The Interplay Between European Merger Control Law and the Liberalisation of European Electricity, Natural Gas and Petroleum Markets

A Critical Assessment of Market Opening Incidental Provisions within the Relevant Decisions of the European Commission

Von der Fakultät Wirtschaftswissenschaften der Leuphana Universität Lüneburg zur Erlangung des Grades Dr. iur. genehmigte Dissertation von

Henning Matthiesen, geboren am 09.06.1972 in Düsseldorf

Eingereicht am 19/09/2019

Mündliche Verteidigung (Disputation) am 09/11/2020

Erstbetreuer und Erstgutachter: Prof. Dr. Terhechte

Zweitgutachter: Prof. Dr. Schomerus

Drittgutachter: Prof. Dr. Wein

Erschienen unter dem Titel:

The Interplay Between European Merger Control Law and the Liberalisation of European Electricity, Natural Gas and Petroleum Markets

A Critical Assessment of Market Opening Incidental Provisions within the Relevant Decisions of the European Commission

Druckjahr: 2021

Veröffentlicht über die Bibliothek der Leuphana Universität nach § 16 III 1. lit. d Promotionsordnung der Fakultät Wirtschaftswissenschaften

Table of Contents

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Hiermit erkläre ich, dass ich mich noch keiner Doktorprüfung unterzogen oder mich um Zulassung zu einer solchen beworben habe. Ich versichere, dass die Dissertation mit dem Titel „The Interplay between European Merger Control Law and the Liberalisation of European Electricity, Natural Gas and Petroleum Markets“ noch keinem Fachvertreter vorgelegen hat, ich die Dissertation nur in diesem und keinem anderen Promotionsverfahren eingereicht habe, und dass diesem Promotionsverfahren keine endgültig gescheiterten Promotionsverfahren vorausgegangen sind. Ich versichere, dass ich die eingereichte Dissertation „The Interplay between European Merger Control Law and the Liberalisation of European Electricity, Natural Gas and Petroleum Markets“ selbständig und ohne erlaubte Hilfsmittel verfasst habe. Anderer als der von mir angegebenen Hilfsmittel und Schriften habe ich mich nicht bedient. Alle wörtlich oder sinngemäß anderen Schriften entnommenen Stellen habe ich kenntlich gemacht.

Lübeck, 19/09/2019

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1.2.4 Decisions

1.2.4.1 Antitrust Law

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Commission Decision 1985/78/EEC of 12 December 1984 Relating to A Proceeding under Art. 85 of The EEC Treaty, O.J. L 35 07/02/1985, p 54 (*Mecaniver v PPG*).

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Commission Decision 1992/262/EEC of 1 April 1992 Relating to A Proceeding pursuant to Art. 85 and 86 of The EEC Treaty, O.J. L 134

18/05/1992, p 1 (*French-West African Shipowners' Committees*).

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1.2.4.2 Control of Concentrations

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Commission Decision 1977/781/EEC of 23 November 1977 Relating to Proceedings under Art. 85 of The EEC Treaty, O.J. L 327 20/12/1977, p 26 (*GEC-Weir Sodium Circulators*).

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Commission Decision, *SYDKRAFT / GRANINGE*, CASE IV/M. 3268.

Commission Decision, *UFG / ENEL / UFEE / JV*, CASE IV/M. 3270.

Commission Decision, *SHELL ESPANA / CEPSA / SIS JV*, CASE IV/M. 3275.

Commission Decision, *TNK-BP / SIBNEFT / SLAVNEFT*, CASE IV/M. 3288.

Commission Decision, *PREEM / SKANDINAVISKA RAFFINADERI*, CASE IV/M. 3291.

Commission Decision, *SHELL / BEB*, CASE IV/M. 3293.

Commission Decision, *EXXONMOBIL / BEB*, CASE IV/M. 3294.

Commission Decision, *NORSK HYDRO / DUKE ENERGY*, CASE IV/M. 3297.

Commission Decision, *E.ON / MIDLANDS*, CASE IV/M. 3306.

Commission Decision, *ECS / SIBELGA*, CASE IV/M. 3318.

Commission Decision, *GESO / ZWECKVERBAND / GASO*, CASE IV/M. 3332.

Commission Decision, *NORSK HYDRO / WINGAS / HYDROWINGAS JV*, CASE IV/M. 3350.

Commission Decision, *DILLINGER HÜTTENWERKE / SAARSTAHL / COKERIE DE CARLING*, CASE IV/M. 3376.

Commission Decision, *TOTAL / GAZ DE FRANCE*, CASE IV/M. 3410.

Commission Decision, *ENDESA / SNET*, CASE IV/M. 3412.

Commission Decision, ENI / EDP / GDP CASE IV/M. 3440.

Commission Decision, *UBS / MOTOR COLUMBUS*, CASE IV/M. 3444.

Commission Decision, *EDP / HIDROELECTRICA DEL CANTABRICO*, CASE IV/M. 3448.

Commission Decision, *RIVR / PETROPLUS*, CASE IV/M. 3478.

Commission Decision, *HELSINGIN / VANTAAN / E.ON FINLAND / LAHTI / SEU*, CASE IV/M. 3507.

Commission Decision, *SHELL / SAUDI ARAMCO / SHOWA SHELL*, CASE IV/M. 3510.

Commission Decision, *REPSOLYPF / SHELL PORTUGAL*, CASE IV/M. 3516.

Commission Decision, *PKN ORLEN / UNIPETROL*, CASE IV/M. 3543.

Commission Decision, *IPR / MITSUI / MEC*, CASE IV/M. 3557.

Commission Decision, *CONOCO / LUKOIL / NMN / JV*, CASE IV/M. 3573.

Commission Decision, *HUTCHISON WHAMPOA / NORTH DN*, CASE IV/M. 3584.

Commission Decision, *VEOLIA / BVAG*, CASE IV/M. 3630.

Commission Decision, *PETRONAS / SASOL / UHAMBO JV*, CASE IV/M. 3636.

Commission Decision, *INDUSTRI KAPITAL / IDEX*, CASE IV/M. 3645.

Commission Decision, *SIEMENS / VA TECH*, CASE IV/M. 3653.

Commission Decision, *REPSOL BUTANO / SHELL GASS (LPG)*, CASE IV/M. 3664.

Commission Decision, *ENEL / SLOVENSKE ELEKTRARNE*, CASE IV/M. 3665.

Commission Decision, *E.ON / MOL*, CASE IV/M. 3696.

Commission Decision, *EDF / AEM / EDISON*, CASE IV/M. 3729.

Commission Decision, *LUKOIL / TEBOIL / SUOMEN PETROOLI*, CASE IV/M. 3730.

Commission Decision, *ORANJE-NASSAU GROUP / SHV HOLDING / EDINBURGH OIL & GAS*, CASE IV/M. 3831.

Commission Decision, *IPR / MITSUI / CALPINE UK*, CASE IV/M. 3849.

Commission Decision, *VATTENFALL / ELSAM AND E2 ASSETS*, CASE IV/M. 3867.

Commission Decision, *DONG / ELSAM / ENERGI E2*, CASE IV/M. 3868.

Commission Decision *TESSENDERLO / SIEMENS / ADVANCED POWER / JV*, CASE IV/M. 3869.

Commission Decision, *GDF / CENTRICA / SPE*, CASE IV/M. 3883.

Commission Decision, *SHELL / ERG / IONIO GAS / JV*, CASE IV/M. 3949.

Commission Decision, *A.P. MOLLER-MAERSK / KERR-MCGEE (North Sea Business)*, CASE IV/M. 3950.

Commission Decision, *BERKSHIRE / HATHAWAY / MEHC*, CASE IV/M. 3964.

Commission Decision, *TECHNIP / SUBSEA 7 / ASIA PACIFIC JV*, CASE IV/M. 3982.

Commission Decision, *GAZPROM / SIBNEFT*, CASE IV/M. 3999.

Commission Decision, *OMV / ARAL CR*, CASE IV/M. 4002.

Commission Decision, *INEOS / INNOVENE*, CASE IV/M. 4005.

Commission Decision *WINGAS / ZGHG /JV*, CASE IV/M . 4020.

Commission Decision, *ATEL / EOSH*, CASE IV/M. 4025.

Commission Decision, *FLAGA / PROGAS / JV*, CASE IV/M. 4028.

Commission Decision, *ENDESA EUROPA / ZEDO*, CASE IV/M. 4060.

Commission Decision, *CONOCO PHILLIPS / LOUIS DREYFUS REFINING AND MARKETING / LOUIS DREYFUS ENERGY HOLDING*, CASE IV/M. 4073.

Commission Decision, *LINDE / SPECTRA*, CASE IV/M. 4091.

Commission Decision, *INEOS / BP DORMAGEN*, CASE IV/M. 4094.

Commission Decision, *ENBW / SWD*, CASE IV/M. 4103.

Commission Decision, *E.ON / ENDESA*, CASE IV/M. 4110.

Commission Decision, *EDISON / EDF / ENERGIA ITALIA*, CASE IV/M. 4127.

Commission Decision, *ENI / GRUPO AMORIM / CGD / GALP*, CASE IV/M. 4130.

Commission Decision, *LINDE / BOC*, CASE IV/M. 4141.

Commission Decision, *MITSUI / VOPAK*, CASE IV/M. 4167.

Commission Decision, *GAZ DE FRANCE / SUEZ*, CASE IV/M. 4180.

Commission Decision, *BAYERNGAS / DEUTSCHE ESSENT / NOVOGATE JV*, CASE IV/M. 4203.

Commission Decision, *PETROPLUS / EUROPEAN PETROLEUM HOLDING*, CASE IV/M. 4208.

Commission Decision, *BP FRANCE / VITOGAZ / ENERGAZ JV*, CASE IV/M. 4233.

Commission Decision, *E.ON / PRAZSKA PLYNARENSKA*, CASE IV/M. 4238.

Commission Decision, *ATEL ENERGIA / AZIENDA ENERGETICA-ETSCHWERKE / ENERG.IT*, CASE IV/M. 4266.

Commission Decision, *GDF / CAMFIN / ENERGIA INVESTMENT JV*, CASE IV/M. 4279.

Commission Decision, *ENDESA / FOSTER WHEELER / JV*, CASE IV/M. 4295.

Commission Decision, *TOTAL / CEPSA*, CASE IV/M. 4329.

Commission Decision, *PKN / MAZEIKIU*, CASE IV/M. 4348.

Commission Decision, *PETROPLUS / EXXONMOBIL*, CASE IV/M. 4359.

Commission Decision, *EDISON / ENECO ENERGIA*, CASE IV/M. 4368.

Commission Decision, *MACQUARIE / CORONA*, CASE IV/M. 4369.

Commission Decision, *EBN / COGAS ENERGY*, CASE IV/M. 4370.

Commission Decision, *EST / DALMINE*, CASE IV/M. 4380.

Commission Decision, *BG GROUP / SERENE*, CASE IV/M. 4431.

Commission Decision, *BC PARTNERS / TECHEM*, CASE IV/M. 4474.

Commission Decision, *MEIF II / TECHEM*, CASE IV/M. 4485.

Commission Decision, *IBERDROLA / SCOTTISH POWER*, CASE IV/M. 4517.

Commission Decision, *LUKOIL / CONOCOPHILLIPS*, CASE IV/M. 4532.

Commission Decision, *STATOIL / HYDRO*, CASE IV/M. 4545.

Commission Decision, *PETROPLUS / CORTON REFINERY BUSINESS*, CASE IV/M. 4588.

Commission Decision, *SABANCI / VERBUND / ENERJISA JV*, CASE IV/M. 4634.

Commission Decision, *CHARTERHOUSE / ISTA*, CASE IV/M. 4649.

Commission Decision, *NATIONAL GRID / TENNET / BRITNED JV*, CASE IV/M. 4652.

Commission Decision, *IPR / MITSUI (UK electricity generation business)*, CASE IV/M. 4654.

Commission Decision, *E.ON / ENDESA EUROPA / VIESGO*, CASE IV/M. 4672.

Commission Decision, *IBERDROLA / API /SER JV*, CASE IV/M. 4675.

Commission Decision, *ENEL / ACCIONA / ENDESA*, CASE IV/M. 4685.

Commission Decision, *WINGAS / HYDRO WINGAS*, CASE IV/M. 4689.

Commission Decision, *ERG / IPM / ISAB ENERGY SERVICES*, CASE IV/M. 4712.

Commission Decision, *ENI / EXXONMOBIL (Hungarian, Czech and Slovak Package)*, CASE IV/M. 4723.

Commission Decision, *ALTOR FUND II / WRIST GRUOUP*, CASE IV/M. 4736.

Commission Decision, *DELEK / TEXACO BENELUX*, CASE IV/M. 4782.

Commission Decision, *BP / ASSOCIATED BRITISH FOODS / JV*, CASE IV/M. 4798.

Commission Decision, *OMV / MOL*, CASE IV/M. 4799.

Commission Decision, *AREVA NP / MHI / ATMEA*, CASE IV/M. 4839.

Commission Decision, *ENEL / EMS*, CASE IV/M. 4841.

Commission Decision, *GDFI / ENERGIE INVESTMENT*, CASE IV/M. 4876.

Commission Decision, *PETROPLUS / SHELL FRENCH REFINERIES*, CASE IV/M. 4886.

Commission Decision, *ARCELOR / FERNGAS*, CASE IV/M. 4890.

Commission Decision, *MOL / ITALIANA ENERGIA E SERVIZI*, CASE IV/M. 4895.

Commission Decision, *STV FUND / SMITH / AT-BALANCE*, CASE IV/M. 4908.

Commission Decision, *GOLDMAN SACHS / LOMO*, CASE IV/M. 4911.

Commission Decision, *STATOILHYDRO / CONOCOPHILLIPS*, CASE IV/M. 4919.

Commission Decision, *EMCC*, CASE IV/M. 4922.

Commission Decision, *BASELL / BERRE L´ETANG REFINERY*, CASE IV/M. 4926.

Commission Decision, *KAZMUNAIGAS / ROMPETROL*, CASE IV/M. 4934.

Commission Decision, *EDF / ENBW / KOGENERACJA*, CASE IV/M. 4993.

Commission Decision, *ELECTRABEL / CMPAGNIE NAIONALE DU RHONE*, CASE IV/M. 4994.

Commission Decision, *EDF / ENBW / ERSA*, CASE IV/M. 4998.

Commission Decision, *GALP ENERGIA / EXXON MOBIL IBERIA*, CASE IV/M. 5005.

Commission Decision, *COFATHEC / EDISON*, CASE IV/M. 5023.

Commission Decision, *CEZ / MOL / JV*, CASE IV/M. 5090.

Commission Decision, *GDF / SUEZ / TEESIDE POWER*, CASE IV/M. 5092.

Commission Decision *CASC JV*, CASE IV/M. 5154.

Commission Decision, *GALP ENERGIA ESPANA / AGIP ESPANA*, CASE IV/M. 5169.

Commission Decision, *E.ON / ENDESA / EUROPA / VIESGO*, CASE IV/M. 5170.

Commission Decision, *ENEL / ACCIONA / ENDESA*, CASE IV/M. 5171.

Commission Decision, *GOLDMAN SACHS / CANDOVER / EXPRO*, CASE IV/M. 5177.

Commission Decision, *CENTREX / ZMB / ENIA / JV*, CASE IV/M. 5183.

Commission Decision, *ENI / DISTRIGAZ*, CASE IV/M. 5220.

Commission Decision, *EDF / BRITISH ENERGY*, CASE IV/M. 5224.

Commission Decision, *OMV / LEHMAN / MET / JV*, CASE IV/M. 5229.

Commission Decision, *CAPMAN / LITORINA / CEDERROTH*, CASE IV/M. 5230.

Commission Decision, *SABANCI / VERBUND / BASKENT*, CASE IV/M. 5235.

Commission Decision, *EDISON / HELLENIC PETROLEUM / JV*, CASE IV/M. 5249.

Commission Decision, *DELEK NEDERLAND / SALLAND OLIE HOLDING*, CASE IV/M. 5275.

Commission Decision, *GMR INFRASTRUCTURE (MALTA) / ONTARIO TEACHERS' PENSION PLAN / INTERGEN*, CASE IV/M. 5288.

Commission Decision, *STICHTING ADMINSTRATIEKANT OOR VAN DER SLUIJS GROEP / FRISOL BEHEER / NORTH SEA PETROLEUM HOLDING*, CASE IV/M. 5315.

Commission Decision, *CENTRICA / SEGEBEL*, CASE IV/M. 5324.

Commission Decision, *TESSENDERLO CHEMIE / SPV / IPCHL / T-POWER JV*, CASE IV/M. 5359.

Commission Decision, *IPO /ENBW / PRAHA PT*, CASE IV/M. 5365.

Commission Decision, *IBERDROLA RENOVABLES / GAMESA*, CASE IV/M. 5366.

Commission Decision, *MIDAMERICAN / CONSTELLATION*, CASE IV/M. 5368.

Commission Decision, *CEZ / AKKOK / SEDAS / AKENERJY*, CASE IV/M. 5370.

Commission Decision, *ELECTRABEL DEUTSCHLAND / WSE WUPPERTALER STADTWERKE / WSW ENERGIE & WASSER*, CASE IV/M. 5375.

Commission Decision, *EN+ / RUSSNEFT*, CASE IV/M. 5396.

Commission Decision, *PANASONIC / SANYO*, CASE IV/M. 5421.

Commission Decision, *STATOILHYDRO / STI / STI AVIFUELS*, CASE IV/M. 5422.

Commission Decision, *E.ON ITALIA / MPE ENERGIA*, CASE IV/M. 5442.

Commission Decision, *MYTILINEOS / MOTOR OIL / CORINTHOS POWER*, CASE IV/M. 5445.

Commission Decision, *RWE / ESSENT*, CASE IV/M. 5467.

Commission Decision, *GDF SUEZ / GEK*, CASE IV/M. 5468.

Commission Decision, *GOLDMAN SACHS / CONSTELLATION ENERGY COMMODITIES*, CASE IV/M. 5471.

Commission Decision, *MOL / INA*, CASE IV/M. 5490.

Commission Decision, *ENEL / ENDESA*, CASE IV/M. 5494.

Commission Decision, *VATTENFALL / NUON*, CASE IV/M. 5496.

Commission Decision, *SD / JTIA / MIBRAG*, CASE IV/M. 5498.

Commission Decision, *GDF SUEZ ENERGY SERVICES / ELYO ITALIA*, CASE IV/M. 5501.

Commission Decision, *SIBUR / CITCO*, CASE IV/M. 5503.

Commission Decision, *ELECTRABEL / E.ON*, CASE IV/M. 5512.

Commission Decision, *KMG / CNPC / MMG*, CASE IV/M. 5513.

Commission Decision, *RWE INNOGY / RHEINENERGIE / STADTWERKE MÜNCHEN / MAN FERROSTAAL / MARQUESADO SOLAR*, CASE IV/M. 5515.

Commission Decision, *E.ON / ELECTRABEL ACQUIRED ASSETS*, CASE IV/M. 5519.

Commission Decision, *ITOCHU / MITSUBISHI / ENOLIA / JV*, CASE IV/M. 5520.

Commission Decision, *ENBW / BORUSAN / JV*, CASE IV/M. 5543.

Commission Decision, *EDF / SEGEBEL*, CASE IV/M. 5549.

Commission Decision, *BP / DUPONT / JV*, CASE IV/M. 5550.

Commission Decision, *F2I / FINAVIAS / ERG*, CASE IV/M. 5551.

Commission Decision, *CENTRICA / VENTURE PRODUCTION*, CASE IV/M. 5585.

Commission Decision, *CEZB / JAVYS / JESS JV*, CASE IV/M. 5591.

Commission Decision, *RREEF FUND / BP / EVE / REPSOL / BBG*, CASE IV/M. 5602.

Commission Decision, *ENI / TEC*, CASE IV/M. 5603.

Commission Decision, *DONG / KOM-STROM*, CASE IV/M. 5604.

Commission Decision, *ROBERT BOSCH / ALEO SOLAR / JOHANNA SOLAR TECHNOLOGY*, CASE IV/M. 5618.

Commission Decision, *MOTOR OIL (HELLAS) / CORINTH REFINERIES / SHELL OVERSEAS HOLDINGS*, CASE IV/M. 5637.

Commission Decision, *RREEF FUND / ENDESA / UFG / SAGGAS*, CASE IV/M. 5649.

Commission Decsion, *ENBW KRAFTWERKE / EVONIK POWER MINERALS / JV*, CASE IV/M. 5657.

Commission Decision, *AVIO / SECI-E/ JV*, CASE IV/M. 5663.

Commission Decision, *BOREAS HOLDINGS / CENTRICA / RENEWABLE ENERGY LIMITED / GLID WIND FARMS*, CASE IV/M. 5679.

Commission Decision, *BROOKFIELD / BBI / DBCT*, CASE IV/M. 5683.

Commission Decision, *VITOL HOLDING / PETROPLUS REFINING ANTWERP / PETROPLUS REFINING ANTWERP BITUMEN*, CASE IV/M. 5686.

Commission Decision, *OCCIDENTAL PETROLEUM CORPORATION / PHIBRO*, CASE IV/M. 5690.

Commission Decision, *DCC ENERGY/ SHELL DIRECT AUSTRIA*, CASE IV/M. 5694.

Commission Decision, *TENNET / E.ON*, CASE IV/M. 5707.

Commission Decision, *RWE / ENSYS*, CASE IV/M. 5711.

Commission Decision, *COMMERZBANK / CONERGY*, CASE IV/M. 5738.

Commission Decision, *GAZPROM / A2A / JV*, CASE IV/M. 5740.

Commission Decision, *TORAY / TCC / JV*, CASE IV/M. 5744.

Commission Decision, *GLENCORE / CHEMOIL ENERGY*, CASE IV/M. 5749.

Commission Decision, *MACQUARIE FUNDS / ANTIN IP / PISTO GROUP*, CASE IV/M. 5759.

Commission Decision, *ENBW / PRE*, CASE IV/M. 5766.

Commission Decision, *SORGENIA / J&P / ARGESTIS*, CASE IV/M. 5767.

Commission Decision, *QATAR PETREOLEUM / GENERAL ELECTRIC COMPANY / PII GROUP*, CASE IV/M. 5773.

Commission Decision, *TOTAL HOLDINGS EUROPE SAS / ERG SPA / JV*, CASE IV/M. 5781.

Commission Decision, *SHARP / ENEL GREEN POWER / JV*, CASE IV/M. 5788.

