in different markets.

In another case, *General Electric/Honeywell* (2001), the European Commission declared the concentration by which General Electric Company of the USA had agreed to merge with Honeywell International Inc. of the USA incompatible with the common market because the proposed merger would create or strengthen a dominant position in several product markets. Schmitz argued that the Commission's decision reflected the goal of EU competition law to protect small and medium enterprises from dominant competitors (Schmitz, 2002, p. 543).

In Gencor v. Commission (1999, § 90), the CFI not only explained the

territorial scope of Regulation 139/2004 but also assessed the compatibility of the European Commission's right to prohibit concentrations of non-EU undertakings with public international law.

In this case, a group of companies incorporated in South Africa (except one parent company incorporated under English law) operating mainly in the mineral resources (platinum and rhodium markets) and metals industries decided to form a concentration. Gencor, which was participating in the concentration, contested the applicability of Regulation 139/2004 on the grounds that the concentration was related to economic activities conducted within the territory of the Republic of South Africa, and had been approved by the authorities of that country (the transaction did not give rise to any concerns under South African competition law).

The court explained the territorial scope of Regulation 139/2004 by stating that in "order for a concentration to be regarded as having a Community dimension, the undertakings in question must be established in the Community or that the production activities covered by the concentration must be carried out within Community territory." Similarly to the European Commission, the court determined that the annual turnover within the EU of the undertakings concerned reached the thresholds defined in Regulation 139/2004, and decided that Regulation 139/2004 was applicable to such concentrations.

As per the court's opinion, the term "substantial operations" mentioned in the Preamble of Regulation 139/2004 does not prioritize production operations over sales operations when defining its territorial scope. Instead, it gives more weight to sales operations within the common market as a factor connecting the concentration to the European Community. This requirement can be met simply by making sales within the European Community, regardless of where the sources of supply and production are located.

The court indicated that undertakings in the concentration "carried out sales

in the Community before the concentration and would have continued to do so thereafter," and concluded that Regulation 139/2004 is applicable to concentrations which, "while relating to mining and/or production activities outside the Community, have the effect of creating or strengthening a dominant position as a result of which effective competition in the common market is significantly impeded."

Commenting on the compatibility of the contested Commission decision with public international law, the CFI pointed out that the application of Regulation 139/2004 "is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community." The court found that three immediate, substantial, and foreseeable effect criteria were satisfied.

In addition, the CFI indicated that the Community violated the principle of non-interference or proportionality in exercising Community jurisdiction, not considering that the concentration was allowed by the Republic of South Africa authorities.

Following that, the CFI concluded that the application of Regulation 139/2004 to the proposed concentration was consistent with public international law.

EU law, practice, and decisions show that, due to the exterritoriality of jurisdiction in regulating concentrations with an EU dimension, the European Commission and EU courts' decisions contribute to ensuring European economic security by protecting the EU internal market. In the *Boeing/McDonnell Douglas* (1997) and *General Electric/Honeywell* (2001) decisions, some experts argue that the EU discriminated against foreign firms to protect or promote domestic firms (Ikejiaku & Dayao, 2021, p. 83).

Article 21 of Regulation 139/2004

One significant provision of Regulation 139/2004 that is often linked to

protectionism is Article 21, which allows Member States to take measures to protect legitimate interests other than those considered by this Regulation. Such measures must be appropriate and compatible with the general principles and other provisions of EU law. Considering the proportionality principle, explained by the ECJ in the *Fromançais SA v. FORMA* (1983) case, such measures should correspond to the importance of the aim and be necessary to achieve those aims. This recognizes that Member States may have a legitimate interest in investigating a merger beyond harm to competition (Whish & Bailey, 2018, 836).

Article 21 also provides a list of reasons – legitimate interests – indicating suitable grounds for involving Article 21 to justify national measures. Such interests include public security, plurality of the media, and prudential rules. These reasons are considered "recognized interests" (prima facia legitimate) (Kokkoris, 2023, p. 190).

This list is not exhaustive. Other interests can also be legitimate grounds for involving specific measures, but they require ex-ante review by the Commission (Kokkoris, 2023, p. 190). Article 21 indicates that any other public interest must be communicated to the Commission and can be implemented after the Commission's approval. The Commission makes its decision after an assessment of the compatibility of the measures with the general principles and other provisions of EU law.

Ikejiaku and Dayao (2021) state that the provisions of Article 21 can be described as a double-edged sword. Although this article is a powerful tool against the threat of protectionism, it is also a loophole that presents an opportunity to exploit it for protectionist ends. Significant government interventions on the ground of legitimate interest in merger cases illustrate Member States' attempts to use merger regulation to pursue protectionism (p. 83).

Kokkoris (2023) indicates that there has been an increasing trend of making concentration assessments based on factors that are not merger-specific per se.

A concentration's competitive impact was assessed by considering public interest, national security, and other factors. Concentration control has been used to introduce or complement wider industrial policy or other priorities unrelated to the economic impact of the mergers in question (p. 177).

The Commission's Proposal for a Regulation on Foreign Subsidies Distorting the Internal Market

The European Commission's (2021) Proposal for a Regulation on Foreign Subsidies Distorting the Internal Market, also foresees protectionist measures for safeguarding EU economic security.

Article 1 of the Draft Regulation indicates that the Regulation lays down rules and procedures for investigating foreign subsidies that distort the internal market and for redressing such distortions. Such distortions may arise with respect to any economic activity, including concentrations. It also addresses foreign subsidies granted to an undertaking engaging in an economic activity in the internal market. An undertaking acquiring control or merging with an undertaking established in the Union or an undertaking participating in a public procurement procedure is considered to be engaging in economic activity in the internal market.

The meaning of a concentration in the Draft Regulation is similar to the meaning defined in Regulation 139/2004. Article 18(1) of the Draft Regulation indicates that a concentration is considered to represent changes in control on a lasting basis as a result of "a merger of two or more previously independent undertakings or parts of undertakings," or as a result of an "acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings."

This Draft Regulation requires the European Commission to approve the

concentration ex-ante when at least one of the merging undertakings is established in the EU and generates an aggregate turnover in the EU of at least €500 million, and the undertakings received from third countries an aggregate financial contribution in the 3 calendar years before notification of more than €50 million. The smaller concentrations are subject to an ex officio procedure.

Following Article 3 of the Draft Regulation, the European Commission, under an ex-ante or ex officio assessment procedure, assesses the degree of distortion of the internal market. A distortion on the internal market is considered to exist where a foreign subsidy is liable to improve the competitive position of the undertaking concerned in the internal market and where, in doing so, it actually or potentially detrimentally affects competition in the internal market. A foreign subsidy directly facilitating a concentration is considered most likely to distort the internal market. However, a subsidy whose total turnover is below €5 million over a 3-year period is unlikely to distort the internal market.

9.1.3. The assessment of non-horizontal concentrations

Since making decisions under Regulation 139/2004, the European Commission has scrutinized vertical and conglomerate mergers. Already in the first Commission Regulation 3384/94, implementing the first Council Regulation on concentration control No. 4064/89, three (vertical, horizontal, and conglomerate) effects on the market, and, accordingly, types of concentrations, were distinguished.

In the currently valid Commission Regulation 2023/914 implementing Regulation 139/2004, the participants in the concentration are also requested to provide the European Commission with information on the markets on which the concentration will have an impact (including the main affected markets) (CO form, § 1.1). In Section 6, the CO form requires, in addition to detailed information about the horizontally related affected markets and vertically related upstream and downstream affected markets, information about any other markets

in which the notified concentration may have a significant impact.

The analysis shows that, unlike vertical impact, conglomerate impact is assessed not in "affected" markets, but in those "in which the notified concentration may have a significant impact." The notified concentration is considered regarding whether it may have a significant impact on product and geographic markets, where such markets include the whole or a part of the EEA and:

> a. any of the parties to the concentration has a market share larger than 25% and any other party to the concentration is a potential competitor in that market.
>
> b. any of the parties to the concentration is present in a product market, which is a neighbouring market closely related to a product market in which any other party to the concentration is engaged, and the individual or combined market shares of the parties in any one of these markets is 30% or more (CO form, Section 6).

The analysis of Section 6 of the CO form allows us to state that the European Commission assesses conglomerate concentrations formed by market participants located in closely related neighboring markets and non-parallel product markets. However, in the case of a merger with a market participant located in a non-parallel market, the concentration is considered to have a significant effect only if the concentration involves a considered potential competitor – that is, if one of the participants in the concentration "has plans to enter a market, or has developed or pursued such plans in the past three years."

The European Commission confirms its approach to concentrations in the *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings* (2008), stating that in practice, it focuses "on mergers between companies that are active in closely

related markets, e.g. mergers involving suppliers of complementary products or of products which belong to a range of products that are generally purchased by the same set of customers for the same end use."

The European Commission should limit itself only to paying attention to concentrations in which the undertakings forming the transaction are located in neighboring and closely related markets. Due to the merger, the undertakings, with the power gained in one market, can, for example, foreclose the market through predatory pricing, even in those markets that are not adjacent or closely related. There are also many concentrations of economic entities located in unrelated markets. The harm to competition from such concentrations is also no less significant than the harm caused by other concentrations. Large undertakings operating in several unrelated markets can cover losses in one business with profits earned in another market without disruption. By doing so, they can eliminate competitors from their chosen market. Smaller companies that can operate in only one product market are usually unable to compete and withstand the actions of powerful competitors in that market. It is understandable that other market protection measures, such as those prohibiting the abuse of a dominant position, can be used. However, it is not necessary to dominate the market to force a competitor out of the market. Until a dominant position is achieved by subsidizing losses with profits gained in other product markets, some competitors will be weakened or excluded from the market. As a result, the possibility that entire industries may be transferred to the control of several undertakings cannot be ruled out. Large market participants can determine the development of a state's economy and influence the political situation. Such power acquired by one undertaking is not useful for either the consumer or the state.

Article 2(3) of Regulation 139/2004 establishes the assessment rule of "significant impediment of effective competition" (hereinafter - SIEC), which reads as follows: "A concentration which would significantly impede effective competition,

in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market." This allows the evaluation of all types of concentrations: horizontal and non-horizontal (vertical and conglomerate).

Briefly discussing this rule, it can be said that its main focus is not on determining a dominant position and the resulting harm, but directly on the possible anti-competitive effects. The central question of the rule is whether sufficient competition will remain after the concentration (Varona et al., 2005, p. 145). Damages resulting from the creation of a dominant position, although considered the most important (Regulation 139/2004, Preamble, § 26) or exemplary (Vickers, 2004, p. 460; Völcker, 2004, p. 403), are not the only possible form of damage. In contrast to the former rule under Regulation 4064/89, the new rule does not require the establishment of a dominant position during the assessment of concentrations, but allows for a direct assessment of the impact on competition and allows an immediate decision to prohibit or allow a specific concentration.

When harm to competition is established, a transaction cannot be justified on the grounds that a dominant position is not created. When assessing the consequences of a concentration, the focus is not on determining dominance, but on determining the impact on competitors, buyers, and consumers (Colley, 2004, p. 343; Monti, 2004a) .

The conditions for assessing concentrations provided for in the assessment rule require it to be applied dynamically (European Commission, 2004, p. 12), assessing not only the situation of the economic entities participating in the concentration, but also the competition in the market itself. The SIEC rule is flexible enough to adapt to all possible situations. It allows all types of concentrations and all types of damage that occur to be evaluated (Monti, 2004b, p. 3).

The assessment rule does not raise any concerns regarding its applicability to vertical and conglomerate concentrations, where the power acquired in one

market is used in another market where the undertaking does not have significant market power. In the case of a power transfer from one market to another, it is not always easy to prove that the transaction creates or strengthens a dominant position, as the impact essentially arises in the market to which the power is transferred. Impact results may not appear immediately after the transaction, but may instead manifest later. They can also appear without the creation or strengthening of a dominant position.

It is important to note that the assessment rule allows the prohibition of a transaction that creates or strengthens a dominant position not of the parties to the concentration, but of other competitors who are not involved in the transaction. The rule also allows the assessment of the acquisition of the "disobedient" competitor and transactions in an oligopolistic market. In an oligopolistic market, if the concentration significantly impedes effective competition, it may be prohibited even if the company is not dominant (Regulation 139/2004, Preamble, § 25).

Some authors posit that the SIEC rule establishes more rigorous economic analysis, a higher level of analytical evidence (Ridley & Ysewyn, 2004), and new economic professionalism (Schmidt, 2004, p. 1567) in assessing EU mergers. Applying the SIEC rule requires focusing not on the legal, but on the economic assessment of the impact of a concentration. Such an economic analysis reduces the likelihood of errors, leading to the prohibition of concentrations, which does not significantly impede effective competition.

An economic, analytical assessment allows for the consideration of both competition-damaging and competition-enhancing impacts. If the concentration brings more benefits than harm to the market, it is more easily authorized under an economic assessment (Varona et al., 2005, p. 144; Schmidt, 2004, p. 1568). Understandably, such an economics- and impact-based analysis results in a more complex assessment of concentrations. Therefore, both lawyers and economists

should participate in the assessment.

The analysis shows that concentrations are assessed by applying the universally known causation rule, which requires establishing a causal connection between the action and the loss suffered. The only difference is that in the European Commission's authorization, it is not the performed activity and the existing damage, but the planned activity and the estimated damage that are assessed. In concentration regulation, the action is a proposed concentration, and the loss is expected to have a detrimental effect on competition. The following parts of this paper present an analysis of concentration regulation following the causation rule.

9.2. Action: concentration

In § 20 of its Preamble, Regulation 139/2004 defines concentrations as "operations bringing about a lasting change in the control of the undertakings concerned and therefore in the structure of the market." Article 3(1) explains which transactions in the change of control bring lasting results. It can be clearly seen that the definition of a concentration in Regulation 139/2004 emphasizes not so much the change in the structure of undertakings, but the impact on the market structure arising due to the change in the control of economic entities.

Article 3(1) of Regulation 139/2004 states that a concentration arises when a change of control on a lasting basis results from:

- the merger of two or more previously independent undertakings or parts of undertakings; or
- the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by the purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.

The analysis of Article 3(1) of Regulation 139/2004 allows two ways of formation of concentrations to be distinguished:

- merging of undertakings or their parts;
- acquiring the right to control another undertaking or its part.

Accordingly, the definition of the content of the concentration transaction depends on the specific ways in which concentrations are formed, which are discussed below.

9.2.1. Concentration due to the merger of undertakings

Article 3(1)(a) of Regulation 139/2004 shows that a concentration may arise as a result of the merger of two or more previously independent undertakings or parts of undertakings. Analysis of this statement indicates that a concentration under Article 3(1)(a) arises when:

- independent undertakings participate in the transaction; and
- changes arise due to the merger of undertakings

Undertakings participating in the merger

The concept of an "undertaking" is not provided in the TEU, TFEU, or Regulation 139/2004. In the practice of applying EU competition law norms, EU institutions, based on economics, interpret the concept of an "undertaking" broadly (Craig & Burca, 1998, p. 888). In the decisions of the CJEU and the European Commission and the acts adopted by EU institutions, when defining the concept, not legal but economic criteria are put forward; that is, an undertaking is understood not as a registered economic unit, established and operating in accordance with the law, but as an economic market unit, not necessarily registered and not necessarily composed of one legal or natural person (Lasok, 2004, pp. 383–385). In the regulation of concentrations, an undertaking is considered to be any natural or legal person, regardless of its legal status and funding, which engages in economic activities of a certain regularity and continuity for which a fee is paid. For example, in *Polypropylene* (1986), the Commission indicated that the term

"undertaking " is not limited to legal entities; it also includes entities that do not have such rights.

Funding forms, legal status, or possible state ownership do not limit the concept of an undertaking. Business associations and government agencies can also be recognized as undertakings. Moreover, the business entity does not need to seek profit constantly. It does not matter whether the business entity aims to gain profit; it is sufficient that it carries out economic and commercial activities (Bellamy & Child, 2001, p. 39). For example, in the *Job Centre* (1997) and *Klaus Höfner and Fritz Elser v. Macrotron GmbH* (1991) cases, the ECJ indicated that public employment agencies are economic entities because employment has always been an economic activity carried out on a commercial basis, although no profit is gained in this particular case.

Following Article 3(1)(a) of Regulation 139/2004, two or more previously independent undertakings should participate in the transaction. This article applies not only when previously independent undertakings are merged, but also when only parts of undertakings are merged. However, such parts must be able to function as independent economic units capable of making independent decisions.

The words "previously independent" seem redundant in this definition, but they are intended to exclude a transaction involving undertakings that are already "concentrated" among themselves. This situation is likely to be rare, although it does occur in practice. For example, in *Ernst & Young France/Andersen France* (2002, *§ 11–17),* the Commission recognized the operation of five legally separate entities in a common network called Ernst & Young as a single undertaking. Following the Commission's assessment, the basis for the successful operation of five companies using one brand in an international network is in compliance with common professional rules and standards of service provision, which are set and controlled centrally for network members. Also, the network was recognized as a de facto single undertaking due to uniform behavior in the market. The members

of the network were vitally dependent on the centralized organization of network activities, opportunities to work with their international partners, and the reputation of individual network members. Although there was no common profit sharing among its members, a strong common financial interest manifested itself in the constant transfer of customers from one network unit to another. In addition, it should be noted that the failure of one member firm to comply with professional standards would have condemned other members of the network to the risk of loss, which also had an impact. In this way, the risk created by one member is shared among all members of the network. This sharing of risk also manifested itself in the fact that all the companies belonging to the network were covered by the same business risk insurance.

An essential condition for the independence of an undertaking is the ability to make economic and commercial decisions unilaterally. Therefore, a group of related economic entities that do not have a separate, independent business strategy are considered to constitute one undertaking. For example, in the ECJ case of *Imperial Chemicals Industries Ltd. v. Commission* (1972), the question of whether the parent and subsidiary companies should be considered as separate undertakings was decided. Although the subsidiary company was legally an independent entity, taking into account the fact that the subsidiary company did not actually carry out an independent policy in the market but obeyed the instructions of the parent company (§§ 132–136) and that the parent company had a decisive influence on the price policy of the subsidiary company (§§ 137–140), the ECJ came to the conclusion that the parent company and the subsidiary company formed one joint undertaking.

In another case, *Corinne Bodson v. SA Pompes funèbres des régions libérées* (1988), the ECJ noted that an agent acting on behalf of their principal is not considered a separate economic entity, even if they have separate legal subjectivity. However, following the decision of the CFI in *VIHO Europe BV v. Commission*

(1995), it cannot be completely ruled out that the members of a clearly decentralized group may be recognized as separate independent economic entities.

Furthermore, § 52 of the Commission Consolidated Jurisdictional Notice under Council Regulation No 139/2004 on the control of concentrations between undertakings (2004; hereinafter – Consolidated Notice) indicates that the situation is more complicated when both the acquiring and the acquired undertakings are managed by the state's one state institution or municipality. The fact that the state controls two undertakings does not necessarily mean that they cannot be considered independent. For example, in the Commission's decision in *CEA Industrie/France Telecom/Finmeccanica/SGS-Thomson* (1993), the enterprises SGS-Thomson, France Telecom, and CEA-Industrie were considered independent undertakings, although the owner of all entities was the French state.

In such a situation, it is essential to determine whether the transaction means internal restructuring or a concentration. If both economic entities were parts of the same undertaking before the transaction, unable to make decisions independently, then changes in the structure of the undertakings would not be considered a concentration, but internal restructuring. The opposite is also true: if they were not part of the same undertaking and could make decisions independently, the transaction would be regarded as a concentration. When undertakings can independently decide on their strategic issues after a legal transaction, the transaction will be considered a restructuring, even though the management of the shares of these undertakings would be transferred to one undertaking (Consolidated Notice, 2004, § 52).

Changes arising due to the merging of undertakings

Article 3(1)(a) of Regulation 139/2004 does not provide the meaning of the concept of "merger." In the Consolidated Notice, the Commission explained the meaning of this concept, distinguishing two types of "mergers": de jure

amalgamations or *absorptions* and de facto *amalgamations*.

De jure amalgamations occur "when two or more independent undertakings amalgamate into a new undertaking and cease to exist as separate legal entities" (Consolidated Notice, 2004, § 9). *De jure absorptions* occur when "an undertaking is absorbed by another, the latter retaining its legal identity while the former ceases to exist as a legal entity" (Consolidated Notice, 2004, § 9). An example of *de jure absorption* can be the *World Com/MCI* merger authorized by the Commission in 1998. In this case, the concentration involved the merger of MCI into TC Investments Corp, a Delaware corporation and a direct wholly-owned subsidiary of WorldCom. As a result of the transaction, only TC Investments Corp continued to exist as the surviving corporation under the name MCI Communications Corporation (EC case *World Com/MCI*, 1998, § 6).

In such a case, all the rights and obligations of one or more undertakings are transferred to another, which may be created for that purpose. After transferring assets and rights, the amalgamated or absorbed undertakings usually no longer legally exist or operate in a particular market segment, leaving this market segment to the newly created undertaking. A well-known example of the merger is the 1996 amalgamation of Ciba-Geigy and Sandoz, making the large pharmaceutical and chemical company Novartis (EC case *Ciba-Geigy/Sandoz*, 1996). Another example would be the amalgamation of Glaxo Wellcome and SmithKlein-Beecham and the creation of GlaxoSmithKlein in 2000 (EC case *Glaxo Wellcome/SmithKleinBeecham*, 2000).

De facto amalgamations do not change the legal personalities of the entities. This may arise when the activities of previously independent undertakings are combined in such a way that results in the creation of a single economic unit. The "existence of a permanent, single economic management" is needed to establish a single economic unit (Consolidated Notice, 2004, § 10). Examples of *de facto amalgamations* could be Commission cases *Ernst & Young France/*

Andersen France (2002) and *Price Waterhouse/Coopers & Lybrand* (1998) mergers scrutinized by the Commission. In *Ernst & Young France/ Andersen France* (2002, §§ 23–25), the Commission concluded that already at the co-operation stage, under the cooperation contract without changing legal personalities, Ernst & Young and Andersen France shared the same permanent economic management and financial interests conferring to them the character of a single economic entity. Meanwhile, in *Price Waterhouse/Coopers & Lybrand* (1998), a de facto *amalgamation*, the Commission recognized the alignment of the activities of two market networks performing audits and financial analyses. According to the Commission, when considering the question of whether a transaction constitutes a merger, it is necessary to determine whether the coordination of the activities of previously independent economic entities constitutes or does not constitute one single economic unit. Since the new entity, Price Waterhouse, had the characteristics of a single economic unit – that is, it had sufficient influence in decision-making and the coordination of activities, it had a financial interest in recognizing and adhering to this coordination, it distributed profits and losses among group members, and it had joint external responsibility – the actions were recognized as a de facto amalgamation.

9.2.2. Concentration due to acquisition of control

Article 3(1)(b) of Regulation 139/2004 clarifies that a concentration may also occur if a person controlling one or more economic entities or an economic entity acquires control of another economic entity. The analysis of this article allows us to distinguish several basic conditions that must exist for a specific transaction to be recognized as a concentration. A transaction will be recognized as a concentration if:

1. At least two participants are involved in the transaction:
    - acquirer of control – a person who controls one or more undertakings

or an undertaking;
- undertakings transferring control.

2. Changes will result from an acquisition of control or a change in control.

The paper now further analyzes conditions for transactions to be considered a concentration.

Undertakings participating in the acquisition

As mentioned, a concentration in which one of its participants acquires control over another must involve at least two participants: the acquirer and the transferor.