Commission Decision, *DALKIA CZ / NWR ENERGY*, CASE IV/M. 5793.

Commission Decision, *ENI / MOBIL OIL AUSTRIA*, CASE IV/M. 5796.

Commission Decision, *RWE ENERGY / MITGAS*, CASE IV/M. 5802.

Commission Decision, *ENI / FOX ENERGY*, CASE IV/M. 5807.

Commission Decision, *ELIA / IFM / 50 HERTZ*, CASE IV/M. 5827.

Commission Decision, *AVELAR / ENOVOS / AVELEOS*, CASE IV/M. 5832.

Commission Decision, *SCHLUMBERGER / SMITH INTERNATIONAL*, CASE IV/M. 5839.

Commission Decision, *SHELL / COSAN / JV*, CASE IV/M. 5846.

Commission Decision, *SHELL / TOPAZ / JV*, CASE IV/M. 5880.

Commission Decision, *DELEK EUROPE / BP FRANCE RETAIL*, CASE IV/M. 5888.

Commission Decision, *MARTANK / MTTI / VTTI*, CASE IV/M. 5910.

Commission Decision, *TENNET / ELIA / GASUNIE / APX-ENDEX*, CASE IV/M. 5911.

Commission Decision, *GDF SUEZ / GASELYS*, CASE IV/M. 5918.

Commission Decision, *VERBUND / EVN*, CASE IV/M. 5923.

Commission Decision, *OSAKA / UFG / INFRASTRUCTURE ARZAK / SAGGAS*, CASE IV/M. 5944.

Commission Decision, *SSI / QP /ORYX*, CASE IV/M. 5962.

Commission Decision, *BROOKFIELD / PRIME*, CASE IV/M. 5965.

Commission Decision, *PPC / URBASER / JV*, CASE IV/M. 5971.

Commission Decision, *CKI / HEH / EDF (UK ELECTRICITY DISTRIBUTION BUSINESS*, CASE IV/M. 5972.

Commission Decision, *GDF SUEZ / INTERNATIONAL POWER*, CASE IV/M. 5978.

Commission Decision, *HC / NATURGAS*, CASE IV/M. 5989.

Commission Decision, *KGHM / TAURON WYTWARZANIE / JV*, CASE IV/M. 5979.

Commission Decision, *ZMB CH / GWH*, CASE IV/M. 5985.

Commission Decision, *E.ON / PP (II)*, CASE IV/M. 6000.

Commission Decision, *CINVEN / SPICE*, CASE IV/M.6005.

Commission Decision, *GDF SUEZ / CERTAIN ASSETS OF ACEA ELECTRABEL*, CASE IV/M. 6014.

Commission Decision, *FIRST RESERVE CORPORATION / BLACKSTONE / PBF ENERGY*, CASE IV/M. 6054.

Commission Decision, *ENI / ACEGASAPS / JV*, CASE IV/M. 6068.

Commission Decision, *MITSUI RENEWABLE / FCCE / GUZMAN*, CASE IV/M. 6069.

Commission Decision, *CEZ / EPH / MIBRAG GROUP*, CASE IV/M. 6074.

Commission Decision, *VEOLIA / EDF / SOCIETE D'ENERGIE ET D'EAU DU GABON*, CASE IV/M. 6105.

Commission Decision, *HUANENG / OTPPB / INTERGEN*, CASE IV/M. 6111.

Commission Decision, *GOOD ENERGIES / NEIF / NEWCO*, CASE IV/M. 6112.

Commission Decision, *ARCELORMITTAL BREMEN / KOKEREI PROSPER / ARSOL AROMATICS*, CASE IV/M.6123.

Commission Decision, *ROSNEFT OIL COMPANY / BP / RUHR OEL*, CASE IV/M. 6147.

Commission Decision, *PETROCHINA / INEOS / JV*, CASE IV/M. 6151.

Commission Decision, *GEM / DEME / ELECTRAWINDS OFFSORE / SRIWE / Z-KRACHT / POWER@SEA / RENT A PORT ENERGY / SOCOFE / JV*, CASE IV/M. 6155.

Commission Decision, *ALTOR FUND III / E.ON ES*, CASE IV/M. 6157.

Commission Decision, *RWA / OMV / WARME*, CASE IV/M. 6167.

Commission Decision, *IPIC / CEPSA*, CASE IV/M. 6171.

Commission Decision, *ATLAS / SUNLIGHT / ADVANCED LITHIUM SYSTEMS EUROPE JV*, CASE IV/M. 6174.

Commission Decision, *MITSUBISHI CORPORATION / BARCLAYS BANK / WALNEY I TOPCO / WALNEY II TOBCO / SHERINGHAM SHOAL TOPCO*, CASE IV/M. 6176.

Commission Decision, *VITOL / HELIOS / SHELL / PLATEEAU HOLDING / BV3*, CASE IV/M. 6188.

Commission Decision, *GRUPO IBERDROLA / CAJA RURAL DE NAVARRA / RENOVABLES DE LA RIBERA*, CASE IV/M. 6206.

Commission Decision, *MOLARIS / COMMERZ REAL / RWE / AMPRION*, CASE IV/M. 6225.

Commission Decision, *RREEF / SMAG / OHL / ARENALES*, CASE IV/M. 6238.

Commission Decision, *CE GAS MARKETING & TRADING / VERBUNDNETZ GAS AG / VNG AUSTRIA*, CASE IV/M. 6243.

Commission Decision, *TOTAL / SUNPOWER*, CASE IV/M. 6252.

Commission Decision, *REGGEBORGH / NORTH SEA GROUP*, CASE IV/M. 6260.

Commission Decision, *NORTH SEA GROUP / ARGOS ROEP / JV*, CASE IV/M. 6261.

Commission Decision, *SAMSUNG C&T DEUTSCHLAND / KOREA DEVELOPMENT BANK / KNS SOLAR*, CASE IV/M. 6273.

Commission Decision, *ERG / LUKOIL / JV*, CASE IV/M. 6282.

Commission Decision, *VALERO / CHEVRON*, CASE IV/M. 6283.

Commission Decision, *SHELL / RONTEC INVESTMENTS*, CASE IV/M. 6294.

Commission Decision, *KKR / SORGENIA / SORGENIA FRANCE*, CASE IV/M. 6299.

Commission Decision, *F2I / AXA FUNDS / G6 RETE GAS*, CASE IV/M. 6302.

Commission Decision, *ANTIN INFRASTRUCTURE PARTNERS FCPR / RREEF PAN EUROPEAN INFASTRUCTURE FUND LP / ANDASOL 1-CENTRAL TERMOSOLAR UNO SA AND ANSADOL –2*, CASE IV/M. 6303.

Commission Decision, *CASSA DEPOSITI E PRESTITI / OMV GAS / TRANS AUSTRIA GASLEITUNG JV*, CASE IV/M. 6307.

Commission Decision, *ILVA / TARANTO ENERGIA*, CASE IV/M. 6351.

Commission Decision, *VITOL / TTI / ARCLIGHT / PETRO LUX*, CASE IV/M. 6352.

Commission Decision, *NYNAS / SHELL / HARBURG REFINERY*, CASE IV/M. 6360.

Commission Decision, *RWE INNOGY / CONETWORK*, CASE IV/M. 6366.

Commission Decision, *ENI / NUON BELGIUM / NUON WIND BELGIUM / NUON POWER GENERATION*, CASE IV/M. 6389.

Commission Decision, *HOCHTIEF SOLUTIONS / VENTIZZ / JV*, CASE IV/M. 6404.

Commission Decision, *APACHE / MOBIL NORTH SEA*, CASE IV/M. 6407.

Commission Decision, *GAZPROM SCHWEIZ / PROMGAS*, CASE IV/M. 6409.

Commission Decision, *EVRAZ / ALROSA / MINING AND METALLURGICAL COMPANY TIMIR JV*, CASE IV/M. 6412.

Commission Decision, *ITOCHU / TESSENDERLO CHEMIE / SIEMENS PROJECT VENTURES / T-POWER JV*, CASE IV/M. 6414.

Commission Decision, *DONG ENERGY / SHELL GAS DIRECT*, CASE IV/M. 6420.

Commission Decision, *TOKYO GAS / SIEMENS / TESSENDERLO CHEMIE / INTERNATIONAL POWER / GDF SUEZ / T-POWER JV*, CASE IV/M. 6422.

Commission Decision, *TEEKAY / MARUBENI / MAERSK LNG*, CASE IV/M. 6434.

Commission Decision, *DCC ENERGY / SWEA ENERGI*, CASE IV/M. 6449.

Commission Decision, *EDF / ERSA*, CASE IV/M. 6450.

Commission Decision, *EDF / KOGENERACJA*, CASE IV/M. 6456.

Commission Decision, *MARQUARD & BAHLS / BOMINFLOT*, CASE IV/M. 6463.

Commission Decision, *BP / CHEVRON / ENI / SONANGOL / TOTAL JV*, CASE IV/M. 6477.

Commission Decision, *TOTAL / NOVATEK / OAO YAMAL LNG*, CASE IV/M. 6494.

Commission Decision, *FCC / MITSUI RENEWABLE ENERGY / FCC ENERGIA*, CASE IV/M. 6499.

Commission Decision, *GIP / FLUXYS G / FLUXYS SWITZERLAND*, CASE IV/M. 6508.

Commission Decision, *GE / KGAL / EXTRESOL-2*, CASE IV/M. 6509.

Commission Decision, *OK EKONOMISK FÖRENING / KUWAIT PETROLEUM EUROPE / KUWAIT PETROLEUM DANMARK*, CASE IV/M. 6514.

Commission Decision, *SESA / DISA / SAE / JV*, CASE IV/M. 6525.

Commission Decision, *ABB / THOMAS & BETTS*, CASE IV/M. 6529.

Commission Decision, *EDF / EDISON*, CASE IV/M. 6530.

Commission Decisoin, *DONG ENERGY BORKUM RIFFGRUND I HOLDCO / BOSTON HOLDING / BORKUM RIFFGRUND I OFFSHORE WINDPARK*, CASE IV/M. 6540.

Commission Decision, *VITOL /GRINDROD / COCKETT GROUP*, CASE IV/M. 6571.

Commission Decision, *TENNET OFFSHORE GMBH / MITSUBISHI CORPORATION / TENNET OFFSHORE 2*, CASE IV/M. 6591.

Commission Decision, *VITOL / ATLASINVEST / PETROPLUS MARKETING*, CASE IV/M. 6612.

Commission Decision, *TRAFIGURA / BAYCLIFFE / BLUE OCEAN*, CASE IV/M. 6617.

Commission Decision, *LUKOIL / ISAB REFINERY*, CASE IV/M. 6635.

Commission Decision, *GUNVOR INGOLSTADT / GUNVOR DEUTSCHLAND / PETROPLUS ASSETS*, CASE IV/M. 6656.

Commission Decision, *CDC INFRASTRUCTURE / FORESIGHT SOLAR / ADENIUM SOLAR / VEI CAPITAL FOR VEI*, CASE IV/M. 6669.

Commission Decision, *MOL / KMG EP / JV*, CASE IV/M. 6677.

Commission Decision, *STEAG / FRONTERASOL / OHL INDUSTRIAL / ARENALES SOLAR*, CASE IV/M. 6679.

Commission Decision, *O. W. BUNKER / BERGEN BUNKERS*, CASE IV/M. 6697.

Commission Decision, *CHEUNG KONG HOLDINGS / CHEUNG KON INFRASTRUCTURE HOLDINGS / POWER ASSETS HOLDINGS / MGN GAS NETWORKS*, CASE IV/M. 6698.

Commission Decision, *TALISMAN / SINOPEC / JV*, CASE IV/M. 6700.

Commission Decision, *SK INNOVATION CO / CONTINENTAL AG*, CASE IV/M. 6706.

Commission Decision, *CNOOC / NEXEN*, CASE IV/M. 6715.

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Commission Decision, *KOCH INDUSTRIES / GUARDIAN*, CASE IV/M. 6734.

Commission Decision, *ENERGIE STEIERMARK / STEWEAG STEG*, CASE IV/M. 6747.

Commission Decision, *EVN NETZ / OÖ.FERNGAS NETZ / GASNETZ STEIERMARK / GAS CONNECT AUSTRIA / AGGM AUSTRIAN GAS GRID MANAGEMENT*, CASE IV/M. 6780.

Commission Decision, *EPH / SPP*, CASE IV/M. 6786.

Commission Decision, *ROSNEFT / TNK-BP*, CASE IV/M. 6801.

Commission Decision, *E.ON / SABANCI / ENERJISA*, CASE IV/M. 6810.

Commision Decision, *ENEL GREEN POWER / SECI ENERGIA / POWERCROP*, CASE IV/M. 6849.

Commission Decision, *CAMERON / SCHLUMBERGER / ONESUBSEA*, CASE IV/M. 6854.

Commission Decision, *DSE / INCJ / SOLAR VENTURES / JV*, CASE IV/M. 6864.

Commission Decision, *GE / MUNICH RE / IBERDROLA RENOVABLES FRANCEM*, CASE IV/M. 6870.

Commission Decision, *TENNET OFFSHORE / MITSUBISHI CORPORATION / TENNET OFFSHORE 8*, CASE IV/M. 6875.

Commission Decision, *OILTANKING GMBH / GUNVOR GROUP LTD / PT OILTANKING KARIMON*, CASE IVM. 6877.

Commission Decision, *SHELL / REPSOL (MAJOR PART OF LNG BUSINESS)*, CASE IV/M. 6897.

Commission Decision, *RWA / GENOL*, CASE IV/M. 6903.

Commission Decision, *GAZPROM / WINTERSHALL / TARGET COMPANIES*, CASE IV/M. 6910.

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Commission Decision, *ABB / POWER-ONE*, CASE IV/M. 6945.

Commission Decision, *UPC / GPT / JV*, CASE IV/M. 6950.

Commission Decision, *EPH / STREDOSLOVENSKA ENERGETIKA*, CASE IV/M. 6984.

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Commission Decision, *CARLYLE / KLENK HOLZ*, CASE IV/M. 7001.

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Commission Decision, *MARUBENI / NPIH*, CASE IV/M. 7014.

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Commission Decision, *OILTANKING / MACQUARIE / CHEMOIL STORAGE*, CASE IV/M. 7025.

Commission Decision *TRITON / AE HOLDING*, CASE IV/M. 7034.

Commission Decision, *PGGM / GDF SUEZ / EBN /NOGAT*, CASE IV/M. 7039.

Commission Decision, *PARKWIND / SUMMIT RENEWABLE ENERGY BELWIND 1 / BELWIND*, CASE IV/M. 7046.

Commission Decision, *QATAR PETROLEUM INTERNATIONAL / GEK TERNA / GDF SUEZ / HERON II VIOTIA THERMOELECTRIC STATION*, CASE IV/M. 7053.

Commission Decision, *CNODC / NOVATEK / TOTAL EPY / YAMAL LNG*, CASE IV/M. 7066.

Commission Decision, *GOLDMAN SACHS / KINGDOM OF DENMARK / DONG ENERGY*, CASE IV/M. 7068.

Commission Decision, *GESTAMP / EOLICA / BANCO SANTANDER / JV*, CASE IV /M. 7070.

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Commission Decision, *VITOL / CARLYLE / VARO*, CASE IV/M. 7087.

Commission Decision, *SOCAR / DESFA*, CASE IV/M. 7095.

Commission Decision, *ENI ULX / LIVERPOOL BAY JV*, CASE IV/M. 7096.

Commission Decision, *SALES & SOLUTIONS / VERBUND / JV*, CASE IV/M. 7098.

Commission Decision, *PENSIONDANMARK HOLDING / GDF-SUEZ / NOORDGASTRANSPORT*, CASE IV/M. 7106.

Commission Decision, *AXPO GROUP / EDF GROUP / JV*, CASE IV/M. 7108.

Commission Decision, *E.ON SVERIGE / SEAS-NVE HOLDING / E.ON VIND SVERIGE*, CASE IV/M. 7121.

Commission Decision, *EDF / DALKIA EN FRANCE*, CASE IV/M. 7137.

Commission Decision, *GDF SUEZ / OMNES CAPITAL / PREDICA PREVOYANCE / FEIH*, CASE IV/M. 7139.

Commission Decision, *VEOLIA ENVIRONMENT / DALKIA INTERNATIONAL*, CASE IV/M. 7145.

Commission Decision, *BOREALIS EUROPEAN HOLDINGS / FIRST STATE INVESTMENTS / FORTUM DISTRIBUTION FINLAND*, CASE IV/M. 7148.

Commission Decision, *WORLD FUEL SERVICES CORPORATION / WATSON PETROLEUM LTD.*, CASE IV/M. 7154.

Commission Decision, *WEX / RADIUS / EUROPEAN FUEL CARD BUSINESS OF ESSO*, CASE IV/M. 7156.

Commission Decision, *DCC ENERGY / QSTAR FÖRSÄLJNING / QSTAR / CARD NETWORK SOLUTIONS*, CASE IV/M. 7161.

Commission Decision, *LUKOIL / ISAB / ISAB ENERGY / ISAB ENERGY SERVICES*, CASE IV/M. 7168.

Commission Decision, *VARO ENERGY / BAYERNOIL PACKAGE*, CASE IV/M. 7171.

Commission Decision, *KENDRICK / TOPAS / RPIF*, CASE IV/M. 7183.

Commission Decision, *KUWAIT PETREOLEUM BV / KUWAIT PETROLEUM ITALIA / SHELL ITALIA / SHELL AVIAZIONE*, CASE IV/M. 7196.

Commission Decision, *AMEC / FOSTER WHEELER*, CASE IV/M. 7215.

Commission Decision, *REGGEBORGH / ARGOS GROUP HOLDING*, CASE IV/M. 7216.

Commission Decision, *SONACI / DTS / SONACI DT*, CASE IV/M. 7219.

Commission Decision, *ENERCON INDEPENDENT POWER PRODUCER / GOTHAER LEBEN RENEWABLES / SKOGBERGET VIND*, CASE IV/M. 7222.

Commission Decision, *CENTRICA / BORD GAIS ENERGY*, CASE IV/M. 7228.

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Commission Decision, *TDR CAPITAL / DELEK EUROPE*, CASE IV/M. 7305.

Commission Decision, *ELECTRICITY SUPPLY BOARD / VODAFONE IRELAND / JV*, CASE IV/M. 7307.

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Commission Decision, *DET NORSKE OLJESELSKAP/ MARATHON OIL NORGE*, CASE IV/M. 7316.

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Commission Decision, *OFI INFRAVIA / GDF SUEZ / PENSIONDANMARK / NGT*, CASE IV/M. 7390.

Commission Decision, *SAUDI ARAMCO / S-OIL*, CASE IV/M. 7396.

Commission Decision, *KLESCH REFINING / MILFORD HAVEN REFINERY ASSETS*, CASE IV/M. 7402.

Commission Decision, *EPH / EGGBOROUGH HOLDCO 2*, CASE IV/M. 7439.

Commission Decision, *O. J.I HOLDINGS / ITOCHU CORPORATION / SALES AND PRODUCTION JVS*, CASE IV/M. 7468.

Commission Decision, *MACQUARIE / WREN HOUSE / E.ON SPAIN*, CASE IV/M. 7490.

Commission Decision, *DCC ENERGY / ESSO SAF*, CASE IV/M. 7508.

Commission Decision, *EPH / E.ON ITALIA COAL AND GAS BUSINESS*, CASE IV/M. 7534.

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Commission Decision, *RWE / VSE*, CASE IV/M. 7589.

Commisison Decision, *3I GROUP / OILTANKING GMBH / OILTANKING GHENT / OILTANKING TERNEUZEN*, CASE IV/M. 7591.

Commission Decision, *STATOIL FUEL AND RETAIL / DANSK FUELS*, CASE IV/M. 7603.

Commission Decision, *BOREALIS SIEGFRIED HOLDINGS / FORTUM DISTRIBUTION AB*, CASE IV/M. 7608.

Commission Decision, *DCC / DLG DANISH ENERGY BUSINESS*, CASE IV/M. 7616.

Commission Decision, *PSP / OTTP / TONOPAH SOLAR INVESTMENTS / TONOPAH SOLAR ENERGY*, CASE IV/M. 7629.

Commission Decision, *ROYAL DUTCH SHELL / BG GROUP*, CASE IV/M. 7631.

Commission Decision, *KIA / GAS NATURAL FENOSA / GPG*, CASE IV/M. 7633.

Commission Decision, *CASTLETON / MORGAN STANLEY GLOBAL OIL MERCHANTING UNIT*, CASE IV/M. 7665.

Commission Decision, *DCC / BUTAGAZ*, CASE IV/M. 7680.

Commission Decision, *WORLD FUEL SERVICES / BP AVIATION FUEL DIVESTMENT BUSINESS*, CASE IV/M. 7694.

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Commission Decision, *CVC CAPITAL PARTNERS / SICAV-FIS / PKP ENERGETYKA*, CASE IV/M. 7751.

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Commission Deicision, *ENI HUNGARIIA / ENI SLOVENIJA / MOL HUNGARIAN OIL AND GAS PLC*, CASE IV/M. 7849.

Commission Decision, *EDF / CGN / NNB GROUP OF COMPANIES*, CASE IV/M. 7850.

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Commission Decision, *MACQUARIE / DOLOMITI ENERGIA / HYDRO DOLOMITI ENEL*, CASE IV/M. 7869.

Commission Decision, *SAUDI ARAMCO / LANXESS / JV*, CASE IV/M. 7879.

Commission Decision, *BP EUROPA / RUHROEL*, CASE IV/M. 7885.

Commission Decision, *ALIMENTATION COUCHE TARD / TOPAZ ENERGY GROUP / RESOURCE PROPERTY INVESTMENT FUND / ESSO IRELAND*, CASE IV/M. 7899.

Commission Decision, *EPH / ENEL / SE*, CASE IV/M. 7927.

Commission Decision, *PETROL / GEOPLIN*, CASE IV/M. 7936.

Commission Decision, *THE KINGDOM OF DENMARK / DONG*, CASE IV/M. 7994.

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Commission Decision, *CENTRICA / NEAS ENERGY*, CASE IV/M. 8042.

Commission Decision, *BOSKALIS / VOLKER WESSELS OFFSHORE BUSINESS*, CASE IV/ M.8045.

Commission Decision, *EPH / PPF INVESTMENTS / VATTENFALL GENERATION / VATTENFALL MINING*, CASE IV/M. 8056.

Commission Decision, *TOTAL / SAFT*, CASE IV/M. 8072.