The acquirer of control

The analysis of Article 3(1)(b) of Regulation 139/2004 shows that an "undertaking," the meaning of which is the same as in the case of a merger of economic entities, can be the acquirer of control. When the undertaking acquires control of another undertaking, it is clear that a concentration exists. For example, in the Commission case of *Bridgepoint/Nexity Lamy And Oralia Partenaires* (2024), the Bridgepoint Group acquired ultimate and indirect sole control over Nexity Lamy and Oralia Partenaires and its subsidiaries. The concentration was established by acquiring the entire share capital and voting rights of Nexity Lamy and Oralia Partenaires through new holding companies, which, in turn, would be indirectly controlled by Bridgepoint.

The analysis of Article 3(1)(b) of Regulation 139/2004 shows that next to the concept of an "undertaking," the concept of a "person" is presented. The question is: is the concept of a "person" the same as the concept of an "undertaking" under Article 3(1)(a)? Is it reasonable to assume that "persons" can also include natural persons? Since the explanation of this concept is not provided in Regulation 139/2004, to determine its content, it is necessary to study the practice of the Commission and the courts and refer to the guidelines issued by the Commission.

Examining Article 3(1)(b) of Regulation 139/2004, it can be observed that if a natural person or their group does not engage in economic activity and does not have company shares or control, the acquisition of an undertaking or its shares during the transaction will not result in a concentration.

However, when a person or related persons already carry out economic activities or control one or more undertakings, acquiring an undertaking or shares may constitute a concentration. The Commission's practice also confirms this. For example, in *Asko/Jacobs/Adia* (1991), the Commission recognized that the German holding company Asko and the private Swiss investor Jacobs had jointly acquired control of the Swiss company Adia. Jacobs was recognized as a related person because he had shares in other businesses trading in chocolate, candy, and coffee. In another case, *Allied Lyons/HWE-Pedro Domecq* (1994), Mora-Figueroa was recognized as a "person" because he was the owner and president of the company HWE, and the executive director of the company Pedro Domecq.

Following Article 3(5)(a) of Regulation 139/2004, a transaction will not be recognized as a concentration if, upon its occurrence, control would be gained by entities such as credit institutions, other financial institutions, or insurance companies, whose regular activity is transactions or dealing in securities, if they only temporarily acquire the securities of the undertaking to resell them. In such a case, it is required that their activities do not affect the competitive behavior of the undertaking, and they vote in the undertaking's activities only on matters of the transfer of the undertaking's assets or its securities. Resale of securities must take place within 1 year from the date of purchase, unless the Commission extends the deadline on reasonable grounds. Article 3(5)(c) of the Regulation indicates that a concentration also does not occur when the holding companies acquire the shares of the undertaking. However, the holding companies must use voting rights only to protect their investments and not to directly or indirectly influence the competitive behavior of the economic entity.

Article 3(5)(b) of Regulation 139/2004 shows that there would also be no concentration if control of an economic entity was acquired by an official, following the procedures provided for in the legislation of the Member State related to the liquidation of the company, insolvency, the conclusion of compromise agreements and the like.

The transferor of control

Following Article 3(1)(b) of Regulation 139/2004, it can be stressed that only the control of the undertaking can be transferred. Control can be transferred over the entire undertaking or only part of it. The concept of an "undertaking" in this article coincides with the concept of an "undertaking" provided in Article 3(1)(a) of Regulation 139/2004. When considering the transfer of control of an undertaking, the main question should be in what situation it is recognized that the transfer of control to another undertaking or person has occurred or will occur. This issue is addressed below.

Changes which arise due to the acquisition of control

Reference to when control is acquired under Article 3(1)(b) of Regulation 139/2004 can be found in the Regulation itself. Following this article, transactions are evaluated, which, upon conclusion, transfer previously independent undertakings to permanent sole or joint control, retaining their individual legal personality (Snelders, 1997, p. 96).

The Regulation clearly states that control can be transferred not only by purchasing shares (EC cases *Barclays/Computerlinks*, 2008; *Klepierre/ABP/Steen & Ström*, 2008; *Goldman Sachs/Deutsche Bank/Befraco*, 2008), but also by transferring all or part of the assets of the undertaking (Regulation 139/2004, Article 3(2)(a); EC case *Phoenix/Cerp Lorraine–Repartition France*, 2008).

The transfer of intangible assets such as registered trademarks or licenses can also constitute a concentration. In practice, it is quite difficult to distinguish the

transfer of assets from the transfer of assets equivalent to the transfer of control of an undertaking or its part. This depends only on whether the acquired property can operate on the market as a separate independent economic unit to which the market turnover can be clearly attributed (EC case *Vattenfall/Elsam and E2 Assets*, 2005). If the answer to this question is yes, then the transfer of assets is considered a concentration. For example, in the decision *Blokker/Toys'R'Us* (1997, §§ 12–16), the Commission concluded that the transfer of facilities, together with the right to sell the toys under the franchise agreement, constituted a concentration. However, it should be noted that the transfer of registered trademarks, licenses, patents, or copyrights, if no other assets are transferred, can constitute a concentration only if the licenses are exclusive and long-term (Consolidated Notice, 2004, § 24).

Article 3(2) of Regulation 139/2004 also notes that control can be acquired by concluding various agreements. The agreement will transfer control when its conclusion creates a similar influence on another business entity as when acquiring shares or transferring assets (Consolidated Notice, 2004, § 18). Control can be transferred not only by transferring ownership of the property, but also by granting the right to use it only. For example, in *GE/Agfa NDT* (2003, §§ 7–12), the Commission indicated that GE, through its wholly owned subsidiary, GE Aircraft Engines Inc. (GEAE), acquired sole control of Agfas NDT Business by way of a stock and asset purchase agreement. Control of business resources, management, and risk was acquired through contracts.

It should also be noted that some outsourcing may lead to concentration issues. In outsourcing, the service provider provides services to the client that the client previously performed themselves, such as cleaning services, organizational maintenance services, assembly of parts, etc. Generally, the service providers do not transfer the client's assets or employees, nor does the client retain the assets and employees. However, it can also be the other way around; the client's tools

and employees may be transferred to the service provider's organization, and the former employees would provide services to the client using the client's tools.

In outsourcing, a concentration may be established when these services can be provided not only to the client, but also to third parties immediately or soon after the property transfer (Consolidated Notice, 2004, §§ 25–27). According to the Commission, condition one is that the transferred property must provide conditions for market operation; that is, it must allow the undertaking acquiring the property to start operating in the market at least during the period corresponding to the start-up period of the joint operation (§ 26).

Control can be acquired simply because of the economic relationship between the parties (Consolidated Notice, 2004, § 20). It can also be created during not one, but several transactions. For example, in the Commission case *Royal Bank Private Equity/CINVEN/Chelwood Group* (2002, *§§ 1–3), the merger Commission noted that* within the framework of the planned operation, RBPE and Cinven were going to create a new company, Galileo, which the two parent companies would control. As a second step, RBPE's current stake in Ambion, as well as Cinven's current stake in Chelwood, would be transferred to Galileo, and therefore, RBPE and Cinven would acquire, through this newly incorporated joint venture, ultimate control over the target companies.

It is clear that when evaluating concentrations and examining possible cases of acquisition (transfer) of control, the Commission does not look into the form of a specific transaction, but into its essence and likely influence on the undertaking's behavior. In addition, it should be said that the Regulation on Concentrations does not consider a situation where existing control is strengthened as a concentration (Cook & Kerse, 2000, p.27). This is understandable because control either exists or it does not.

Following Article 3(3)(a) of Regulation 139/2004, control is usually acquired by persons or undertakings who directly acquire a majority of shares or are entitled

to rights under contracts. However, Article 3(3)(b) of Regulation 139/2004 indicates that there may be cases when undertakings or persons, without directly having legal rights, can, in fact, have a decisive influence on an undertaking. In the mentioned situations, indirect control is acquired, as indicated in Article 3(1)(b) of Regulation 139/2004. For example, a majority of shares may be owned by one person, but another may exercise the rights granted by the shares. Such a situation can arise when the rights granted by the shares are used not directly, but through another person or company. In such situations, the shareholder is only a theoretical intermediary, practically used as a tool by another company. Then, it is considered that a company that does not legally participate in the transaction but, in fact, acquires the power to control another business entity acquires control (Consolidated Notice, 2004, § 13). Such a relationship would occur where a subsidiary is involved in the transaction but the parent acquires effective control, or where the transactions involve an undertaking created to concentrate the shares or voting rights of the beneficial owners and to represent common interests or use their votes in unison (Cook & Kerse, 2000, p. 34). Indirect control can also be created in the presence of certain contractual relationships, financing, family ties, and other factors. For example, an investment company, by controlling an investment fund that finances an undertaking, may, in certain circumstances, indirectly acquire control of that entity (Consolidated Notice, 2004, § 15). It should be noted that not all circumstances must be present at the same time; each is important depending on the specific situation.

The fact that control can be gained indirectly is of great importance in practice. Undertaking (A) directly purchasing shares or assets may be controlled by one or more other undertakings (B), so the person controlling undertaking (B) may indirectly acquire control of undertaking (A). For example, in *PTT Post/TNT-GD Net* (1996) the Commission found that five postal companies and TNT acquired control of the company JVC. Five postal companies owned 50% of the

shares, with TNT holding the remaining 50%. Five postal companies established GD as a joint venture and transferred their shares to it for joint management. Given that GD was merely a means for coordinating the actions of the five postal companies, it was recognized that the five postal companies had indirect control over JVC. In another case, *Medeol/Elosua* (1994), the Commission found that Medeol acquired control of Elosua because it indirectly held 37% of Elosua's shares through its subsidiary Koipe, and then directly acquired an additional 20% of Elosua's shares.

Finally, it should be said that there will be no control if, to protect the public interest, the state acquires shares but does not intend nor have the opportunity to exercise decisive influence in that undertaking (Consolidated Notice, 2004, § 53).

The analysis of Article 3(2) of Regulation 139/2004 allows us to distinguish the main conditions under which control of an undertaking is acquired:

- a transaction must confer the possibility of exercising **decisive influence** on an undertaking;
- decisive influence enough to **be possible**;
- decisive influence must be on a **lasting basis**.

In further sections, the paper details the importance of determining decisive influence, ways of acquiring influence, and the significance of the ability to influence an undertaking's activities.

9.2.3. "Decisive influence" and control

Concentration occurs in the presence of influence, determining the activity of the undertaking. Article 3(2) of Regulation 139/2004 indicates those who could have the possibility of exercising decisive influence on an undertaking – that is, the "ownership or the right to use all or part of the assets of an undertaking," or "rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking."

Following Article 3(2) of Regulation 139/2004, it can be argued that legal control is unnecessary for "decisive influence" to occur. For example, in *Arjomari-Prioux SA/Wiggins Teape Appleton plc*. (1990), the Commission found that a transaction in which Arjomari acquired 39% of Wiggins Teape gave Arjomari sole de facto control over Wiggins Teape, as no single shareholder held more than 4% of Wiggins Teape. This means that "decisive influence" can be acquired with less than 50% of the voting shares.

However, the influence must be of some "weight" (Broberg, 2004, p. 742). The rights granted under national company law to protect the interests of minority shareholders are not sufficient to recognize influence. For example, in *Skanska Sverige/Posten/HOOC* (2001, § 9), the Commission indicated that one shareholder's rights were restricted to the power to block proposals concerning changes in the strategy and direction of HOOC. Thus, this person essentially enjoyed a minority protection right and not a decisive influence over the company.

Having a majority share in the undertaking is also not enough (Varona et al., 2005, p. 15). It is not the number of shares that is important, but the majority of votes, allowing influence on the business strategy of the undertaking and the decisions of the management bodies. There is also no "decisive influence" when agreements are only related to the day-to-day management of the undertaking. In contrast, undertakings and persons with veto rights in making strategic business decisions can acquire decisive influence. Business policy control is more important than day-to-day operations (Cook & Kerse, 2000, p. 39).

When assessing a concentration, the Commission examines the voting and other rights that the shareholders have and the influence they provide according to the statutes and regulations of the undertaking (Cook & Kerse, 2000, p. 36). When a qualified majority of shareholders' votes is required when deciding strategic issues, minority shareholders with sufficient votes can have the decisive influence. However, when a qualified majority of votes is only needed for decisions

on the protection of the rights of minority shareholders, then the veto right in making decisions on such issues will be considered insufficient to recognize decisive influence. For example, when the approval of a qualified majority is needed to change the undertaking's statute or significantly increase the share capital, the minority shareholders will not have a decisive influence because such issues are usually not considered issues of business strategy. For example, in *Eridania/ISI* (1991) the Commission recognized that the minority shareholders' veto rights, when dealing with matters of merging, liquidation, capital structure, or changes in the number of shareholders, are not sufficient to have a decisive influence on the undertaking's business decisions.

The influence conferred by "contracts or any other means" depends on national law. For example, national laws may foresee the right of particular persons or their associations (e.g., trade unions) to decide on undertaking control issues, even though they are not shareholders. In *Anglo-American Corporation/Lonrho* (1997) the Commission recognized that Anglo-American acquired decisive influence over Lonrho because a representative of Anglo-American on Lonrho's board, although not an executive member and having only one decision-making vote, was able to influence business decisions because he was the only one on the board who had the necessary business and mining experience.

Differences in national law may result in complicated legal situations, as shareholders may have broader rights in some countries and narrower ones in others.

The European Commission is given broad discretion to assess whether decisive influence is obtained in a particular case. Summarizing the decision-making practice of the Commission when examining the occurrence of decisive influence, it can be said that decisive influence exists when an undertaking or person has the right to decide on the following issues (Cook & Kerse, 2000, p. 41; Broberg, 2004, p. 743):

- *Making decisions on appointing members of management bodies with*

executive powers (general director, deputies, executive director) (e.g., CFI cases *Endemol v. Commission*, 1999, *§§* 159–164, and *Gencor v. Commission*, 1999, *§§ 169–194).*

- *Making decisions related to the approval of financial plans.* The approval of the budget is an important event because it summarizes the goals of all departments of the undertaking (sales, production, distribution, finance, etc.) (e.g., EC case *Reuters/Equant-Project Proton*, 2000; CFI cases *Endemol v. Commission*, 1999, §§ 159–164, and *Gencor v. Commission*, 1999, *§§ 169–194).*
- *Making decisions related to the approval of business plans* (e.g., CFI cases *Endemol v. Commission*, 1999, §§ 159–164, and *Gencor v. Commission*, 1999, §§ 169–194). The Commission considers this issue particularly important, as the right of veto when approving a business plan provides an opportunity for control. According to the Commission, a business plan is a document that sets out the undertaking's objectives and the means to be implemented to achieve them. On the contrary, if an undertaking or a person does not have the veto right on this matter, their influence may be recognized as insufficient. For example, in *NB/Ardian/Mediolanum/Neopharmed* (2023, §§ 7–10), the Commission found that the merger undertakings' co-investment and shareholders' agreement foresaw a number of veto rights for Mediolanum, which were equivalent to veto rights over the annual budget or the business plan. These veto rights would enable Mediolanum to exercise decisive influence in relation to the strategic business behavior of the merged group.

> Mediolanum will enjoy veto rights over the concrete actions that are necessary to implement the business plan's set goals. ... In particular, Mediolanum will have veto rights over any acquisition of companies, going concerns, licenses, rights to market and/or IP rights (including patents and trademarks) or joint-venture agreements relating to any of the [merged groups'] products, regardless of their value. ... Mediolanum

> will have veto rights over the start, change or interruption of business lines of the merged groups that contribute more than EUR 1 million. (§§ 8–9)

However, it should be noted that the business plan for the approval of which a controlling undertaking or person can use the right of veto must present the undertaking's strategic plans in sufficient detail, determining the undertaking's behavior in the market (e.g., issues related to pricing and investments) and establishing qualitative and quantitative goals and the means of achieving these goals, based on which action plans are drawn up (e.g., EC case *Saab Ericsson Space*, 1992). Influence on approving business plans will not be sufficient if the plan contains only a general declaration of aspirations (Consolidated Notice, 2004, § 70).

- *Making decisions related to investment*. The importance of this question depends on the amount of investment that requires approval and the importance of the investment in the market in which the undertaking operates. If approval is needed only for very large investments, then the available veto rights will not be enough to control the economic entity (Consolidated Notice, 2004, § 71). If the company's activity depends on large, long-term investments, then the veto right in this matter is considered relatively significant. However, the conclusion may be the opposite if the company's activity does not depend on long-term investments.
- *Making decisions related to the choice of technologies*. The importance of this question depends on the particularities of an undertaking. When technology is essential to the company's operations, the influence on the question of what technology the entity should use will be considered to be a decisive influence when determining control.
- *Making decisions related to product improvement*. In businesses that operate in markets characterized by product diversity and high innovation, the influence of decision-making related to the production and introduction of new products can be considered significant (e.g., EC case *Conagra/Idea*, 1991, §§ 11–14).

Having the right of veto in all of the matters mentioned above is unnecessary. Depending on the type of business in which a particular undertaking operates, the influence on decisions on at least one of the issues discussed above can be recognized as decisive. However, influence unrelated to strategic trade policy, the appointment of top management, or the approval of budgets or business plans will not be considered sufficient to establish control over the undertaking.

Sole and joint control

According to the Regulation on Concentrations, control can be acquired by one undertaking acting alone (e.g., EC case *Phoenix/Cerp Lorraine–Repartition France*, 2008) or by several undertakings collaborating (e.g., EC cases *GMR Infrastructure (Malta)/Ontario Teachers' Pension Plan/Intergen*, 2008; *Goldman Sachs/Deutsche Bank/Befraco*, 2008). As a result, when evaluating the transaction, the Commission assesses whether the contract or other legal or factual agreement, separately or in combination, provides sole or joint control. Control can be both positive and negative. In the case of positive control, one or more persons or undertakings may actively participate in making decisions related to the strategic business issues of another undertaking. In negative control, one shareholder cannot make decisions but can veto them. The right of veto usually means the minimum number of affirmative votes required to pass decisions in the shareholders' meetings and management bodies (Consolidated Notice, 2004, § 54).

Sole control occurs when one person or undertaking determines the activities of another undertaking (Broberg, 2004, pp. 743–744). In the case of positive control, a person or undertaking acquires sole control of a company by acquiring a controlling stake in the undertaking and the majority of votes required to make strategic decisions (e.g., sell and transfer to MMB 100% of the shares of the Air Bank Group in the EC case of *PPF/MMB*, 2022). In the case of negative control, one shareholder has the right to "block" strategic business decisions (e.g., EC case

Costa Crociere/Chargeurs/Accor, 1993). A shareholder with the right of veto does not necessarily have to cooperate with other shareholders when making decisions. Solely because of the shareholder's ability to influence decisions so that the company can reach a dead end, they are considered to have a decisive influence in decision-making and, accordingly, control of the undertaking.

In the case of joint control, two or more undertakings jointly decide on issues of the undertaking's business policy (Whish, 2001, p. 747; Jones & Sufrin, 2004, p. 868). That is, not one person or undertaking, but several have a decisive influence on another undertaking (Consolidated Notice, 2004, § 62). In this case, decisive influence results from the ability to use the veto power to block a decision. In the simplest case of joint control, joint control will likely be formed if two participants acquire equal voting rights, each acquiring 50% of shares and giving equal voting rights in making every decision. For example, in *SCA/Graninge/Scaninge Timber* (2000, § 4), the Commission found that SCA and Graninge would each hold 50% of the voting rights in Scaninge Timber, with veto rights on certain matters, including the determination of the business plan and budget. Establishing such control does not require a formal agreement between the concentration partners (Consolidated Notice, 2004, § 64). However, in case of agreement, the agreement must not violate the principle of the equal rights of the participants. The voting rights set out in it must be equal; none of the participants shall have a casting vote.

An equal number of shares held by shareholders may not be sufficient to establish joint control if they do not provide adequate veto rights. For example, a company with three shareholders, each holding one-third of the share capital and each of whom can elect one-third of the board of directors, may not have joint control if a simple majority vote is sufficient to make important decisions (Consolidated Notice, 2004, § 80). In this case, the control would not be sustainable because the majority of shareholders could regroup at any moment. The

Commission would recognize joint control only when there is no possibility that a merging alliance could replace the controlling group of shareholders (Arnull et al., 2000, pp. 653–654). For example, in *Paribas/MTH/MBU* (1991) the Commission found that Paribas and MTH each owned 40% of MBU's shares. Each of them did not have a majority of the company's shares, but they had the right of veto at the shareholders' meeting. Although the Commission recognized that the joint management of Paribas and MTH could theoretically be changed by at least one party unifying with other shareholders, their veto power made their joint management relatively stable.

Joint control can also be acquired through "negative control," where minority shareholders have the power to veto important decisions related to the undertaking's strategic commercial activities. This means that even without equal rights, joint control can be established (Jones & Sufrin, 2004, p. 868; Consolidated Notice, 2004, §§ 65–73; Arnull et al., 2000, pp. 653–654). For instance, in the case of *Thomas Cook/LTU/West LB* (1992), the Commission found that LTU and West LB, holding 90% and 10% of Thomas Cook's shares, respectively, had entered into an agreement. This agreement stipulated that the approval of both shareholders was required for crucial strategic decisions, such as the approval of the 5-year business plan. As a result, the Commission concluded that both shareholders had joint control. Without such an agreement, it would be considered that West LB had no influence.

However, if the right of veto is only intended to protect the financial interests of minority shareholders (e.g., change of statutes of undertaking, increase or decrease of capital, liquidation of the company), then joint control is not formed (Consolidated Notice, 2004, § 66). For example, in *Pepsico/General Mills* (1992), the Commission found that General Mills owned 40.5% of the shares and Pepsico 59.5%. However, it concluded that they did not acquire joint control because the shareholders' agreement contained only terms designed to protect the

shareholders' financial investments.

Following the Commission's decisions, it is unclear how many participants can jointly control an undertaking. The Commission has recognized that five (*TNT/GD Sofinim/KBC Invest/Mercator & Noordstar/VIV/Tournesoleon/de Clerck/NIB/FOC*, 2001), seven (*The Airine Group/NATS*, 2001), and eight (*Kelt/American Express*, 1991) undertakings acquired indirect control. In *GTS Hermes Inc/HIT Rail BV* (1996), the Commission found eleven, and in *Archer Daniels Midland Company/Alfred C. Toepfer International GmbH/InTrade NV* and *ADM/ACTI* (2002) thirteen shareholders had joint control.

The question is: How real is this control? It seems the Commission has not decided how many participants could be included in joint control. Such a situation makes the position of persons or undertakings acquiring shares unclear and difficult to predict because they cannot clearly predict whether control has already been acquired according to Regulation 139/2004. This question is important because in cases where control is established, the transaction is recognized as a concentration, and there is an obligation to notify the European Commission about it and obtain its permission to purchase shares.

Both sole and joint control can be acquired de jure or de facto. In the simplest case, one undertaking can become the owner of another undertaking by acquiring a controlling stake, which provides the majority of votes necessary for making strategic business decisions (e.g., EC case *PPF/MMB*, 2022). As already mentioned, a majority of voting rights does not necessarily coincide with a majority of the share capital, just as a majority of voting rights does not necessarily confer sole control, as, for example, a minority shareholder may exercise joint control with a large one because it has veto power.

The situation is less predictable when no shareholder has an absolute majority of votes. In this case, positive sole de jure control can arise in the presence of certain shareholder agreements. For example, for making strategic business

decisions, there may be a requirement to collect a certain number of votes in preferred shares, or other rights may be granted by agreement, allowing a person or undertaking with a minority of shares to influence the strategic business decisions of another undertaking. Such rights for shareholders may be provided for in the undertaking's statutes or contracts. For example, in *CCIE/GTE* (1992), the Commission recognized that CCIE acquired control of EDIL, even though CCIE acquired only 19% of EDIL's voting rights. This allowed CCIE to gain a permanent seat on EDIL's board and granted it the right to appoint the chairman and executive director. Also, the designated director of CCIE was given veto power over all significant decisions of EDIL. In another case, *Saint Gobain/Poliet* (1996), the Commission concluded that Saint Gobain acquired sole control by acquiring 47% of Poliet's shares, even though another company, Paribas, held 51.9% of Poliet's shares. This decision was influenced by the fact that there was a mutual agreement that Saint Gobain would appoint the majority of the board members, and Paribas would vote according to Saint Gobain's instructions.