Commission Decision, *PARTNERS GROUP / INFRARED CAPITAL PARTNERS / MERKUR OFFSHORE*, CASE IV/M. 8075.

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Commission Decision, *DIF / ELECTRICITE DE FRANCE / THYSSENGAS*, CASE IV/M. 8119.

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Commission Decision, *NKT / ABB HIGH VOLTAGE CABLE BUSINESS*, CASE IV/M. 8239.

Commission Decision, *EDF / CDC / RTE*, CASE IV/M. 8270.

Commission Decision, *GENERAL ELECTRIC COMPANY / LM WINDPOWER HOLDING*, CASE IV/M. 8283.

Commission Decision, *ENGIE / OMNES CAPITAL / PREDICA / MAIA EOLIS*, CASE IV/M. 8289.

Commission Decision, *CEFCI / JSC KAZMUNAIGAZ / ROMPETROL FRANCE*, CASE IV/M. 8319.

Commission Decision, *DONG ENERGY / MACQUARIE / SWANCOR / FORMOSA 1 WIND POWER*, CASE IV/M. 8343.

Commission Decision, *EQT FUND MANAGEMENT / GETEC ENERGY HOLDING / GETEC TARGET COMPANIES*, CASE IV/M. 8347.

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Commission Decision, *TPG / OAKTREE / IONA ENERGY*, CASE IV/M. 8443.

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Commission Decision, *INEOS / FORTIES PIPELINE SYSTEM*, CASE IV/M. 8456.

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Commission Decision, *BAYWA / CLEAN ENERGY TRADING*, CASE IV/M. 8758.

Commission Decision, *SHELL / IMPELLO*, CASE IV/M. 8775.

Commission Decision, *VOTORANTIM / CPPIB / VTRM ENERGIA PARTICIPACOES / VENTOS DO ARARIPE III*, Case IV/M.8777.

Commission Decision, *WATERLAND / DE NEDERLANDSE ENERGIE MAATSCHAPPIJ*, CASE IV/M. 8781.

Commission Decision, *GOLDMAN SACHS / RIVERSTONE INVESTMENT / LUCID ENERGY GROUP II*, CASE IV/M. 8800.

Commission Decision, *ELIA SYSTEM OPERATOR / EUROGRID INTERNATIONAL*, CASE IV/M. 8826.

Commission Decision, *STADTWERKE OLCHING / BAG NETZ / NG OLCHING VERWALTUNGS GmbH*, CASE IV/M. 8835.

Commission Decision, *OTARY / ENECO / ELECTRABEL / JV*, CASE IV/M. 8855.

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Commission Decision, *TOTAL / DIRECT ENERGIE*, CASE IV/M. 8926.

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Commission Decision, *PARTNERS GROUP / TECHEM*, CASE IV/M. 8980.

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BVerfGE 90, 145, 173.

BVerfGE 98, 218, 251

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1.9 U.S. Legislation

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Abbreviations

BKartA	Bundeskartellamt (Federal Cartel Office).
CJEU	Court of Justice of the European Union.
DHO	Domestic Heating Oil.
EEA	European Economic Area.
EC	European Community.
ECSCT	Treaty Establishing the European Coal and Steel Community – expired.
ECT	Treaty Establishing the European Economic Community, as Amended by the Treaty of Maastricht, Amsterdam, Nice and Lissabon.
EFTA	European Free Trade Association.
EP	European Parliament.
ESA	Euratom Supply Agency.
EU	European Union.
EUT	European Union Treaty.
FDI	Foreign Direct Investment.
GTGC	Gas to Gas Competition.
GW	Giga Watt.
GWB1998	German Antitrust Act of 26 August 1998.
HEU	Highly Enriched Uranium.
HHI	Herfindahl-Hirschmann-Index. It equals the sum of the squares of market shares of all undertakings active on a given market[1].
IAEA	International Atomic Energy Agency.
IEMD	Internal Electricity Market Directive. Directive 1996/92/EC as amended by Directive 2003/54/EC, Directive 2009/72/EC and Directive EU 2019/944.

[1] Commission Guidelines on the assessment of horizontal mergers of 16/12/2003, O. J. C 31, 05/02/2004, p 5; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 25 II. p 598; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1419, p 559; A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 379, p 178; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 12 p 574; B. Woeckener, Strategischer Wettbewerb (3rd ed.)(Berlin, Germany, Springer, 2014) CH 3.5.1.3, p 88; I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 6 V 1. c), p 171; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.1 (3) (c) p 639 and § 7.15 (1) (d) p 690.

IGMD	Internal Gas Market Directive. Directive 1998/30/EC as amended by Directive 2003/55/EC, Directive 2009/73/EC and Directive EU 2019/692.
IP	Intellectual Property.
JV	Joint Venture.
km	kilometer.
kV	kilo Volt.
Kt	kilo ton.
ktpa	kilo ton per annum.
LEU	Low Enriched Uranium.
LIC	Large Industrial Customer.
MR1989	Merger Regulation of 1989, i.e. Council Regulation No. 4064/1989/EEC of 21 December1989 on the Control of Concentrations between Undertakings, O. J. L 395, 30/12/89, p 1.
MR1997	Merger Regulation of 1997, i.e. Council Regulation 1310/1997/EC of 30 June 1997 Amending Council Regulation 4064/1989/EEC on the Control of Concentrations between Undertakings, O. J. L 180, 09/07/97, p 1.
MR2004	Merger Regulation of 2004, i.e. Council Regulation (EC) No. 139/2004 of 20 January 2004 on the Control of Concentrations between undertakings.
MW	Mega Watt.
NGO	Non Governmental Organisation.
NPT	Treaty on the Non-proliferation of nuclear weapons.
OFGEM	Office For Gas and Electricity Markets.
PSO	Public Service Obligation.
RDC	Regional Distribution Company
REG17	Regulation No. 17/1962: First Regulation Implementing Art. 85 and 86 of The Treaty.
R&D	Research and Development.
SCP	Structure-Conduct-Performance Model.
T&D	Transmission and Distribution.
TFEU	Treaty on the functioning of the European Union.
t	ton.

TPA	Third Party Access.
TWh	Tera Watt hour.

Definitions

Merger — The term merger can be used twofold: Firstly, it may represent a blanket term for all categories of concentrations. Secondly, it describes a specific kind of concentration which is based on an amalgamation of undertakings so that at least one of the partners loses its legal identity (legal merger)[2]. Factual mergers arise if a single economic unit is created although the partners remain independent from the legal point of view[3].

[2] E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 24 II. p 554.
[3] E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 24 II. p 554.

Summary

This doctoral thesis examines how European merger control law is applied to the energy sector and to which extent its application may facilitate the liberalisation of the electricity, natural gas and petroleum industries so that only those concentrations will be cleared that honour the principles of the liberalisation directives (IEMD and IGMD[4]). In its communication on an energy policy for Europe, adopted on 10/01/2007, the Commission emphasized that a real internal European energy market is essential to meet Europe's three energy objectives, i.e. competitiveness to cut costs for citizens and undertakings to foster energy efficiency and investment, sustainability including emissions trading, and security of supply with high standards of public service obligations (Art. 106 TFEU)[5]. The EU issued three pre-liberalisation directives since the 1990s[6]. Dissatisfied with the existing monopolistic structures, i.e. in Germany through demarcation and exclusive concession agreements for the supply of electricity and natural gas, which were until 1998 exempted from the cartel prohibition provision (§ 1 GWB), and the prevalence of exclusive rights on the energy markets, the Commission triggered infringement proceedings against four member states under Art. 258 TFEU[7]. The CJEU confirmed that the Commission has the power to abolish monopoly rights under certain circumstances and the rulings had the effect of convincing the member states to enter into negotiations for an opening up of energy markets owing to the internal market energy liberalization directives of 1996 / 1998 / 2003 / 2009 / 2019 (IEMD and IGMD)[8]. The core element of the IEMD and IGMD is to abolish exclusive rights and offer primarily at least large industrial electricity and gas consumers to choose their supplier (market opening for eligible consumers)[9] and to grant negotiated or regulated third party access to transmission and distribution grids so to address natural monopolies[10].

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[4] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 1, p 1184 and § 34 marginal note 5, p 1185.
[5] Commission, Communication on an Energy Policy for Europe, COM (2007) 1 final, SEC (2007), adopted on 10/01/2007; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 12, marginal note 12.02, p 1582.
[6] Council Directive 1990/377/EEC on a Community crocedure to improve transparency of gas and electricity prices charged to industrial end-users, O. J. 1990 L 185, p 16, Council Directive 1990/547/EEC of 29 October 1990 on the transit of electricity through transmission grids, O. J. 1990 L 313, p 30 and Council Directive 1991/296/EEC on the transit of natural gas through grids, O. J. 1991 L 147, p 37; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 12, marginal note 12.05, p 1582.
[7] CJEU, Case C-157/1994 Commission v Netherlands [1997] ECR I-5699; CJEU, Case C-158/1994 Commission v Italy [1997] ECR I-5789; CJEU, Case C-159/1994 Commission v France [1997] ECR I-5815; CJEU, Case C-160/1994 Commission v Spain [1997] ECR I-5851; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 12, marginal note 12.05, p 1583.
[8] Art. 114 TFEU as legal base; Directive 1996/92/EC of the European Parliament and of the Council of 19 December 1996 Concerning Common Rules for the Internal Market in Electricity, O. J. L 027, 30/01/1997, p 20; Directive 1998/30/EC of the European Parliament and of the Council of 22 June 1998 Concerning Common Rules for the Internal Market in Natural Gas, O. J. L 204, 21/07/1998, p 1; Directive 2003/54/EC of the European Parliament and of the Council of 26/06/2003 Concerning Common Rules for the Internal Market in Electricity and Repealing Directive 1996/92/EC, O. J. L 176, 15/07/2003, p 37; Directive 2003/55/EC of the European Parliament and of the Council of 26/06/2003 Concerning Common Rules for the Internal Market in Natural Gas and Repealing Directive 1998/30/EC, O. J. L 176, 15/07/2003, p 57; Directive 2009/72/EC of the Parliament and the Council of 13/07/2009 Concerning Common Rules for the Internal Market in Electricity and Repealing Directive 2003/54/EC, O. J. L 211, 14/08/2009, p 55; Directive 2009/73/EC of the Parliament and the Council of 13/07/2009 Concerning Common Rules for the Internal Market in Natural Gas and Repealing Directive 2003/55/EC, O.J. L 211, 14/08/2009, p 94; Directive (EU) 2019/692 of the European Parliament and of the Council of 17 April 2019 amending Directive 2009/73/EC concerning common rules for the internal market in natural gas, O.J. 2019 L 117, p 1 (IGMD2019); Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU, O.J. 2019 L 158, p 125 (IEMD2019).
[9] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 12, marginal note 12.06, p 1583.
[10] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 12, marginal note 12.06, p 1583.

The second liberalization package of 2003 brought a widening of market opening and acceleration of pace of market opening to a greater number of eligible customers (all non-household consumers since July 2004 and all consumers since July 2007)[11] and an increase in the provisions on management and legal unbundling[12]. In parallel, two regulations regulate the access to cross-border electricity infrastructure (interconnectors) and the third party access to gas transmission networks[13]. Two further Directives addressed the security of natural gas and power supply[14] and a third deals with energy end use efficiency and services[15], a fourth dealt with the promotion of co-generation[16] and a fifths covers marine environmental policy[17] (Marine Strategy Framework Directive in combination with the Hydrocarbons-Licensing Directive[18]) backed by the public procurement directive in the energy sector[19]. A regulation covers energy statistics[20]. The implementation of the second energy package was slow and the Commission launched infringement proceedings against 5 member states in front of the CJEU (Art. 258, 256 TFEU)[21]. The 3rd energy package of 2009 addressed ownership unbundling[22] of key-infrastructure ownership and energy wholesale and retail supply consisting of three regulations and two directives[23], deals with independent regulators, an agency for the cooperation of energy regulators (ACER) and cross-border cooperation (the European Network for transmission system operators for electricity and gas

[11] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 12, marginal note 12.07, p 1583.
[12] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 12, marginal note 12.14, p 1586.
[13] Regulation (EC) No. 714/2009 of the European Parliament and of the Council of 13 July 2009 on Conditions for Access to the Network for Cross-Border Exchanges in Electricity and Repealing Regulation (EC) No.1228/2003, OJ L 211, 14/08/2009, pp. 15–35; Regulation (EC) No. 1775/2005 on Conditions for Access to the Natural Gas Transmission Networks, O. J. 2005 L 289, p 1.
[14] Council Directive 2004/67/EC of 26 April 2004 concerning measures to safeguard security of natural gas supply, O.J. 2004 L 127, p 92, as repealed by Art. 15 Regulation (EU) No. 994/2010; Directive 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment, O.J. 2006 L 33, p 22, as repealed by Art. 23 Regulation (EU) 2019/941 of the European Parliament and of the Council of 5 June 2019 on risk-preparedness in the electricity sector and repealing Directive 2005/89/EC, O.J. 2019 L 158, p 1.
[15] Directive 2006/32/EC of the European Parliament and of the Council of 5 April 2006 on energy end-use efficiency and energy services and repealing Council Directive 1993/76/EEC, O.J. 2006 L 114, p 64.
[16] Directive 2004/8/EC of the European Parliament and of the Council of 11 February 2004 on the promotion of cogeneration based on a useful heat demand in the internal energy market and amending Directive 1992/42/EEC, O.J. 2004 L 52, p 40 as repealed by Directive 2012/27/EU.
[17] Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive), O.J. 2008 L 164, p 19.
[18] Directive 1994/22/EC of the European Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorizations for the prospection, exploration and production of hydrocarbons, O.J. 1994 L 164, p 3.
[19] Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, O.J. 2004 L 134, p 1 as repealed by Directive 2014/25/EU of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, O.J. 2014 L 94, p 243.
[20] Regulation (EC) No. 1099/2008 of the European Parliament and of the Council of 22 October 2008 on energy statistics, O.J. 2008 L 304, p 1.
[21] At least 10 member states have failed to implement the 2nd energy package; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 12, marginal note 12.08, p 1584.
[22] Art. 9 IEMD 2009; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 12, marginal note 12.14, p 1586.
[23] IEMD2009, IGMD2009, Regulation (EC) No.713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, O. J. L 211, 14/08/2009, pp. 1–14 as amended by Art. 20 Regulation (EU) No. 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No.1364/2006/EC and amending Regulations (EC) No.713/2009, (EC) No.714/2009 and (EC) No. 715/2009, O.J. 2013 L 115, p 39; as repealed by Art. 46 Regulation (EU) 2019/942; Regulation (EC) No. 714/2009 of the European Parliament and of the Council of 13 July 2009 on Conditions for Access to the Network for Cross-Border Exchanges in Electricity and Repealing Regulation (EC) No.1228/2003, OJ L 211, 14/08/2009, pp. 15–35, as amended by Art. 21 Regulation (EU) No. 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No. 1364/2006/EC and amending Regulations (EC) No. 714/2009 and (EC) No.715/2009, O.J. 2013 L 115, p 39; Regulation (EC) No. 715/2009 of the European Parliament and of the Council of 13 July 2009 on Conditions for Access to the Natural Gas Transmission Networks and Repealing Regulation (EC) No. 1775/2005, O. J. L 211, 14/08/2009, pp. 36–54, as amended by Art. 22 Regulation (EU) No. 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No. 1364/2006/EC and amending Regulations (EC) No.713/2009, (EC) No.714/2009 and (EC) No.715/2009, O.J. 2013 L 115, p 39.

[ENTSO-E/G] and a regulation on cross-border grid access for electricity and natural gas[24]. Another new regulation deals with market integrity and transparency[25]. Hence, new regulations regulate guidelines on electricity balancing[26], congestion management[27], long-term capacity allocation[28], the code for grid access[29] and transmission system operation[30]. Other regulations address the guidelines for a European cross-border energy infrastructure[31], which has to be interpreted in the context of European environmental impact assessment law[32], the submission of data in electricity markets[33], establish a network code on demand connection[34], rule on a network code for grid access for direct current transmission systems[35], define guidelines on electricity transmission system operation[36], regulate a network code on electricity emergency[37], deal with security of natural gas supply[38] and establish a programme to aid economic recovery by granting financial assistance[39]. Finally, Directives promote the usage of renewable energies[40], regulate common oil stocks[41], the safety of offshore oil and gas production[42] and the quality of petrol and diesel fuels[43].

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[24] Regulation (EC) No. 714-715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No.1228/2003, O.J. 2009 L 211, p 15.
[25] Regulation (EU) No. 1227/2011 of the European Parliament and of the Council of 25 October 2011 on Wholesale Energy Market Integrity and Transparency, O. J. 2011 L 326, p 1; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 12, marginal note 12.135, p 1622 and marginal note 12.203, p 1638.
[26] Commission Regulation (EU) 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing, O.J. 2017 L 312, p 6.
[27] Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management, O.J. L 2015 L 197, p 24.
[28] Commission Regulation (EU) 2016/1719 of 26 September 2016 establishing a guideline on forward capacity allocation, O.J. 2016 L 259, p 42.
[29] Commission Regulation (EU) 2016/631 of 14 April 2016 establishing a network code on requirements for grid connection of generators, O.J. 2016 L 112, p 1.
[30] Commission Regulation (EU) 2017/1485 of 2 August 2017 establishing a guideline on electricity transmission system operation, O.J. 2017 L 220, p 1.
[31] Regulation (EU) No. 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No.1364/2006/EC and amending Regulations (EC) No.713/2009, (EC) No.714/2009 and (EC) No.715/2009, O.J. 2013 L 115, p 39.
[32] Council Directive 1985/33/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, O.J. L 1985 175, p 40; Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, O.J. 2001 L 197, p 30; Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 1985/337/EEC and 1996/61/EC, O.J. 2003 L 156, p 17; Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, O.J. 2011 L 26, p 1; Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, O.J. 2014 L 124, p 1.
[33] Commission Regulation (EU) No. 543/2013 of 14 June 2013 on submission and publication of data in electricity markets and amending Annex I to Regulation (EC) No.714/2009 of the European Parliament and of the Council, O.J. 2013 L 163, p 1.
[34] Commission Regulation (EU) 2016/1388 of 17 August 2016 establishing a network code on demand connection, O.J. 2016 L 223, p 10.
[35] Commission Regulation (EU) 2016/1447 of 26 August 2016 establishing a network code on requirements for grid connection of high voltage direct current systems and direct current-connected power park modules, O.J. 2016 L 241, p 1.
[36] Commission Regulation (EU) 2017/1485 of 2 August 2017 establishing a guideline on electricity transmission system operation, O.J. 2017 L 220, p 1.
[37] Commission Regulation (EU) 2017/2196 of 24 November 2017 establishing a network code on electricity emergency and restoration, O.J. 2017 L 312, p 54.
[38] Regulation (EU) 2017/1938 of the Parliament and the of the Council of 25 October 2017 concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No. 994/2010, O.J. 2017 L 280, p 1; Regulation (EU) No. 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC, O.J. 2010 L 295, p 1.
[39] Regulation (EC) No. 663/2009 of the European Parliament and of the Council of 13 July 2009 establishing a programme to aid economic recovery by granting Community financial assistance to projects in the field of energy, O.J. 2009 L 200, p 31.
[40] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, O.J. 2009 L 140, p 16, now Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources, O.J. 2018 L 328, p 82.
[41] Council Directive 2009/119/EC of 14 September 2009 imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products, O.J. 2009 L 265, p 9.
[42] Directive 2013/30/EU of the European Parliament and of the Council of 12 June 2013 on safety of offshore oil and gas operations and amending Directive 2004/35/EC, O.J. 2013 L 178, p 66 in combination with the Marine Strategy Framework Directive 2008/56/EC and the Hydrocarbons Licensing Directive 1994/22/EC.
[43] Directive (EU) 2015/1513 of the European Parliament and of the Council of 9 September 2015 amending Directive 1998/70/EC relating to the quality of petrol and diesel fuels and amending Directive 2009/28/EC on the promotion of the use of energy from renewable sources, O.J. 2015 L 239, p 1.

The 4th liberalization package consists of a new IEMD2019[44] and IGMD2019[45], of a new regulation on European cross-border electricity trade[46], of a regulation on risk preparedness in the electricity sector[47], of a new agency for the cooperation of European energy regulators[48], addresses energy efficiency[49] and rules on good governance in the energy union[50].

Since 2008, the Art. 194 I-II TFEU governs the ordinary legislation procedure in the energy sector (internal market in energy, security of energy supply, energy efficiency, energy saving, renewable energies, interconnection of energy grids)[51] notwithstanding of unanimous decision making in case of energy taxation matters (Art. 194 III TFEU).

A brief analysis of the economic implications of concentrations is followed by an assessment of the evolution of European merger control law under Art. 66 ECSCT, Art. 101 and 102 TFEU, the merger control regulation of 1989 and its significant amendments of 1997 and 2004. Then, the theoretical findings are contrasted to the results of recent merger proceedings in the energy sector with a focus on the VEBA/VIAG decision. Several deficiencies are established which limit the efficacy of merger control as a tool of offsetting shortcomings in the secondary EC law with regard to the liberalisation of the electricity and gas supply industry (IEMD and IGMD). Commitments proposed by the parties of a given concentration and accepted by the Commission as being sufficient to remedy a serious potential of dominance may only be of subsidiary relevance to the liberalisation of sectors owing to a number of analytical and practical drawbacks. One dominant drawback relates to the fact that the commitments depend always on parties' proposals and can never be imposed ex officio. Others relate to the blunt authorisations provided by the wording of Art. 6 and 8 MR1997 and MR2004 as to the implementation of incidental provisions or undertakings.

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[44] Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU, O.J. 2019 L 158, p 125.

[45] Directive (EU) 2019/692 of the European Parliament and of the Council of 17 April 2019 amending Directive 2009/73/EC concerning common rules for the internal market in natural gas, O.J. 2019 L 117, p 1.

[46] Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity, O.J. 2019 L 158, p 54.

[47] Regulation (EU) 2019/941 of the European Parliament and of the Council of 5 June 2019 on risk-preparedness in the electricity sector and repealing Directive 2005/89/EC, O.J. 2019 L 158, p 1.

[48] Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators, O.J. 2019 L 158, p 22.

[49] Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC O.J. 2012 L 315, p 1, as amended by Art. 70 Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU, O.J. 2019 L 158, p 125.

[50] Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the governance of the Energy Union and climate action, amending Regulations (EC) No. 663/2009 and (EC) No. 715/2009 of the European Parliament and of the Council, Directives 1994/22/EC, 1998/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No. 525/2013 of the European Parliament and of the Council, O.J. 2018 L 328, p 1.