Negative sole control can be created when one shareholder acquires 50% of the shares and two or more other shareholders acquire the other 50% , or if only one shareholder has veto power in making strategic business decisions (e.g., EC case *BBVA/BNL*, 2005, § 3).

Joint de jure control is created when the undertaking's shareholders enter into a legally binding agreement that provides for the joint exercise of voting rights. For example, in *Thomson/Banco Zaragozano/Caja Madrid/Indra* (1999), the Commission found that a group of shareholders with less than 25% of shares had joint control because they had agreed to coordinate voting at the shareholders' meeting.

The agreement can provide information on how to vote and what policy to follow in the meetings of the undertaking's management bodies. For example, in *Cable I Televisió de Catalunya* (1998), the Commission found that each of the

two groups of shareholders had joint control, as each group could prevent the company from making strategic decisions – each of the members of those groups was obliged to support the group's unified position when voting on the company's activities.

Due to the undertaking's economic dependence, de facto control may be acquired in exceptional circumstances. Control can arise from necessary long-term supply contracts, a loan granted by a supplier or buyer, or structural interconnections. For example, in *Lockheed Martin Corporation/Loral Corporation* (1996, § 6), the Commission found a merger between LMC and Loral due to LMC's connections with Loral. After the indicated transaction, LMC would guarantee up to $250 million of indebtedness of Loral, would license extensive intellectual property rights to Loral, and would hold non-voting preferred stock in Loral without the right to increase its shareholding for 7 years after the merger transaction.

However, the fact that the undertaking has a pre-emptive right to acquire a major shareholding in the undertaking in the future does not constitute control (CFI case *Air France v. Commission*, 1994, §§ 70–72). This conclusion would be different if, among other circumstances, there was a binding agreement to implement this right in the near future (Consolidated Notice, 2004, § 60). For example, in *Ford/Hertz* (1994) the Commission found that before the transaction, Ford held 49% of the voting rights and had the power to appoint four directors out of a total of 9 members of Hertz's Board, whose decisions were taken by a simple majority. Ford also had veto rights on matters aimed at protecting Ford's financial investment in Hertz. The Commission noted that Ford's voting and veto rights in Hertz did not confer upon it a de jure right of control of Hertz. However, in addition, Ford was also granted by the Stockholders' Agreement between Ford and all other shareholders in Hertz the power to convert, at its sole discretion and at any time, part of its Class C shares into Class B shares, and by this operation to increase its representation on Hertz's Board with the addition of two other

directors. The Commission concluded that Ford's unconditional right to obtain a majority on the Hertz Board at any time meant Ford's de facto sole control of Hertz.

De facto control can occur when minority shareholders really hold a majority of votes at a general meeting of shareholders. When a minority shareholder, considering the number of shares held by them, previous voting practices at the shareholders' meeting, and the strength of other shareholders (Varona et al., 2005, p. 22), is likely to have a permanent majority of votes at the shareholders' meeting, then such a minority shareholder is considered to have sole control.

For example, in *Coca-Cola Enterprises/Amalgamated Beverages Great Britain*, the Commission – considering that the votes of the Coca-Cola Company at the shareholders' meeting always determined the decisions taken, the business of Coca-Cola Enterprises was highly dependent on the products produced by the Coca-Cola Company, and other shareholders of Coca-Cola Enterprises, taking care regarding their financial interest, consider the potential harm to the long-term goals of Coca-Cola Enterprises when voting against the decisions proposed by the Coca-Cola Company – concluded that the Coca-Cola Company had de facto control over Coca-Cola Enterprises. However, it did not have de jure sole control. The Coca-Cola Company owned 45% of the shares of Coca-Cola Enterprises and 49% of the voting rights at shareholder meetings. The Commission concluded that if the Coca-Cola Company did not have a decisive influence, it could buy an additional 2% of the shares on the stock exchange and acquire an effective majority.

When assessing the possible formation of de facto control, the following are important: the number of votes that are constantly participating in general meetings of shareholders; the number of votes required to make decisions; permanent votes given by various shareholders to support the decisions of one of the shareholder groups; the use of the veto right in practice when making important

decisions; the distribution of remaining shares; the structural, economic, or kinship ties of other major shareholders with the minor shareholder; and other shareholders' interests (strategic or financial) in the acquired company. For example, in *Arjomari-Prioux/Wiggins Teape* (1990), the Commission recognized that Arjomari's acquisition of 39% of Wiggins Teape's shares gave him sole control of Wiggins Teape, as the other shares were widely dispersed among 100,000 shareholders, none of whom had more than 4% of the share capital. In *Jefferson Smurfit Group plc/Munksjo AB* (1995), the Commission recognized that 29.04% of owning a share gave control, as in practice, this share accounted for more than 70% of the votes at the general meeting of shareholders.

Joint control can also occur de facto, when minority shareholders, after mobilizing small shares and the corresponding number of votes, can jointly control the acquired undertaking by acting together (Consolidated Notice, 2004, § 74). Control does not require an explicit binding agreement on how to vote at a general meetings or what policy to follow at board meetings. A common written desire to act jointly may be sufficient, without establishing a pattern of cooperation.

De facto control can also occur when shareholders have common interests that are so important that they do not act against each other (Consolidated Notice, 2004, § 76); when the minority shareholder has a unique technology, know-how, exclusive supply, or sales arrangements; or when the majority shareholder is highly dependent on a minority shareholder because, for example, the minor shareholder has the necessary practical experience. In contrast, a large shareholder is only an investor. For example, in *Arcelor/Oyak/Erdemir Arcelor* (2006, § 6) the Commission found that after the transaction, Arcelor would own a 41% stake in the Special Purpose Vehicle, and Oyak would own the remaining 59%. The Commission concluded that joint control by Oyak and Arcelor of Erdemir could not be established on a legal basis. However, the Commission found that there were strong common interests between Oyak and Arcelor, to the effect that

it could be expected that they would not act against each other in exercising their rights in relation to Erdemir. Considering this, the Commission concluded that Oyak and Arcelor jointly controlled Erdemir on a de facto basis.

When no important common interests exist, and the majority of shareholders do not change, the Commission recognizes sole control. When the majority shareholder changes when making decisions, the Commission recognizes that minority shareholders (or a particular group) jointly control the undertaking (e.g., EC case *Ericsson/Nokia/Psion/Motorola*, 1998).

The analysis shows that joint de facto control is more significant than de jure control. If the Commission had relied only on de jure control, then in the previously mentioned situations, it would probably have identified the sole control of the major shareholder (Consolidated Notice, 2004, § 78).

The possibility of exercising decisive influence

Following Article 3(2) of Regulation 139/2004, when assessing the acquisition of control, the essential question is whether the rights that one undertaking or person acquires concerning another undertaking are sufficient to recognize that it acquires the "possibility of exercising decisive influence on an undertaking." Control, according to Regulation 139/2004, only requires the possibility to exercise decisive influence, so if it is determined that such a possibility exists, it does not matter whether it is used in practice (Broberg, 2004, p. 744; Arnull et al., 2000, pp. 653–654; Verloop & Landes, 2003, p. 30); it is not necessary to provide evidence that the possibility will be used in the future. However, the possibility of using decisive influence must be real. In *Cementbouw Handel v. Commission* (2006, *§ 1),* the CFI noted that "while decisive influence ... need not necessarily be exercised in order to exist, the existence of control ... requires that the possibility of exercising that influence be effective."

Whether the undertaking sought to acquire control is irrelevant to the

determination of the acquisition of control. Control can be acquired even if the undertakings acquiring another undertaking claim that they did not seek control at all (Consolidated Notice, 2004, § 21) or do not plan to use their power.

For example, in *McCormick/CPC/Rabobank/Osmann* (1993) the Commission found that the voting procedure, which requires the approval of all three shareholders for decisions affecting the company's management or commercial policy, gave each of the shareholders a specific right of veto, enabling them to exercise decisive influence. Although Rabobank only invested and said that it would not take part in making the most important business decisions, the Commission noted that although Rabobank had a small share of the total stake and the agreement provided for a fixed percentage of the profits, this could not negate the fact that Rabobank had the legal possibility to exercise decisive influence in joint activities.

This provides an ambitious answer to the question of whether the possibility of gaining influence in the future is relevant for assessing a concentration. In this regard, the Commission and the ECJ's interpretations are not uniform. According to the ECJ, if, at the time of assessment, the owner of the rights has not used them and there is no evidence that they intend to use them, it would be correct not to consider this when determining the emergence of control (CFI case *Air France v. Commission*, 1994, §§ 71–72). Some competition law experts also support this; they argue that the impact should be at the moment of evaluation, not at some point in the future (Cook & Kerse, 2000, p. 32; Broberg, 2004, p. 745). The Commission has not made up its mind clearly on this matter because, in one case, it stated that the possibility of gaining influence in the future (for example, the priority right to purchase shares) is not enough for control; in another case, it stated that the possibility of gaining influence at any moment in the future constitutes de facto control, already at the moment of assessment.

In particular, in *Ascott Group/Goldman Sachs/Oriville* (2003, *§ 7), the Commission concluded that the joint control exercised by Ascott and Goldman Sachs over*

Oriville could not be put into question just because of the existence of a Share Purchase Agreement under which Goldman Sachs would transfer 50% of the outstanding shares and voting rights in Oriville to Ascott if Ascott requested it. Whereas, in *Ford/Hertz*, the Commission found that the shareholders' agreement provided a right (which they did not exercise) for the minority shareholder, Ford, to convert a portion of their Class C shares into Class B shares at any time without any additional charge. Such a right allowed Ford to nominate two additional Hertz board members to form a majority. Considering this, the Commission concluded that such right constituted de facto control of Hertz. In its decision, the Commission also noted that the likely use of such a right may be an additional circumstance that, together with other circumstances, may indicate the emergence of control.

It can be stated that when deciding whether a concentration exists, it is essential to consider the potential for future control if a clear cause-and-effect relationship can be established between the transaction and the possibility of gaining influence in the future. When such a connection cannot be clearly established, it is subjective to consider such influence, as it may arise in the future not solely due to the transaction, but for other reasons, such as gaining experience. The direct appearance of influence immediately after an agreement is concluded is important when determining if a transaction should be recognized as a concentration.

Changing the quality of decisive influence

Regulation 139/2004 applies not only to the acquisition of control of another undertaking, but also to a change in the quality of control of the undertaking (Cook & Kerse, 2000, pp. 34–43; Broberg, 2004, pp. 743–744; Arnull et al., 2000, pp. 653–654). For example, in *ICI/Tioxide* (1990, § 4), the Commission found "changing the quality of decisive influence" to be a factual circumstance indicating the formation of a concentration.

In § 83 of its Consolidated Notice (2004), the Commission explains what

changes in the quality of control lead to the formation of a concentration. A change in the quality of control resulting in a concentration occurs: when an undertaking that previously had sole control in another undertaking accepts a partner in joint control; when joint control changes to sole because one of the joint control partners buys another partner's share; and when the number of shareholders increases, or the identity of the controlling shareholder is changed. However, if positive control replaces sole negative control, it is assumed that the form of control has not changed and the concentration has not been formed.

Furthermore, § 51 of the Consolidated Notice indicates that such control changes obligate the transaction participants to notify the Commission. As noted in Regulation 139/2004, a concentration only means a change of control. Therefore, internal restructuring within a group of companies is not considered a concentration.

Change of joint control to sole control

Reducing the number of shareholders who were partners in the joint control of an undertaking may result in a concentration (Jones & Sufrin, 2004, p. 868). For example, in *ABB/BREL* (1992), the Commission recognized a transaction in which ABB, having 40% of BREL's shares, bought an additional 40% of ABB's shares from another shareholder, Trafalgar House, as a concentration. This is because joint control by BREL and Trafalgar House was changed to sole control by only BREL.

The transition from joint to sole control is considered a concentration (Arnull et al., 2000, pp. 653–654) because a single undertaking's decisive influence fundamentally differs from influence exercised jointly (Whish, 2001, p. 748). The Commission has often stated that joint decisive influence is very different from that of sole influence because, in joint control, shareholders have to consider each other's interests, which may differ among shareholders. For example, in *ICI/Tioxide* (1990), the Commission found a concentration in a transaction in which ICI,

having a 50% stake in Tioxide, acquired an additional 50% from Cookson. In this decision, the Commission, emphasizing the differences between joint and sole decisive influence, noted that "Decisive influence exercised singly is substantially different to the decisive influence exercised jointly since the latter has to take into account the potentially different interest of the other party or parties concerned" (§ 2). In § 4 Commission continued:

> "By changing the quality of decisive influence exercised by ICI on Tioxide, the transaction will bring about a durable change of the structure of the concerned parties. Tioxide will become a wholly owned subsidiary of ICI; and by acquiring the ownership of all assets of Tioxide as well as the uncontested influence on the composition and decisions, etc. of Tioxide, ICI will obtain full control of Tioxide" (§ 4).

It is not necessary that all of the shares were bought from another shareholder with joint control. As mentioned, it is enough that during the transaction, the sole decisive influence on the strategic decisions of the business entity is acquired. For example, in *Eridania/ISI* (1991), the Commission found that ISI, with a 50% stake in Eridania, acquired a further 15% from another shareholder, Finbieticola, which was left with a 35% stake. Thus, ICI increased its stake to 65%. Before the share purchase, ISI jointly controlled Eridania with Finbieticola. After the transaction, ISI gained sole control, meaning a concentration occurred.

In § 90 of the Consolidated Notice (2004), the Commission stated that, in most cases, there will be no concentration if, after the number of controlling shareholders decreases, collective control does not change to sole control. However, in practice, this assessment is ambiguous. There have been cases where a transaction in which control by three undertakings was changed to two was recognized as a concentration (EC case *Bertelsmann/Kirch/Premiere*, 1998).

Change of sole control to joint control

Following Regulation 139/2004, a concentration can also occur when a person or undertaking which previously had sole control over the activities of another undertaking accepts a partner and replaces sole control with joint control. Due to the appearance of a new partner, the position of the controlling partner has fundamentally changed, as in the future, it will be necessary to take into account the interests of other partners, cooperate with them, and coordinate actions.

Changes in joint control members

When one of the control participants is replaced by another in the case of joint control, this also results in a concentration. In *James River/Rayne* (1992, § 3), the Commission found that under the agreements made by the parties, Rayne would replace Montedison as one of the two parent companies of the holdings by acquiring Montedison's 50% share. It concluded that this operation constituted a concentration. It is irrelevant that the economic entity was under collective control before and after the transaction (EC case *ENI/EDP/GDP*, 2004, §§ 9–10).

In § 21 of the Consolidated Notice (2004), the Commission indicated that in most cases, undertakings or individuals intentionally acquire control of another undertaking. However, sometimes, control can be gained without actively seeking it: it can be acquired because of the actions of third parties. Such control, according to Article 3(1)(b) of Regulation 139/2004, is considered to be acquired by "other means." For example, in *Avesta (II)* (1994), the Commission found that the four major shareholders of Avesta agreed, according to which major decisions related to the activities of Avesta require the prior written consent of two of the four major and at least one of the two minor shareholders (but not necessarily both). When one of the two minority shareholders sold Avesta shares, the contract was not changed. As a result, the two major shareholders and the remaining minor shareholders always had to agree in writing before making important decisions. Before the sale, two shareholders had the veto right. After the sale, three

shareholders already had the veto right. In other words, the remaining minority shareholder gained collective control of Avesta (§ 13).

Control may arise due to external circumstances that may not be known, and therefore, it may not be known that a concentration has occurred (Broberg, 2004, p. 750). Assume that A owns 35% of X's shares. Other smaller shareholders each have 10%–15% of the shares. The shareholders split over time, so A increasingly holds between 55% and 90% of X's votes in the last ten general meetings. In this way, A acquires de facto sole control over X. However, it is not possible to say precisely when this control arose.

Changes of control due to the break-up of the undertaking

The break-up of an undertaking's business may also constitute a concentration. For example, in *Solvay/Laporte/Interox* (1992), the Commission found that Solvay and Laporte wanted to break up the Interox joint venture. Solvay wanted to take Interox's "non-initiator business" (mainly H_2O_2 and persalts) and Laporte's "initiator business" (organic peroxides and persulphates). The Commission recognized that Solvay and Laporte had collective control of Interox before the break-up and that Solvay and Laporte would gain sole control of a part of the business after the break-up. This resulted in two concentrations.

9.2.4. Long-lasting change

Article 3(1) and § 20 of the Preamble of Regulation 139/2004 indicate that a concentration means a transaction that results in long-lasting changes in the structure of the undertakings participating in the concentration and market structure. Accordingly, the change in control must be on a "lasting basis."

Sometimes, one undertaking acquires control of another undertaking only temporarily, until it is transferred to another undertaking or person. Theoretically, there are two concentrations in this situation: acquisition and transfer. However, in practice, such a situation is considered a single concentration evaluated

according to the last transmission. Although the intermediate entity acquires control, according to the Commission, external circumstances quickly remove this control (EC case *OM Group/DMC 2*, 2001, § 5).

When several undertakings acquire another undertaking to break up that undertaking's assets, the answer as to whether both acquisition and break-up transactions should be considered concentrations depends on whether a legally binding break-up plan is drawn up. When such a plan exists and is implemented, regardless of whether the same entities or different entities participate in the acquisition and break-up, the acquisition will not be considered a concentration if the break-up occurs within 1 year at the most. For example, in *Fortune Brands/Allied Domecq* (2005, § 7), the merger transaction provided for the division of assets within 6 months of acquisition.

Following §§ 29–33 of the Consolidated Notice (2004), concentrations would be regarded as only break-up transactions. When there is no plan, especially when it is unclear whether the break-up will happen soon after the acquisition, when the second deal can be carried out independently of the first (EC case *Norske Skog/Parenco/Walsum*, 2001, § 7), the acquisition will also be considered a concentration.

It is uncertain how long a change must last for a change in control to be considered long-lasting. The Commission did not provide a clear answer in its decisions, which is understandable considering the complexity of the transactions. The duration of activity has a different meaning in various economic sectors; therefore, depending on the specific business branch, the period after which the change will be recognized as long-lasting may be different.

The Commission's decisions show that structural changes need not last for an exceptionally long time. However, it is reasonable to argue that a 1-to-3-year period is too short (EC case *Lehman Brothers/SCG/Starwood/Le Meridien*, 2005). In its decisions, the Commission considered five (*Gas Trading Ltd/Group 4 Utility*

Services, 1996) to 10-year (*Voest Alpine Industrieanlagenbau GmbH/Davy International*, 1995) periods of activity long enough for changes to be recognized as long-lasting.

9.3. Harm: detrimental effect on competition

The concentration of undertakings is not prohibited in itself, but is forbidden when it is incompatible with the common market, i.e., when it detrimentally affects the market. It should be observed that the effects of conglomerate concentration and firm dominance are not limited to markets in which firms sell products to consumers. Those effects can extend to markets in which firms have market power as buyers or monopsony power, including markets of employers as buyers of labor services (Hafiz, 2022, p. 1499).

Following Article 2 of Regulation 139/2004, a detrimental effect manifests itself as a significant impediment to effective competition. The term "significant" is vague and gives the European Commission too much discretion in assessing concentrations. However, § 26 of the Preamble of Regulation 139/2004 provides some clarifications, indicating that competition is primarily significantly restricted when a dominant position of the undertaking is created or strengthened. This is the primary form of harm to competition.

The analysis shows that to prohibit a concentration, it is necessary to establish that it harms competition, as would creating or strengthening a dominant position. Therefore, concentration will not be prohibited if there is only a tiny or insignificant restriction on competition (CFI case *General Electric*, § 543).

In the case of non-horizontal concentrations, it is difficult to say what kind of impact arising from the concentration should be considered significant damage to effective competition. Considering the objectives of EU competition regulation and the practice of both the Commission and the EC courts, it can be assumed that changes in the market structure which enable concentration participants to

harm both competition and consumers should be considered as harmful impacts. Harmful impacts that may occur in the event of vertical or conglomerate concentration are presented in Table 1.

Table 1. Detrimental effects of non-horizontal concentrations

Type of concentration	Impact	Actions	Damages to competition	Damages to consumers
Vertical	The upstream market is closed	Refusal to sell	Competitors in the downstream market are pushed out of the market or weakened	Prices of products have increased; the portfolio of products has decreased
	The downstream market is closed	Refusal to buy	Competitors in the upstream market are pushed out of the market or weakened	
	Market transparency is increased: an information transmission channel is created	Business-sensitive information is acquired or used	Competitors are pushed out of the market or weakened	
Conglomerate Vertical	Leveraging power from one market into another	Product tying, pure bundling, technical tying, mixed bundling, full-line forcing, cross-subsidization, predatory pricing	Competitors are eliminated or weakened in the market in which the power is leveraged	In the longer period, the prices of goods increased, and product portfolio or product quality decreased
Conglomerate	The power of an undertaking is increased	Abuse of power	Competitors are eliminated or weakened in the market; potential competition is reduced	
Conglomerate Vertical	Increases market transparency: facilitates coordination of actions of undertakings	Coordinated actions between competitors	Non-competitive market	Prices of goods have increased

Individual actions by undertakings can significantly restrict effective competition in the market when the occurrence of a non-horizontal concentration removes significant competitive constraints from one or more market participants and creates the ability and incentive to close upstream and downstream markets, increase market power and use market power in a market where such power is not available, and use information sensitive to competitors. As a result of the concentration of undertakings, the goods of other producers may become weaker substitutes (due to lower quality, higher price, the elimination of competitors, and the restriction of new entry into the market); therefore, the market power of the merged undertakings may increase (Church, 2006, p. ii). A concentration may also create opportunities for competitors to coordinate their activities. Eventually, this may lead to competitors being removed from the market or weakened, and as a result, the supply of goods to consumers and the quality of goods could decrease, or the price of goods could increase.

When determining harmful effects, it is necessary to consider both the incentives of the merged entity to perform anti-competitive actions and its ability to do so. An undertaking may intend to take anti-competitive actions. Still, it may not be able to do so due to the structure of the market, the undertaking's market position and power, the response of competitors and consumers, or the entry of new competitors into the market. On the other hand, although capable of restricting competition, an undertaking may not do so for objective or subjective reasons.

Whether the merged group, in the event of a non-horizontal concentration, intends and is able to restrict competition has been examined in many Commission decisions. For example, in *Johnson & Johnson/Guidant* (2005, § 339), the Commission, assessing likely market foreclosure, analyzed "whether the merging entity has the ability and the incentive to engage in bundling practices, and if so, whether such a strategy could give rise to foreclosure effects." Such an assessment is compatible with ECJ decisions. For example, in *Tetra Laval BV v. Commission*

(2002), the Court assessed the merged group's ability to leverage (§§ 192–199), its incentive to engage in the leverage (§§ 200–216), the methods the merged group may use in the leverage (§§ 217–224), and the foreseeable consequences of leveraging on the markets (§§ 225–307).

The incentives of an undertaking to coordinate, to foreclose a market, or to exercise power are not the same as the objectives of an undertaking. It does not matter whether the parties to the concentration plan to take anti-competitive actions; it is enough that the undertaking acquires "the ability and economic incentive to foreclosure competition" (EC case *GE/Amersham*, 2004, § 31) or that they "have the economic power to implement different strategic options" (EC case *CVC/Lenzing*, 2001, § 168).

An incentive should be understood as a need to act, not an aim to engage in such an activity. In non-horizontal concentrations, the incentive of merged undertakings should be understood as an economic need to close the market, use power, or coordinate mutual actions. Therefore, the undertaking's assertion that it has no incentive to restrict competition should not be considered. It is enough to create an economic incentive to do so. This means that it is necessary to determine whether actions "would have been in the merged entity's commercial interests" (CFI case *General Electric Company v. Commission*, 2005, § 333). Therefore, the assessment is carried out on the basis of objective economic criteria and not on the undertaking's subjective goals. The incentives of the merged group can be determined by analyzing the company's internal documents, which describe the planned goals of the board of directors or an "economic assessment showing that such behaviour would objectively have been in the merged entity's commercial interests" (§ 333).

Following ECJ and European Commission practice, when assessing whether undertakings intend to restrict competition, commitments regarding the undertaking's conduct or the question of whether actions are considered illegal under

the law are not considered. This is insufficient to prevent harm to competition. However, according to EU courts, when evaluating cases where the impact of a concentration does not appear immediately but at a later date (transfer of power, market closure), the assumed behavioral obligations (*Tetra Laval BV v. Commission*, 2002, *§ 161)* or legal regulation of activities (*General Electric Company v. Commission*, 2005, § 73) must also be considered. For example, following the opinion of the CFI in *Tetra Laval BV v. Commission* (2002, § 159), when market closure or power transfer actions violate Article 101 or 102 of the TFEU, the Commission, when assessing such behavior, has "to assess whether, despite the prohibition of such conduct, it is none the less likely that the entity resulting from the merger will act in such a manner or whether, on the contrary, the illegal nature of the conduct and/or the risk of detection will make such a strategy unlikely." It must also consider the extent to which incentives could be reduced or eliminated "owing to the illegality of the conduct in question, the likelihood of its detection, action taken by the competent authorities, both at Community and national level, and the financial penalties which could ensue."

In addition, EU courts have clarified examination requirements, opining that the analysis must be pragmatic, considering the Commission's short period for assessment. In *General Electric Company v. Commission* (2005, § 73), the CFI indicated that in the assessment, the Commission must, in principle, consider "the potentially unlawful, and thus sanctionable, nature of certain conduct as a factor which might diminish, or even eliminate, incentives for an undertaking to engage in particular conduct." However, the assessment does not "require an exhaustive and detailed examination of the rules of the various legal orders which might be applicable and of the enforcement policy practised within them, given that an assessment intended to establish whether an infringement is likely." Therefore, the Commission's assessment considers "the likelihood that this conduct would be clearly, or highly probably, unlawful under Community law," "the likelihood

that this illegal conduct could be detected," and "the penalties which could be imposed" (Guidelines for non-horizontal mergers, § 46).

Next, the paper presents a detailed examination of the damages that may occur in the event of a non-horizontal concentration, assessing the conditions of the undertaking's incentives and ability to perform such actions.

9.3.1. Market foreclosure due to vertical concentration

Firstly, § 18 and § 29 of the Guidelines for non-horizontal mergers indicate that to foreclose a market means to hamper or eliminate actual or potential rivals' access to supplies or markets and, at the same time, to reduce their ability and/or incentive to compete. New market participants cannot enter the closed market. Competitors cannot expand their activities in it, or may be forced to leave it (Abbamonte & Rabassa, 2001, pp. 214–226). This is especially true in emerging markets where new technologies are being developed. Vertical concentration with a weak early-stage buyer or seller can hinder technology development (Nouel, 2001, p. 6).

Actions that can close the market include refusing to have business relations, refusing to grant licenses or access to critical raw materials, discriminatory practices, cross-subsidization, predatory pricing (Nouel, 2001, p.21), exclusive distribution of goods (Lindsay, 2006, p. 420), etc. Therefore, market foreclosure can be expected in a vertical concentration when the undertaking has exceptional advantages, such as access to critical raw materials or occupying a dominant market position (Nouel, 2001, p.20).

Additionally, § 18 and § 29 of the Guidelines for non-horizontal mergers indicate that when the market is successfully closed, it is a merged undertaking, and likely, the remaining market participants can profitably raise prices for buyers in one or both vertically related markets. Competitors do not need to be forced out of the market; it is enough that they compete less.

The Commission often assesses the results of the expected vertical foreclosure of the market, obliging the concentration participants to open access to these markets. For example, in *Alcatel/Telettra* (1991), the Commission recognized that a vertical relationship between a telecoms operator and its supplier may distort competition, as suppliers that do not have such a relationship may find themselves in a weaker position. It does not matter that the income derived from the transactions with the vertically related undertaking constitutes only a small part of the total income (§ 34). The Commission authorized the concentration only after the parties to the concentration undertook to eliminate vertical ties.

One of the most widely commented on (Varona et al., 2005, pp. 143, 279–280; Lofaro & Ridyard, 2002, pp. 151–153; OECD, 1998, p. 7) Commission decisions dealing with the vertical ties of a concentration was *Boeing/McDonnell Douglas* (1997). Since the planned concentration would have impacted the US and EU markets, the US and EU competition authorities assessed Boeing's bid to acquire McDonnell Douglas. Their opinions differed on evaluating aspects of the concentration's vertical ties. Boeing's long-term (up to 20 years) exclusive supply contracts concluded with various airline companies even before the merger were evaluated differently. Considering that these agreements existed before the concentration, the US authorities recognized that their existence was not a result of the merger. Furthermore, in their view, these exclusive supply agreements did not create a risk of foreclosure, as they represented only a small part of global market turnover (less than 25% of annual global market sales). Therefore, considering the limited viability of McDonnell Douglas and the benefits created by the concentration, they decided to allow Boeing to buy McDonnell Douglas.

The European Commission came to a different conclusion. In its view, the exclusive supply agreements confirmed that Boeing had a dominant position in the commercial aircraft market even before the concentration, as Boeing had been able to impose exclusive sales conditions on its customers for a long time.

According to the Commission, setting exceptional conditions aims to limit competitors' access to the upstream and downstream product markets and restrict their ability to compete with the dominant undertaking. Acquiring McDonnell Douglas would strengthen Boeing's dominant position by making it easier for Boeing to find new customers and access US military programs funded by the budget. The commission allowed Boeing to buy McDonnell Douglas after it agreed to cancel existing exclusive supply contracts with airlines and not to enter into new ones.

Following the Commission's view in *Telia/Sonera* (2002), when assessing vertical concentrations, it is essential to determine whether the merged entity will have the ability and incentive to foreclose upstream or downstream markets, and whether this has any significant effect on competition in a particular market. The undertaking's incentive to close markets upstream or downstream depends on the profitability and usefulness of such conduct (Lindsay, 2006, p. 384). The assessment considers the circumstances that increase the incentive to act this way and those that decrease it (Guidelines for non-horizontal mergers, § 46).

For example, in *Boeing/Hughes* (2000), when assessing whether the merger between the satellite manufacturer HSC and the satellite launcher manufacturer Boeing would encourage the merging parties to produce products that are incompatible with competitors' products (satellites incompatible with competitors' launchers), the Commission considered whether they would gain more than suffer by doing so (§ 82). The Commission stated that it was "necessary to examine whether the merged entity would gain more through additional launch service contracts than it would lose through lost satellite contracts" (§ 83). After analyzing the situation, the Commission concluded that such behavior was unreasonable since, should the parties engage in such behavior, they would meet with resistance from customers, it would not be profitable to try to persuade customers to switch to Boeing launchers through higher integration costs for other launchers,

and finally, customers indicated that they would prefer to use the products of several launcher manufacturers (§ 87).

Finally, § 40 of the Guidelines for non-horizontal mergers indicates that the influence of a concentration on the profitability of undertakings in upstream and downstream markets is examined in determining the most profitable available choice. Increased profits in one vertically related market must offset losses in another market. For example, in *Johnson & Johnson/Pfizer Consumer Healthcare* (2006, §§ 131–132), the Commission found that the closing of the market for NiQuitin nicotine replacement increased the profitability of the Nicorette nicotine replacement market.

In assessing the overall profitability of the foreclosure, the impact of the vertical foreclosure on the combined group's revenues and costs (Lindsay, 2006, p. 385), and profits obtained in the upstream and downstream markets (*Sony/BMG*, 2004, §§ 163, 174; *Independent Music Publishers and Labels Association v. Commission*, 2006), the increased efficiency of the undertaking's activities due to the concentration are important.

Foreclosure of the upstream market

Figure 1 demonstrates that the vertical upstream market may be closed because producer B merges with raw material supplier A. For this reason, A may refuse to supply raw materials to B's competitors, C and D.

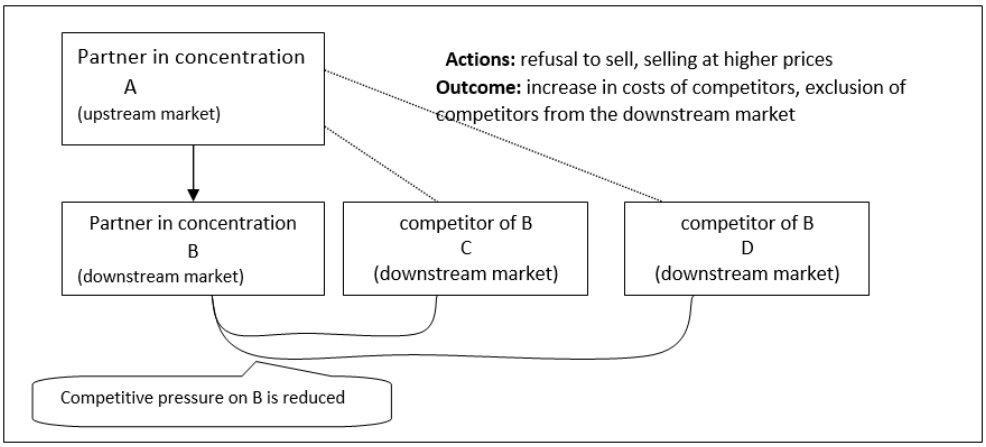


Figure 1. Foreclosure of the upstream market

In a short period, the profit of entity A, if it refuses to supply raw materials, would likely decrease. Still, if C and D do not have other raw material suppliers in the long term, this behavior may be beneficial because competitors C and D may be pushed out of the market. New companies cannot enter the market because competitors cannot purchase raw materials or other materials to produce goods. Alternatively, the costs of C and D may be increased to such an extent that their goods become uncompetitive on the market, or the AB merged undertaking may raise prices for the consumer without any risk (Guidelines for non-horizontal mergers, § 47). Establishing a restriction of competition is enough to demonstrate that there is only a possibility that the merged undertaking may attempt to foreclose the market and that this may have a significant detrimental effect on effective competition.

Considering the previously mentioned conditions for determining the impact of vertical concentrations, it should be noted that when assessing the foreclosure of the upstream market, it is necessary to determine whether the merged undertaking would *be able* to substantially limit access to sales from the upstream market, whether it would *have an incentive* to do so, and whether the foreclosure would have a *significant detrimental effect* on competition in the downstream

market (Guidelines for non-horizontal mergers, § 32).

The ability to foreclose the market can be reasonably foreseen when there is a possibility that the merged undertaking could restrict competitors from purchasing raw materials, components and the like in the upstream market, or where they could only purchase them under worse conditions (Bishop et al., 2005, p. 12; Craig & Burca, 2003, p. 1035; Abbamonte & Rabassa, 2001, p. 214). For example, in *GE/Smiths Aerospace* (2007, *§§ 7–8),* the Commission examined whether competitors would be able to acquire aircraft components and the latest research results of an engine under development in the event of a merger. In another case, *Thales/Finmeccanica/Alcatel Alenia Space & Telespazio* (2007), the Commission, while analyzing the planned concentration, examined whether the new entity would be in a position to adopt various subtle cost-raising strategies which:

> consist in not reacting in time to the integrator's or the satellite manufacturer's requests for price quotations and technical information, offering an unfavourable price, offering a less favourable delivery schedule for [competitors], or offering a less favourable compliance list for the technical performance. (§ 256)

Market foreclosure can occur not only by restricting access to raw materials, but also by reducing their quality or by producing components that are technologically incompatible with competitors' products (Guidelines for non-horizontal mergers, § 33). For example, in *Axalto/Gemplus* (2006, § 75), a significant number of competitors raised strong concerns about the ability of the parties in the concentration to undermine or degrade the activity of other card manufacturers by making their cards incompatible with cell phone operators' platforms or delaying accreditation.

Whether the foreclosure benefits A depends on A's share in the raw material market, the number of competitors in both upstream and downstream markets,

and the level of buyer awareness of competitors. Significant harm to effective competition requires that the foreclosed firms play a sufficiently important role in the competitive process in the downstream market. The greater the number of competitors deprived of access to the upstream market, "the more likely the merger can be expected to result in a significant price increase in the downstream market and, therefore, to significantly impede effective competition therein" (Guidelines for non-horizontal mergers, § 48). For example, in *Skanska/Scancem* (2001), the Commission prevented Swedish construction company Skanska from acquiring Swedish company Scancem because it owned 90% of the Swedish cement supply market, and the merger would reduce competitors' access to the cement market.

Following § 33 of the Guidelines for non-horizontal mergers, the Commission analyzes "a series of alternative or complementary possible strategies" when assessing the possibility of closing access to the upstream market. The possibility to close an upside market is likely to occur when:

- *The concentration involves undertakings supplying critical raw materials or materials for products.* Raw materials or other materials are considered significant when the product cannot be produced without them, when their price significantly influences the price of the final product, when it is much more challenging to sell the final product profitably without their use, or when the choice of these raw materials is one of the essential options (Guidelines for non-horizontal mergers, § 34). For example, in *GE/ Smiths Aerospace* (2007, §§ 48–50), the Commission acknowledged that the merger of an engine manufacturer with a material supplier would not create the possibility of a foreclosure of the upstream market because the contact welding rings used in the engine did not constitute more than 5% of the price of the engine, they were not intellectual property, and they were not a necessary part of the final product, but only one of several options. In another case, *Ineos/ BP Dormagen* (2006, § 183), the Commission acknowledged that the price of raw materials significantly influenced the price of the final product, as their price accounted for 40%–60% of the price of the

final product.

- *The merged entity would occupy a significant position in the upstream market.* The possibility of closing the market would arise only when the merged economic entity is able to significantly impact the conditions of competition in the vertically upward market; that is, it would be able to influence the price of goods or the conditions of sale of goods (Guidelines for non-horizontal mergers, § 35). The market power of the merged entity largely depends on the market structure (EC case *RTL/Veronica/Endemol*, 1995, §§ 37–40), its market share (EC case *Ahlström Capital/Capman/Nordkalk*, 2003, § 36), the vertical integration of competitors, and their ability to restrict the functioning of the market (Lindsay, 2006, p. 388).
- *The merged undertaking acting in the upstream market refuses to sell products or provide services to competitors in the downstream market, and as a result the availability of raw materials or services, their quality, and price would be detrimentally affected.* When the activities of other sellers are less efficient, the goods they sell are of lower quality, they do not have the ability to expand production volumes in the face of higher demand, and they have long-term contracts with the undertakings involved in the concentration (Guidelines for non-horizontal mergers, § 36), then the merged undertaking has a greater ability to affect the market detrimentally. When assessing the situation, the Commission analyzes the possibilities and abilities of the competitors in the upstream market, as well as the prices of their goods or services. The merged undertaking cannot foreclose the upstream market when other competitors could quickly increase supply, in case demand would increase, at the same market price as if there was no concentration. However, a detrimental effect on competition would occur when competitors, considering the prices of the merged undertaking, also raise the prices of their goods or services. Market foreclosure is also unlikely when, before concentration, buyers buy goods from the merged group's competitors in the upstream market and not from the concentration participants because they would still be able to purchase goods from other sellers in the event of a concentration. However, the ability to do so may change when the merged undertaking is so big that it could significantly change the market

structure (Lindsay, 2006, p. 388), and other sellers would not be able to meet the growing needs of competitors.

- *Competitors in the downstream market do not take effective and timely countermeasures against the actions of the merged undertaking.* Producers located in the downstream market can change their production process to reduce dependence on raw materials and services sold by the merged undertaking or to support the emergence of a new seller in the market (Guidelines for non-horizontal mergers, § 39). The buyer may also have the purchasing power to prevent foreclosure. For example, in *Finmeccanica /BAES Avionics & Communications* (2005) and *Finmeccanica/AMS* (2005), the Commission concluded that companies producing aviation equipment had sufficient power to resist attempts by merged undertakings to limit their purchases, as they could start buying products sold by competitors or demand that the merged undertakings organize an open and transparent competition to select avionics sub-contracts.
- *There are no regulatory restrictions on business practices.* National or EU laws may set restrictions.

This analysis allows us to state that the merged entity intends to foreclose an upstream market when this eliminates downstream competitors and increases its market power and profits. This is likely to happen where competitors would be prevented from benefiting from economies of scale, marginal costs or production costs would be increased, and, accordingly, the prices of products would be raised. This can eliminate competitors from the market or enable merged undertakings to raise the prices of their products without risk (Lindsay, 2006, pp. 385–386).

The merged entity would not intend to close the upstream market if it could not increase the prices of products in the downstream market, and the result of the foreclosure would not benefit the merged undertaking. It also would not intend to close the upstream market if the merger partner in the upstream market could not sell all volume of the products it produces when it only sells them to the merger participants for internal needs (Lindsay, 2006, pp. 386, 388). When

partners in a concentration need to sell most of their goods to competitors, there is little chance that the foreclosure would be profitable. For example, in *GE/Agfa NDT* (2003), the Commission found that GE's purchases accounted for less than 5% of Agfa's sales. As a result, it concluded that any anti-competitive behavior by Agfa would be detrimental to its operations and, therefore, unlikely.

Foreclosure of the downstream market

Figure 2 shows that not only the upstream market can be closed to competitors: the downstream market can also be closed when the seller merges with an important buyer. The downstream market would be closed when the merged group refused to buy goods from competitors in the upstream market. As a result, competition in the upstream market may be significantly restricted.

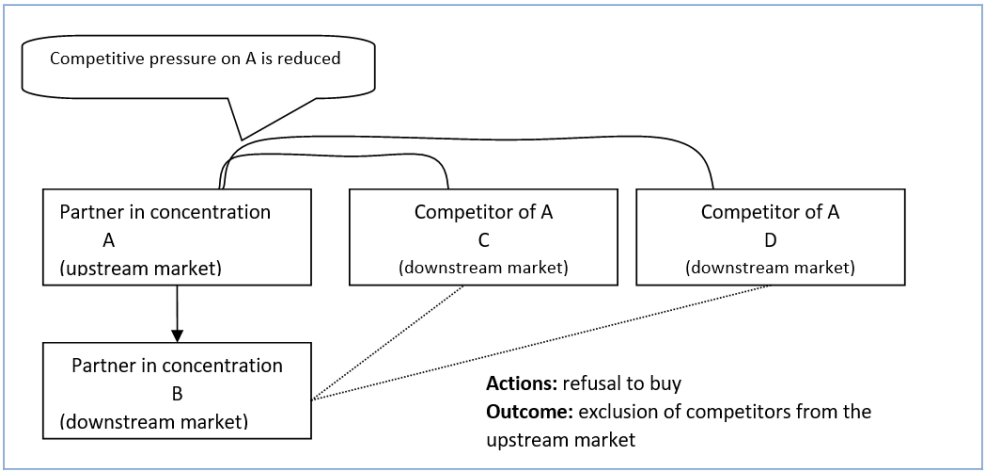


Figure 2. Foreclosure of the downstream market

Following § 60 of the Guidelines for non-horizontal mergers, due to a vertical concentration, competitors in the upstream market may incur higher costs of maintaining ties with consumers or lose these ties altogether. Competitors' position in the upstream market can be infringed in various ways. A partner in a concentration in the downstream market can refuse to buy from competitors and

buy only from concentration members. It may buy a smaller quantity from competitors or buy on terms significantly worse than those that would have existed without the concentration of undertakings. Also, the costs of competitors' products entering the distribution network may increase (Bishop et al., 2005, p. 12).

Closing sales for competitors in the upstream market to a buyer in the downstream market may negatively affect the consumer. As a result, a product range may decrease, or product prices may increase (Guidelines for non-horizontal mergers, § 72). The foreclosure of significant sales from the upstream market would significantly restrict effective competition. If there was a sufficient number of free buyers in the market, then market-closing actions would not be effective (Faull & Nikpay, 1999, § 4157). Harm to competition due to foreclosure occurs not only when competitors are forced to reduce their available sales volumes, but also when their sales expansion is restricted (Guidelines for non-horizontal mergers, § 74).

A considerable number of Commission decisions have addressed the issue of closing the downstream market. For example, in *Bombardier/ADtranz* (2001), the Commission examined the potential foreclosure of the downstream market by mergers between undertakings operating in the regional train and wagon manufacturing markets. It was feared that the other three suppliers in Germany may face the closure of the vertical downstream market. In another decision, *Promodes/Dirsa* (1990), the Commission examined the possibility of the foreclosure of the Spanish food and non-food distribution market, as Promodes gained access to the important Spanish food and non-food retail distribution market through its subsidiary DIA.

Following § 59 of the Guidelines for non-horizontal mergers and the analysis discussed above, it should be noted that the Commission, in assessing the likelihood of an anticompetitive customer foreclosure, examines whether the merged entity would have the ability to foreclose access to downstream markets

by reducing its purchases from its upstream rivals, whether it would have the incentive to reduce its purchases upstream, and whether a foreclosure strategy would have a significant detrimental effect on competition and consumers in the downstream market. An ability to close a vertical downstream market is likely to exist when:

- *Due to the concentration, actual or potential competitors in the upstream market would be deprived of economically viable opportunities to sell their products in the downstream market* (Guidelines for non-horizontal mergers, § 61). Such a situation would likely arise if a concentration member was a buyer with significant power in a downstream market. However, when a sufficient number of buyers start to buy goods from sellers who are not participating in the concentration immediately after the concentration or shortly, it is likely that undertakings in the concentration will not close the market.
- *The scope of activities of actual or potential competitors in the upstream market may be reduced or restricted due to the concentration* (Guidelines for non-horizontal mergers, § 62). When the production volume and income of the competitors in the upstream market depend on the scale of economies of production (Guidelines for non-horizontal mergers, § 63; Areeda et al., 1998, § 1008), then when the sales volume decreases, the competitors will be forced to increase the prices of their goods or services. For this reason, competition would be affected in the upstream and downstream markets, as other buyers in the downstream market would have to buy more expensive goods and services. If, due to the position of the merged entity in the upstream market, potential competitors did not want to enter the upstream market, prices in the market would remain higher in the future compared to those without the concentration. For these reasons, competitors may not make long-term investments to reduce costs, introduce new technologies, and improve product quality. This could weaken their ability to compete and force them out of the market (Guidelines for non-horizontal mergers, §§ 64–65).
- *There are no alternative or secondary markets where competitors can sell*

their products (Guidelines for non-horizontal mergers, § 66). When a concentration closes the market but competitors can sell their goods in alternative or secondary markets, the foreclosure would not harm buyers because the prices of the goods would not increase.

- *Competitors in the upstream market do not take effective and timely countermeasures* (Guidelines for non-horizontal mergers, § 67). When the merged entity engages in foreclosure, competitors may adopt more aggressive pricing policies or support the entry of new buyers.
- *There are no legal restrictions on business practices.* There may be legal restrictions on activity that prohibit foreclosure actions. Legal restrictions may be provided by both national and EU law. For example, in *Sovion/HMG* (2004, §§ 116–117), the Commission found that the parties to the concentration were obliged by law to collect and process slaughterhouse waste, so it was recognized that they could not foreclose the market by refusing to collect and process competitors' slaughterhouse waste.

The analysis allows us to say that the merged entity intends to foreclose a downstream market when buying internally from a vertically upstream unit, which would be more profitable than from competitors. The more units of the merged entity that would benefit from the foreclosure, the more likely the foreclosure would be intended. Incentives to close the market would also arise when the cessation of purchases would result in an economic benefit due to increased prices in the upstream market (Guidelines for non-horizontal mergers, §§ 68–70).