[51] I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 12.11 (1) p 1406.

With regard to acquisitions of U.K. regional electricity companies by EdF, it is elaborated that the current merger control law leaves no scope for reciprocity considerations regarding acquisitions by incumbent companies in liberalised markets even though the acquirer is a protected public undertaking. Moreover, it is established that different decisions apply inconsistent market definitions. By means of the VEBA/VIAG and RWE/VEW cases, the question is addressed which causes are responsible for the established analytical and practical deficiencies of merger control in the energy sector. It is stated that the weaknesses of the IEMD 2009/72/EC and IGMD 2009/73/EC are partly responsible for weak undertakings which do not sufficiently remove the scope for dominance on the affected markets and which do not rule out any possibility of impediments of effective negotiated or regulated TPA[52] and do not remove any commercial incentive of the grid subsidiaries of the vertically integrated companies as to access which discriminates between intra and extra group applicants. It is reported that another argument relates to the limited scope that the Commission has if it wants to remedy deficiencies of written primary law owing to the extraordinary nature of the implied powers doctrine based on the principle of constitutional state. Adverse political influence against competition authorities is also judged. Further, it is analysed that accidental regulation based on incidental provisions imposed on undertakings which may or not implement a concentration is by no means a consistent and non-discriminatory and predictable tool to overcome drawbacks of primary or secondary European law in a given sector owing to the democratic principle and the constitutional state doctrine. It is discussed that secondary legislation with regard to energy networks is inter alia restricted by Art. 345 TFEU and provisions of national constitutions which protect property rights against dis-proportionate expropriations or re-definitions of property. Further, legal authorisations of said calibre will have to be connected to a system of state liability law. Adverse political pressures are considered. The same is true for egoistic national policies which abstain from transnational task forces in order to settle difficulties and disputes. Furthermore, the adverse effect of different stages of the maturity of domestic markets, different consumer patterns and a potential isolation of the system is not neglected, because these conditions make it more difficult to apply consistent standards as to the appropriate market definition in order to facilitate harmonisation. The implementation of the VEBA/VIAG merger is discussed, as the former was further complicated owing to specifically evaluated circumstances which were difficult to predict. Nevertheless, the Commission is not exempted from the duty to take due care concerning potential impediments as to the realisation of

[52] I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 12 § 12.12 (2) (b) p 1409.

parties' commitments. In contrast to the negative aspects, it can be highlighted that the Commission quickly realised flaws of the energy liberalisation project as expressed by the present form of the IEMD and IGMD. Consequently, the co-ordinative and innovative mechanisms of Florence and Madrid were created in order to boost the development of effective cross border trade - i.e. tariff systems and interconnector congestion management. It will be concluded that incidental provisions put forward by the parties and accepted by the Commission should be restricted to a subsidiary legal instrument, only applied if strictly necessary to overcome certain detrimental aspects of given concentrations in order to provide a hint for the legislator, to specify its legislation. Competition as a de-central distributor of risk, wealth and power will be extended to its maximum extent, if wholesale consumers benefit from lower energy prices which allow greater productivity of European products on the world markets in combination with higher environmental standards owing to modern, cost-efficient plants. A successful implementation will be described by liquid spot markets for power accompanied by tools of financial risk management like forwards, futures and options. These will be valuable indicators of efficient liberalisation of the European electricity and gas supply industries.

1. Introduction

This thesis analyses how European merger control law is applied to the energy sector and to which extent its application may facilitate the liberalisation of the electricity, natural gas and petroleum industries so that only these concentrations will be cleared that honour the principles of the liberalisation directives. After having discussed the complex micro- and macro-economic considerations which accompany any concentration of business activities, this thesis will discuss the merger control regime of the European Community [EC] so as to establish whether the merger control under either Art. 66 Treaty Establishing the European Coal and Steal Community[53] [ECSCT], the case law under Art. 101 and 102 Treaty on the functioning of the European Union (TFEU) and (Art. 81 and Art. 82 Treaty Establishing the European Economic Community[54] [ECT], as it was introduced by the Commission[55] and reviewed by the CJEU[56], the original Merger Regulation[57] [MR1989] or the amended Merger Regulation of 1997[58] [MR1997] or the amended Merger Regulation of 2004 [MR2004][59] facilitate the liberalisation of European electricity and gas markets. Said liberalisation was introduced by the Internal Electricity Market Directive[60] [IEMD], the Hydrocarbons Licensing Directive[61] and the Internal Gas Market Directive[62][IGMD]. The paper will focus on the contestable idea that regulatory amendments -

[53] Treaty Establishing the European Coal and Steel Community, April 18, 1951, 261 UNTS 140 (entered into force July 23, 1952); as Amended by the Treaty of Amsterdam Amending The Treaty on European Union, The Treaties Establishing the European Communities and Certain Related Acts, Oct 2, 1997, Official Journal of the European Communities 97/C/430/01 (entered into force May 1, 1999) and as amended by the Treaty of Lissabon, Consolidated Version of the treaty on the functioning of the EU of 2007, ratified on 1/12/2009 Official Journal of the European Union C 115/47, 09/05/2008.

[54] Treaty Establishing the European Economic Community, March 25, 1957, 298 UNTS 11, (entered into force January 1, 1958); as Amended by the Treaty of Amsterdam Amending The Treaty on European Union, The Treaties Establishing the European Communities and Certain Related Acts, Oct 2, 1997, Official Journal of the European Communities 97/C/430/01 (entered into force May 1, 1999) (hereinafter, ECT).

[55] Firstly, concentrations were deemed to be excluded from the scope of Art. 81 ECT so that they could only be analysed by the criteria of Art. 82 ECT: Commission of the European Communities, Memorandum on the Concentration of Enterprises in the Common Market, EEC Competition Series, Study No.3 (1966). Such approach was supported by an argumentum e contrario to Art. 66 ECSCT as the ECT does not address merger control; q.v. M. Furse, Competition Law of the UK and EC (1st ed.) (London, U.K., Blackstone Press Ltd., 1999).

[56]The CJEU found as early as 1973 that Art.82 ECT was a tool to monitor concentrations: q.v. CJEU Case C-6/72 *Europemballage Corp and Continental Can Co Inc v Commission*, [1973] ECR 215. However, the drawback is, that Art. 82 only regulates abusive behaviour of existing dominant undertakings. The wording and rationale does not support mergers between non dominant market players that create such a position. Later, the CJEU introduced legal uncertainty regarding the application of Art. 81 ECT with respect to minority shareholdings: q.v. CJEU Cases C-142/84 & C-156/84 *BAT and Reynolds v Commission* [1987] 4487.

[57] Council Regulation 4064/89/EEC of 21 December 1989 on the Control of Concentrations between Undertakings, O. J. L 395, 30/12/89, p 1, as amended by Corrigendum to Council Regulation 4064/89/EEC of 21 December 1989 on the Control of Concentrations between Undertakings, O. J. L 257, 21/09/90, p 13 (hereinafter, MR1989).

[58] Council Regulation 1310/97/EC of 30 June 1997 Amending Council Regulation 4064/89/EEC on the Control of Concentrations between Undertakings, O. J. L 180, 09/07/97, p 1, as Amended by Corrigendum to Council Regulation 1310/97/EC of 30 June 1997 Amending Council Regulation 4064/89/EEC on the Control of Concentrations between Undertakings, O. J. L 40, 13/02/98, p 17 (entry into force 01/03/98) (hereinafter, MR1997).

[59] Council Regulation (EC) No. 139/2004 of 20 January 2004 on the Control of Concentrations between undertakings, O. J. L 24, 29/01/2004, p 1

[60] Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 Concerning Common Rules for the Internal Market in Electricity, O. J. L 027, 30/01/97, p 20 as amended by Directive 2003/54/EC of the European Parliament and of the Council of 26/06/2003 concerning common rules for the internal market in electricity and repealing Directive 1996/92/EC O. J. L 176 and as amended by Directive 2009/72/EC of the Parliament and the Council of 13/07/2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, O. J. L 211, 14/08/2009 p 55. (hereinafter, IEMD); R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 23 10 (A) (i) p 1021; P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 5 A. pp 125-126.

[61] Directive 1994/22/EC of the European Parliament and of the Council of 30 May 1994 on the Conditions for Granting and Using Authorisations for the Prospection, Exploration and Production of Hydrocarbons, O. J. L 164, 30/06/94 p 3; R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 23 10 (A) (i) p 1021; P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 6 B. (3) (a) p 180; CH 7 B. p 222; CH 19 E. (1) p 570.

[62] Directive 1998/30/EC of the European Parliament and of the Council of 22 June 1998 Concerning Common Rules for the Internal Market in Natural Gas, O. J. L 204, 21/07/1998, p 1 and amended as Directive 2003/55/EC of the European Parliament and of the Council of 26/06/2003 concerning common rules for the internal market in natural gas and repealing Directive 1998/30/EC, O. J. L 176, 15/07/2003 p 57 as amended by Directive

especially the introduction of third party access by means of the directives - only form a first necessary condition for attaining economic alterations whereas pro-active conduct of the marketers is the second and decisive one in order to increase the competitive performance of the European energy supply industries. This approach is justifiable as concentrations of independent undertakings play a vital role in the business strategies not only of European energy companies trying to cope with the new legal framework and to extend activities towards other Member States but also of new European and foreign energy investors looking forward to seizing business opportunities. The analysis is supported by a second argument which relates closely to the ambivalent nature of concentrations: A concentration may be used to increase the process of market opening and the expansion into new markets by pooling of scarce resources.

It may also be used as a retro-active means so as to create national champions, increase barriers to market entry of new competitors, enable cross-subsidisation so as to expand dominant positions on heretofore competitive up- and downstream markets. Consequently, any merger control regime has to fulfil the extremely sensitive task of enabling undertakings to generate the abovementioned pro-competitive benefits and of proportionately[63] limiting any opportunity to establish or strengthen dominant positions which will be easily abused later.

This doctoral paper will address the topic by means of the following methodology: Firstly, the economic rationale behind concentrations will be evaluated before the regulatory regime of the ECSC and EC with respect to concentrations is closely assessed beginning with Art. 66 ECSCT, shifting to the case law under Art. 101-102 TFEU (Art. 81-82 ECT), moving to MR1989 and the amendments of 1997 and 2004 whereby problematic questions like the dominance test, the assessment of JVs, joint dominance and ancillary restraints are included. Finally, the theoretical analysis is contrasted to the factual application of the legal framework to recent concentrations in the energy sector. The examination will concentrate on the VEBA/VIAG case.

Lastly, it will be concluded that the European merger control law seems to be - at least in general - an appropriate instrument to deal with concentrations in the energy sector although its rules regulating the definition and enforcement of incidental provisions imposed on the parties following their commitments need to be elaborated further. It will be revealed that merger control has a subsidiary function as to the implementation of market liberalisation so that it shall only provide for limited remedies unless the secondary law is improved with regard to ownership unbundling and regulated TPA[64]. It shall not be used as an instrument

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2009/73/EC of the Parliament and the Council of 13/07/2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, O. J. L 211, 14/08/2009 p 94; P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 6 A. p 174.

[63] One may think that the reported drawbacks should be strictly prevented but the dilemma is that the pro-competitive benefits of mergers are almost certainly closely attached to their disadvantages so that only a proportionality test based on the teleology of merger control and the rationale of the provisions regarding the abuse of dominant positions will provide for a reasonable examination and decision.

[64] I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 12 § 12.12 (2) (b) p 1409 and § 12.12 (4) p 1411.

which replaces proper regulation as merger control depends on incidental concentrations rather than reflecting a consistent non-discriminatory application of regulations by means of persistent authorisations.

A comprehensive analysis of the legal framework of merger control has to be based on a thorough understanding not only of the term "concentration of independent undertakings" but also of the microeconomic rationale of mergers, their beneficial and detrimental macroeconomic effects, of the technological rationale of mergers and their diverse socio-economic implications according to different ethical or philosophical preferences. These factors assist in developing a corporate strategy how to cope successfully with market liberalisation. One can either try to create a defensive oligopoly, to achieve a vertically integrated company or to prepare for relentless competition by cost-reflective re-structuring and by diversification into different geographical markets.

Therefore, the competition law legislator is obliged to design rules which enable the incumbent cartel authorities to take into account both corporate needs to a significant extent and due respect to public interests as a merger or take-over bid shall not proceed if the outcome dis-proportionately detriments competition on markets for similar products or services. Products or services will be similar if they are exchangeable in regional/geographic[65], temporal[66] and functional terms[67].

This specification must be made from the perspective of the average counterpart on the market. What the average consumer deems to be exchangeable defines the relevant market[68].

1.1 Concentration of Undertakings

Consequently, the first logic step of any merger control law is the accurate definition of a concentration of undertakings. Basically, such a concentration will be available if two formerly independent undertakings in terms of competition law agree voluntarily on merging into a new entity [merger][69], if one or more persons - who control an undertaking - or one or more undertakings unilaterally take control of a formerly independent company[70][take-over/acquisition] or if two independent undertakings agree on creating certain types of joint ventures[71] [JV]. These terms will be elaborated later[72].

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[65] Geographical criteria like supply regions, transportation costs.
[66] Temporal market definition depends inter alia on shop opening hours, preferred delivery periods.
[67] Functional market definition groups products/services that fulfil similar specific needs of the vendees or (final) consumers.
[68] This finding is based on the threefold concept of relevant market power that is used for the determination of abuses of dominant positions under Art. 102 ECT and Section 19 I GWB1998: First the markets for similar products or services is defined based on regional, temporal or functional similarity from the view of the average counterpart. Then, the level of market domination is established. Thirdly, the potential abuse is analysed.
[69] Art. 3 I lit a. MR1989 and MR1997 and Art. 4 II MR1989 and MR1997; q.v. T.A. Downes and J. Ellison, The Legal Control of Mergers in the European Communities (1st ed.) (London, U.K., Blackstone Press Limited, 1991) p 35; L. Wildmann, Einführung in die Volkswirtschaftslehre, Mikroökonomie und Wettbewerbspolitik (1st ed.) (Munich, Germany, Oldenbourg, 2007) CH 15.4.6.1 p 229; C. Koenig, K. Schreiber, Europäisches Wettbewerbsrecht (1st ed.) (Tübingen, Germany, Mohr, 2010) CH 7 III. 1., p 190.
[70] Art. 3 I lit b MR1989 and MR1997; q.v. R. Whish, D. Bailey, Competition Law (8th ed.) (Oxford, U.K., OUP, 2015) CH 20 2. (A), p 853 and T.A. Downes and J. Ellison, The Legal Control of Mergers in the European Communities (1st ed.) (London, U.K., Blackstone Press Limited, 1991) p 35; C. Koenig, K. Schreiber, Europäisches Wettbewerbsrecht (1st ed.) (Tübingen, Germany, Mohr, 2010) CH 7 III. 2., p 191.
[71] Art. 3 II MR1989 and the amended definition in Art. 3 II MR1997.

1.1.1 Undertaking in Terms of Merger Control Law

As the notion of an "undertaking" is neither defined in Art. 3-6 TFEU (Art. 3 I lit. g ECT) nor Art. 101 et seq. TFEU (81 et seq. ECT) nor in the merger control provisions, the question arises how to accurately interpret this term.

For the purposes of competition law, the term undertaking has to be interpreted extremely broadly so as to include virtually every commercial activity[73]: It is an organisational summary of personal and material means so as to pursue a determined economic purpose on a lasting base[74]. This covers not only entities pursuant to company law dogmatic[75], but also sole traders, public enterprises[76] and actions of a public body as long as these are determined by private law[77].

It has to be carefully analysed whether this concept should be applied to merger control as well. The first Commission Notice on JVs gives a positive answer but it indicates a quite restrictive solution by stating that an undertaking should be defined as an organised assembly of human and substantive resources dedicated to attain a defined economic purpose on a lasting basis[78]. Such an approach does not clarify to what extent natural persons and institutional investors could be caught. It is suggested that the term undertaking has to be interpreted even more extensive for the scope of merger control[79] so that - apart from traditional commercial activities - the conduct of influential institutional investors like pension funds or significant private shareholders shall be covered as well[80].

Owing to two arguments, this suggestion is indeed justifiable: Firstly, the extensive interpretation is supported by the close connection between the terms "persons" and "undertakings" within the wording of Art. 3 I lit. b 1st and 2nd Variant MR1989.

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[72] q.v. infra Undertaking: 1.1.1 Undertaking in Terms of Merger Control Law , Merger: 6.3.1.1 Merger; Acquisition: 6.3.1.2 Acquisition; JV under merger control law on the basis of Art. 81-82 ECT: 1.1.1 Undertaking in Terms of Merger Control Law, 5.2.2 New Doctrine Introduced by the BAT Judgement, 5.3 The Complex Assessment of Joint Ventures under Art. 82 and 81 ECT, 5.3.1 Legal nature of JVs, 5.3.2 Assessment of Joint Control within Incorporated JVs, 5.3.3 Competition Law Analysis of JVs with A View to Apply Art. 82 ECT; JV on the basis of MR1989: 6.3.1.3 Concentrative JV: Joint Control, Independence, Recession of Parents and Group Effect, 6.3.2.1.5 Turnovers of Jointly controlled Undertakings, 6.3.2.1.10 Formation of Concentrative JVs; JV on the basis of MR1997: 6.6.3.2.3 Yardsticks for The Assessment of JVs under MR1997.

[73] CJEU Case C-41/90 *Höfner v Macrotron* [1991] ECR I 1979 at p 2016 paragraph 21; Commission, EEC Competition Rules, Guide for Small and Medium-Sized Enterprises, (European Documentation, 1983); q.v. for German Antitrust Law: V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 20 p 177; K. Lange / T. Pries, Einführung in das europäische und deutsche Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2011) CH 4 § 2 III. p 187.

[74] K. Lange, Handbuch zum deutschen und europäischen Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2006) CH 8 § 1 II. 1. pp 506-507; T.A. Downes and J. Ellison, The Legal Control of Mergers in the European Communities (1st ed.) (London, U.K., Blackstone Press Limited, 1991) p 36; p 43.

[75] e.g. corporations, private (limited liability) companies, PLCs, partnerships.

[76] This refers to public undertakings in terms of Art. 86 I ECT, i.e. public law entities or private law entities of which the commercial activities are significantly controlled by public bodies for instance by means of ownership.

[77] It includes the central state, regional states, other independent public bodies and state owned enterprises as long as these engage in private activities like negotiating contracts; q.v. V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 20 III p 181. e.g. awarding contracts for the completion of infrastructure prO. J.ects to private companies. Additionally, several federal states could merge their public procurement activities so as to ensure better conditions.

[78] Commission Notice Regarding The Concentrative and Cooperative Operations under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations Between Undertakings, O. J. C 203, 14/08/1990 p 10 at paragraph 8.

[79] q.v. for German Antitrust Law: BGHZ 74,359, 364 *Brost und Funke v WAZ* ; V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 30 pp 281.

[80] e.g. German merger control: White Paper Regarding the Antitrust Act, Federal Parliament Gazette [Bundestagsdrucksache] 8/2136 and 8/3690; V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 31 p 285.

Secondly, the teleology of merger control backs the concept: All the listed entities can have a decisive impact in terms of Art. 3 I MR1997 on the behaviour of groups of undertakings which may only be formally independent legal personalities.

Additionally, a JV has to be regarded as an undertaking for the purposes of European merger control law[81]. However, if it is to be regarded as a concentration, it will have to satisfy additional conditions: Firstly, it was necessary that the JV autonomously performed its tasks on a long lasting basis[82]. Secondly, it was necessary that the JV was not exposed to competition by either of the mothers and that the mother undertakings ceased to compete against each other in its scope[83]. Such JVs are called Concentrative JVs. If these included ancillary restraints, the MR1989 will be applicable but the substantive criteria may be taken from Art. 101 TFEU (Art. 81 ECT[84]). Other types of JVs, i.e. concentrative ones involving non-ancillary or non-separable competitive restraints of major importance, concentrative ones below the turnover thresholds, or co-operative ones were only governed by Art. 101 TFEU (Art. 81 ECT[85]). Nowadays, it is - apart from the turnover thresholds[86] - solely relevant whether an organisational structure is established that is able to fulfill functions of autonomous entities on a long-lasting basis[87]. However, various other hybrid structures are imaginable as undertakings for instance may separate significant parts of their operations and sell them to another undertaking which either incorporates the assets or forms a dependent subsidiary with or without adding parts of its own[88]. For the purpose of this doctoral paper, the term merger is sometimes used in a broad sense, i.e. as a blanket term including the abovementioned phenomena. This approach is supported by the fact, that - despite contrary public relation activities during merger talks - mergers in the narrow sense usually contain a significantly weaker partner who is factually forced to accept the deal by institutional shareholders' leverage or economic pressures as otherwise either a promising take-over bid by the "partner" will be issued or even more inconvenient companies may try to threaten the entity in the foreseeable future[89].

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[81] Commission Notice Regarding The Concentrative and Cooperative Operations under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations Between Undertakings, O. J. C 203, 14/08/1990 p 10 at paragraph 8; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 IV 2. a) p 195.

[82] Art. 3 II 2nd Sentence MR1989; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 IV 2. a) p 195.

[83] Art. 3 II 2nd sub-paragraph MR1989. Concentrative joint ventures were covered by the Merger Regulation if they met the criteria of turnover and geographical allocation pursuant to Art. 1 MR1989. Otherwise, Art. 81 I ECT was applicable.

[84] T.A. Downes and J. Ellison, The Legal Control of Mergers in the European Communities (1st ed.) (London, U.K., Blackstone Press Limited, 1991) p 149.

[85] T.A. Downes and J. Ellison, The Legal Control of Mergers in the European Communities (1st ed.) (London, U.K., Blackstone Press Limited, 1991) p 149.

[86] Art. 1 II MR1989; Art. 1 II-III MR1997.

[87] Art. 3 II MR1997.

[88] q.v. Sections 1 I No.1, 2 et seq. (merger); Sections 1 I No.2 123 et seq. (3 forms of divestiture), Sections 1 I No.3, 174 et seq. (transfer of assets), Sections 1 I 4, 190 et seq. (conversion of legal form) Change of Corporate Form Act of 28 October 1994, Federal Law Gazette 1994 I 3210 and Federal Law Gazette 1995 I 428, as amended on 22 July 1998, Federal Law Gazette 1998 I 1878).