The merged entity would not intend to foreclose a vertically downstream market if it was more profitable to buy goods from competitors than internally from the merged entity, if the unit of the merged entity located in the upstream market had limited production and sales capabilities and could not meet the entire demand of the merged undertaking, or if competitors could offer a greater volume of goods (Guidelines for non-horizontal mergers, § 70).

Finally, it should be noted that complex concentrations sometimes occur in practice, which can simultaneously close upstream and downstream markets. For

example, in *WLR/BST* (2006) the Commission examined the potential of buyer-to-seller and seller-to-buyer ties restrictions.

9.3.2. Leveraging into another market

In conglomerate (mergers) and sometimes vertical concentrations, competition can also be significantly restricted when the merged undertaking, exploiting its power in one market, can impact another market where it does not have such power. As a result of that impact, it can also gain power in that market in the future (Howarth, 2005, pp. 369–372). The CFI, in *Tetra Laval v. Commission* (2002, § 151), noted that "capacities brought together by the transaction may immediately create conditions allowing the merged entity to leverage its way to acquire, in the relatively near future, a dominant position on the other market." For example, in *Tetra Laval/Sidel* (2001), the Commission examined the bid of Tetra Laval, the world leader in carton packaging, which also produces small quantities of plastic packaging (PET), to acquire 95% of the shares of Sidel SA, producing packaging equipment and systems and a global leader in the production and supply of blow-molding machines. The Commission prohibited the concentration because it would create a dominant position in the market for PET packaging equipment and strengthen Tetra Laval's dominant position in the market for carton packaging through leveraging – that is, by allowing it to transfer the power it held in the market for carton packaging to the market for PET packaging equipment.

The CFI, in *Tetra Laval v. Commission* (2002), and the ECJ, in *Commission v. Tetra Laval* (2005), confirmed that the changes that occurred as a result of the concentration, allowing leveraging from one market into another, were reasonably considered to be harmful to the competition. Although the courts annulled the Commission's decision prohibiting the concentration because the Commission could not prove its conclusions convincingly, they confirmed that leverage as harm should be analyzed in assessing conglomerate concentrations. Since the

courts did not elaborate on this issue in their decisions, they left much room for academic discussion.

The impact of leveraging from one market to another differs from changes emerging due to horizontal or vertical concentrations. This does not result in a price increase for consumers. In contrast to a vertical concentration, competitors' prices also do not increase. Often, the opposite situation occurs – prices are reduced. According to Völcker (2003, p. 587), the merged group, acting intelligently, lowers the prices of the jointly sold products because there may not be enough consumers to buy the product, and there would be significant market foreclosure.

However, this behavior is short-term since the merged entity, having pushed competitors out of the market, can increase prices for buyers. The expulsion of competitors from the market succeeds because consumer demand is directed towards the products of the merged entity, and competitors' ability and intention to compete decrease as competitors' profits decrease. The merger may increase the probability that the merged entity will refuse to have business relations with competitors or will support products with lower demand (Bishop & Walker, 1999, pp. 159–160). Therefore, it can be concluded that the merged undertaking can gain or strengthen its power in the market (Guidelines for non-horizontal mergers, § 111).

The merged group can use its market or financial power to exclude competitors from the market.

Leveraging market power

In leveraging from one product market into another, an undertaking can engage in "product tying," "pure bundling," the production of goods that are technically incompatible with competitors' goods ("technical tying"), "mixed bundling," or selling goods in groups ("full-line forcing").

In product tying, the buyer can purchase product A only when combined with

a different product B (Lindsay, 2006, p. 419). For example, in *Tetra Laval/Sidel* (2001, § 367), the Commission, while prohibiting the concentration, noted that the merged entity selling products could optionally "tie" them, requiring buyers who use carton packaging and SBM machines to buy Sidel SBM machines. Otherwise, they would not be equipped with Tetra Pak carton packaging machines and carton reels.

In pure bundling, two products – A and B – are sold as one set, and items A and B are not sold separately (Lindsay, 2006, p. 419; Burnside, 2001, pp. 107–110). For example, a restaurant offers set menus and does not sell dishes separately. "Pure bundling" may also be a form of "technical tying," in which individual devices work correctly only when they are part of a unified system, and are incompatible with competitors' devices.

In mixed bundling, the seller offers both a set of products and individual products (Lindsay, 2006, p. 419). For example, a restaurant engaged in "mixed binding" offers both set menus and individual dishes from the menu. The price of the set is lower than the sum of the individual dishes in the set because otherwise, the consumer would not want to buy the set.

In full-line forcing, the seller forces the buyer to buy the entire group of products, refusing to sell individual products that the buyer needs or wants to buy (Lindsay, 2006, p. 419). For example, in *Tetra Laval/SIG* (2005, § 71), the Commission analyzed whether the situation showed a clear trend towards in-line sales (sales encompassing several machines). In another case, *Gillette/Duracell* (1996), the Commission found that combining Gillette's personal care products, stationery, and small electrical appliances businesses with Duracell's battery manufacturing business would create an opportunity to force the buyer to buy the entire product group.

Economic theory recognizes that the bundling or tying of products can, under certain circumstances, weaken competitors and harm competition. However, it

should be noted that economic theory does not state that the tying or bundling of products is always harmful to competition, and the power gained in one market is always transferred to another market using tying or bundling (Bishop & Walker, 1999, pp. 159–160). Therefore, a merger that makes the bundling or tying of goods more likely does not necessarily harm competition.

Leveraging financial power

In leveraging financial power from one market into another, the merged group can engage in the "cross-subsidization of products" and "predatory pricing," and use financial resources under better conditions.

The merged group can use the revenue accumulated from selling products in one market with weak competition to subsidize its secondary products that face stronger competition. For example, the reduced price of a razor can be offset by the price of the blades used. This is called "cross-subsidization." In *General Electric/Honeywell* (2001, § 353), the Commission analyzed merged entities' financial capability "to cross-subsidize discounts across the products composing the packaged deal." In another decision, *Danish Crown/Vestjyske Slagterier* (1999, *§ 196*), the Commission found that the merged group would be the only slaughterhouse selling fresh beef and pork on the Danish market, and would therefore be able to apply rebates by subsidizing the sale of pork at the expense of the price of beef and vice versa. In *Boeing/McDonnell Douglas* (1997, § 78), the Commission found that the merger would allow Boeing to set prices equal to cost in a more competitive market, offset by higher prices in other markets.

It should be noted that cross-subsidization is likely only when, as a result of such actions, competitors would be excluded from the market and merged group members could recover lost income by raising the prices of goods.

Concentration can also increase the probability of excluding undertakings from the market when the concentration creates conditions for using "predatory

pricing." In particular, in *Aérospatiale-Alenia/de Havilland* (1991, § 69), two competitors of the merger undertakings notified the Commission that they could not withstand a price war with the merged entity. Consequently, both would leave the market. In evaluating these statements, the Commission noted that such conduct of a merged undertaking could be rational since the proposed concentration would mean that ATR/de Havilland would exceed the market share threshold, making such a pricing policy likely given that it would be the optimal profit-maximizing strategy.

The merged entity would discourage potential competitors from entering the market if it lowered prices to a level where competitors could not survive. When it is necessary to enter several markets simultaneously to compete effectively, the ability of the merged entity to prevent access to at least one of the markets can significantly restrict effective competition (Guidelines for non-horizontal mergers, § 112). As in the case of cross-subsidization, predatory pricing is likely when such behavior will force competitors to leave the market and allow them to recover lost income by raising the prices of goods. For example, in *P&O Stena Line (Holding) Ltd* (2002, *§§ 19–20),* the Commission examined whether P&O, using its monopoly power in one market, could use predatory pricing in another market with competition. After the analysis, the Commission decided that such an option was not likely, as predatory pricing would have to be applied to several competitors; some competitors have significant financial support from banks and/or are vertically integrated with them, and there are low barriers to entry into the market.

A concentration may also significantly restrict effective competition in a market where the merger removes capital constraints on the merged undertakings (Church, 2006, p. 260; Völcker, 2003, p. 583). When an undertaking is connected to another with financial power, it can use internally accumulated funds. It does not need to use the capital market, or can do so on significantly more favorable terms than its competitors.

Assessing the leverage of financial power in another market poses various issues because there is no clear methodology for evaluating the use of such financial power. Competition law experts debate whether it is necessary to consider the leverage of financial power as a harmful impact on effective competition. In the opinion of the author, when assessing concentrations, it is necessary to consider the fact that capital constraints may be removed when this allows the undertaking to engage in the cross-subsidization or predatory pricing of products, and such behavior is likely to exclude competitors from the market or prevent the entry of new competitors.

Conditions for leveraging

The undertaking can apply leverage when it, having power in one or several markets, acquires an undertaking operating in one or several adjacent markets. In *GE/Amersham* (2004, § 37), the Commission, discussing the conditions for commercial bundling to result in the foreclosure of competition, indicated that for this to be successful, "it is necessary that the merged entity [would] be able to leverage its pre-merger dominance in one product to another complementary product." In this case, the acquired undertaking's market power is increased not by combining the undertakings' positions in the market, but by enabling it to use the power the merged entity has in one market in another where it does not have such power (Völcker, 2003, p. 583). Some factors can be identified which facilitate the merged entity's ability to implement leverage practice:

- *The bundling or tying of goods could be involved when a buyer wants to buy together goods that are usually sold separately, or when a group of buyers wants to buy different goods.* For example, a buyer may prefer to purchase all items from one source instead of several to save money (Guidelines for non-horizontal mergers, §§ 98, 100, 104). Tied or bundled goods should be bought by a significant number of buyers. The more buyers who need both products, the better the opportunity to link products. Otherwise, buyers

would likely refuse to buy tied or bundled goods (Lindsay, 2006, p. 416). For example, in *Tetra Laval/SIG* (2005, *§ 74), the Commission ruled out tying because there was no evidence that customers would buy several different products together*. The Commission decision in *Procter & Gamble/Gillette* (2005, § 117), shows that when goods complement each other, the probability that goods will be tied or bundled is higher.

- *When the merged undertaking would have a significant degree of market power, which would not necessarily amount to dominance* (Guidelines for non-horizontal mergers, § 99; *GE/Amersham*, 2004, §§ 21, 31, 37–38). It may be enough that at least one of the linked goods is necessary for the buyer to decide that the seller holds significant market power – for example, when there are no other options in the market, or the possibilities are minimal. Competition law experts consider whether power should be held in the pre- or post-merger area, or both. Under the SIEC rule, it is sufficient to show that the merger would strengthen power in the pre-merger market. However, a concentration may also be prohibited where the merger would create or strengthen market power in the market acquired after the merger. Following the EU court's decisions in *Tetra Laval v. Commission* (2002, § 197), and *Commission v. Tetra Laval* (2005) it could be concluded that when, before the concentration, the market power of the undertaking is greater than the power held by the competitors, there is a possibility that the merged group involving that undertaking will be able and intend to use the available power in the future. The use of financial power would be unlikely where the merged undertaking has insufficient financial power or market conditions are such that the use of financial power is unattractive and such conduct would be unlikely (Völcker, 2003, pp. 590, 595). In cases where the undertaking does not have power in the market, the Commission will determine that the merged undertaking does not have the ability to apply leverage strategy. For example, in *Tetra Laval/SIG* (2005, *§ 76),* The Commission did not establish that the merged undertaking had the ability to exercise power, as the merged group did not have power (dominant position) in any of the markets.
- *When buyers or competitors do not take timely and effective countermeasures*

(Guidelines for non-horizontal mergers, § 103). In *GE/Amersham* (2004, *§ 37)*, the Commission noted that for a leverage strategy to be profitable, "there must be a reasonable expectation that rivals will not be able to propose a competitive response and that their resulting marginalisation will force them to exit the market." Once rivals have exited the market, "the merged firm must be able to implement unilateral price increases, and such increases need to be sustainable in the long term, without being challenged by the likelihood of new rivals entering the market or previously marginalised ones re-entering the market." Where there are strong competitors and/or buyers in the market, the merged group may not be able to successfully use the power it has in one market in another market. For example, in *Tetra Laval v. Commission* (2002, *§ 245),* the CFI, considering the level of competition in the market where the merger entity intended to exercise market power, acknowledged that the Commission had not demonstrated that "sales could reach a level which could threaten the strong competition prevailing on the market." In another decision, *Procter & Gamble/Gillette* (2005, *§§ 120–130),* the Commission – examining whether the market conditions resulting from the concentration of the merged undertaking would allow the application of bundling, thereby forcing buyers to buy necessary or known goods together with unknown ones, limiting the participation of competitors in the distribution network or preventing potential competitors from entering the market – concluded that such behavior would likely not be anti-competitive as competitors also sell similar products and retailers can use existing buyer power. In *GE/Amersham* (2004, *§* 39), the Commission indicated that when competitors do not have all the goods needed by the buyer, which a merged group have, several sellers can combine their goods in one group and be more attractive to the buyer. For example, in *BC Funds/Sanitec* (2001, *§ 19)*, the Commission found that the merged group would be able to "mix bundle" ceramic sanitary ware, water taps, and faucets. It allowed the concentration because such actions "could not squeeze competitors out of the market," since competitors could offer the same group of goods to the buyer. It should be noted that competitors may use a more aggressive pricing policy in response to the merged entity's

anti-competitive actions (Guidelines for non-horizontal mergers, § 104). In the case of *Air Liquide/Messer Targets* (2004, § 66), the Commission noted that the merged group would be unable to exercise market power when buyers, even in long-term relationships, could switch to other sellers. It is likely that competitors, in response to the merged undertaking's anti-competitive actions, may use more aggressive pricing.

According to the EU courts, the Commission, when proving the possible use of the merged undertaking's power, must not only establish that the merged undertaking will be able to leverage power from one market to another, but must also provide "convincing evidence" to substantiate that it intends to do so. In *General Electric Company v. Commission* (2005, § 327), the CFI noted that "the Commission [must] establish not only that the merged entity had the ability to transfer those practices to the markets for avionics and non-avionics products but also, on the basis of convincing evidence, that it was likely that the merged entity would engage in such conduct." In the court's opinion, the fact that the combined undertaking would be able to make strategic decisions regarding leverage was not sufficient to prove that it would act this way in practice.

Whether the merged undertaking intends to leverage market power from one product market into another depends on whether such behavior would be profitable (Guidelines for non-horizontal mergers, § 105). Some conditions could facilitate a merged undertaking's intention to use its power in one market in another. Such conditions are as follows:

- *When losses incurred in the market to which the merged entity's power would be transferred would be offset by profits and/or future profits in the market where the power is already held*. When assessing a merger group's intentions to exercise power, it is necessary to determine how much profit would decrease in one market and increase in another if such intentions were to be carried out. In the case of *General Electric Company v. Commission* (2005), the CFI criticized the Commission for not properly verifying this when

assessing the merged group's intention to leverage its power from one market to another. Regarding leverage practice, the court noted that such practice:

> would have been rational commercial behaviour following the merger only in so far as the revenues which the merged entity was likely to derive from those practices would have offset that potential cost. … the Commission was not entitled to regard it as logical or inevitable that the merged entity would extend those practices to the markets for avionics and non-avionics products. (§ 338)

The combined group would intend to use the power it has in one market in another when such actions could increase the profitability of its activity by selling the goods necessary for the buyer, forcing competitors to leave the market, limiting the entry of potential competitors to the market, or increasing the prices of competitors (due to the elimination of economies of scale).

- *When a benefit obtained by bundling or tying goods offsets the losses incurred*. Some buyers may refuse to buy bundled or tied products when they need one product. They can buy a single item, even though it would be more expensive than buying it as a group. Buyers may purchase goods from competitors or not buy them at all when the seller bundles or ties the goods (Guidelines for non-horizontal mergers, §§ 105–106).
- *When the market in which the power is intended to be used is not mature, turnover is relatively small, and profits are modest* (Guidelines for non-horizontal mergers, § 107). An undertaking operating and having power in a highly profitable market is unlikely to exercise power in a market with low profitability.
- *When leverage increases profits by gaining market power in the tied goods market, protecting market power in the tying goods market, or combining the two* (Guidelines for non-horizontal mergers, § 108).
- When determining the intention to leverage market power from one market to another, the Commission considers the circumstances that

encourage such behavior and those that reduce or eliminate such an intention (Guidelines for non-horizontal mergers, § 110). The Commission also considers the pre-concentration behavior of the undertakings when determining intent (*GE/Amersham*, 2004, § 35). When merger undertakings or their competitors have used market power leverage practice before the concentration, the Commission analyzes the impact of this practice on competition. When such a practice has not been carried out, the Commission assesses whether the concentration creates the conditions for such a practice (Lindsay, 2006, p. 416).

9.3.3. Increased market power

If market power increases because of a concentration, creating conditions for restricting competition, it can be recognized as a harmful effect of the concentration. As indicated in § 10 of the Guidelines for non-horizontal mergers, "[a]n 'increase in market power' means the ability of one or more undertakings to increase prices profitably, reduce output, choice or quality of goods and services, diminish innovation, or otherwise negatively influence parameters of competition." A concentration can increase undertakings' power by expanding the portfolio of goods produced and/or sold, eliminating potential competition, or increasing their ability to implement countermeasures.

In *Coca-Cola Company/Carlsberg* (1997), *Guinness/GrandMetropolitan* (1997), and *Coca-Cola/Amalgamated Beverages* (1997), the Commission recognized that the expansion of the undertaking's portfolio of goods as a result of the concentration might result in the emergence or strengthening of the undertaking's market power. The expansion of the product portfolio creates or strengthens the undertaking's market power when the sum of the market power in the individual product groups is less than the power of the combined product group (Church, 2006; Nalebuff, 2003, p. 11). For example, in *Coca-Cola Company/Carlsberg* (1997, *§ 67), the Commission noted that* "the inclusion of strong beer and packaged water

brands, such as those of Carlsberg, in the beverage portfolio gives each of the brands in the portfolio greater market power than if they were sold on a 'stand-alone' basis." The expansion of the product portfolio is significant in markets where buyers (wholesalers, large retailers) usually buy goods in groups (Bishop & Walker, 1999, pp. 159; EC case *Guinness/GrandMetropolitan*, 1997, *§ 46*).

An example of such market power strengthening can be found in *Guinness/GrandMetropolitan* (1997). In this case, the Commission examined the influence of a concentration on the markets of individual types of alcohol. It allowed the concentration only when its participants undertook to terminate the existing long-term distribution contract for Bacardi rum in Greece. This decision is significant in that it confirmed that the expansion of the offered portfolio of the world's leading alcohol types during the concentration might create a dominant position of a particular kind of alcohol (whiskey) on the Greek market (separate geographic market) and strengthen the dominance of the position of other sorts of alcohol (gin, rum and brandy) in the market. However, the market shares occupied by each participant did not increase (§§ 114–118).

This decision was criticized because it did not clearly state the damage caused by the widening of the product portfolio. The decision states that the market power would be strengthened because merger undertakings would: increase their ability to involve "bundling sales or increasing the sales volume of one category by tying it to the sale of another category" (*Guinness/GrandMetropolitan*, 1997, § 100); gain the ability to provide a portfolio of products and account for a more significant proportion of business (§ 40); gain greater flexibility to structure its prices, promotions, and discounts (§ 40); be able to realize economies of scale and scope in their sales and marketing activities (§ 40); be able to afford to make substantial offers, discounts, and credits or organize and finance promotional events (§ 101); be able to influence which products are stocked or displayed in the limited space available behind a bar (the so-called back-bar) (§ 101); be shielded

from market pressures due to increased ability to cross-subsidize goods in lower demand (§ 99); be able to use its strength in leading brands, such as Johnnie Walker Red Label, Gordon's gin, and Bacardi rum, in order to induce bars to list brands in the same or another category (§ 101); and increase attractiveness for one-stop-shopping considerations (§ 101).

It cannot be accepted that, in all the cases mentioned in the decision, competitors would be weakened or removed from the market, and competition would be damaged. Buying products from a single source or exploiting economies of scale and scope usually does not restrict competition. Even the opposite – in such cases, competition is strengthened, and this is beneficial to consumers.

Such an attitude of the Commission raises doubts as to whether it has too wide a discretionary right to prohibit concentrations when assessing the increase in the power of merger undertakings due to improved efficiency. The *Guinness/Grand-Metropolitan* (1997) decision is highly questionable, as it treats efficiency gains as harmful because they increase or strengthen the merger undertakings' market power. Considering this approach of the Commission, it can be concluded that there is a possibility that concentrations beneficial to the market may be prohibited. It is necessary to establish clear criteria under which the expansion of the product portfolio could be recognized as harmful to competition.

Harm to competition could also occur when, after expanding the product portfolio**,** the possibility of bundling or tying products would increase. For example, in *General Electric/Honeywell* (2001, *§§ 443*–444), the Commission decided that such a situation would detrimentally affect competition in the engine and aviation equipment markets in the long term because the acquisition of a broad product portfolio would increase merger undertakings' ability to sell them in various bundling scenarios, and would enable more efficient pricing than competitors.

The Commission decision in *Guinness/GrandMetropolitan* (1997) raises

doubts. It can be agreed that expanding the product portfolio may restrict competition, but it is unclear whether the advantages mentioned in the decision would affect competition detrimentally. In the decision, competition is equated with competitors' position in the market, as it examines the possible negative impact on competitors due to merger undertakings gaining advantages. The decision does not determine whether the merger undertakings' advantages would push out one or more competitors from the market. Nor does it explain why competitors could not obtain the same benefits through collusion or otherwise. It is unclear whether harm to competition from bundling goods outweighs its economic benefits.

Understanding that a concentration that makes the tying or bundling of goods more likely is not necessarily harmful to competition is important. When assessing the impact of the concentration, it is necessary to convincingly prove that the expanded product portfolio strengthens the ability to apply leverage from one market to another to such an extent that competitors can no longer operate in the market (Bishop & Walker, 1999, pp. 159–160). The harmfulness of the impact on competition due to an expanded product portfolio depends on the number of existing product leaders in the product portfolio, their importance, and the market share occupied by the undertaking in separate product markets, compared to the number of markets in which competitors occupy a significant market share, the importance of those markets, and the available product portfolio (*Guinness/GrandMetropolitan*, 1997, § 41–42).

As a result of the concentration, damage to the competition could also occur when an expanded product portfolio strengthens the purchasing power of the merger undertakings. For example, in *Boeing/McDonnell Douglas* (1997), the Commission was concerned that by increasing the buyer's share of the fleet servicing market from 60% to 84%, the merged group would have greater leverage in negotiating exclusive distribution agreements with airlines. According to

the Commission, the merger of the civil and military aviation businesses would strengthen the negotiating position of the merged group when negotiating with suppliers.

In addition to the harm that can occur when the product portfolio is expanded, other detrimental impacts can also appear. One such negative result would be the elimination of potential competition (Verloop & Landes, 2003, pp. 52–53). Following the Commission's opinion, a merger of undertakings occupying a dominant position in different geographic markets would be considered harmful to competition when there is a possibility that they would come to each other's market in the future due to expanded activities. For example, in *Air Liquide/BOC* (2000) and *EDF/EnBW* (2001), the Commission concluded that both concentrations were of concern, even though the parties to the concentration operated in different geographic markets. In *EDF/EnBW* (2001, § 64), the Commission found that EDF intended to enter the French market and was the best prepared of all the undertakings. Therefore, the competition was harmed by the elimination of a potential competitor during the merger between EDF and the French company EnBW. In *Air Liquide/BOC* (2000, *§§ 201–204),* the Commission identified Air Liquide as the most likely potential competitor of BOC. According to the Commission, it was not important that Air Liquide did not, in practice, try to enter the UK market, as this could only be considered a tactical behavior that can be changed at any time.