[89] A merger can be the only defense against corporate predators as increased stock market value can prevent investors from taking control that are only interested in the liquidation of struggling undervalued undertakings so as make profits by selling the assets. Alternatively, an unwanted rival can be excluded. For instance, the Hypo-Vereinsbank was founded between Bayerische Vereinsbank und Bayerische Hypothekenbank in 1997 so as to defend against Deutsche Bank who had secretively begun to build up a position, q.v. The Economist, *Merger Brief - A Bavarian Botch-Up* 87 (5 August 2000). Additionally, the detrimental effects of called-off merger talks especially for the weaker part must not be neglected, including resignations of the Chief Executive Officer and bad publicity inaugurating the public chase for the next bidder; q.v. Disapproved Merger Plan between Deutsche Bank AG and Dresdner Bank AG in Spring 2000.

1.1.2 Control

In general, the notion of Control has to be interpreted broadly as well, so that not only a significant ownership of assets or shares is relevant but also contractual claims and obligations, as long as a decisive influence is attained[90]. Even negative control is deemed to be sufficient if two partners in a 50:50 JV are bound to agree on common concepts as no unilateral measure can succeed[91]. With respect to individuals, controlling a company and acquiring a second one, it must be stressed that the concentration will take place between both companies[92] and not between the shareholder and the target company because only undertakings operate on markets according to the rationale of competition law. A company A has indirect control of the subsidiaries of its target company B of which it owns the shares in terms of Art. 3 IV MR1989[93].

1.2 Categories of Concentrations

At the beginning, the MR1989 does distinguish between three types of concentrations owing to the change of control on a lasting basis[94]: mergers, acquisitions and full function JVs (Art. 3 I lit. a and b and Art. 3 IV MR2004[95]). A merger is not defined but involves a combination of two former separate undertakings with an absorption or to a newly established undertaking[96]. One can distinguish between four different categories of mergers: Firstly, a horizontal merger is available, if the involved undertakings used to compete on markets for products or services that are exchangeable in terms of their functions, their marketing regions and times from the perspective of average consumers[97]. Secondly, vertical mergers involve companies that do not compete but of which one is dedicated to up- or downstream activities with respect to relevant products or services of the

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[90] Art. 3 III lit a.-b. MR1989 and MR1997. Even minority shareholdings can be covered; T.A. Downes and J. Ellison, The Legal Control of Mergers in the European Communities (1st ed.) (London, U.K., Blackstone Press Limited, 1991) p 45.

[91] V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 17 p 153. Even minority shareholders can execute decisive influence by means of provisions of mandatory consent within the articles or shareholder-agreements.

[92] T.A. Downes and J. Ellison, The Legal Control of Mergers in the European Communities (1st ed.) (London, U.K., Blackstone Press Limited, 1991) p 36.

[93] T.A. Downes and J. Ellison, The Legal Control of Mergers in the European Communities (1st ed.) (London, U.K., Blackstone Press Limited, 1991) p 46.

[94] Art. 3 I and IV MR1997 and MR2004; Under Art. 3 I MR1989 the lasting change of control was an unwritten criterion; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1383, p 546; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 29, p 521 and § 15 marginal note 69c p 548; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.015, p 601; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.33, p 548.

[95] M. Heße, Wettbewerbsrecht (2nd ed.)(Heidelberg, Germany, Springer, 2011) CH 4.1, p 199; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.2 p 643 and § 7.2. (1) p 643; Commission consolidated jurisdictional notice under Council Regulation (EC) No.139/2004 on the control of concentrations between undertakings, O. J. C 95, 2008, p 1; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.016, pp. 601-602 and marginal note 8.058, p 623; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.33, p 548 and marginal note 5.115, p 567; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 3. A. (i), p 1095; A. Ezrachi, EU Competition Law (5th Ed.) (London, UK, Bloomsbury, 2016) CH 9, p 398 and p 408.

[96] T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 IV 2. b) and c) p 196; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1385, p 547 and marginal note 1388, p 548; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 71, p 550; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.2. (1) (b) p 645.

[97] R. Whish, D.Bailey, Competition Law (8th ed.) (London, U.K., Butterworths, 2015) CH 20 2. (A), p 853; K. Lange / T. Pries, Einführung in das europäische und deutsche Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2011) CH 4 § 2 V. 2. b) (1) p 200; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 23 III. 1. p 534; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1359, p 536 and marginal note 1414 p 557; I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 6 V 2. a), pp. 174-175; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.15 p 686; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.05, p 541; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 2. B. (ii) a., p 1088; A. Ezrachi, EU Competition Law (5th Ed.) (London, UK, Bloomsbury, 2016) CH 9, p 403; M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 7 marginal note 7-003, p 349.

other entity[98]. Non-horizontal mergers are less likely to cause competition concerns[99] and may increase efficiencies[100]. Thirdly, conglomerate mergers are concluded between undertakings which neither compete on relevant geographic markets nor engage in related up- or downstream activities[101]. They involve a leverage effect on affected markets owing to the concentration on affected markets[102]. Moreover, a company active on several markets can foreclose access to the markets by bundling or tying of products that links the products on separate markets together[103]. A distinction can be made between conglomerate mergers that involve complementary products and those which involve unrelated products[104]. Lastly, hybrid mergers involve undertakings that compete partly in relevant product markets, engage partly in up- or downstream businesses and engage partly in absolutely separate sectors[105]. Other concentrations are sole control takeovers (acquisitions) and joint control full function joint ventures (Art. 3 I lit. b and Art. 3 IV MR2004[106] or when a non full function JV becomes a full function JV[107]. Non-controlling majority[108] or minority interests, providing that

[98] q.v. European Commission, Guidelines on the assessment of non-horizontal mergers under Council Regulation on the control of concentrations between undertakings, O. J. EU C 265 from 18/10/2008, p 6; K. Lange / T. Pries, Einführung in das europäische und deutsche Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2011) CH 4 § 2 V. 2. b) (1) p 200; CH 4 § 2 V 2. b) (2) p 203; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 23 III. 1. p 534; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1414-1415, p 557-558; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 10 p 573; I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 6 V 2. a), p 174 and p 178; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.13, p 543; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 2. B. (ii) a., p 1088 and 5. D. (ix) a., p 1174, A. Ezrachi, EU Competition Law (5th Ed.) (London, UK, Bloomsbury, 2016) CH 9, pp. 403-404; M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 7 marginal note 7-003, p 350 and CH 8 marginal note 8-001, p 424.

[99] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.810, p 722.

[100] European Commission, Guidelines on the assessment of non-horizontal mergers under Council Regulation on the control of concentrations between undertakings, O. J. EU C 265 from 18/10/2008, p 6 para 13; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 2. B. (ii) a., p 1088 and 5. D. (ix) a., p 1174.

[101] q.v. European Commission, Guidelines on the assessment of non-horizontal mergers under Council Regulation on the control of concentrations between undertakings, O. J. EU C 265 from 18/10/2008 p 6; V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 30 p 281. D. Waldman, E. Jensen, Industrial Organization (4th ed.)(London, U.K., Routledge, 2016) CH 4.3 p 112); K. Lange / T. Pries, Einführung in das europäische und deutsche Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2011) CH 4 § 2 V. 2. b) (1) p 200; CH 4 § 2 V 2. b) (3) pp 204-205; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 23 III. 2. p 536; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 V 4. c) p 215; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1359, p 536; marginal note 1414, p 557 and marginal note 1416, p 558; A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 386, p 181; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 10 p 573 and § 16 marginal note 39, p 581; I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 6 V 2. a), p 174; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.18 p 727; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.13, p 543; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 2. B. (ii) a., p 1089; A. Ezrachi, EU Competition Law (5th Ed.) (London, UK, Bloomsbury, 2016) CH 9, pp. 403-404; M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 7 marginal note 7-003, p 350, CH 8 marginal note 8-001, p 424 and marginal note 8-030, p 451.

[102] A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 386, p 181; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 97, p 604; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.18 (2) p 728.

[103] I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.18 (2) (a) and (b) p 728; M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 8 marginal note 8-031, p 453 and marginal note 8-035, p 457.

[104] M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 8 marginal note 8-030, p 451.

[105] They can also be called "market combination mergers"; q.v. V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 30 p 281; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1417, p 558; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.17 (1) p 719; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 5. D. (ix) d., p 1187; M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 7 marginal note 7-003, p 350.

[106] T.A. Downes and J. Ellison, The Legal Control of Mergers in the European Communities (1st ed.) (London, U.K., Blackstone Press Limited, 1991) p 1; p 29; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1385, p 547, marginal note 1389, p 548 and marginal note 1392, p 549; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 72, pp. 550-551; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.2. (1) (a) p 645; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 3. A. (i) b., p 1096.

[107] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.34, p 548 and marginal note 5.119, p 567.

[108] A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 3. A. (i) b., p 1097.

the remaining shares are not widely dispersed so that factual control is implemented[109], internal corporate restructurings and restructuring of state owned public bodies within the same economic unit do not constitute concentrations[110]. Management buy-outs are acquisitions of control by individuals[111]. A minority shareholding may constitute sole control, if the remaining shares are widely dispersed so that majority decisions in shareholder meetings are available[112]. Interrelated transactions that are closely connected within a short period of time are treated as a single concentration[113].

1.3 Incidental Provisions

Art. 6 II and Art. 8 II MR2004 enable the Commission to add incidental provisions or collateral clauses to its decision declaring a concentration compatible with the common market (conditions and obligations)[114] in order to address commitments or remedies or undertakings that the parties offered to the Commission with a view to rendering the concentration compatible with the internal market in terms of Art. 2 II MR2004[115]. Remedies cannot be unilaterally imposed by the Commission[116]. Remedies include structural (divestments of a viable business for sale to a suitable purchaser[117]), behavioural (parties to refrain from certain behaviour, supply or purchase obligations) and hybrid or quasi-structural commitments (non-structural remedies with a permanent character, i.e. the termination of long term supply agreements, access to infrastructure, IT platforms, key-technologies, production or R&D facilities and the licensing of IP rights)[118].

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[109] A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 3. A. (i) b., p 1097.
[110] C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal notes 8.017-8.020, pp. 602-603.
[111] C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.021, p 603.
[112] C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.032, p 608; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 3. A. (i) b., p 1097.
[113] Recital 20 MR2004; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.049, p 618.
[114] C. Koenig, K. Schreiber, Europäisches Wettbewerbsrecht (1st ed.) (Tübingen, Germany, Mohr, 2010) CH 7 V. 3., p 216; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. III. 9. a) p 438; C. III. 9. c) p 442, C. VI. 2. c) (1) p 560; P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 B. (1) (c) p 375; Art. 6 II MR1997; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 25 VII. p 648; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 VII 1. b) p 227 and § 10 VII 4. p 377; q.v. § 40 III GWB; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1425, p 562; A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 394, p 185; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 109, p 694; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.980, p 754.
[115] Recital 30 of MR2004; P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 D. (1) p 406; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 23 VI. 2. b) p 547; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 25 VII. p 648; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 163, p 634; A. Ezrachi, EU Competition Law (5th Ed.) (London, UK, Bloomsbury, 2016) CH 9, p 407.
[116] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.984, p 756.
[117] E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 25 VII. 3. p 651; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 169, p 638 and § 19 marginal note 639, p 639; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.981, p 754; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 5. G. (iii), p 1196.
[118] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 D. (1) pp 406-407; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.981, p 755 and marginal note 5.1047-5.1049, pp 770-771; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.164, p 1865; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 5. G. (iii), p 1196.

Commitments under Art. 6 II MR2004 shall be usually forwarded to the Commission within 20 days of the notification of the concentration[119] and commitments under a decision owing to Art. 8 II MR2004 within 65 working days from the date at which phase two proceedings were initiated (Art. 6 I lit. c MR2004 decision)[120]. Incidental provisions are in general limitations, conditions, obligations, disclaimer reservations and obligation reservations owing to § 36 German Administrative Proceedings Act (VwVfG)[121] and assuring that the legal requirements for the issuance of an administrative act will be met, if the addressee of the act has a legal right to attain an act. Alternatively, the collateral clauses are subject to discretion of the authority. If the undertakings offered by the parties in phase one are not sufficient to remedy the competition concerns, the Commission issues a decision in order to enter phase two proceedings under Art. 6 I lit. c MR2004[122]. This happens in 5% of all cases[123]. The proposal for undertakings must reach the Commission within 20 days after phase one is triggered by virtue of an application and within 65 days after initiating the proceedings in phase two[124]. Having received the undertakings, the Commission initiates a market test whether the proposed conditions and obligations are sufficient to remedy any competition concerns[125]. The form of remedies extends to sale remedies, access to infrastructure, access to grids, access to key-technology so as to remove barriers to market entry[126], the alteration of long term exclusive agreements remedies[127] and firewalls[128] (management unbundling, legal unbundling and ownership unbundling[129]). Conditions reform the market in structural aspects so as to remove the competitive problem on the market[130]. Obligations are measures so as to implement conditions[131]. Examples of obligations are:

- the inauguration of a trustee for the supervision of unbundling and for the sale of assets[132];
- management and legal unbundling of the sold business area;
- removal of access to business secrets;

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119 Art. 19 I Commission Regulation (EC) No. 802/2004 implementing MR2004 as amended by Commission Regulation (EC) No. 1033/2008 and Commission Regulation (EU) No. 1269/2013.
120 Art. 19 II Commission Regulation (EC) No. 802/2004 Implementing MR2004 as amended by Commission Regulation (EC) No. 1033/2008 and Commission Regulation (EU) No. 1269/2013; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.1043, p 770; J. P. Terhechte (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.3, p 1815 and marginal note 73.167, p 1866 and marginal note 73.172, p 1868.
121 Verwaltungsverfahrensgesetz (German Administrative Proceedings Act).
122 J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. III. 9. b) p 441; A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 391, p 184 and marginal note 393, p 185).
123 q.v. http://ec.europa.eu/competition/mergers/statistics.pdf (28/02/2019); G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 66, p 679.
124 J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. III. 9. e) p 443; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.1022, p 766 and marginal note 5.1038, p 768.
125 J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. III. 9. g) (2) pp 445-446.
126 P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 D. (1) p 407.
127 J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. III. 9. j) (1) p 452; C. III. 9. j) (2) p 460.
128 J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. III. 9. k) (5) p 466. IEMD 2009/71 and IGMD 2009/72 apply to ownership unbundling.
129 I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 12 § 12.12 (2) (a) pp. 1408-1409.
130 G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 130, p 699.
131 G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 131, p 699.
132 A. Ezrachi, EU Competition Law (5th Ed.) (London, UK, Bloomsbury, 2016) CH 9, p 408.

- obligation to ask the Commission for approval of shareholder decisions;
- fixation of periods for the sale of business units;
- regular monitoring duties;
- obligation to ask the Commission for approval of the selected buyer of business units;
- obligation to ask national competent authorities for approval of selected buyers of business units[133]. In order to assess whether the remedies are effective and sufficient to address the competition concerns, the standard form RM has to filled out[134]. Undertakings are separated from take-note-commitments (which are those which are not necessary to address a concentrations) and facts taken into account (which are not officially introduced as remedies)[135]. All remedies must fulfill basic conditions of sufficiency, proportionality and timely and effective implementation[136]. A remedy must eliminate the competition concerns in order to clear the concentration (sufficiency)[137]. Additionally, the proportionality principle of EU law is honoured, if the remedy does not go beyond what is necessary to clear the concentration and the disadvantages of the remedy must not be disproportionate to the aims pursued, and when there is a choice between several remedies the least onerous must be chosen[138]. Moreover, remedies must be capable of being implemented in a short period and leading to a lasting and workable solution to the competition concerns[139]. Hence, a remedy must be implemented in a timely manner, so that remedies are capable of being implemented within a short period of time (six months)[140]. Additionally, remedies must not lead to new competition concerns[141]. Phase one remedies must remove straightforward competition concerns (Art. 6 I lit. b and II MR2004) and must be so clear-cut that it is not necessary to enter into an in-depth investigation in phase two (Art. 8 II MR2004)[142]. A formal requirement of phase one remedies is that the remedy must fully specify substantive and implementing commitments, must be signed by a duly authorized person, must attach all relevant pieces of information necessary to allow the Commission to assess the feasibility, viability, competitiveness and marketability of any assets proposed for divestment, and must attach a non-confidential version of the remedies for market testing with third parties[143]. If the market test results in the finding that proposed remedies are not sufficient, the Commission will immediately inform the notifying parties which may offer modified remedies so to address clearly the competition

[133] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 133, pp. 700-701.
[134] Commission Regulation (EC) 1033/2008, O. J. 2008 L 279, p 3 Form RM; Commission Notice on Remedies Acceptable under MR2004, O. J. (2008) C 267, p 1; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.985, p 757.
[135] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal notes 5.991-5.995, pp. 758-759.
[136] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.997, p 759.
[137] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.998, p 760.
[138] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.1000, p 760.
[139] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.1005, p 761.
[140] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal notes 5.1006 and 5.1008, p 762.
[141] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.1014, p 764.
[142] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.1016, p 764; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.169, p 1867.
[143] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.1018, p 765.

concerns[144]. Structural (divestments) or behavioural modifications are only accepted if they can be assessed by the Commission within the short phase one deadline[145]. If the remedies are not sufficient to remove the competition concerns, the Commission must issue an Art. 6 I lit. c MR2004 decision so as to open a phase two investigation[146]. Phase two remedies must address all competition concerns raised by the concentration (Art. 8 II MR2004)[147]. The Commission has a strong preference to structural remedies as they constitute a lasting solution to competition problems and do not require long term monitoring[148]. The purpose of a divestiture remedy is generally to eliminate or reduce the horizontal overlap between the parties of a concentration so as to maintain the level of competition in the market prior to the concentration (horizontal concentrations) or to eliminate the vertical or conglomerate relationship[149]. The divested business must be viable, i.e. operate on a stand-alone base without regard to parties' resources, and able to compete with the parties on a lasting basis[150] and must not be hurt by the seller in the implementation period[151]. If a remedy might not be sufficient the parties may offer an alternative remedy for divestment (the so-called remedy of crown jewels) which will address the competition concerns more clearly[152]. A suitable purchaser of the divested business must be independent, posses sufficient financial resources and expertise and must not imply new competition concerns and is authorized by a divestment trustee and the Commission if the parties fail to present a credible buyer[153]. The submitted undertakings will be assessed by the Commission under a market test by virtue of a request for information to be answered by competitor, clients, suppliers and other companies (Art. 11 MR2004)[154]. If this market test is positive, a conditional clearance decision under Art. 6 II MR2004 is taken. One can distinguish between commitments that has to be fulfilled before the implementation of the concentration (the so-called up-front buyer as a condition in exceptional cases) or within a given period thereafter (six months until one year)[155]. The divested business must be governed as a separate business unit (hold-separate obligation) with marketing support for divested brands, the payment of patent fees or the nomination of a hold-separate-manager

[144] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.1029, p 767.
[145] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.1030, p 767.
[146] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.1033, p 768.
[147] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.1037, p 768.
[148] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.981, p 755 and marginal note 5.1050, p 771; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 5. G. (iii), p 1196.
[149] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.981, p 755 and marginal note 5.1058, p 773.
[150] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.1059, p 773 and marginal note 5.1061, p 773; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.178, p 1870 and marginal note 73.185, p 1872.
[151] J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.181, p 1871.
[152] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.1059, p 773 and marginal note 5.1072, p 776.
[153] Commission Notice on Remedies, O. J. 2008, C 267/1, para 104; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.1059, p 773 and marginal note 5.1076, p 777; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.180, p 1871 and marginal note 73.186, p 1872.
[154] J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.170, p 1867.

(trustee)[156], and a ring-fencing obligation so that business secrets of the divestment business are not transferred to the notifying party[157]. As a hold-separate trustee may be nominated an investment bank, a management-consultancy or an auditor[158]. The seller is obliged to nominate a surveillance trustee with a concise work plan within one week since the conditional clearance decision (Art. 6 II, 8 II MR2004)[159] who will act as a divestiture trustee if the divestiture business is not sold within the first sale period[160].

1.4 Fine Analysis

The doctoral thesis will assess in its main part (Chapter 9.3 et seq.) the undertakings offered by the parties in order to make a concentration compatible with the common market and which allow the Commission to add incidental provisions to its clearance decision. The following methodology is applied: Firstly, the parties are assessed before the concentration (merger) is analysed. Furthermore the Community dimension is evaluated. Then the relevant product and geographic market definition is discussed followed by the assessment of undertakings before the final conclusion is drawn[161]. In the original version of the GWB, mergers were per se allowed until 1973 where a merger control was introduced[162].

2. Microeconomic Rationale of Concentrations

It is worthwhile developing, for the sake of which benefits undertakings intend to merge and acquire companies rather than relying on own sustainable growth. Later, the probable positive and detrimental micro- and macro-economic effects attached to mergers are scrutinized (micro: the view regarding single economic units as producers and consumers; macro: the view as to national economic issues)[163].

2.1 Microeconomic Benefits of Mergers

Companies can very quickly realise a diverse range of new business opportunities and at less risk levels with respect to supply and volume risks, at least in comparison with a strategy that focuses on own growth.

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[155] J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.175, p 1869 and marginal note 73.180, p 1871.
[156] J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.183, p 1871.
[157] J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.184, p 1872.
[158] J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.188, p 1873.
[159] J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.189, p 1873 and marginal note 73.195, p 1875.
[160] J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.197, p 1876.
[161] Q.v. Commission Notice on the Definition of the Relevant Market for the Purpose of Community Competition Law, O. J. C 372, 09/12/1997, p 5.
[162] G. Knieps, Wettbewerbsökonomie (3rd ed.) (Berlin, Germany, Springer, 2008) CH 6.1.7 p 129; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) A. I. 1 p 1; C I. 2. a) p 270; P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 B. (2) (b) p 385.
[163] L. Wildmann, Einführung in die Volkswirtschaftslehre, Mikroökonomie und Wettbewerbspolitik (1st ed.) (Munich, Germany, Oldenbourg, 2007) CH 2.3.1 pp 38-39; CH 9.1 pp 121-124; CH 15.5.2-15.5.3 pp 233-234.

2.1.1 Microeconomic Benefits of Vertical Integration

A merger may create a new or expand an existing vertically integrated company so that the chain of subsequent value adding activities is enhanced (transaction costs advantages)[164] and the turnover and profits increase[165] and synergies are realised[166].

Another advantage is that the purchase of a well established downstream supply company can be faster and less risky than creating new and relatively small and inexperienced own marketing subsidiaries or networks of possibly unreliable dealers[167].