Concentrations can also increase merger undertakings' ability to implement countermeasures against competitors. As a result of a concentration, an enlarged group that includes undertakings operating in different geographic markets could be able to react more effectively to competitors' actions. For example, in *EDF/EnBW* (2001, *§§ 69–71),* the Commission noted that before the concentration, EDF was less able to resist the entry of German companies into the French market, as it was unable to retaliate in the German electricity market due to its lack of

a representative there. The Commission concluded that the merger of the French company EDF with the German company EnBW would create better abilities for the merged entity to resist the aggressive actions of competitors RWE, E.ON, and HEW in France.

9.3.4. Access to competitively sensitive information

Controlling competitively sensitive information can also eliminate or weaken competitors (Lindsay, 2006, p. 420). A vertical concentration can make the market more transparent. This can facilitate the transfer of information from a unit in a downstream market to a unit in an upstream market, and vice versa (Church, 2006, p. 250). As a result of a vertical concentration, merger undertakings can obtain information about competitors in upstream or downstream markets, which is significant for competing in the market.

In particular, in a vertical concentration, an undertaking in the upstream market may become a seller to an undertaking in the downstream market, which was, until the merger, its competitor. Because of this, it could receive information, allowing it to implement a less aggressive price policy in the downstream market. This may result in harm to the consumer. For example, in *ENI/EDP/GDP* (2004, §§ 368–379), the Commission, recognizing the concentration as incompatible with the common market, took into account the fact that after the concentration, the merged entity could easily obtain confidential information about the costs or sources of raw materials available to existing and potential competitors.

The control of competitively sensitive information can worsen competitors' positions in the market. They may abandon their intention to enter, or be forced out of, the market (Guidelines for non-horizontal mergers, § 78). Using competitively sensitive information, merger undertakings can not only refuse to buy and sell goods or sell them under anti-competitive conditions, but also perform other actions harmful to competition. With competitively sensitive information, the

vertically merged undertaking can more easily coordinate actions with competitors in upstream or downstream markets.

Regarding access to competitively sensitive information, it should also be noted that a vertical concentration can create a "disobedient" undertaking whose presence in the market would benefit competition, as it would hinder the coordination of actions with competitors. This could appear when a concentration creates an asymmetry between undertakings in upstream or downstream markets. Such an undertaking could more easily hide information from its competitors through its territorial units, and, as a result, the transparency of the market would decrease (Church, 2006, p. 252).

In *Boeing/Hughes* (2000, *§ 82),* the Commission singled out six potentially adverse effects of the concentration, which increased merger undertakings' access to business-sensitive information. According to the Commission, such a concentration increases the ability of the merger undertakings to:

- increase the incompatibility of their products with competitors' products;
- develop products that competitors' installation equipment cannot install;
- refuse to allow time to adapt equipment to competitors who install products;
- refuse to provide information to competitors, which is necessary for adapting products;
- use competitively sensitive information to eliminate competitors from upstream or downstream markets;
- design new products compatible only with the products of members of the merger group.

9.3.5. Easier coordination with competitors

In some markets, the structure may be such that competitors would consider it possible and economically rational, and hence preferable, to coordinate their behavior, aiming to sell products at increased prices (Guidelines for non-horizontal

mergers, § 79; Guidelines for horizontal mergers, § 39).

Coordination may take various forms. "In some markets, ... coordination may involve keeping prices above the competitive level. In other markets, coordination may aim at limiting production or the amount of new capacity brought to the market ... dividing the market ... allocating contracts in bidding markets" (Guidelines for horizontal mergers, § 40).

In the event of a non-horizontal concentration, the merged group would gain the ability to coordinate actions with competitors in markets where it is relatively easy to identify the terms of coordination and where such coordination is sustainable (Guidelines for non-horizontal mergers, § 119). In *Airtours v. Commission* (2002, § 62), the CFI provided three conditions that make coordination of action sustainable:

1. *Actions coordinating undertakings must be able to monitor how the other undertakings behave to ensure that they adopt the common policy.* Market participants not only need to be aware of the benefits of coordinated behavior for everyone, but must also able to quickly check whether other market participants are consistent with the coordinated behavior. Therefore, there must be sufficient market transparency.
2. *Adequate deterrents must ensure a long-term incentive to adhere to the common policy.* Market participants must realize that deviations from coordinated behavior will result in retaliatory actions by other market participants to nullify the benefits expected from non-coordinated behavior.
3. *The foreseeable reaction of current and future competitors and consumers should not jeopardize the results expected from the common policy.*

Damage to competition would occur when a non-horizontal concentration changes the nature of competition so that firms that were previously not coordinating their behavior are significantly more likely to coordinate and raise prices or otherwise harm effective competition. Undertakings that have already

coordinated actions before the concentration would find it easier to do so. The coordination of actions would be more stable or more effective (Guidelines for non-horizontal mergers, §§ 19, 79; Guidelines for horizontal mergers, § 22(b)); it may also facilitate the collective use of market power (Church, 2006, p. 242).

A vertical concentration can simplify understanding the conditions for coordinating the actions of undertakings, both in upstream and downstream markets. As mentioned above, vertically merged undertakings can close any vertically related markets, reduce the number of competitors, and increase market transparency (Guidelines for non-horizontal mergers, § 84). The transparency of the market will also increase when the manufacturer: gains control of the distributor, who also distributes the goods of other sellers (competitors); gains control of the buyer with purchasing power, allowing them to encourage the competitor to deviate from coordinated practice (Guidelines for non-horizontal mergers, § 90); or gains control of a disobedient buyer. Actions to remove a disobedient buyer are taken when (Church, 2006, pp. 247–249):

- the upstream market is sufficiently concentrated and has suitable conditions for coordinating actions;
- an economy of scale is important for the seller (a certain amount of goods sold is necessary to maintain profitability);
- there is evidence that the buyer may impede coordination.

Market transparency, increased by vertical integration, can simplify control of compliance with coordinated practices, making identifying deviations easier. A vertically integrated undertaking can respond more efficiently to competitors' attempts to deviate from concerted practice. As a result of a vertical concentration, the pressure of external undertakings may be reduced, as barriers to entry may be increased, or other restrictions could be implemented to prevent newcomers from entering the market (Guidelines for non-horizontal mergers, §§ 86–89).

Conglomerate concentrations may also, under certain circumstances, facilitate the coordination of practices between undertakings that harm competition. The number of effective competitors in the market can be reduced to the point where there is a real possibility of coordination without any collusion. It is not necessary to exclude competitors from the market; it is enough to weaken them so that they do not oppose coordination and stick to the set prices. A conglomerate merger can reduce competition in several markets and strengthen the disciplinary mechanism in order to ensure coordinated practices (Guidelines for non-horizontal mergers, §§ 119–121).

Finally, it could be said that the intention to coordinate actions would appear or would be strengthened if, due to concentration in the market, a situation arose in which the profit that firms could make by competing aggressively in the short term (deviating) was less than the expected reduction in revenues that this behavior would entail in the longer term due to competitors' responses (punishment) (Guidelines for non-horizontal mergers, § 80).

9.3.6. Harm vs. benefits to competition

Concentrations can have both harmful and beneficial effects on the market. The same concentration is often harmful to competition in one aspect and beneficial in another. Accordingly, determining the likelihood of an anticompetitive merger should involve comparing the likelihood and magnitude of these competitive benefits and harms to determine if consumers and competition are injured on balance (Salop, 2018, p. 1981).

Therefore, it is necessary to determine whether efficiency improvements are considered by the Commission when assessing concentrations according to Regulation 139/2004. Some authors argue that it weighs all the anti-competitive and countervailing factors and is decided holistically (Cress, 2012). It is also necessary to answer the question of how significant the benefits arising from improved

efficiency should be so that they can be used to justify a concentration that is harmful in other aspects.

In economic theory, the improvement of the efficiency of the undertaking means the benefits obtained from the improvement of the business activity, which results in the reduction of the prices of goods and production costs, the increase of production capacities or the volume of services, and the improvement of the quality of goods and innovations. Efficiency can arise from optimizing production, the distribution of goods, investments, or management, using economies of scale or scope, increasing purchasing power, innovations, etc. (Ivaldi et al., 2003, p. 63). In some of these situations, the buyer also benefits because the price of goods may decrease, new goods may appear, or the quality of existing ones may improve. In other cases, only the undertaking would benefit. For example, reducing fixed costs due to economies of scale would typically only increase the undertaking's profits.

Both vertical and conglomerate concentrations can provide conditions for improving pricing and planning, increasing operational efficiency, and reducing losses and problems when executing contracts with partners (Bishop et al., 2005, pp. 107, 108–112, 113–118).

As a result of a vertical concentration, operational costs can be reduced, and the supply of goods can be improved because the costs of supplying goods, due to the internal connections of the merger undertakings, are lower than the costs incurred when purchasing goods in the market (Lindsay, 2006, p. 380). The costs of negotiating the purchase of goods with independent undertakings may be reduced (Korah, 2004, p. 353). Vertical mergers may align the incentives of the parties regarding investments in new products, production processes, and product marketing (Guidelines for non-horizontal mergers, § 57). Eliminating the double markup can reduce the price of the final product (Lindsay, 2006, p. 380). Because the goods in vertically related markets are complementary, the merger of

undertakings operating in these markets may increase the undertakings' intentions to reduce the final prices of the goods. Such intentions may arise because the increase in the demand for goods in the downstream market also increases the demand for goods in the upstream market (Guidelines for non-horizontal mergers, § 13). As a result, reducing the price of one product can increase the sales volume of both products (Korah, 2004, p. 353). However, it should also be kept in mind that when an undertaking with market power in the production or sales markets is created through a vertical concentration, competitors may be pushed out of these markets, the entry of new potential competitors could be restricted, and prices for the final consumer may be increased.

A conglomerate concentration can decrease the price of complementary goods and the cost of sales of jointly sold goods and improve the compatibility of goods and their services. The consumer can also benefit from being able to purchase goods from one seller (Guidelines for non-horizontal mergers, §§ 14, 117–118). However, it should be noted that price reductions or product range expansion can be short-term, lasting only until competitors are removed from the market (Völcker, 2003, p. 587).

In response to the question of which efficiency improvements due to a concentration should be considered when assessing the harmfulness of concentrations, it should be emphasized that there are three main approaches among experts in competition law (Hovenkamp, 1994, pp. 446, 450–451).

The first is the "integrated approach" (Lowe, 2002, p. 7), where the same assessment takes into account both the harm and benefits of a concentration. The concentration is evaluated by considering the overall impact on the market. It may be found that the increased efficiency resulting from the concentration has such a positive effect on competition that, in an overall assessment, it will be recognized that the concentration does not significantly restrict competition.

In the second approach, efficiency gains and harm to competition are

determined separately. Once they are identified, they are compared. The concentration is justified when the increase in efficiency outweighs or nullifies the harm.

In the third approach, efficiency improvement is not considered a positive, but an adverse effect of a concentration. Improved efficiency is said to increase the undertaking's competitiveness and only indicate the emergence or increase of the undertaking's market power (Kenny, 2002, p. 168).

Considering the peculiarities of non-horizontal concentrations, it can be concluded that the first approach is the most appropriate when assessing non-horizontal concentrations because it is difficult to separate the benefits created in vertical or conglomerate concentrations from harm. As mentioned earlier, the origin of both the resulting damage and the resulting benefit is often the same. The third approach is the most questionable: in the opinion of the author, it is entirely unsuitable for assessing non-horizontal concentrations.

In assessing non-horizontal concentrations, combining the quantitative and qualitative research methods, the efficiency increased by the concentration should always be evaluated and considered. Quantitative analysis determines the minimum generated efficiency required to outweigh the harm (Röller et al., 2000, pp. 10, 92). Qualitative analysis is applied when quantitative data is not enough. This approach examines whether the efficiency is sufficient to prevent the concentration from significantly restricting effective competition (Lindsay, 2006, p. 529).

Understandably, it is difficult to determine the outcome of the concentration in a prospective evaluation. At the time of assessment, efficiency has not yet increased. Therefore, it would be appropriate to implement an ex-post concentration assessment to correct possible errors in authorizing concentrations. However, some may claim that an ex-post evaluation is not possible in some cases because only undertakings manage and present information publicly (Ivaldi et al., 2003, p. 63). As a result, evaluators usually do not have accurate information. Inaccurate information provided by undertakings could reduce the reliability of the

assessment. However, the same problems arise when evaluating concentrations that are already in place. The reliability of the data during the preliminary evaluation of concentrations is even lower because the impact of the concentration is not known at that time. Outcomes are only predicted using various methods.

The objectives of concentration control and assessment rules determine whose benefit is suitable to justify the damage caused. As mentioned in the first part of this paper, the general benefit or only consumers' benefit can be considered. According to experts who claim that only the benefits received by the consumer should be considered, if the general benefit were to be evaluated, then the losses suffered by the consumer could be justified by any slight reduction in operating costs (Lowe, 2002, p. 10). Such an opinion cannot be accepted because such a view is too narrow. In markets where technical and economic progress is essential and it is important to ensure resources for research and product development and know-how, a strong focus on the final product and the consumer's interests may negatively impact the competition. Thus, the benefits provided to the consumer and the benefits related to improving competition should be considered.

The "significant impediment of effective competition" rule of Regulation 139/2004 mainly focuses on effect, not dominance, so when evaluating concentrations, the increase in efficiency that neutralizes the adverse effects of a concentration can be considered; §§ 77 and 115 of the Guidelines for non-horizontal mergers confirm this conclusion. They state that "the effect on competition needs to be assessed in light of the efficiencies substantiated by the merging parties."

Article 2 of Regulation 139/2004 provides three possibilities to consider the improvement of efficiency when evaluating concentrations:

- applying the "significant impediment of effective competition" rule (Regulation 139/2004, Article 2(3));
- considering "the need to maintain and develop effective competition within the common market" (Regulation 139/2004, Article 2(1)(a));
- considering "the development of technical and economic progress provided

that it is to consumers' advantage and does not form an obstacle to competition" (Regulation 139/2004, Article 2(1)(b)).

In addition, the preamble of Regulation 139/2004, which provides the goals and principles of the Regulation, also guides this issue: § 4 states that concentrations in the EU "are to be welcomed to the extent that they are in line with the requirements of dynamic competition and capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the Community"; § 29 acknowledges that it is appropriate to consider "any substantiated and likely efficiencies put forward by the undertakings concerned" and indicates that it is possible that "the efficiencies brought about by the concentration counteract the effects on competition and in particular the potential harm to consumers."

Moreover, § 52 of the Guidelines for non-horizontal mergers indicates that "the effect on competition needs to be assessed in light of efficiencies substantiated by the merging parties." The Guidelines show that the Commission "may decide that, as a consequence of the efficiencies that the merger brings about, there are no grounds for declaring the merger incompatible with the common market." When merger undertakings provide "sufficient evidence that the efficiencies generated by the merger are likely to enhance the ability and incentive of the merged entity to act pro-competitively for the benefit of consumers, thereby counteracting the adverse effects on competition," the Commission may authorize the concentration.

The analysis shows that the justification of efficiency improvement is clearly provided in the legal regulation mechanism surrounding EU concentrations. However, it should be noted that not all efficiency is valuable: § 53 of the Guidelines for non-horizontal mergers indicates that an increase in efficiency is recognized as valuable only if it satisfies three cumulative conditions. It must benefit consumers, be merger-specific, and be verifiable.

Benefits to consumers and competition

Some experts argue that the Commission takes the view that the purpose of competition regulation is to ensure only the welfare of consumers (Luescher, 2004, pp. 77–79, 82–83, 86) and not general welfare, so efficiency gains that benefit market participants but not consumers cannot be considered (Korah, 2004, p. 352). Such a position seems to correspond with the Commission's opinion. Following § 21 of the Guidelines for non-horizontal mergers, in its assessment the Commission considers "the possible pro-competitive effects stemming from substantiated efficiencies benefiting consumers." Additionally, § 79 of the Guidelines for horizontal mergers specifies that efficiencies "should, in principle, benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur."

However, the author believes that paying so much attention to the consumer is not appropriate. If the focus were exclusively on the consumer, the benefits to the manufacturer and other competitors would be completely insignificant. It can hardly be expected that the merged undertakings would transfer all the benefits obtained from enhancing efficiency to the consumer. If this were the case, undertakings would have no incentive to merge. Therefore, the requirement to consider only consumer benefits would make evaluating efficiency improvement meaningless.

The text of Regulation 139/2004, which focuses on both the consumer and the competition, supports such an approach. The Preamble (§ 4) specifies that in the EU those concentrations which are "in line with the requirements of dynamic competition and capable of increasing the competitiveness of European industry" are welcomed. Moreover, § 29 of the Preamble indicates that "i] is possible that the efficiencies brought about by the concentration counteract the effects on competition." Article 2(1)(a) of the Regulation provides for the need to maintain and develop "effective competition," while Article 2(1)(b) of the Regulation states

that the development of technical and economic progress must not only be to consumers' advantage, but must also "not form an obstacle to competition." Article 2(3) of the Regulation indicates that concentration assessment is based on the establishment of whether concentration would "significantly impede effective competition."

This leads to the conclusion that when evaluating the efficiency gained from a concentration, not only the benefit to the consumer, but also the benefit to the competition should be taken into account.

Merger-specific benefits

Although there was a debate at the time of the adoption of Regulation 139/2004 as to whether the benefits obtained from improving efficiency must necessarily be merger-specific (Monti, 2022c, p.6), it was decided that only those benefits that are gained directly from the concentration and cannot be achieved to a similar extent by other, less competition-restrictive means can be taken into account (Guidelines for non-horizontal mergers, § 85). Such a requirement is justified because it establishes the application of the principle of proportionality, which is widely used in EU law. Following the principle of proportionality, a concentration should not be allowed if efficiency can be increased by other means that are less restrictive on competition.

The time during which the efficiency must appear is also important for the assessment. The shorter the time, the more likely the Commission will consider the resulting efficiencies when assessing concentrations (Guidelines for non-horizontal mergers, § 21). Because of this, it is easier to demonstrate the efficiency gains resulting from reduced production costs. Manufacturing process costs can be reduced by pooling assets, facilities, or technology. The benefits of this pooling appear immediately after the concentration is completed. The dynamic improvement in efficiency resulting from changes in the management of the merged undertaking is more difficult to demonstrate because the results appear later.

Verifiable benefits

It is difficult to objectively assess the benefits of improving operational efficiency, as only the participants in the concentration have all the information about the potential increase in efficiency. The assessment of concentrations is prospective, so the concentration results are not yet known exactly at the time of judgement. In addition, a significant number of concentrations remain unimplemented (Lindsay, 2006, p. 528). Such issues make it difficult to ensure verifiability.

According to § 86 of the Guidelines for horizontal mergers, verifiable efficiency means that:

- the Commission should be reasonably sure that the efficiencies are likely to materialize; and
- the efficiency should be substantial enough to counteract a merger's potential consumer harm.

The Guidelines clearly show that increasing efficiency should benefit not just a single consumer, but many of them.

EU law regulating the formation of concentrations does not clearly state how much benefit must be received due to improved efficiency to be considered "verifiable," which allows for the claim that the harmful impact of the concentration has been eliminated. Neither Regulation 139/2004 nor the Commission's guidelines clearly indicate what this benefit should be. In this vein, § 52 of the Guidelines for non-horizontal mergers states that "on the basis of sufficient evidence," it can be concluded that due to a vertical concentration, "the efficiencies generated by the merger are likely to enhance the ability and incentive of the merged entity to act pro-competitively for the benefit of consumers, thereby counteracting the adverse effects on competition." Additionally, § 76 of the Guidelines for horizontal mergers specifies that "it is possible that efficiencies brought about by a merger counteract the effects on competition and in particular the potential harm to

consumers that it might otherwise have." This can include situations where improved efficiencies "are likely to enhance the ability and incentive of the merged entity to act pro-competitively" (Guidelines for non-horizontal mergers, § 77). However, nowhere is it explained when this amount of efficiency will be sufficient to eliminate the negative effects of the concentration. This shows that the Commission has wide discretion when assessing the impacts of concentrations. As a result, merger undertakings can never be sure whether a concentration will be permitted if they intend to justify their actions by potential efficiency gains.

The Commission states that assessing efficiencies has been included in concentration analysis (European Commission, 2014, § 23). For example, in *UPS/TNT Express* (2013), the Commission acknowledged some of the cost savings claimed by the merging companies, specifically in the European air network and related to ground handling. It could measure these efficiencies and predict the expected price increase. By taking these efficiencies into account, the Commission was able to determine that the merger would not have detrimental effects on competition in certain countries. Nevertheless, the acknowledged efficiencies were not enough to counteract the expected negative impacts in all countries.

Efficiency evaluation can be performed in two stages: in the first stage, the harm and benefits caused by the concentration are determined; in the second stage, comparisons are made. However, this can be done when harm can be separated from benefit and harm and benefit can be directly compared. In non-horizontal concentrations, especially vertical ones, it is not always possible to distinguish the effects harmful to competition from the beneficial impacts on competition and the consumer because the reason for both positive and negative effects of the concentration is the same. Efficiency improvement in non-horizontal concentrations is often manifested in marginal cost savings so that such benefits can be easily identified and separated from harm. Other types of significant efficiency improvements result from the combination of means of production and/

or distribution rather than from direct cost reduction.

In non-horizontal mergers, harm to competition often results from merger-specific efficiency improvement (Bishop et al., 2005, p.106). In particular, the ability to apply the bundling of products resulting from a non-horizontal concentration can be assessed positively or negatively, because the undertaking's ability to bundle goods can increase or decrease market competition. Merging weaker undertakings in the market and giving them the ability to engage in the bundling of goods can strengthen their position in the market, and their activities can enhance competition in the market. However, if other weaker undertakings in the market cannot or would not be able to bundle their goods, they could be weakened and pushed out of the market. This would weaken competition in the market. This allows us to state that in non-horizontal concentrations, the evaluation of most types of efficiency should be included in the concentration's overall integrated impact assessment. The final decision should determine whether the concentration, considering both its positive and negative effects, will benefit competition and the consumer and, therefore, should be permitted; or will be harmful to competition, and therefore should be prohibited.

9.3.7. The market and power therein

In the event of a non-horizontal concentration, whether the merger undertaking will have the ability and incentive to significantly restrict effective competition in the market by closing vertically related markets, leveraging market power from one market to another, controlling business-relevant information, or coordinating actions with competitors depends on the size and structure of the specific market and the merged group's market power.

Defining the market

A market refers to certain boundaries within which the effects of a

concentration on competition are examined. Following § 6 of the Commission Notice on the definition of the relevant market for the purposes of Union competition law (Communication from the Commission, 2024), by defining the market, the Commission aims to identify and define the boundaries of competition between undertakings. Market identification enables the gathering of information about the market share and acquired market power of the merger undertakings and the assessment of the competition in the market. The Commission states in § 8 of the Notice that it defines a market when "there is a need to assess the relative competitive strength of undertakings as part of the competitive assessment and, most notably, to assess whether an undertaking holds market power."

The decisions of EU courts have repeatedly noted that the assessment of a concentration must begin with defining the relevant market (CFI case *Air France v. Commission*, 1994, *§ 80)*. The ECJ in *French Republic and SCPA and EMC v. Commission* (1998, § 143), and the CFI in *Airtours v. Commission* (2002, *§ 19)*, noted that "a proper definition of the relevant market is a necessary precondition for any assessment of the effect of a concentration on competition."

Following section 6 of Annex I of Regulation 2023/914, both relevant markets where the parties to the concentration are actual or potential competitors and neighboring markets are considered for the assessment. The CO form specifies that when the concentration involves potential competitors, the parties to the concentration must provide data on markets where they have a market share larger than 25%. For other concentrations involving undertakings acting in a neighboring market closely related to a product market, the parties to the concentration must notify the European Commission when the individual or combined market shares of the parties in any one of these markets makes up 30% or more.

Following the ECJ's reasoning in *United Brands Company and United Brands Continental BV v. Commission* (1978, § 10), the relevant market within which the Commission appraises competition dynamics comprises a product and a

geographic dimension.