Furthermore, the vertical integration of upstream activities reduces the dependence on suppliers so that the supply risk is minimized (security of supply of certain raw materials[168]). As the availability of commercial discoveries of natural resources is strictly limited, the degree of control over production automatically determines the supply risk of competitors who operate only in a downstream segment of the commodity chain[169].

Additionally, vertical integration enables undertakings to spread the price risk over the whole supply chain so that the difficult process of negotiating with distributors, wholesalers and retailers can be internalized and prices are lowered (pricing and productive efficiency)[170]. Vertically integrated undertakings are also entitled to introduce a company wide pricing system between the upstream and downstream branches which allocates the profits in those countries where the taxation systems are investor friendly, where the repatriation of profits is easy and the political risks are relatively low.

Compared with single activity companies, vertically integrated ones benefit from reduced volume risks as well[171]. The overall potential of risk reduction by offsetting antagonistic risks along the supply chain[172] can be illustrated by the following examples:

A scarcity of a commodity increases the supply risk and the purchase price risk. Higher purchase prices lead generally to increased delivery prices so that the delivery price risk is actually reduced to the benefit of the

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[164] J.J. Spengler, *Vertical Integration and Antitrust Policy*, Journal of Political Economy 347-352 (1950); A. Ellis and E. Bowitz and K. Roland, *Structural Change in Europe's Gas Markets: Three Scenarios for the Development of the European Gas Market to 2020*, Energy Policy 301 (2000); R. Whish, D. Bailey, Competition Law (8th ed.) (Oxford, U.K., OUP, 2015) CH 20, 2. (B) (ii) p 854; C. Koenig, K. Schreiber, Europäisches Wettbewerbsrecht (1st ed.) (Tübingen, Germany, Mohr, 2010) CH 7 IV. 4. b), p 213; B. Woeckener, Strategischer Wettbewerb (3rd ed.)(Berlin, Germany, Springer, 2014) CH 3.31 p 82; I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 6 V 2. a), p 178; M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 8 marginal note 8-044, p 466.

[165] B. Woeckener, Strategischer Wettbewerb (3rd ed.)(Berlin, Germany, Springer, 2014) CH 2.1 p 52.

[166] E. Fox & D. Gerard, EU Competition Law (1st ed.)(Cheltenham, UK, Elgar, 2017) CH 6 B.2., p 241.

[167] R. Whish, D. Bailey, Competition Law (8th ed.) (Oxford, U.K., OUP, 2015) CH 20, 2. (B) (ii), p 854; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 2. B. (ii) a., p 1088.

[168] A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 2. B. (ii) a., p 1088.

[169] A. Ellis and E. Bowitz and K. Roland, *Structural Change in Europe's Gas Markets: Three Scenarios for the Development of the European Gas Market to 2020*, Energy Policy 301 (2000).

[170] M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 8 marginal note 8-004, p 427 and marginal note 8-044, p 466.

[171] e.g. An integrated Gas Company with excess gas could either store the commodity for later sales - perhaps re-injections in depleted fields - or use it as fuel gas for electricity generation; I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 6 V 2. a), p 178.

[172] A. Ellis and E. Bowitz and K. Roland, *Structural Change in Europe's Gas Markets: Three Scenarios for the Development of the European Gas Market to 2020*, Energy Policy 302 (2000).

integrated company. However, risk related to delivery volumes will increase owing to higher prices (inverse ratio).

Conversely, a bubble of a commodity reduces the supply risk and the purchase price risk and it increases risk, that the product cannot be delivered to the planned prices. However, the integrated company will benefit as the risks related to the delivery volumes has decreased owing to the low retail prices[173].

Thereby, a vertical integration can at least partly offset the diverse business risks[174].

On the other hand, the essential facilities doctrine must not be neglected which can reduce the incentives for investing in new networks as competitors may later claim a fair, transparent and non discriminatory access[175].

Another incentive for vertical concentration is that the expanding entity is keen on obtaining valuable intellectual property rights from the undertaking that is due to be controlled in order to facilitate the operations in the up- or downstream markets[176].

Merging into a vertically integrated business can realise various synergies with respect to business functions like marketing, accounting, integrated technologies, communication technology and legal services which require not identical but very similar expertise regarding different commodities and activities, too[177]. However, this argument is also true for horizontal mergers.

Vertical integration can also allow a firm to take advantage of technological complementarities or reduce transaction costs so as to gain efficiency[178].

2.1.2 Microeconomic Benefits of Horizontal Integration

In a similar pattern, horizontal mergers[179] are likely to cause beneficial effects for the businesses involved in the concentrations.

The primary and obvious advantages refer to economies of scale regarding productivity[180] and economics of scope[181], management innovation[182] and innovation to pool research and development, globalisation,

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[173] I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 6 V 2. a), p 178.
[174] V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 16 IV pp 147-148.
[175] q.v. M.A. Bergman, *The Bronner Case - A Turning Point for the Essential Facilities Doctrine ?*, ECLR 63 (2000). This incentive also exists to a lesser extent for horizontal concentrations; Whish, D. Bailey, Competition Law (8th ed.) (Oxford, U.K., OUP, 2015) CH 23 10 (B), p 1032.
[176] q.v. R. Whish, D. Bailey, Competition Law (8th ed.) (London, U.K., Butterworths, 2015) p 854. However, this argument is also true for horizontal mergers with respect to traditional markets.
[177] J. Crowley and P. Spence and G. Rockefeller and R. Patrick, *European Gas & Power Analysis - The Rush to the Altar*, Petroleum Economist 5-6 (March 2000).
[178] D. Waldman, E. Jensen, Industrial Organization (4th ed.)(London, U.K., Routledge, 2016) CH 4.3.2 p 116; I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 6 2. a) (4), p 184.
[179] Commission Guidelines on the assessment of horizontal mergers of 16/12/2003, O. J. C 31, 05/02/2004, p 5; C. Koenig, K. Schreiber, Europäisches Wettbewerbsrecht (1st ed.) (Tübingen, Germany, Mohr, 2010) CH 7 IV. 4. a), p 212; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.11, p 542.
[180] B. Woeckener, Strategischer Wettbewerb (3rd ed.)(Berlin, Germany, Springer, 2014) CH 2.1 p 52; CH 3.3.1 p 82; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 2. B. (i) a., p 1086; A. Ezrachi, EU Competition Law (5th Ed.) (London, UK, Bloomsbury, 2016) CH 9, p 398; M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 7 marginal note 7-076, p 412; E. Fox & D. Gerard, EU Competition Law (1st ed.)(Cheltenham, UK, Elgar, 2017) CH 6 B.2., p 241.
[181] I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 5 V 4., p 128; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 2. B. (i) a., p 1086; A. Ezrachi, EU Competition Law (5th Ed.) (London, UK, Bloomsbury,

information technology, deregulation and privatisation[183] and an increase in market transparency[184]. The concept of economies of scale states that an entity can produce at lowest marginal costs and thereby with maximum economically viable output if it operates at the minimum efficient scale[185]. Thereby, productive efficiency is increased[186]. Additional microeconomic benefits arise as low marginal cost production improves the allocative efficiency so that mergers can sometimes support the general objectives of competition policy[187]. Moreover, the acquirer always believes that the acquired company is worth more than the management of the target believes[188]. Finally, market power is increased[189].

Unfortunately, these beneficial microeconomic effects will be often far from real if the horizontally merged entity is able to create and to abuse a dominant position on market for regionally, temporally and functionally relevant products by charging of excessive prices or delivering goods to wholesalers, retailers and consumers only by using discriminatory terms or pricing. Therefore, downstream markets may be severely distorted. Vice versa, dominant purchase power can be executed in the same detrimental way. However, from the microeconomic point of view, these opportunities represent highly desirable powers because economic competition as a contention for superiority usually involves the attempt to create non transparent, separated markets with barriers to entry in order to achieve a monopoly-like situation[190].

These intentions are sometimes facilitated by politicians who prefer the installation of a national champion rather than permitting international investors to gain a significant control on the domestic market by buying weak undertakings.

Once factual monopolies on regional markets are erected they may be used to achieve relevant discounts of producer prices as the volumes of contracted commodities increase and the demand forecasts become more predictable. As already mentioned with respect to vertical integration, horizontal mergers also offer significant opportunities to integrate similar research & development or marketing[191] functions, especially the traditionally neglected brand building in the utility sectors[192].

2016) CH 9, p 398; M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 7 marginal note 7-076, p 412; E. Fox & D. Gerard, EU Competition Law (1st ed.)(Cheltenham, UK, Elgar, 2017) CH 6 B.2., p 241.

[182] A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 2. B. (i) a., p 1086.

[183] L. Wildmann, Einführung in die Volkswirtschaftslehre, Mikroökonomie und Wettbewerbspolitik (1st ed.) (Munich, Germany, Oldenbourg, 2007) CH 14.3 p 207; A. Ezrachi, EU Competition Law (5th Ed.) (London, UK, Bloomsbury, 2016) CH 9, p 398.

[184] q.v. B. Woeckener, Strategischer Wettbewerb (3rd ed.)(Berlin, Germany, Springer, 2014) CH 3.7, p 94.

[185] F. M. Scherer and D. Ross, Industrial Market Structure and Economic Performance (3rd ed.) (Cambridge, U.S., Harvard University Publishing, 1991) p 163; R. Whish, D. Bailey, Competition Law (8th ed.) (Oxford, U.K., OUP, 2015) 2. (B), p 854; L. Wildmann, Einführung in die Volkswirtschaftslehre, Mikroökonomie und Wettbewerbspolitik (1st ed.) (Munich, Germany, Oldenbourg, 2007) CH 14.3.1 pp 207-209. The higher operational costs are offset by virtue of the lower costs per unit produced.

[186] D. Waldman, E. Jensen, Industrial Organization (4th ed.)(London, U.K., Routledge, 2016) CH 4.3.2 p 116.

[187] M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 7 marginal note 7-076, p 412.

[188] D. Waldman, E. Jensen, Industrial Organization (4th ed.)(London, U.K., Routledge, 2016) CH 4.3.2 p 115.

[189] D. Waldman, E. Jensen, Industrial Organization (4th ed.)(London, U.K., Routledge, 2016) CH 4.3.2 p 115-116.

[190] q.v. Theory of monopolistic Competition.

[191] J. Crowley and P. Spence and G. Rockefeller and R. Patrick, *European Gas & Power Analysis - The Rush to the Altar*, Petroleum Economist 3 and 5 (March 2000).

[192] J. Crowley and P. Spence and G. Rockefeller and R. Patrick, *European Gas & Power Analysis - The Rush to the Altar*, Petroleum Economist 6 (March 2000).

This argument is also valid for comparable back-office functions for different products. Although the underlying physical phenomena of network bound industries are very different, the financial and commodity risk management tools with respect to medium and short term electricity or gas trading tend to be extremely similar. However, it must be stressed that only medium term commodity trading can be addressed by conventional tools of financial risk management, e.g. the value-at-risk model[193], whereas short-term electricity or gas trading requires more sophisticated models[194]. The reason is that dangerous positions can not be closed in adverse market conditions unless the consumers are interruptible.

Further, these synergies make it very desirable to merge power, gas, petroleum and other network bound activities in horizontal terms[195]. Such integration can also lead to managerial economies[196] as larger businesses have the financial capabilities to re-organise existing back offices so as to support either a greater degree of in-house expertise and to take better advantage of existing highly qualified personnel or to focus on relevant departments and close down redundant ones.

Hence, one can take advantage of technical synergies by merging horizontally as investments in new equipment are more rapidly amortised and the supervision of different kind of plants involve comparable total quality management skills[197].

Horizontal cross-commodity mergers can also provide for the hedging of oil supply, price or volume risk fluctuations being partly offset by parallel gas activities[198].

Moreover, it must not neglected that the actual pace of concentration encourages further horizontal mergers as barriers to entry tend to increase significantly: The higher the average turnover of undertakings within a business sector - or even in different sectors of the domestic economy[199] - the more difficult it becomes for small and medium sized companies and start-ups to attract necessary project finance either from banks in form of loans or from bond markets, a stock floatation or venture capital firms.

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[193] The value at risk model establishes stop prices so as to close a position in case of adverse market movements, q.v. G. Keers, *Taking the Corporate Risk out of Power Trading*, Petroleum Economist, 5 (March 2000).

[194] e.g. the so called profit-at-risk model, which becomes relevant after the forward markets near the delivery date so that whether conditions, plant or network failures and other variables replace the traditional demand forecasts based on long-term models; q.v. G. Keers, *Taking the Corporate Risk out of Power Trading*, Petroleum Economist, 6-7 (March 2000).

[195] e.g. operation of cable-television networks, fixed telephone networks, mobile phone networks, water networks, q.v. J. Crowley and P. Spence and G. Rockefeller and R. Patrick, *European Gas & Power Analysis - The Rush to the Altar*, Petroleum Economist 6 (March 2000). Even internet broadband services belong to this category, q.v. recent activities of Enron.

[196] R. Whish, D. Bailey, Competition Law (8th ed.) (Oxford, U.K., OUP, 2015) CH 20, 3., p 855.

[197] e.g. programmes to increase plant efficiency, reduce maintenance and increase reliability; E. Fox & D. Gerard, EU Competition Law (1st ed.)(Cheltenham, UK, Elgar, 2017) CH 6 B.2., p 241.

[198] J. Crowley and P. Spence and G. Rockefeller and R. Patrick, *European Gas & Power Analysis - The Rush to the Altar*, Petroleum Economist 6 (March 2000).

[199] W.J. Simpson, *Canada Analysis - The Missing Link*, Petroleum Economist 19 (March 2000).

Hence, economies of scope are available due to horizontal concentrations, if common resources are used together (synergy effects)[200].

Additionally, a horizontal merger allows for conditional policy improvements so that a larger company can implement cost reductions in the supply of goods and in the obtainment of credit conditions[201].

Hence, price policy allows larger undertakings to increase sale prices largely independent from competitors[202] or to reduce prices in order to force weaker competitors to withdraw from the market through extreme economies of scale[203].

Moreover, horizontal concentration may facilitate the introduction to new markets through the creation of foreign subsidiaries[204].

Horizontal market power may set standards for whole industries and thus increase revenues, increase lobbying targeting political entities and in order to receive state aids for large scale investments[205]. The management may also increase its prestige (empire building policy)[206] and take advantage from liberalisation, deregulation and privatisation of economic sectors[207] like electricity and natural gas transmission and distribution (natural monopolies). Mergers may also provide for a tool to rescue failing firms[208]. Cross-border mergers through foreign direct investment (FDI) may foster technological change, global competition and the liberalisation of markets[209]: FDI triggers technology spillovers, assist human capital formation, leads to international trade integration, helps to create a more competitive business environment and fosters enterprise development[210]. Finally national or European champions may be created competing better on international markets, contribute to technological and economic progress and facilitate cross-border trade (industrial policy aspect under Title XVII Industry TFEU)[211].

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[200] L. Wildmann, Einführung in die Volkswirtschaftslehre, Mikroökonomie und Wettbewerbspolitik (1st ed.) (Munich, Germany, Oldenbourg, 2007) CH 14.3.3 p 210: "Verbundvorteile"; I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 5 4. pp 128-129; M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 7 marginal note 7-076, p 412.

[201] L. Wildmann, Einführung in die Volkswirtschaftslehre, Mikroökonomie und Wettbewerbspolitik (1st ed.) (Munich, Germany, Oldenbourg, 2007) CH 14.3.4 p 211: „Konditionenpolitik".

[202] L. Wildmann, Einführung in die Volkswirtschaftslehre, Mikroökonomie und Wettbewerbspolitik (1st ed.) (Munich, Germany, Oldenbourg, 2007) CH 14.3.5 p 211.

[203] L. Wildmann, Einführung in die Volkswirtschaftslehre, Mikroökonomie und Wettbewerbspolitik (1st ed.) (Munich, Germany, Oldenbourg, 2007) CH 14.3.5 p 212; I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 6 2. a)(5), p 184.

[204] L. Wildmann, Einführung in die Volkswirtschaftslehre, Mikroökonomie und Wettbewerbspolitik (1st ed.) (Munich, Germany, Oldenbourg, 2007) CH 14.3.6 p 212.

[205] L. Wildmann, Einführung in die Volkswirtschaftslehre, Mikroökonomie und Wettbewerbspolitik (1st ed.) (Munich, Germany, Oldenbourg, 2007) CH 14.3.7 pp 212-213.

[206] I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 6 2. a)(6), p 185.

[207] I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 6 2. a)(6), p 185.

[208] Commission Guidelines on the Assessment of Horizontal Mergers of 16/12/2003, O. J. C 31, 05/02/2004, p 5, para 90; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 2. B. (i) c., p 1086 and 5. D. (vii) p 1168; A. Ezrachi, EU Competition Law (5th Ed.) (London, UK, Bloomsbury, 2016) CH 9, p 407.

[209] A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 2. B. (i) d., p 1086.

[210] A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 2. B. (i) d., pp. 1086-1087.

[211] A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 2. B. (i) e., p 1087.

2.1.3 Microeconomic Beneficial Effects of Conglomerate Integration

Finally, the controversial microeconomic benefits of conglomerate mergers are considered. One school of scholars highlights that conglomerates achieve a great deal of economic influence by means of the size of their aggregated turnover figures even if no dominant positions on markets for relevant products are available[212]. Especially, the power to undermine free markets by means of systematic predatory pricing[213] is criticised which is financed by revenues or gentle price increases in other product markets[214].

The second school focuses on the concept of "relevant market power"[215] which is widely accepted as a yardstick to examine whether a dominant position is available[216]. It emphasises that corporate power shall be attributed solely to markets for specific products and services and not to aggregated turnover of different branches with small market shares. Based on this model, conglomerate mergers would not make any sense in microeconomic terms.

As a matter of fact, a combination of both concepts seems to be superior - at least for the purposes of merger control - as cross-subsidisation is an opportunity too serious to be ignored. Additionally, conglomerate mergers can be implemented in order to prevent undertakings which could well be future competitors on relevant product markets from becoming competitors in the first place (leverage[217]). Thirdly, the aggregated size of a company and its financial status can be so impressive that potential or real competitors abstain from commencing serious attacks (competition advantages)[218]. Consequently, the said opportunities form real incentives for founding conglomerates and these mergers must be controlled, too. Finally, conglomerate mergers might improve efficiency by taking advantage of synergies in production or distribution[219]. Conglomerate mergers also reduce risks by spreading[220] and increase economies of scope[221].

2.1.4 Aging Owners

In some cases, a motive for a merger is the age structure of the target company's ownership (privately owned firm owned by an individual without heirs)[222].

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[212] The so called deep pocket theory, q.v. R. Whish, D. Bailey, Competition Law (8th ed.) (Oxford, U.K., OUP, 2015) CH 20 3., p 855; V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 30 III p 284; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. III. 7. a) p 430; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 25 III. 7. p 619.

[213] systematic pricing below costs, dumping.

[214] The strategy is called "cross subsidisation".

[215] A. Bork, The Antitrust Paradox, (1st ed.) (New York, U.S., Harper Collins Publishers, 1978) Chapter 12; V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 26 II p 225.

[216] q.v. Art. 82 ECT; Section 19 I in combination with 19 II 1 No.1 1st and 2nd Variant and No.2 German Antitrust Act of 26 August 1998 [Gesetz gegen Wettbewerbsbeschränkungen], Federal Law Gazette 1998 I 2521.

[217] T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 V 4. c) pp 216-217..

[218] I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 6 V 2. a), p 179.

[219] D. Waldman, E. Jensen, Industrial Organization (4th ed.)(London, U.K., Routledge, 2016) CH 4.3.2 p 116.

[220] D. Waldman, E. Jensen, Industrial Organization (4th ed.)(London, U.K., Routledge, 2016) CH 4.3.2 p 117; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 2. B. (ii) a., p 1089.

[221] I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 6 2. a)(5), p 184.

[222] D. Waldman, E. Jensen, Industrial Organization (4th ed.)(London, U.K., Routledge, 2016) CH 4.3.2 p 118.

2.2 Microeconomic Drawbacks of Mergers

After having praised the various beneficial prospects attached to mergers, it has to be stressed that companies do often struggle to effectuate the projected benefits during the difficult implementation of the transaction.

2.2.1 In-transparent Economic Status of the Partner

First of all, a profound lack of knowledge of the true economic[223] or financial[224] status of the counterpart can cause serious detriment and which - a posteriori - may explain why the counterpart did agree so happily on the merger covenants. An analogous problem can arise if the allocation of important intellectual property rights remains non-transparent[225]. All these shortcomings can prevent the projected economies of scale[226].

2.2.2 Merger Related Expenditure

Secondly the financial sacrifices needed in order to finance expensive take-over bids can cause a loss of reputation and de-valuation of credit ratings so that today's predator may easily becomes a future target[227].

2.2.3 Managerial Dis-Economies

Thirdly, severe managerial dis-economies of scale owing to a super-optimal size of an undertaking[228] can be caused by insufficient merger preparations and unreasonable implementation: Careful strategies are required to bridge different corporate cultures and leadership styles, to overcome former rivalries, to avoid the victimisation of staff of the smaller partner and to create a new corporate identity. The failure to integrate highly respected departments in the earliest stages can cause the key-personnel to leave[229] as redundancy is feared. Furthermore, a dispute about the divestiture of a prestigious department of the smaller partner which shall remunerate the major partner for the merger related expenditure can terminate merger talks combined with bad publicity[230]. Lastly, active merger strategies can encourage a short-term attitude of management that ceases to develop and address long-term corporate objectives and policies as it focuses either on merger policies or on defences against unwanted predators[231].

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[223] e.g. BMW seriously mis-judged the marketing opportunities and currency fluctuations regarding the unsuccessful integration of Rover although the technical and the productivity weaknesses had been solved.
[224] For instance, Bayerische Vereinsbank did not know the true amount of instability of Bayerische Hypothekenbank owing to mortgages and loans in the former GDR as many debtors were insolvent: The Economist, *Merger Brief - A Bavarian Botch-Up* 87 (5 August 2000).
[225] For example, Volkswagen did not duly analyse the allocation of the Rolls Royce brand when bidding for the car manufacturer so that a dispute with BMW arose.
[226] R. Whish, D. Bailey, Competition Law (8th ed.) (Oxford, U.K., OUP, 2015) CH 20 5. (A), p 857.
[227] e.g. Mannesmann's credit rating was reduced after the successful bid for Orange Telecom in Summer 1999 and subsequently it did not have sufficient resources to defend against the bid of Voodafone Airtouch.
[228] I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 6 V 2. a), p 175; A. Ezrachi, EU Competition Law (5th Ed.) (London, UK, Bloomsbury, 2016) CH 9, p 398.
[229] R. Whish, D. Bailey, Competition Law (8th ed.) (Oxford, U.K., OUP, 2015) CH 20 5. (D), p 858.
[230] e.g. Merger talks between Deutsche Bank and Dresdner Bank in Spring 2000 that were terminated by the latter party as Dresdner Bank did not agree on selling the investment banking department Dresdner Kleinwort Benson. The Dresdner CEO resigned.
[231] R. Whish, D. Bailey, Competition Law (8th ed.) (Oxford, U.K., OUP, 2015) CH 20 5. (A), p 857.

2.2.4 Unreasonable Focus on Integration

Unsustainable levels of concentration exemplified by an extreme degree of unification of research and development facilities have a tendency to uniform basic industrial platforms so that less flexible solutions are offered to final consumers. Thereby, undue integration of products which differ only superficially for marketing reasons[232] can leave consumers either unsatisfied at all or persuade them to opt for the cheapest option owing to similar basic quality standards. Even more serious is the fact that the capability to cope with erroneous developments is reduced if undertakings concentrate on a small range of core-products and services.

2.2.5 Increase of Barriers to Market Entry

Finally, vertical integration can increase barriers to market entry for an industry or raise rivals' costs[233]. By integrating vertically, a firm might be able to reduce its rivals' access to distributors or to suppliers[234]. Vertical mergers may foreclose the market for competitors[235].

2.2.6 Increases of Prices and Costs and Slow Innovation

Additionally, the output may fall[236], prices and costs may increase unsustainably[237]. Moreover, innovation may be hindered and productive diversity may be reduced[238]. Hence, there is a danger of increased organisational costs[239]. Then, there is the problem of leverage effects if one company uses its dominant position in a given market so as to expand it to neighbouring up- or downstream markets so to reduce competition[240]. Foreign takeovers may harm national security issues, businesses of national strategic relevance, technological capabilities, may cut jobs and exports[241]. Mergers may also reduce competitiveness by virtue of increased market power on relevant product and geographic markets[242]. Vertical mergers may lead to foreclosure of rival firms and leverage market power so that they are marginalized or driven from the market[243].

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[232] e.g. Integration in the automobile industry leads to various different brands at different price levels although the platforms are identical (many Volkswagen-Seat-Skoda-Audi models).
[233] D. Waldman, E. Jensen, Industrial Organization (4th ed.)(London, U.K., Routledge, 2016) CH 4.3.2 p 116; I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 6 V 2. a), p 178; E. Fox & D. Gerard, EU Competition Law (1st ed.)(Cheltenham, UK, Elgar, 2017) CH 6 B.1., p 240.
[234] D. Waldman, E. Jensen, Industrial Organization (4th ed.)(London, U.K., Routledge, 2016) CH 4.3.2 p 116; E. Fox & D. Gerard, EU Competition Law (1st ed.)(Cheltenham, UK, Elgar, 2017) CH 6 B.1., p 240.
[235] A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 2. B. (ii) a., p 1088.
[236] E. Fox & D. Gerard, EU Competition Law (1st ed.)(Cheltenham, UK, Elgar, 2017) CH 6 B.1., p 239.
[237] I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 6 V 2. a), p 176; A. Ezrachi, EU Competition Law (5th Ed.) (London, UK, Bloomsbury, 2016) CH 9, p 398.
[238] I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 6 V 2. a), p 176; E. Fox & D. Gerard, EU Competition Law (1st ed.)(Cheltenham, UK, Elgar, 2017) CH 6 B.1., p 239.
[239] I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 6 V 2. a), p 178.
[240] I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 6 V 2. a), p 178.
[241] A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 2. B. (ii), p 1087.
[242] A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 2. B. (ii) a., p 1087.
[243] M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 8 marginal note 8-004, p 428.

2.2.7 Drawbacks of Conglomerate Mergers

Conglomerate mergers might also increase market power by virtue of a reduction in the level of potential competition[244] (reciprocal dealing or predatory behaviour)[245]. Moreover, smaller competitors are facing drawbacks on the markets (for example as to the implementation of beneficial standard commercial terms by the conglomerate firm) [246]. Additionally dis-economies of scope may arise[247]. A conglomerate merger may also lead to tying of separate products to the detriment of consumers and encourage cross-subsidisation[248].

3. Macroeconomic Implications of Mergers

After having discussed the relevance of mergers from the corporate point of view it is necessary to focus on the macroeconomic and public wealth related considerations regarding increased consolidation within economic sectors[249].

3.1 Macroeconomic Benefits of Concentrations

As already mentioned, mergers can improve the overall allocative efficiency of an economy owing to widespread economies of scale and minimised marginal costs[250].

3.1.1 Aggregated Productive Efficiencies

The persistent threat that companies, which do not perform duly on stock exchanges[251], can easily become subject of a rival's take-over bid forms an important incentive for the management to concentrate on productive efficiency so that - in aggregated terms - the international competitiveness of the domestic economy is in safeguarded[252].

The important role of shareholders with respect to take-over bids or merger agreements is also vital for the ongoing macroeconomic efficacy of shareholders' control over the boards of directors pursuant to company law. Generally, diverse groups of shareholders lack the power to challenge the arguments of the management on annual meetings. However, the prospect of concentration is likely to unite the shareholders and reinstate

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[244] D. Waldman, E. Jensen, Industrial Organization (4th ed.)(London, U.K., Routledge, 2016) CH 4.3.2 p 116, p 119, p 121; B. Woeckener, Strategischer Wettbewerb (3rd ed.)(Berlin, Germany, Springer, 2014) CH 3.1 p 77; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 2. B. (ii) a., p 1089.

[245] I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 6 V 2. a), pp. 178-179; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 2. B. (ii) a., p 1089.

[246] I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 6 V 2. a), p 179.

[247] I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 6 2. a)(5), p 184.

[248] A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 2. B. (ii) a., p 1089; E. Fox & D. Gerard, EU Competition Law (1st ed.)(Cheltenham, UK, Elgar, 2017) CH 6 B.1., p 241.

[249] L. Wildmann, Einführung in die Volkswirtschaftslehre, Mikroökonomie und Wettbewerbspolitik (1st ed.) (Munich, Germany, Oldenbourg, 2007) CH 2.3.1 pp. 38-39.

[250] R. Whish, D. Bailey, Competition Law (8th ed.) (Oxford, U.K., OUP, 2015) CH 20 5. (A), p 857.

[251] e.g. the listing is close to the value of the assets, q.v. The Economist, *Merger Brief Building a New Boeing*, 84 (12 August 2000).

[252] R. Whish, D. Bailey, Competition Law (8th ed.) (Oxford, U.K., OUP, 2015) CH 20 5. (B), p 858; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 25 V. 3. p 645.

their power[253]. In this case, only a board backed by confident stakeholders may find the necessary support. Therefore, merger waves force the undertakings to concentrate on shareholders' values so that corporate efficiencies and in aggregated terms - macroeconomic efficiency is achieved.

3.1.2 Reduction of Macroeconomic Barriers to Exit

Another macroeconomic beneficial effect of mergers is related to the incentives for new or experienced entrepreneurs to set up and engage in new businesses.

This incentive depends crucially on the factor that once the business is well established the owner can achieve an enormous revenue by either selling the independent company to another one or by reducing his percentage of shares so as to give up management control. If competition authorities impeded the profitable sale of companies to major partners to an undue extent, the incentive to found a business would diminish[254]. Therefore, mergers are an important tool to avoid barriers to exit markets.

3.1.3 Tool to Rescue Weak Undertakings

Additionally, a concentration provides weak companies with an important means to evade insolvency by means of pooling scarce resources[255] which is crucial in recessive periods of the business cycle. This justification is called the failing firm defence so that the concentration is not causal for the impediment of competition as the acquired company would have been removed from the market entirely if the concentration had been avoided[256]. The horizontal merger guidelines list three criteria in order to establish a failing firm defense:

- financial difficulties of the target
- there is no less anti-competitive concentration available (e.g. the target would not be acquired by another less dominant undertaking)

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253 R. Whish, D. Bailey, Competition Law (8th ed.) (Oxford, U.K., OUP, 2015) CH 20 5. (G), p 859.

254 R. Whish, D. Bailey, Competition Law (8th ed.) (Oxford, U.K., OUP, 2015) CH 20 5. (G), p 859.

255 This reflects the general idea of managerial economies and economies of scale; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 2. B. (i) c., p 1086; M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 7 marginal note 7-087, p 421.

256 R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 21 5. (D)(vi) p 898; D. Waldman, E. Jensen, Industrial Organization (4th ed.)(London, U.K., Routledge, 2016) CH 4.3.2 p 118; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 25 VI. pp 646-647; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 V 2. p 209; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1422, p 561; A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 381, p 179; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 20 p 576 and § 16 marginal note 56, p 588; § 16 marginal note 89, p 602; § 16 marginal note 219, p 656; I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 9 III. 3. b) (2), p 263; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.1 (3) (c) p 640 and § 7.15 (11) p 704; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.273, p 739; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.561, p 669 and marginal note 5.961, p 750; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 5. D. (vii) p 1168; A. Ezrachi, EU Competition Law (5th Ed.) (London, UK, Bloomsbury, 2016) CH 9, p 407; M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 7 marginal note 7-087, p 421; E. Fox & D. Gerard, EU Competition Law (1st ed.) (Cheltenham, UK, Elgar, 2017) CH 6 C.1.d., p 253.

- the assets of the target would inevitably exit the market[257].

3.1.4 Facilitator of Market Integration

Finally, mergers may strengthen the creation of a single and transparent European market[258] for energy as only relatively large entities can create the economies of scale required to engage in large infrastructure investments, to bargain with powerful producers on equal footing or to overcome the remaining obstacles to significant cross-border trade of electricity or gas. Integration leads to a larger size of markets for relevant products or services so that economies of scale are promoted by increased demand of consumers.

However, it must not be neglected, that the creation of a transparent internal market can be circumvented by means of those mergers that intend to create national champions until the existing barriers to cross-border trade are reduced: Undertakings, both horizontally and vertically integrated and with cross commodity activities have the power to exclude any effective foreign competition.

3.2 Detrimental Macroeconomic Effects of Mergers

The ambiguous nature of mergers with respect to microeconomic effects is also reflected on the macroeconomic level.

3.2.1 Dominance over Industrial Sectors

In order to assess the potential of a horizontal concentration to dominate relevant product or service markets, the Herfindahl-Hirschmann-Index [HHI] is applied by North American and European antitrust authorities[259]. Its methodology is as follows:

The existing market shares of the entities in question are squared and added in a first step[260]. A HHI near 0 represents an atomistic market and a result of 10,000 a monopoly. A horizontal concentration is generally presumed to be contrary to competition law if the post concentration HHI exceeds 1800 and the individual

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[257] Commission Guidelines on the Assessment of Horizontal Mergers of 16/12/2003, O. J. C 31, 05/02/2004, p 5, para 90; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.963, p 751 and marginal note 5.967, p 752; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 5. D. (vii) p 1168; A. Ezrachi, EU Competition Law (5th Ed.) (London, UK, Bloomsbury, 2016) CH 9, p 407; M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 7 marginal note 7-087, p 421; E. Fox & D. Gerard, EU Competition Law (1st ed.)(Cheltenham, UK, Elgar, 2017) CH 6 C.1.d., p 254.

[258] R. Whish, D. Bailey, Competition Law (8th ed.) (Oxford, U.K., OUP, 2015) CH 20 6. (C), p 866.

[259] Department of Justice, *Department of Justice's Merger Guidelines of 1982*, 47 Fed Reg 28, 493-502 (1982), as amended by *Department of Justice Merger Guidelines of 1992*, 57 Fed Reg 41, 552 (1992), as amended 1997 and 2010; Commission Guidelines on the assessment of horizontal mergers of 16/12/2003, O. J. C 31, 05/02/2004, p 5; V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 16 2. p 144; D. Waldman, E. Jensen, Industrial Organization (4th ed.)(London, U.K., Routledge, 2016) CH 4.3.6 pp 128-129; G. Knieps, Wettbewerbsökonomie (3rd ed.) (Berlin, Germany, Springer, 2008) CH 3 3.3.2. 2. p 51; C. Koenig, K. Schreiber, Europäisches Wettbewerbsrecht (1st ed.) (Tübingen, Germany, Mohr, 2010) CH 7 IV. 2., p 202; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. III. 4. a) (2) pp 394-395; K. Lange, Handbuch zum deutschen und europäischen Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2006) CH 8 § 1 III. 3. b) aa) p 556; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1419, pp. 559-560; A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 379, p 178; B. Woeckener, Strategischer Wettbewerb (3rd ed.)(Berlin, Germany, Springer, 2014) CH 3.5.1.3, p 88 and CH 3.7, p 95; I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 6 V 1. c), p 171; CH 9 III. 3. b) (1), p 261; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.1 (3) (c) p 639 and § 7.15 (1) (d) p 690; M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 7 marginal note 7-014, p 362; E. Fox & D. Gerard, EU Competition Law (1st ed.)(Cheltenham, UK, Elgar, 2017) CH 6 B.2., p 244.

[260] E. Fox & D. Gerard, EU Competition Law (1st ed.)(Cheltenham, UK, Elgar, 2017) CH 6 B.2., p 244.

index of the largest entity involved is increased by at least 100 points[261]. However, a qualitative analysis of market structures can overcome the legal presumption. Likely arguments are eases of barriers, natural heterogeneity of products, strong international competitors, efficiencies and the failing firm defence[262].

Contrarily, a horizontal concentration will be deemed to be legal if the post concentration HHI is below 1000 points[263]. On a moderately horizontally concentrated market with a post concentration HHI between 1000 and 1800, the concentration will be deemed to be legal if the individual increase of the largest partner is below 100[264]. A detailed examination will follow in case of individual results exceeding 100 points.

As a matter of fact, legal uncertainty remains if the HHI exceeds 1800 points and a very powerful entity mergers with an extremely small partner[265].

The non-horizontal merger guidelines state that a non-horizontal concentration is unlikely to give rise to competition concerns where the market share of the merged entity is below 30% and the post- merger HHI is below 2000[266].

Both horizontal and vertical mergers can offer various opportunities to create and abuse dominant positions. As a matter of fact, an exhaustive analysis of the macroeconomic detrimental effects of market power related conduct of dominant undertakings is beyond the scope of this paper as such a conduct includes phenomena as diverse as the following:

- a too grand concentration may reduce the freedom of a society, is anti-democratic and restricts individual freedom and has an adverse effect on the decentral distribution of wealth, whereas competition law intends to diffuse economic power in order to protect individual freedom[267],
- special economic sectors may deserve a democratic protection against concentration (e.g. plurality of the press[268])

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[261] Section 1.51 Department of Justice, *Department of Justice's Merger Guidelines of 1982*, 47 Fed Reg 28, 493-502 (1982), as amended by *Department of Justice Merger Guidelines of 1992*, 57 Fed Reg 41, 552 (1992). Additionally, if the individual undertaking's increases of the HHI between 50 and 100 will cause a detailed examination whereas increases are below 50, will lead to a clearance decision; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 25 II. p 598; q.v. Commission Guidelines on the Assessment of Horizontal Mergers of 16/12/2003, O. J. C 31, 05/02/2004, p 5 para 19-21: A HHI above 2000 is tolerable where the change is below 150; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 5. D. (iii) b., p 1141.

[262] Sections 2.2., 3.0, 4.0, 5.0 Department of Justice, *Department of Justice's Merger Guidelines of 1982*, 47 Fed Reg 28, 493-502 (1982), as amended by *Department of Justice Merger Guidelines of 1992*, 57 Fed Reg 41, 552 (1992); G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 89, p 602, § 16 marginal note 219-220, p 656; I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 9 III. 3. b) (2), p 263.

[263] Commission Guidelines on the Assessment of Horizontal Mergers of 16/12/2003, O. J. C 31, 05/02/2004, p 5 para 19-21; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.15 (1) (d) p 690; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 5. D. (iii) b., p 1141; M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 7 marginal note 7-014, p 363.

[264] Q.v. Commission Guidelines on the Assessment of Horizontal Mergers of 16/12/2003, O. J. C 31, 05/02/2004, p 5 para 19-21: A HHI between 1000 and 2000 is tolerable where the change is below 250: A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 5. D. (iii) b., p 1141; M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 7 marginal note 7-014, p 363

[265] e.g. Undertaking A with a market share of 45% (HHI 2025) mergers with Undertaking B with a share of 1%. (HHI 1). The merged entity has an HHI of 2026 but the large entity is barely affected by the increase of 1 point; q.v. a HHI above 2000 and with a delta below 250: M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 7 marginal note 7-014, p 363.

[266] Commission Guidelines on the Assessment of Non-Horizontal Mergers, O. J. EU C 265, 18/10/2008, p 6, para 25; M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 8 marginal note 8-008, p 432.

[267] A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 2. B. (ii) b., p 1089.

- protection as to foreign controlled key-national businesses[269],
- concentration may foster a higher unemployment in return for profits to shareholders due to rationalisation[270],
- concentrations may interfere with personal data may as a key-input[271],
- discrimination in terms of prices or conditions,
- discrimination with regard to marketing channels,
- discrimination concerning access to resources,
- refusal of access to essential facilities like networks[272],
- systematic dumping,
- requests of dominant downstream marketers that the upstream company shall bear parts of the costs regarding brand-building and marketing.

However, it can be summarised that any kind of concrete behaviour, of which the efficacy - and thus the detrimental effect on competitors or consumers - depends primarily on dominant market power of the merged entity, must be outlawed pursuant Art. 102 TFEU (Art. 82 ECT). If one translates this doctrine into the abstract categories of merger control, every concentration that vests the merged entity with the abstract power to obtain a dominant position on markets for relevant products in geographic[273], temporal or functional terms[274] and to abuse this position must be interdicted. As abstract potentials prevail, it is irrelevant whether the converging parties of a merger case promise to abstain from specific abusive conduct or not.

3.2.2 Unemployment and Regional Disparities

Additionally, mergers have an undisputed potential of raising unemployment rates as the realisation of synergies is related closely to closure of branches or departments that cannot be sold. Furthermore, closure plans usually ignore externalities like the overall economic wealth of the region where the engagement is reduced[275].

As a matter of fact, one can more adequately address these implications by political means that are superior to the introduction of public interest considerations into the scope of competition law. Not only federal but also regional governments and municipalities are capable and responsible to internalise public unemployment and regional economic wealth considerations with respect to undertakings in a more sophisticated way. For

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[268] A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 2. B. (ii) b., p 1090.
[269] A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 2. B. (ii) b., p 1090.
[270] A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 2. B. (ii) b., p 1089.
[271] A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 2. B. (ii) b., p 1089.
[272] R. Whish, D. Bailey, Competition Law (8th ed.) (Oxford, U.K., OUP, 2015) CH 23 7. (B) p 1032.
[273] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 39, p 581.
[274] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 24 pp 576-577.
[275] R. Whish, D. Bailey, Competition Law (8th ed.) (Oxford, U.K., OUP, 2015) CH 20 6., p 860.

instance, differentiated tax regimes[276], pro-active regulatory policies with regard to land planning law and environmental standards, investments in education and infrastructure and development programmes and business parks can provide the incentives for undertakings that are necessary not to abandon activities in remote, rural areas[277] without putting the efficacy of competition law at risk.

3.2.3 Socio-Economic Concentration of Wealth and Power

The most serious implication of mergers relates to the fact that increased domination on markets reduces the de-centralised allocation of wealth and power within the society[278] so that the democratic institutions are put at risk if an economic crisis occurs[279]. Powerful trusts do not necessarily have to rely on ordinary forms of lobbying or business associations when they influence legislation, administration and judiciary.

Additionally, reciprocity with respect to concentrations[280] is a major concern for public wealth as it will be highly questionable if investors who benefit from public ownership or barely contestable factual monopolies take over foreign companies[281]. Consequently, the IGMD explicitly entitles Member States to derogate from the IGMD in order to enforce reciprocity[282]. Market power can threaten the economic order, increase dependencies, maximize revenue to the detriment of other market players[283].

3.3 Evaluation

Due to the plethora of arguments related to economic concentration it is extremely difficult to formulate any general assessment. This is especially true for the microeconomic considerations which clearly fall into the responsibility of the highest levels of corporate management.

Although one can criticise the secrecy of merger talks in terms of leadership as they sometimes exclude even board members and ignore the interests of staff, such conduct is justified for the sake of quick success. However, the widespread involvement of external business consultants[284] is questionable because conflicts of interests regarding different clients' business secrets are very probable: First of all, the leading consultancy firms

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[276] e.g. higher depreciation rates.

[277] q.v. Discussion about infrastructure, education in South-West England (Devon, Cornwall) and its Objective One Status in terms of EC funds: The Economist, *Devon and Cornwall - California Dreaming*, 32 (5 August 2000).

[278] V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 1 p 3; K. Lange / T. Pries, Einführung in das europäische und deutsche Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2011) CH 1 § 1 p 2.

[279] This is especially important for concentrations in the sectors close to sovereignty or public opinion like energy, telecommunications, press, radio, television and internet. Consequently these sectors are usually covered by specific regulators which supervise specific competition law provisions.

[280] R. Whish, D. Bailey, Competition Law (8th ed.) (Oxford, U.K., OUP, 2015) CH20 6. (B) (i), p 862.

[281] e.g. EdF acquired the Regional Electricity Companies London Electricity and Southwestern in the UK an a share in Energiewerke Baden-Würtemberg whereas no foreign company can participate in the 100% government owned EdF, q.v. H. Avati, *European Gas & Power Analysis - The tardy French*, 16 (Petroleum Economist (March 2000). e.g. Ruhrgas: On the one hand, it delays the association agreement on negotiated third party access to their transmission network in Germany and claims that the Energy Industry Act of 24 April 1998 and the Antitrust Act of 26 August 1998 were sufficient to implement the IGMD. On the other hand, it expands into various up- and downstream activities in Europe so as to create a vertically and horizontally integrated undertaking within an oligopolistic energy market. q.v. V. Baum, *Germany Analysis - Market Participants will define the Rules*, Petroleum Economist, 8 (April 2000).

[282] Art. 19 IGMD.

[283] L. Wildmann, Einführung in die Volkswirtschaftslehre, Mikroökonomie und Wettbewerbspolitik (1st ed.) (Munich, Germany, Oldenbourg, 2007) CH 14.5 pp 216-217.