According to § 25(b) of Annex I of Regulation 2023/914, a relevant product market comprises all those products or services, or both, that the consumer regards as interchangeable or substitutable because of their characteristics, prices, and intended use. Moreover, § 12(a) of the Commission Notice (Communication from the Commission, 2024) specifies that product market identification should take into consideration the conditions of competition and the structure of supply and demand on the market.

When determining the product's market, the products that compete with the products of the parties to the concentration during the evaluation are identified. As a result, the product market must be narrow enough to exclude non-substitutes and broad enough to include all of the product's substitutes (Whish, 2001, p. 6; Areeda et al., 1998, § 929). When the market for a product is determined to be too narrow, a concentration that does not cause harmful effects on competition could be prohibited because the parties to the concentration would be considered to have an unreasonably large market share and high power in the market. For example, the Commission has been criticized for defining the market too narrowly in *Aerospatiale-Alenial/de Havilland* (1991). However, it should also be noted that when the product market is too broad, a concentration with harmful effects on competition may be allowed.

A geographic market is a geographic area where producers or sellers of substitute goods affect each other's economic activities. According to Epstein and Rubinfeld, the definition of a geographic market is essentially no different from that of a product market, as the product's geographic location is only one of many characteristics that make up the product. Therefore, goods with the same physical characteristics can be considered different products when they are located in different geographical areas (Epstein & Rubinfeld, 2004, part III).

In *French Republic and SCPA and EMC v. Commission* (1998, §143), the ECJ

indicated that "the relevant geographical market is a defined geographical area in which the product concerned is marketed and where the conditions of competition are sufficiently homogeneous for all economic operators so that the effect on competition of the concentration notified can be evaluated rationally." Similarly, in *Nederlandse Vakbond Varkenshouders* (2009), the CFI said that:

> the relevant geographic market comprises the area in which the undertakings concerned are involved in the supply of the products or services in question; in which the conditions of competition are sufficiently homogeneous; and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas. (§ 52)

In addition, in the same case the same court noted that a number of factors – such as the nature and characteristics of the products or services concerned; the existence of entry barriers; consumer preferences; the existence in the area concerned, as compared with neighboring areas, of appreciable differences in the market share of undertakings; or price differences – must be considered when defining the geographic market.

It should also be said that, considering the fact that concentration assessment is a forward-looking assessment, the market assessment should include an analysis not only of the existing situation in the market, but "also sufficiently foreseeable changes in such constraints" (Communication from the Commission, 2024, § 8). In the Commission Notice, the Commission indicated that it may "take into account expected transitions in the structure of a market when the case calls for a forward-looking assessment" (Communication from the Commission, 2024, § 21).

The analysis of defining the product and geographic markets shows the importance of market definition accuracy when considering the economic security issues of the EU and its Member States. A too-broad or too-narrow definition of

the market for concentrations involving non-EU undertakings that impact the EU market from one side could strengthen its power in the EU market, thereby creating an unjustified burden on EU undertakings. On the other hand, it could lead to the unjustified prohibition of such undertakings, thereby diminishing effective competition in the market. Similarly, an improper definition of the market for concentrations involving undertakings acting in the EU could lead to unjustified prohibition, thereby reducing such undertakings' ability to compete effectively against global giants.

Identifying power in the market

Power means the ability to control people or things (Hornby & Ashby, 2000, p. 988). Accordingly, market power refers to the ability to influence the functioning of the market. When evaluating the potential impact of non-horizontal concentrations on effective competition, it is necessary to determine the undertaking's ability and intention to harm the market through its behavior, as discussed above in this paper.

As mentioned earlier, in the case of vertical concentrations, the undertaking must be able to close the upstream or downstream market to have a harmful impact on competition. As a result, it is important to determine the extent to which market power is relevant to this ability.

Under economic theory, when merged undertakings do not have significant market power in the upstream market, they would be considered unable to close the market because buyers would likely start buying goods from other sellers. Therefore, it can be argued that significant market power in the upstream market is necessary to reasonably foresee the foreclosure of the upstream market and the restriction of competition in the downstream market. The same reasoning is applicable to the foreclosure of the upstream market.

Commission practice shows how significant the market power should be and

whether this power is even needed in the assessment of vertical concentrations. However, the practice of the Commission's decisions on this matter is not consistent.

In *AOL/Time Warner* (2000, § 25), the Commission, having regard to the undertaking's dominant position in the upstream market, recognized that it would be able to dictate the terms of sales in the downstream market by refusing to issue permits or threatening to withdraw the rights granted. In *Hilton/Accor/Forte/Travel Services JV* (2001, § 31), the Commission also noted that there was a risk of restriction of competition in the downstream market if the parent company was found to have sufficient market power in the upstream market. However, in *Vivendi/Canal+/Seagram* (2000, §§ 43–50), the Commission argued that it is sufficient to restrict competition in a downstream market if one of the seven permitting entities not in a dominant position refused to grant permits to downstream competitors. According to the Commission, this would strengthen the dominant position of the concentration partner in the downstream market. Such arguments are not clear and valid, as it remains unclear why competitors would not be able to obtain permits from the other six issuing entities.

Considering the practice of the Commission's decisions, it can also be stated that it is not always necessary for the merged group to acquire significant market power in the downstream market in order to be able to close the downstream market and limit competition in the upstream market. For example, in *Alcan/Pechiney (II)* (2003, *§§ 40–44),* the Commission found that the concentration would not result in the acquisition of a dominant position in the downstream market, but still concluded that competition in the upstream market could be restricted because the harmful effect could increase competitors' costs. In another decision, *BP/E.ON* (2001, *§ 89),* the Commission stated that the issue of whether the merging parties would acquire a dominant position in the downstream market was not relevant, and examined whether the concentration would create or strengthen the

undertaking's dominant position in the upstream market.

In assessing conglomerate concentrations, it can be said that harmful effects may occur when the power available in one market is leveraged in another. Therefore, it is clear that the merged undertakings should have power in the primary market. However, it is not clear whether it is necessary to investigate whether the concentration may result in the acquisition of power in the market in which power is leveraged. For example, in *Tetra Laval v. Commission* (2002, *§§ 148, 153, 154, 251, 254, 281, 291),* the CFI focused on examining whether the merged group could leverage its power from the original market to another market to such an extent that it allowed the creation or strengthening of the dominant position in that market. It is doubtful whether the exclusive attention of the court to the market to which market power was leveraged from another market is justified. Competition can be restricted without creating or strengthening the undertaking's dominant position. Such a decision could perhaps be explained by the fact that the assessment was made on the basis of the dominance rule, according to which the Commission had to determine whether a concentration in any of the markets would create or strengthen a dominant position.

Power is no less important in the occurrence of other harmful impacts. The increase in the power of the merged group can be recognized as a detrimental effect of the concentration in itself. For example, undertakings that have acquired a collective dominant position can more easily coordinate actions or control business-relevant information.

The identification and assessment of the power possessed by an undertaking or acquired through a concentration is different from the identification and assessment of power in the investigation of abuse of a dominant position by an undertaking. In the assessment of the concentration, determining the power means making a prediction not only about the concentration partners, but also about the behavior of their competitors, buyers, or consumers after the concentration.

In practice, competitors may start producing a different product, or buyers may choose a different seller. When studying the situation, possible market development trends must be considered. The CFI noted in *Airtours v. Commission* (2002), that:

> the prospective analysis of the market ... must not only view that position statically at a fixed point in time – the point when the transaction takes place and the structure of competition is altered – but must also assess it dynamically, with regard in particular to its internal equilibrium, stability, and the question as to whether any parallel anti-competitive conduct to which it might give rise is sustainable over time. (§ 192)

An undertaking's market power depends on many factors, each of which alone does not necessarily determine the decision (ECJ case *United Brands Company and United Brands Continental BV v. Commission*, 1978, § 66). Following Article 2 of Regulation 139/2004, along with EU courts and Commission practice, the merged group's market power depends on the group's market share, competitors' market share, exclusive advantages of the merger group, market characteristics, potential competition, the merger group's buying power, and the countervailing power of the buyer.

Merged group's market share

The main and clearest forms of merger undertaking power are individual and collective dominance. Thus, § 26 of the Preamble of Regulation 139/2004 acknowledges that "a significant impediment to effective competition generally results from the creation or strengthening of a dominant position," while § 4 confirms that "most cases of incompatibility of a concentration with the common market will continue to be based upon a finding of dominance." According to the practice of the Commission, an undertaking's sole dominance is generally recognized when the undertaking has 70% or more of the market. When an

undertaking has a smaller market share, other factors are considered.

Competitors' market share

Merger undertakings' market power depends not only on their market share, but also on the market shares of their competitors (ECJ case *Hoffmann La-Roche & Co. AG v. Commission*, 1979, § 48). When a merged undertaking acquires 51% of the market, its market position would be different if there was one competitor with 49% of the market than if there were three competitors with 18%, 16%, and 15% of the market. The situation would be even more different if there were 49 competitors occupying 1% of the market each. If the merged entity were to occupy 51% of the market and the competitor 49%, an oligopoly would be formed in the market, and a collective dominant position would likely be established.

Exclusive advantages of the merger group

Merger undertakings' market power is strengthened by the other unique advantages they have acquired. In the practice of EU courts and the Commission, the following were recognized as exceptional advantages: the existing and future production and commercial capacities of the merged group (EC case *Rexam (PLH)/American National Can*, 2000); the degree of their utilization (ECJ case *Hoffmann La-Roche & Co. AG v. Commission*, 1979); the possession of goods with a well-known brand and the significance of the brand for the consumer (ECJ case *NV Nederlandsche Banden Industrie Michelin v. Commission*, 1983); the degree of research development (EC case *Hilti Eurofix-Bauco/Hilti*, 1987; CFI case *Hilti AG v. Commission*, 1991; ECJ case *Hilti AG v. Komisija*, 1994); the number and volume of special, exclusive products under possession (ECJ case *Michelin v. Commission*, 1983); the use of new technologies protected by patents, financial possibilities, economies of scale, and the advantages of transportation or sales of goods (ECJ case *United Brands Company and United Brands Continental BV v. Commission*, 1978); access to sources of raw materials (EC cases *Gencor/Lonrho*, 1996; *BP Amoco/Arco*, 1999); the possession of the main source (EC case *World*

Com/MCI, 1998); the possession of long-term supply contracts (EC case *Soda-ash – Solvay*, 1990); the undertaking's economic strength (ECJ case *United Brands Company and United Brands Continental BV v. Commission*, 1978); technological advantages (ECJ case *Hoffmann La-Roche & Co. AG v. Commission*, 1979); the possession of distribution (ECJ case *NV Nederlandsche Banden Industrie Michelin v. Commission*, 1983) and effective customer service networks (EC case *Soda-ash – Solvay*, 1990), etc.

Market characteristics

Each market is unique, and market characteristics are considered when determining the merger undertaking's impact on competition. In its assessment, the Commission considers "if the market is highly dynamic in character and if the market structure is unstable due to innovation or growth" (Guidelines for horizontal mergers, § 15). The level of market maturity (EC case *Hilti Eurofix-Bauco/Hilti*, 1987; CFI case *Hilti AG v. Commission*, 1991; ECJ case *Hilti AG v. Komisija*, 1994), supply and demand trends (Regulation 139/2004, Article 2(1)(b)), technological progress, and high start-up business costs, the degree of fulfilling the geographic and product markets, the harmonization of technical standards, the impact of the implementation of public procurement directives (Goyder, 2003, p. 363), and other factors are important for the assessment.

The Commission pays attention not only to the circumstances at the time of the concentration, but also to the changes in these circumstances, which can be predicted based on assumed market development trends. In particular, if the market is expanding, the entry of new entrants into the market is very likely. As a result, the large market share held by the parties to the concentration may not reflect their market power. For example, in *Gerling/NCM* (2001, §§ 44–45), the Commission concluded that the merged group, with a market share of 60%–70%, did not have significant market power, as the market growth in the last 5 years had been 60%–65%, which encouraged the entry of new competitors into the

market, and the latter had gained significant market shares in a short period of time. On the other hand, if the market is stable or shrinking, the entry of a new competitor into the market is less likely because it would have to take business from the existing seller.

Potential competition

The merged group would not acquire significant market power if the competitors provided or could immediately provide the buyers of the merged group with the option to purchase goods elsewhere, and these actions would have a significant restrictive effect on the behavior of the merged group. For example, in *Aérospatiale/MBB* (1991, § 19), even though the parties to the concentration had 50% of the market, the Commission allowed the concentration because potential competitors from the United States strongly influenced the market for the sale of civil helicopters.

Potential competition exists when new competitors are likely to enter the market from another product or geographic market or when existing competitors have the capacity to increase production or sales volumes.

Entry of new competitors from another product or geographic market

Irrespective of whether the merged undertaking would gain a significant market share, the Commission would permit a concentration where any action by that undertaking to increase the price, quality, or choice of products would be constrained by a new competitor entering the market. In *Aérospatiale-Alenia/de Havilland* (1991, § 53), the Commission noted that "a concentration which leads to the creation of a dominant position may, however, be compatible with the common market ... if there exists strong evidence that this position is only temporary and would be quickly eroded because of the high probability of strong market entry." In this case, the Commission found that the probability of new competitors entering the market was low because the airplane market is mature, entering the

market requires high initial costs, marketing research to determine which plane is required to meet the anticipated needs of the market takes 2–3 years, and the manufacturing of an airplane takes 4 years (§§ 54–55).

Moreover, § 68 of the Guidelines for horizontal mergers indicates that for "entry to be considered a sufficient competitive constraint on the merging parties, it must be shown to be likely, timely and sufficient to deter or defeat any potential anti-competitive effects of the merger."

Increasing production and sales volumes of existing competitors

Existing competitors that can increase sales or production volumes can also constrain the merged group's unilateral actions. The merged group would not be able to raise prices profitably when there is a threat that, due to such an action, buyers will choose competitors' products. The ability of competitors to limit the actions of the merged group depends on the viability of competitors' supply (Lindsay, 2006, p. 451), which depends on whether the increase in production and sales volumes is likely, timely, and sufficient. For example, in *Sonoco/Ahlstrom* (2004, *§§ 96–97)*, the Commission unanimously acknowledged that the merged group's continuous market decline would increase competition for orders. It found that four competitors could increase their production level by at least 30% without incurring significant expenses and within a short time frame. Therefore, any customer within could immediately turn to competitors of the merged group, and these suppliers were able to serve them on a competitive basis and for any conceivable quantity. Considering this, the Commission concluded that "the concentration does not risk creating or strengthening a dominant position as a result of which effective competition would be significantly impeded in the common market."

The likelihood that competitors will expand their production and sales volumes depends on whether competitors are able and willing to do so. It is likely

that competitors would be willing to expand their production or sales volume when it is profitable to do this (Lindsay, 2006, p. 452).

The ability to expand production or sales volume depends on the available raw materials, equipment, etc. For example, in *Ciba-Geigy/Sandoz*, *§ 61,* the Commission concluded that other companies could easily increase their production volumes, considering that the patent for genetic medicines was expiring. Following *Bertelsmann/Springer/JV* (2005, § 106), competitors' abilities to expand production volumes depend on whether competitors have sufficient spare capacity to replace these sales to a significant extent, whether competitors could make available such capacity by shifting their capacity to the merged group's action field, whether planned capacity extensions will make available further capacity, and whether potential competitors could contribute to making available further capacity in the event of a price increase.

Financial resources may constrain competitors' abilities for the expansion of production or sales volumes (EC case *General Electric/Honeywell*, 2001, §§ 302–304) due to contractual obligations (for example, a loan agreement), weak management (Porter, 1998, pp. 64–65), and other factors.

Competitors' intentions and abilities to increase production or sales volume also depend on buyers' reactions. If buyers cannot or do not intend to buy larger quantities of competitors' goods, then competitors would not intend to and could not increase production or sales volumes.

Merger group's buying power

Buying power is significant when a company or a group of companies, due to its dominant position in the market for goods or services or because of other advantages, can negotiate significantly more favorable conditions for the purchase of goods with the seller than those available to other buyers (OECD, 2006, p. 8, 35–37) or those that are usually agreed upon under normal competitive conditions (Dobson et al., 1998).

Investigations and reports by competition authorities have revealed at least two situations in which buying power detrimentally affects competition (Varona et al., 2005, pp. 291–292). First, buying power could have an anti-competitive effect if, in the course of a concentration, it were combined with market power in a vertically downstream market. Second, a buyer with buying power can force competitors to raise prices to a level that benefits them and distort competition in a vertically downstream market. Specifically, a buyer with sufficient buying power may prevent competing buyers from purchasing the seller's goods at lower prices because they buy all the goods, and it is more convenient for the seller to sell all the goods to one buyer. Such a buyer can also negotiate the price so that only the variable costs of the seller's goods are covered. In order to cover fixed costs, the seller would have to sell the goods to other buyers at significantly higher prices.

Undertaking to acquire purchasing power, the seller must not be able to sell goods in other markets, and there must be high barriers to entry into the market.

The European Commission analyzed buying power issues in various decisions, including a controversial case that raised discussions about protecting the European market. In *Boeing/McDonnell Douglas* (1997, §§ 105–108), the Commission concluded that the merger of McDonnell Douglas' buying power with Boeing's strong position in the commercial aircraft market would increase suppliers' dependence on Boeing and weaken the competitive position of its main competitor, Airbus.

Countervailing power of buyer

The seller's competitive behavior is influenced not only by the actions of competitors, but also by buyers (consumers). The buyer's countervailing power exists when the buyer can quickly take retaliatory actions in response to the merged group's intentions to restrict effective competition. In § 64 of the Guidelines for horizontal mergers, it is specified that "countervailing buyer power … should be understood as the bargaining strength that the buyer has vis-à-vis the seller in

commercial negotiations due to its size, its commercial significance to the seller and its ability to switch to alternative suppliers." The effect of countervailing buyer power on the actions of the merged undertaking depends on the strength of the buyers in the related markets (Goyder, 2003, p. 362). The Commission considers this while analyzing buyers' countervailing power in the market. For example, in *Coca-Cola Company/Carlsberg A/S* (1997, *§ 81), the Commission considered* "whether there is sufficient countervailing buyer power to neutralise the market power of the parties."

If product purchases by one or more buyers make up a large part of the demand for products, the merged entity will likely not be able to act independently of buyers.

The countervailing power of the buyer is considered effective enough to be taken into account in the assessment of the concentration when (Lindsay, 2006, pp. 469–475):

- buyers can choose goods in the market and have bargaining power;
- buyers would buy goods from other sellers if the merged undertaking were to take competition-restricting actions;
- all buyers are protected by countervailing buying power, not only those who have buying power.

The effectiveness of the buyer's countervailing power also depends on the buyer's willingness to buy other sellers' goods if the merged group raises prices. For example, in *Enso/Stora* (1998, § 91), the Commission found that Tetra Pak, as a buyer of merged group products, has an incentive to seek to exercise its countervailing buyer power. This finding was based on the fact that Tetra Pak "would have the option of developing new capacity with other existing or new suppliers should the merged group attempt to exercise market power." Additionally, the Commission indicated that through close cooperation with the producers of the liquid packaging board, Tetra Pak "has an intimate knowledge of the

cost structure of the parties." Furthermore, the liquid packaging board represents more than 50 % of the cost of the blank supplied by Tetra Pak to its customers. Finally, the Commission noted that plastic, which is uses as packaging material, may also, "to a certain extent, be a substitute for liquid packaging boards in the long term in the downstream market for the packaging of liquids."

Economic theory shows that the higher the cost of the product, the greater the probability that the buyer will start buying another seller's goods if the original seller raises their prices (Lindsay, 2006, p. 473).

It should be noted that the buyer's compensatory power is insufficient if not all buyers are protected because the merged group could set different sales conditions for different buyers. According to the Commission, "countervailing buyer power cannot be found to sufficiently off-set potential adverse effects of a merger if it only ensures that a particular segment of customers … is shielded from significantly higher prices or deteriorated conditions after the merger" (Guidelines for horizontal mergers, § 67).

9.4. Chains of cause and effect

9.4.1. Causality issues

A concentration is prohibited if it significantly restricts effective competition. The transaction must cause harmful results in order to be prohibited, and there must be causal links between mergers and potential competition harms (Wang & Rudanko, 2012, p. 557). Therefore, concentration assessments require the determination of the causal link between the concentration and its effect on competition. Case *IAG/BMI* (2012, § 111), shows that when "assessing the competitive effects of a concentration, the Commission compares the competitive conditions that would result from the [t]ransaction with the conditions that would have prevailed absent the [t]ransaction."

Each market has its own characteristics, so determining causation is sometimes tricky. Non-horizontal concentrations, in contrast to horizontal, do not directly restrict competition in the market because direct competitors do not participate in them. For this reason, it is difficult to determine what effect the concentration will have on the price, quality, or supply of goods.

Establishing a causality of power leverage from one market to another and the effect in the second market is even more complicated. In *GE/Amersham* (2004, § 31), the Commission noted that it analyzes "whether or not the merged entity may acquire, as a direct and immediate result of the merger, the ability and economic incentive to foreclosure competition, by leveraging its pre-merger market power from one market to another." However, it should be noted that sometimes the effect of using power in another market is felt "only after a certain time" (*Tetra Laval v. Commission*, 2002, § 154). This makes it different from an impact that directly and immediately changes market conditions.

Merger control entails a prospective analysis of future market events requiring a prognostic exercise of great accuracy, which must be based on sufficiently reliable predictions (Todino et al., 2019, p. 26). The ECJ noted in *Commission v. Tetra Laval* (2005, § 44), that the impact of conglomerate concentrations is assessed "a lengthy period of time in the future," and in determining the consequences, "the chains of cause and effect are dimly discernible, uncertain and difficult to establish." When evaluating, it is necessary to predict how the merged undertaking will act, how buyers and competitors will react to its behavior, and what influence other circumstances will have. Nor can it be said with certainty whether the merged undertaking will actually exercise power, resulting in long-term competitive damage. Thus, the Commission's analysis "calls for a particularly close examination of the circumstances relevant for assessing that effect on the conditions of competition in the reference market" (*Tetra Laval v. Commission*, 2002, § 155).

Perhaps because of this, the CFI emphasized in *Tetra Laval v. Commission*

(2002, *§ 155)*, that "the proof of anti-competitive conglomerate effects of such a merger calls for a precise examination, supported by convincing evidence, of the circumstances which allegedly produce those effects." Following the opinion of the CFI in *Airtours v. Commission* (2002), "convincing evidence" means "the evidence must concern … factors playing a significant role in the assessment." In *French Republic and SCPA and EMC v. Commission* (1998, § 222), the ECJ explained that this means "close examination in particular of the circumstances which, in each case, are relevant for assessing the effects of the concentration on competition in the reference market." The CFI, in *General Electric Company v. Commission* (2005, §66), emphasized the importance of the quality of the evidence to be produced by the Commission "to form a sound basis for a decision declaring a concentration incompatible with the common market." The court explained that "evidence must support the Commission's conclusion that, if such [Commission's] decision were not adopted, the economic changes envisaged by it would be plausible."

Following Articles 2(2) and (3) of Regulation 139/2004, a concentration can only be prohibited when it "significantly" impedes competition. This allows us to assume that only a significant impact on the functioning of the market and effective competition can be considered a cause of harmful effects. The Commission's practice confirms this assumption. For example, in *Tetra Laval/SIG* (2005, *§ 76),* the Commission noted that "the transaction brings only marginal changes to the incentives for Tetra," so this cannot be the reason for possible consequences in the future.

Following the analysis presented in the other parts of this paper, the European Commission must prove whether a merged undertaking will have the ability and initiative to engage in activities detrimentally affecting market competition. Such an analysis requires imagining various chains of cause and effect to ascertain which are the most likely (*Commission v. Tetra Laval*, 2005, *§ 43*). This, in

practice, means determining the most profitable line of business.

A concentration is not prohibited if the market changes are the same as they would be without the concentration. Following the Commission's reasoning in *Kali & Salz/MdK/Treuhand* (1993, *§ 71)*, it could be said that a concentration will not be considered the reason for the creation or strengthening of the merger undertakings' power in the market or otherwise increasing their ability to impede competition in the market when, even in the event of the concentration being prohibited, the acquirer would inevitably achieve or reinforce its position in the market. Therefore, when assessing the results of the concentration, the Commission compares the conditions of competition that would arise in the event of a merger and the conditions that would exist without the merger. The assessment considers the consequences of the market expanding in all possible directions.

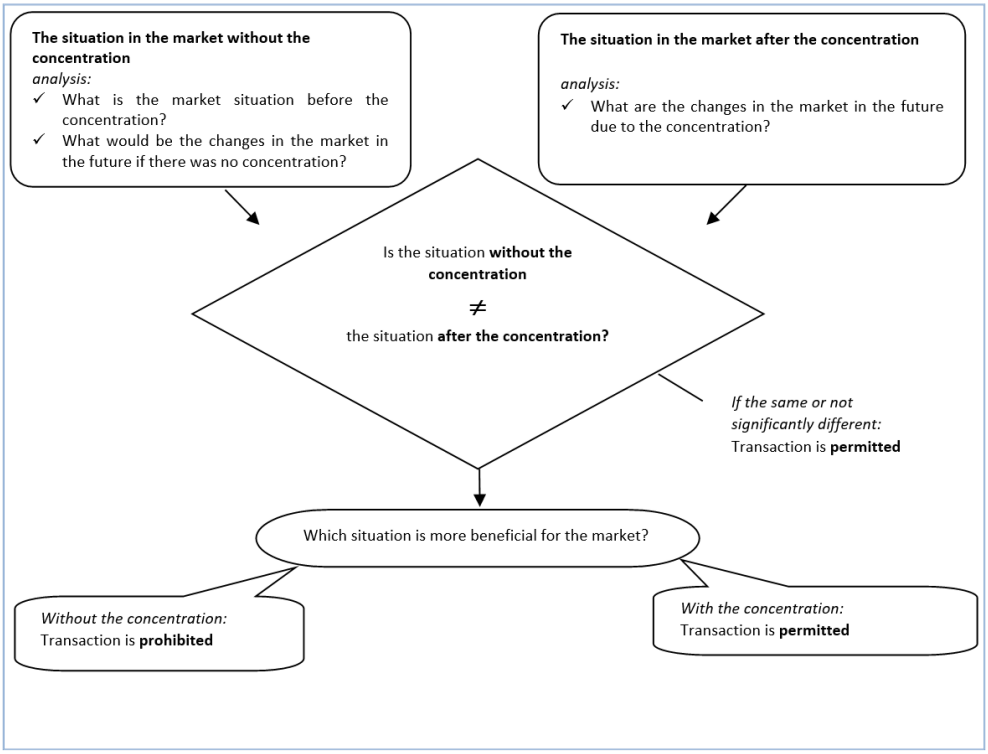


Figure 3. Establishing causation

Figure 3 presents the structure of causation analysis, prepared following the practice of Commission and EU court cases. This shows that to determine whether the concentration is the cause of harmful effects in the market, it is necessary to compare the market situation with the concentration against the situation without the concentration. When determining the market situation that would have existed in the absence of the concentration, it is necessary to consider not only the facts that existed before the concentration, but also the changes in the development of the market that would take place without the concentration. Once the situation in the market has been established (both with and without the concentration), differences in the situation are examined. If the functioning of the market, both with and without the concentration, are the same or do not differ significantly, then the concentration is allowed. The concentration is also allowed if the situation after the concentration is better. However, when it is established that the situation in the market after the concentration would be worse, the concentration is prohibited because there is a clear causal connection between the concentration and the occurrence of harmful effects.

The period over which the concentration's impact on the market should be examined is highly important in determining causation. When considering the harmful effects of leveraging market power to another market, the length of time during which the exercise of power is expected to eliminate or weaken competitors in the market is relevant. Hence, § 21 of the Guidelines for non-horizontal mergers indicates that the "more immediate and direct the perceived anti-competitive effects of a merger," the more likely the concentration transaction will be prohibited.

In *Airtours v. Commission* (2002, *§ 58),* the CFI indicated that the impact on market competition which is expected to have a "direct and immediate effect" should be considered. In *Tetra Laval v. Commission* (2002*,* § 153), the same court, considering the leverage of the effect of market power, explained that the effect

should result "in the relatively near future." The question arises as to whether a "direct and immediate effect" is the same as "in the relatively near future." Applying both concepts, EU court and Commission practice show the time frame within which market changes need to be examined.

While applying the "direct and immediate effect" concept, the Commission analyzed market development over 3 years (*Procter & Gamble/VP Schickedanz (II)*, 1994; *Glaxo Wellcome/SmithKline Beecham*, 2000). However, there have been cases where periods of 5 (*ABB/Daimler-Benz*, 1995) or 10 years (*Shell/Enterprise Oil*, 2002) have been examined.

At first glance, the concept of "in the relatively near future" seems similar to the concept of "direct and immediate effect" because the CFI, in *Tetra Laval v. Commission* (2002, § 239), examined market changes over 3 years. However, it should be emphasized that the ECJ, in *Commission v. Tetra Laval* (2005, § 44), noted that the significant impact on the market of a conglomerate-type concentration using leveraging occurs "a lengthy period of time in the future." This indicates that the period in which impact may appear which should be examined when assessing such concentrations can be longer than 3 years. It is likely that in the assessment of future market power leverage to another market, the court, using the concept of "in the relatively near future," wanted to maintain flexibility in choosing the evaluation period, which would allow choosing the period depending on the need that arose in a particular case. The period in some situations can be the same as when applying the concept "in the relatively near future," but it also can be much longer.

9.4.2. The merger of a failing undertaking

In EU Member States, a concentration in which another undertaking acquires or amalgamates a failing (bankrupt) undertaking is usually allowed because the interests of creditors, owners, and/or employees of small businesses are protected.

There may also be no causal connection between the concentration and changes in the market because a bankrupt undertaking would disappear from the market without the concentration. Jones and Sufrin observe that allowing the bankrupt undertaking to amalgamate is rational when the bankrupt undertaking and its creditors avoid the high bankruptcy administration costs and preserve valuable means of production in the market (Jones & Sufrin, 2001, p. 801). In the evaluation, it is necessary to take into account both the social price that the consumer must pay when the seller joins the bankrupt undertaking and the merged undertaking acquires or strengthens market power, and the social price that the consumer should pay when the seller acquires or strengthens market power because the bankrupt undertaking disappears from the market due to their bankruptcy (Hovenkamp, 1994, pp. 494–495).

Article 2(1) of Regulation 139/2004 indicates that in making its appraisal, the Commission must consider "the need to maintain and develop effective competition," "the structure of all the markets concerned," and "the market position of the undertakings concerned and their economic and financial power." Such regulation shows that concentrations involving the amalgamation of a failing undertaking can be justified under EU law. However, the Regulation does not provide a broader explanation of this issue. As in other areas regulated by the EU, the interpretation of the provisions of the Regulation is left to the EU courts, and the practical application of the Regulation is left to the European Commission.

On this issue, § 6 of the Guidelines for non-horizontal mergers indicates that general guidance in the Guidelines for horizontal mergers is also relevant in non-horizontal mergers. Therefore, guidance regarding the amalgamation of a failing undertaking provided in the Guidelines for horizontal mergers also applies to non-horizontal concentrations. Thus, § 89 of the Guidelines for non-horizontal mergers indicates that an otherwise problematic merger can nevertheless be declared compatible with the common market if one of the merging parties is a

failing undertaking. There is one primary condition that "the deterioration of the competitive structure that follows the merger cannot be said to be caused by the merger." Following the Commission's decision in *BASF/Eurodiol/Pantochim* (2001, § 143), the application of the concept of the rescue merger requires that the deterioration of the competitive structure through the merger is at least no worse than in the absence of the merger.

The ECJ's decision in *French Republic and SCPA and EMC v. Commission* (1998) indicates that the ECJ allows the failing firm defense, considering this issue from the chain of cause perspective, as § 110 of the decision shows that the Court considers that if the concentration is not the cause of changes in the market having a significant impact on the competitive situation, it must be declared compatible with the common market. In § 115, the Court explained that "the existence of a causal link between the concentration and the deterioration of the competitive structure of the market can be excluded only if the competitive structure resulting from the concentration would deteriorate similarly even if the concentration did not proceed." In addition, the ECJ, in §111, agreed with the Commission's established conditions in *Kali & Salz/MdK/Treuhand* (1993) when a concentration involving the amalgamation of failing undertakings was not considered the cause of the deterioration of the market's competitive structure.

The Commission decision in *Kali & Salz/MdK/Treuhand* (1993) was the first decision authorizing the acquisition of a failing undertaking. In this case, Kali & Salz wanted to acquire MdK. The merged undertaking would have 98% of the German potash market and 100% of the market for magnesium products. The Commission allowed the concentration because MdK would have been forced out of the market by bankruptcy anyway.

Following *French Republic and SCPA and EMC v. Commission* (1998, § 111), and *Kali & Salz/MdK/Treuhand* (1993, § 71), a concentration involving the acquisition of failing undertakings is not considered the cause of the deterioration of

the market's competitive structure when three conditions are fulfilled:

1. the acquired undertaking would, in the near future, be forced out of the market if not taken over by another undertaking;
2. the acquiring undertaking would gain the market share of the acquired undertaking if it were forced out of the market;
3. there is no less anticompetitive alternative purchase.

The first condition means that the concentration is not considered to be restricting competition when the merged undertaking would disappear from the market regardless of whether or not it was merged with another undertaking. The second condition shows that there should not be a causal connection between the concentration and changes in the market when the changes after the concentration are the same as if the concentration had not occurred. The third condition includes the principle of proportionality, widely recognized in the EU. This means that the justification of the amalgamation of the failing undertaking is possible only in exceptional cases when there is no other option, which is less restrictive of competition.

Finally, it should be said that, following § 116 of *French Republic and SCPA and EMC v. Commission* (1998), the merger of a failing firm is possible if the change in the competitive structure after the concentration is not more harmful than if the concentration had not occurred. The ECJ has stressed that this is consistent with the concept of causal connection.

One of the conditions set in *French Republic and SCPA and EMC v. Commission* (1998), and *Kali & Salz/MdK/Treuhand* (1993) was changed in later Commission practice regarding merger cases. In *BASF/Eurodiol/Pantochim* (2001), the Commission updated the conditions for the justification of failing to undertake an amalgamation.

In this case, BASF Antwerpen N.V. was going to acquire two chemical subsidiaries, Eurodiol and Pantochim, of the Italian company SISAS Spa, which were

established in Belgium. Eurodiol and Pantochim were close to bankruptcy, and their parent company in Italy was already bankrupt. Considering the position of Eurodiol and Pantochim, the Commission allowed the acquisition even though the concentration would create a dominant position in various chemical product markets. In the situation under consideration, BASF could satisfy the first and third requirements of *Kali & Salz/MdK/Treuhand*. However, it could not meet the second one, which requires that when an undertaking disappears from the market, its market share is taken over by the company that acquires it (*BASF/Eurodiol/Pantochim*, 2001, § 151). In *Kali & Salz/MdK/Treuhand*, there were only two companies in the market – the bankrupt company and the company that wanted to amalgamate the bankrupt company – so it was easy to prove that the market share of the bankrupt company would still go to another company, regardless of whether the concentration happened or not. However, this requirement is unsuitable for situations where several undertakings remain on the market after the merger and the market share of the undertaking that disappeared from the market would probably go to several undertakings. In particular, with the disappearance of Eurodiol and Pantochim from the market, BASF's competitors could also expect to gain market share.

Considering the facts of this case, the Commission changed the conditions established in *Kali & Salz/MdK/Treuhand*, the fulfilment of which can justify the acquisition of a failing undertaking. Instead of the requirement to prove that after the undertaking disappears from the market its market share will be taken over by the acquiring undertaking, an additional alternative condition – "assets' disappearance" – was established. This means that the Commission will consider the failing firm defence in cases when, in addition to the fulfilment of the first and third criteria established in *Kali & Salz/MdK/Treuhand*, there are indications that "the assets to be purchased would inevitably disappear from the market in the absence of the merger." (*BASF/Eurodiol/Pantochim*, 2001, § 141).

In the BASF/Eurodiol/Pantochim (2001), the Commission recognised that the assets of the failing firm would definitely exit the market if there were no acquisitions (§ 151). The conclusion was based on the following circumstances: an immediate takeover of Eurodiol and Pantochim, after bankruptcy, by a third party seems unlikely (§ 153); restarting the plants after six months would be relatively expensive compared with an immediate takeover (§ 154); and the "plants of Eurodiol and Pantochim can only be economically operated as a whole as they use a highly integrated production process which does not make it possible to purchase isolated assets" (§ 155). In addition, the Commission determined that, given the limited supply and growing demand, prices in the market would rise above what they would have been in the absence of concentration. If factories were shut down due to the long-term installation of new equipment, there would be a significant shortage of supply in the market. Consequently, removing assets from the market would hinder competition for an extended period. The Commission as well concluded that BASF will not intend to raise the prices of its goods following the concentration, as it could not reduce production volumes without jeopardizing its ability to secure raw materials (*BASF/Eurodiol/Pantochim*, 2001, §§ 157- 162).

Considering the mentioned circumstances, the Commission decided that the concentration was less harmful to competition than if it were not to take place (*BASF/Eurodiol/Pantochim*, 2001, § 163).

Summarizing the case practice of EU courts and the European Commission, it could be concluded that a concentration involving the acquisition of failing undertakings is not considered the cause of the deterioration of the market's competitive structure when the following conditions are fulfilled:

1. the acquired undertaking would, in the near future, be forced out of the market if not taken over by another undertaking;
2. the acquiring undertaking would gain the market share of the acquired undertaking if it were forced out of the market, or the assets would inevitably disappear from the market in the absence of the merger;

3. there is no less anticompetitive alternative purchase.

The following conclusions can be drawn by comparing the conditions of causality with the conditions of justification for acquiring a failing undertaking. In order not to establish a causal relationship between the concentration and changes in the market, it is sufficient to prove that the situation in the market after the concentration would not be worse than it would have been without the concentration. The justification of a concentration due to the acquisition of a failing undertaking essentially means the justification of the fact that there is no causal connection between the acquisition of the failing undertaking and changes in the market. In other words, whether or not the failing undertaking were to be merged with another undertaking in the market, the conditions of competition in the market would be similar or even better if a concentration were to occur. In establishing that there is no causation, it is sufficient to show that the merged undertaking will be able and will have the intention to engage in anti-competitive conduct regardless of whether the concentration takes place or not. When justifying a concentration through acquiring a failing undertaking, it is necessary to prove more – that is, that if the undertaking goes bankrupt, its assets would inevitably be removed from the market, or the merger undertaking would acquire all its assets. If this cannot be proven, the concentration whose harmful impact would not be more significant than the changes that would have occurred without the acquisition of the bankrupt undertaking (that is, where there is no causal connection between the transaction and the functioning of the market) may not be allowed, as it is necessary to additionally prove that the acquiring undertaking would gain the market share of the acquired undertaking if it were forced out of the market, or the assets would inevitably disappear from the market in the absence of the merger. This suggests that justifying the acquisition of a failing firm requires more than simply not establishing a causal relationship.

In addition, considering the proportionality principle, all possible acquisition

options must be considered. This requirement is not foreseen when establishing causation. It can be assumed that in authorizing the acquisition of a failing undertaking, the Commission evaluates whether strengthening the undertaking's market power is the best possible option.

Discussing such regulation, competition law experts Monti and Rousseva (1999) even observe that the additional conditions set for the authorization of the acquisition of a failing undertaking are intended to create opportunities for potential competitors to enter the market or to implement one of the objectives of EU competition regulation – to increase competitiveness in the European Union (p. 42). It can be assumed that the Commission not only determines whether the concentration significantly restricts effective competition, but also actively promotes competition by choosing a solution most suitable for the market.

Given this, competition experts debate whether the resulting social or economic benefits should be considered when assessing a concentration during which a bankrupt undertaking is merged (Monti & Rousseva, 1999, pp. 38–55). Some even claim that acquiring a failing company is always beneficial (McChesney, 1986, p. 3). In the case of a concentration, shareholders do not lose their investments; if the merger is profitable, they increase them. If successful, creditors can recover debts. In bankruptcy, they would probably lose at least some of them. Moreover, at least some employees do not lose their jobs, especially in cases where the undertaking's activities require highly qualified and experienced staff. The undertaking's disappearance from the market may affect the overall economic stability of the region.

Given this, it can be agreed that economic and social benefits should also be considered when assessing concentrations that the acquisition of a failing undertaking could justify. Benefit assessment should be clearly provided for, if not in legal norms, then at least in concentration assessment practice. As the analysis presented in the first part of this paper shows, the legal prerequisites for such an

assessment are in both EU treaties and Regulation 139/2004.

The benefits generated could be considered when examining whether the concentration worsens competition in the market. An assessment of the benefits would allow the improvement of competition to be considered, as the concentration itself may contribute to realizing the objectives set out in the EU Treaties.

According to Monti and Rousseva, the solution to social issues should also be included among the benefits. By evaluating social problems together with competition issues, an effective model can be created to assess the impact of concentrations that include a bankrupt company (Monti & Rousseva, 1999, p. 55). The assessment should consider both the harmful and beneficial effects of the concentration on the economy and the social environment.

Understandably, social benefits should not justify eliminating competition in the market, but improving the economic and social environment falls within the scope of EU competition regulation and should, therefore, be considered in the assessment.

Conclusions

Vertical, and conglomerate concentrations differ from those of a horizontal nature. Mergers of companies operating at different supply levels of goods or services or mergers of companies operating in complementary, neighboring, or even unrelated product or geographical markets can create various mega-conglomerates. These conglomerates can include companies that operate not only in the EU internal market, but also in non-EU countries. Non-EU mergers may impact the EU market due to existing ties with producers, consumers, and raw materials, or because the products of these conglomerates belong to the global market in which EU companies also share.

The detrimental effects of such concentrations are harder to assess than those of horizontal concentrations because, in most cases, a longer prognosis is needed

to identify the negative impact of such a merger, and the impact itself can be ambiguous. In addition, there is broad disagreement about whether such concentrations negatively impact competition. They create the conditions to increase productivity due to economies of scale, encourage large-scale, long-term investments, accelerate the implementation of research and innovations, etc. However, they can also create conditions for the foreclosure of upstream or downstream markets by creating the ability and intention of the merger group to refuse to buy or sell products. They can increase market transparency, thereby facilitating merger groups' easy access to business-sensitive information. Merger groups can acquire the ability and thereby gain the initiative to involve product tying, pure bundling, technical tying, mixed bundling, full-line forcing, cross-subsidization, predatory pricing, abuses of power, and coordinating business actions with competitors.

In addition, attention should be drawn to the fact that mega-conglomerates formed by concentrations can have various negative effects, not only on competition but also on political situations in various countries. Corporate size often translates to political power. Considering its role in monitoring and supervising the functioning of the EU, the European Commission, while deciding on the authorization of the concentrations of such mega-conglomerates, should be able to focus not only on economic issues, but also on political aspects.

EU competition policy influences the regulation of concentrations. As a basis, Regulation 139/2004 is focused on strengthening the internal market, increasing competitiveness, protecting effective competition, and raising living standards in the EU. Raising living standards includes various social aims indicated in the EU treaties, such as the well-being of people, balanced economic growth and price stability, employment, the protection and improvement of the quality of the environment, etc. Recently, the Commission has indicated that strengthening European economic security should also be the aim of EU competition policy. The

new reality determines the appearance of such an aim – the COVID-19 pandemic, Russia's war in Ukraine, hostile economic actions, cyber and infrastructure attacks, foreign interference and disinformation, and a global increase in geopolitical tensions.

It is not clear whether EU economic security is an integral part of the common security policy or whether it falls under the EU common commercial policy. If EU economic security is an integral part of the common security policy, then this means that the powers of the European Commission will be narrowed, and not only the European Council but also the Member States will have to be more active in this field. Considering the unanimity requirement in making decisions on common security policy issues, this means that decisions on economic security issues may be hindered, especially when the current geopolitical situation shows that the EU Member States do not find consensus on other EU national security issues. The integration of economic security policy into common security policy may not only weaken the EU's economic security, but may also have a detrimental effect on the Single Market.

If EU policymakers would like to consider economic security as an integral part of EU national security, then EU constitutional treaties should clearly allocate the responsibilities of the EU institutions and Member States. The EU treaties should unambiguously show which decisions can be made by EU institutions under the common commercial policy and which decisions can be made only following the EU national security policy implementation procedure.

Economic security issues can be addressed by applying the principle of extraterritoriality when deciding on the authorization of concentrations and Article 21 of Regulation 139/2004. Article 21 indicates that Member States can address public security issues, the plurality of the media, and prudential rules when deciding on mergers. In addition, any other public interest can be addressed after the Commission's approval.

The European Commission's proposal for a Regulation on Foreign Subsidies Distorting the Internal Market foresees additional measures under the EU's economic security policy. The document authorizes the Commission to approve a concentration when any of the merger partners received an aggregate financial contribution of more than €50 million from third countries in the last 3 years before notification. A foreign subsidy directly facilitating a concentration is considered most likely to distort the internal market.

Concentrations can be assessed by applying the universally known causation rule, under which a causal connection between the action and the future harm is identified. The action here is making a concentration, which could be a merger, amalgamation, or acquisition of sole and joint control. Control means "decisive influence," which can be acquired de jure by any form of agreement or de facto. The European Commission and EU courts decide on a case-by-case basis whether a particular form of action or the holding of rights is considered an acquisition of control. Changes in the quality of control (change of joint control to sole control or sole control to joint control, changes in members of joint control or changes of control due to the break up of an undertaking) also constitute a concentration. Acquisition of control or changes of control should be long-lasting. The Commission's practice shows that changes lasting for 5 to 10 years are considered long enough for them to be recognized as long-lasting.

Additional power acquired by the merger group may facilitate the appearance of damages to competition and consumers. Competitors could be removed from the market, product prices for consumers could be increased, and the product portfolio could decrease. To cause damage, the merged group must have power in the market. Therefore, market size determines which actors are included and what power particular actors have. A too-wide market means more actors in the market with less power, and the opposite: a too-narrow market means fewer actors in the market but with more significant power. The imprecise determination

of the market can lead to prohibiting a harmless concentration or authorizing a harmful one. Improper market determination can even lead to economic security problems in the EU. The Commission decides holistically on the merged group's market power. It considers the market share of the merged group and competitors, exclusive advantages of the merger group, market characteristics, potential competition, the merger group's buying power, and the countervailing power of the buyer (consumer).

The efficiency of undertakings, the welfare of consumers, labor, environmental protection, and other social issues should be considered in the assessment of a merger. This could also include benefits for EU economic security. Of course, common well-being is not always compatible with the direct interests of consumers because consumers are interested in the widest product portfolio at the lowest price. Therefore, increasing employment, promoting social progress, ensuring a high level of environmental protection, and allowing measures for increasing EU economic security can lead to results that are opposite to the interests of consumers. Considering this, the role of the European Commission and the EU courts in regulating concentrations is particularly significant, as the meaning of EU goals and their compatibility depends on the interpretation and application of EU law.

There must be causal links between mergers and potential harm. Following the Commission, the causal link does not exist when the conditions in the market will be at least the same, irrespective of whether there is concentration or not. Two additional conditions should be fulfilled for the "failing firm" justification: indications should be that the undertaking's assets would inevitably disappear from the market; and there must be no less anti-competitive alternative than the merger.

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