[284] The importance of consultants is highlighted by D. Townsend, *Mergers & Acquisitions - Leading the Merger Pack*, Petroleum Economist 33 (March 2000).

consist of highly specialised teams for specific industries which often work for various clients. Secondly, they are often linked with accountants and due Chinese Walls are not as consistent as desirable.

From the technological point of view, concentrations can partly be welcomed as especially JVs indeed foster research with shared development risks[285]

As a matter of fact, especially the abovementioned socio-economic arguments related to de-centralised wealth allocation shall prevent any kind of laissez-faire attitude towards mergers however one prefers to evaluate the abovementioned considerations between micro- or macroeconomic beneficial and detrimental effects. According to this finding, two options are feasible:

One can either favour an interventionist's approach that intends to serve industrial policy goals that are defined by the current government's prerogatives or one can give priority to considerations strictly based on antitrust law pursuant to either the HHI or the examination of dominated positions on relevant product markets under Art. 2 I lit a-b; II-III MR1989[286].

3.3.1 Public Interest Theory

The public interest approach is backed by the Preamble and Art. 1 III of the draft merger regulation[287] which would have enabled the Commission to declare the regulation inapplicable in order to attain "priority" objectives of the EC[288]. Additionally, a small passage in the wording of Art. 2 I lit. b MR1989 takes industrial policy into account because the Commission is inter alia entitled to consider the benefits of a concentration regarding the development of technological or economic progress.

It is also praised by scholars[289] and supported by government officials and Commission officials[290] in the aftermath of the De Havilland Decision[291].

3.3.2 Competition Law Theory

Conversely and in favour of a narrow interpretation of the teleology of merger control, it must be noted that Art. 2 I lit b MR1989 itself limits the value of industrial policy considerations as the attainment of economic progress must be linked with beneficial effects for consumers and must not contain obstacles to competition.

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[285] Joint Ventures cause complex considerations with respect to the application of EC competition law: Depending on turnover thresholds, turnover allocation, autonomous full integration structures or merely dependent structures, solely the Merger Regulation, the procedure of the Merger Regulation and substantially Art. 81 or solely Art. 81 et seq. ECT may apply.

[286] V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H. Beck, 2018) § 14 I p 130; § 16 2. p 144.

[287] Draft Merger Control Regulation, Proposal for a Regulation (EEC) of the Council on the Control of Concentrations between Undertakings, O. J. C 92, 20/07/73 p 1; as amended on 12/02/82 O. J. C 36, 12/02/82 p 3; as amended on 23 February 1984, O. J. C 51 23/02/84 p 8; as amended on 17 December 1986, O. J. C 324, 17/12/86 p 5.

[288] The legal function of Art. 1 III of the Draft as a justification for derogations from the scope is highlighted by T.A., Downes and D.S. MacDougall, *Significantly Impeding Effective Competition: Substantive Appraisal under the Merger Regulation*, unpublished CEPMLP Paper, p 12 (1993); Brussels Offices at Avenue de la Joyeuse Entrée 1, Merger Control in the EEC (1st ed.) (Deventer, Netherlands, Kluwer Law and Taxation Publishers, 1988), p 281.

[289] B.J. Rodger and A.MacCulloch, Competition Law and Policy in the EC and UK (1st ed.) (London, U.K., Cavendish Publishing Limited, 1999) p 3.

[290] Criticism by the then Industry Commissioner Mr Bangemann, by the French Transport Minister M. Quiles and his Italian Collegue Mr. Benini; q.v. L. Hawkes, *The EC Merger Control Regulation: Not an Industrial Policy Instrument: the De Havilland Decision* ECLR 34 (1992).

Furthermore, the narrow approach, focusing on competition law considerations, is superior as it reflects the intentions of the legislator very closely: The relevance of industrial policy which once justified a derogation from the whole draft was reduced intentionally to a single criterion competing against 14 other aspects that are of concern within the interpretation of Art. 2 I lit b MR1989.

Subsequently, the first theory is weakened by the experience that pro-active government involvement in strategic matters of industrial re-organisation is likely to set unrealistic and over-ambitious targets and leads to in-efficient structures so that a strict competition policy assessment of mergers is the superior solution.

3.3.3 Structure-Conduct-Performance Model or Consensual Approach to Liberalisation

A final aspect of the evaluation of mergers leads to the finding, that it can be established that the role of mergers and therefore the intentions of the actors very much depend on the business culture. If businesses follow the liberal doctrines of Anglo-Saxon capitalism, the Structure Conduct-Performance[292] Model [SCP] is an accurate means to predict the new characteristics of business organisation:

As a result of amendments of the regulatory framework it is extremely likely that the conduct of businesses will rapidly adapt and take maximum advantage of new opportunities. The performance of businesses is likely to reach its optimum on the basis of the legal regimes.

Contrarily, it might be wrong to focus on regulatory amendments with respect to societies, which are in favour of gradual change and consensus-based methodologies regarding regulatory reforms. In such a culture, regulation alone will not trigger the desired efficiency gains[293]. This idea can be exemplified not only by the controversy regarding the third party access [TPA] regimes of the IEMD[294] and the IGMD[295] which have been negotiated since the beginning of the 1990s before they were finally adopted in 1996 and 1998. It is also reflected in the weak unbundling provisions[296], the derogations for take-or-pay contracts[297] and stranded investments[298] and finally the efficacy of the implementation by the Member States[299].

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[291] Commission Decision 91/619/EEC of 2 October 1991 in Case IV/M. .053, O. J. L 334 5/12/91 p 42 (*Aérospatiale SNI Alenia and Aeritalia e Selenia SpA*). The companies operated a JV (ATR) and were interested in purchasing the then Canadian Boeing affiliate De Havilland.

[292] J.S. Bain, Barriers to New Competition: Their Character and Consequences in Manufacturing Industries (1st ed.) (Cambridge, U.S., Harvard University Press, 1956); A. Ellis and E. Bowitz and K. Roland, *Structural Change in Europe's Gas Markets: Three Scenarios for the Development of the European Gas Market to 2020*, Energy Policy 299 (2000).

[293] A. Ellis and E. Bowitz and K. Roland, *Structural Change in Europe's Gas Markets: Three Scenarios for the Development of the European Gas Market to 2020*, Energy Policy 299 (2000).

[294] Art. 16, 17 I-V IEMD; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 12 § 12.12 (2) (b) p 1409.

[295] Art. 14-16 IGMD.

[296] Art. 7 VI IEMD, Art. 13 II-III IGMD: The IGMD only calls for separated accounts that have to be published annually whereas the IEMD demands legal or at least management unbundling.

[297] Art. 17 in conjunction with Art. 25 I; III IGMD.

[298] Art. 24 IEMD.

[299] e.g. Germany introduces TPA to electricity transmission and distribution networks pursuant to Art. 6 EnWG1998 but tries to implement the IGMD by a vague provision in Section 19 IV No.4 GWB1998.

The latter societies will prefer relatively weak negotiated TPA or single buyer procedures which are additionally weakened by time consuming, non-transparent negotiations of concession agreements between the competitors[300] rather than straightforward solutions like regulated TPA.

These prerogatives are reflected by the objectives of mergers in these countries: Acquisitions will generally be carried out, to erect new or defend existing dominant positions and to raise barriers to market entry so that oligopolistic structures shall prevail in the long-term.

3.3.4 Concept of Contestable Markets

The concept of contestable markets as to merger control reduces the scope of a market structure conduct analytical model (reduction of the relevance of market shares for the competitive analysis)[301].

4. Merger Control under Art. 66 ECSCT and the Euratom Treaty

Art. 66 ECSCT provided until 24/07/2002 for a comprehensive system of transnational control of concentrations and forms an important precedent not only for the attempts to apply Art. 102 and 101 TFEU (Art. 82 and 81 ECT) to concentrations but also for the adoption of a community wide merger control law which shall prevent market distortions by means of two strategies: universal provisions and unified enforcement by the supranational Commission[302]. After the expiry of the ECSCT, concentration between coal and steel undertakings are covered by MR1997 and MR2004[303].

4.1 Preventive Prohibition of Concentrations Art. 66 § 1 ECSCT

According to Art. 66 § 1 ECSCT, any undertaking under the jurisdiction of the Commission - i.e. an undertaking in terms of competition law which is active in the coal and steel sector as specified in Art. 80, 81 and Annex I ECSCT - was generally prevented from implementing any concentration unless an allowance decision was issued[304].

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[300] e.g. Germany: The first associations' agreement for negotiated TPA was inefficient owing to transaction and distance related pricing whereas the second one - despite of introducing access based postage stamp pricing - insists on two separate trading zones; q.v. K.Pritsche, *Germany -Gas and Electricity Third-Party Access*, IELTR N-12 (2000).The Gas association's agreement regarding TPA is still under consideration; q.v. V. Baum, *Germany Analysis - Market Participants will define the Rules*, Petroleum Economist, 8 (April 2000).

[301] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) A. II. 2. c) p 9.

[302] The Wording of the ECSCT still refers to the "High Authority" but the organs were merged to the Commission of the European Communities owing to Art. 9 Treaty Merging the Executives of the three Communities, 8 April 1965, Entry into Force 1 July 1967. Additionally, the Commission issued a Notice in order to synchronise certain procedural aspects of merger control under the ECSCT and the Merger Regulation: Commission Notice Concerning Alignment of Procedures for Processing Mergers under the ECSC and EC Treaties, O. J. C 66, 02/03/1998; pdf.file, downloadable from http://europa.eu.int/comm/competition/mergers/legislation/mergin98.html; U. Immenga, Die Europäische Fusionskontrolle im wettbewerbspolitischen Kräftefeld (1st ed.) (Tübingen, Germany, Mohr, 1993) p 31; W. Veelken, M. Karl, S. Richter, Die Europäische Fusionskontrolle (1st ed.) (Tübingen, Germany, Mohr, 1992) IV 1 b) p 16, I p 83; P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 8 B. p 234; CH 8. C. (2) p 238; T.A. Downes and J. Ellison, The Legal Control of Mergers in the European Communities (1st ed.) (London, U.K., Blackstone Press Limited, 1991) p 1.

[303] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 2, p 509.

[304] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) A. III. 3. b) p 23; T.A. Downes and J. Ellison, The Legal Control of Mergers in the European Communities (1st ed.) (London, U.K., Blackstone Press Limited, 1991) pp. 2, 163; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1362, p 538.

However, the Commission had the power to exempt specific concentrations from the scope of merger control pursuant to Art. 66 § 3 ECSCT. Such a general derogation is issued as a Regulation. The substantive criteria of Art. 66 § 3 ECSCT required that no concern was caused in terms of market structure or barriers to entry markets pursuant to Art. 66 § 2 ECSCT.

Regarding the scope of Art. 66 § 1 ECSCT, it was sufficient that at least one of the undertakings concerned had to be active in the coal and steel sector[305]. The territorial scope was defined by Art. 79 I ECSCT.

The concept of supranational control of concentrations was limited by the fact that the Commission was bound to hear the Council if the former was interested in adopting a Regulation in order to specify the criteria for the assessment of concentrations under Art. 66 § 1 ECSCT. The ECSC was lex specialis to the ECT, MR1989 and MR1997 until it expired on 23/07/2002[306].

4.2 Allowances under Art. 66 § 2 ECSCT

Art. 66 § 2 ECSCT formed the legal basis for an allowance decision. Furthermore, the Commission was empowered to impose undertakings on the companies concerned. Therefore, the legal validity of the clearance decision was based on the fulfillment of the conditions attached to it[307]. Mergers, that created the power to determine prices, to control or restrict production or distribution or to hinder effective competition in a substantial part of the market, were prohibited[308].

Its first part listed substantive criteria related to market structure[309]. It can be stated that these are similar to the compatibility criteria of Art. 2 I lit. a MR1997. Whereas the 2nd part of Art. 66 § 2 ECSCT dealt with barriers to entry a market by means of inter alia very favourable access to either resources or markets. Therefore, the Commission was bound to reduce the scope of discriminations when it issued decisions under Art. 66 § 2. This concept of appraising discriminations with a view of establishing a level playing field for competitors was similar to Art. 2 I lit. b MR1989.

Finally, Art. 66 § 4 ECSCT enabled the Commission to require additional information by means of a Regulation. Compared with Art. 11 MR1989, it has to be summarised that this procedure is quite slow because it involves a mandatory hearing of the Council.

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[305] Art. 66 § 1 ECSCT.

[306] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. I. 2. a) p 272, C. I. 3. a) (1) p 276; P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 8 B. p 233.

[307] Alternatively, obligations could be imposed so that the non fulfilment does not affect the validity but enables the authorities to enforce them and to revoke the decision as a measure of last resort; U. Immenga, Die Europäische Fusionskontrolle im wettbewerbspolitischen Kräftefeld (1st ed.) (Tübingen, Germany, Mohr, 1993) p 31.

[308] E. Fox & D. Gerard, EU Competition Law (1st ed.)(Cheltenham, UK, Elgar, 2017) CH 6, p 234.

[309] control of production and allocation of goods, capability of impeding effective competition.

4.3 Fines, Divestiture, Judicial Review, Enforcement

First of all, Art. 66 § 5 1st ECSCT Sentence provided for a legal basis to impose fines on undertakings which failed to apply for an allowance even if the concentration achieved the substantive criteria[310]. In case of non-fulfillment or of concentrations failing to meet the substantive criteria of Art. 66 § 2 ECSCT, the Commission issued an incompatibility decision under Art. 66 § 5 2nd Sentence ECSCT. The former was accompanied by undertakings either to divest undertakings, assets or joint control or to honour other obligations which were suitable and necessary to restore efficient competition on the relevant markets[311].

The next part of Art. 66 § 5 ECSCT dealt with the available judicial review, whereas the 10th Sentence allowed the Commission to implement its decisions after due time limits have been ignored by the addressees. This included inter alia the administration of assets earned by means of the illegal concentration and the administration by means of trustees. For this purpose, the Commission had the power to issue necessary guidelines to the Member States so as to ensure close co-operation.

4.4 Cartels and Abuses of Dominant Positions

The merger control law is accompanied by provisions related to cartels (Art. 65 §§ 1-5 ECSCT) and abuses of dominant positions (Art. 66 § 7 ECSCT) which are broadly similar to Art. 101 and 102 TFEU (Art. 81 and 82 ECT).

However, some inconsistencies existed because the regulatory powers of the Commission were far more comprehensive. These included the ability to set prices and general trading terms if a dominant undertaking fails to implement a recommendation[312]. As a matter of last resort, the Commission could introduce production quotas[313], request allocation quotas[314] and impose fines[315].

4.5 Evaluation

This highly specific centralised framework is justified as the ECSCT pooled sovereignty in a specific economic sector that could be distinguished easily from the economy and economic policy as a whole. Furthermore, due to its former strategic relevance, the sector was of utter importance for the peace building in Europe in the aftermath of the 2nd world war. Therefore, transnational elements were introduced backed by strong political support.

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310 Art. 66 § 6 ECSCT contains detailed provisions as to the amount.
311 It is remarkable that no discretion is granted whether to impose additional undertakings or not so that the Commission is only empowered to choose the appropriate condition.
312 Art. 66 § 7 ECSCT.
313 Art. 66 § 7; Art. 58 ECSCT.
314 Art. 66 § 7; Art. 59 ECSCT.
315 Art. 66 § 7; Art. 43 ECSCT.

Contrarily, the ECT does not include specific provisions regarding concentrations and decades of negotiations were required before the Merger Control Regulation was implemented[316] on the bases of Art. 107 TFEU (Art. 87 and especially Art. 352 TFEU (Art. 308 ECT[317]). This period of lengthy discussions is understandable not only on the basis of domestic policies that focused on national responses to global crises since the beginnings of the 1970s - for instance the oil crises - but also because of the fact that the proposed rules would apply to the economy as a whole. Therefore, various domestic policies - even those for which economic implications are usually of minor concern - are restricted to an extent that is often not exactly foreseeable to the negotiating parties. This lead to various opposition. Thus, several negotiators were made to demand a broad industrial policy approach towards concentrations so as not to rely on market structure criteria pursuant to the genuine rationale of competition law[318]. From 23/07/2002 mergers in the coal and steel sector are subject to Art. 101-102 TFEU (Art. 81-82 ECT), MR1997 and MR2004[319].

4.6 Euratom Treaty

According to Art. 305 II EC (deleted in the Treaty of Lisbon), the EC-treaty does not interfere with the Euratom-treaty. As the Euratom treaty does not contain provisions on the control of concentrations it was disputed if Art. 101 and 102 TFEU and the MR2004 are applicable to undertakings in the nuclear energy sector[320]. Since the provision is deleted, the TFEU and the MR2004 are applicable to full extent unless they directly interfere with Euratom rules.

5. Merger Control under Art. 102 and 101 TFEU (Art. 82 and 81 ECT)

As a consequence of the fact, that neither a specific merger control law was incorporated into the ECT nor the proposals for a merger control regulation were timely adopted, the Commission - subject to the Review of the CJEU - had to rely solely on Art. 102 and 101 TFEU (Art. 82 and 81 ECT) and the Regulation 17/1962 (Regulation 1/2003/EC)[321] unless Art. 106 II TFEU (Art. 86 II ECT) grants an exemption from EU competition law which is not true for the energy sector in Germany[322]. It was disputed whether these provisions could be used for a control of the structure of undertakings operating on relevant product markets even if the wording and

[316] q.v. Draft Merger Control Regulation, Proposal for a Regulation (EEC) of the Council on the Control of Concentrations between Undertakings, O. J. C 92, 20/07/73 p 1; as amended on 12/02/82 O. J. C 36, 12/02/82 p 3; as amended on 23 February 1984, O. J. C 51 23/02/84 p 8; as amended on 17 December 1986, O. J. C 324, 17/12/86 p 5.
[317] Introduction of the MR1989 prior to the first recital.
[318] q.v. supra 3.3; 3.3.1-3.3.3 .
[319] Whish, D. Bailey, Competition Law (8th ed.) (Oxford, U.K., OUP, 2015) CH 23 5., p 1022; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. I. 3. a) (1) p 276.
[320] I. van Bael and J.-F. Bellis, Competition Law of the European Community (4th ed.) (The Hague, The Netherlands, Kluwer Law International, 2005) CH 12 § 12.38, p 1454.
[321] W. Veelken, M. Karl, S. Richter, Die Europäische Fusionskontrolle (1st ed.) (Tübingen, Germany, Mohr, 1992) I pp 83-84; I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 2 F. I 1. p 181; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) A. III. 3. b) p 24.

immediate rationale of these provisions indicate that they are only a legal basis for a classical behavioural control of the conduct of independent undertakings and not a regulatory instrument which enables the Commission to ban certain structural concentrations between formerly independent competitors. The MR2004 as secondary EU law cannot restrict the applicability of primary EU law under Art. 101-102 TFEU (Art. 81-82 ECT)[323] although it was stated jointly by the Council and Commission that where MR1989 applies, normally Art. 101-102 TFEU do not longer regulate the case[324].

5.1 EC Merger Control under Art. 102 TFEU (Art. 82 ECT)

Supported by a Memorandum of the Commission of 1966[325], it was established in the Continental Can Judgement which followed a Commission decision that Art. 102 TFEU (Art. 82 ECT) should be applied to concentrations[326]. The significance of this interpretation cannot be properly judged without a careful analysis of the scope and teleology of Art. 102 TFEU (Art. 82 ECT). In general, an inconsistency with this provision is available if at least one acquiring undertaking already holds a dominant position[327] on a relevant product market within the common market or its relevant parts which is abused so that trade between Member States is affected[328].

5.1.1 Undertaking

For the purposes of Art. 102 TFEU (Art. 82 ECT), the term undertaking has to be interpreted in the manner that has been already established[329].

5.1.2 Relevant Market

A relevant market denotes the range of products or services which ordinary consumers[330] deem to be exchangeable in functional[331], geographical[332] and temporal terms (time of concluding agreements, delivery times). Additionally, a mere limited extent of substitutability is not regarded as sufficient[333].

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322 I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 2 F. I 2. a. p 182.
323 I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 2 F. I 2. b. pp 183-184.
324 F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1374, p 544; E. Fox & D. Gerard, EU Competition Law (1st ed.)(Cheltenham, UK, Elgar, 2017) CH 6 A.1., p 237.
325 Commission of the European Communities, Le Problème de la Concentration dans le Marché Commun, (1966), Etudes CEE, Série Concurrence, No. 3; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.1 (1) p 634.
326 CJEU Case C-6/72 *Europemballage Corp and Continental Can Co Inc v Commission* [1973] ECR 215; W. Veelken, M. Karl, S. Richter, Die Europäische Fusionskontrolle (1st ed.) (Tübingen, Germany, Mohr, 1992) II p 4; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) A. III. 3. b) p 24; C. I 2. a) p 271; T.A. Downes and J. Ellison, The Legal Control of Mergers in the European Communities (1st ed.) (London, U.K., Blackstone Press Limited, 1991) p 3; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.298, p 751; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 2. C. (ii), p 1091.
327 The term dominant position will be discussed later, at 6.1.4; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.298, p 752; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 2. C. (ii), p 1091.
328 V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 14 IV pp. 132-133.
329 supra at 1.1.1 Undertaking in Terms of Merger Control Law.
330 C. Koenig, K. Schreiber, Europäisches Wettbewerbsrecht (1st ed.) (Tübingen, Germany, Mohr, 2010) CH 7 IV. 1., p 201.
331 A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 375-377, p 177; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 24-25 p 577.
332 q.v. Art. 9 VII MR2004; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 39 p 581.

Geography distinguishes regional markets as the location of supply or demand determines transportation and insurance costs so that - subject to the ratio of product value and transportation costs - the intensity of competition falls significantly with growing distance.

Functional substitutability is available if a consumer can switch easily to like products (or a producer can switch easily to another consumer) which can be used to attain the same economic purposes at similar expenses. It is not given, if a company has market power so that it would be able to raise prices substantially without fear that many consumers would shift to other suppliers[334].

Consequently, cross-elasticity of demand and supply substitutability are generally important tools to define and distinguish markets[335].

However, regarding different consumer groups, it is well established that a significant proportion of captive consumers, i.e. those who lack the ability to switch to more expensive goods, facilitates the definition of a separate market even if more powerful consumers would include a broader range of products as substitutable[336].

It remains a sensitive issue that the case law indicates that indeed a very high level of conformity is actually needed to establish similarity[337]. By means of narrow definitions of interchangeability, small separate markets are established in which a dominant position can be easily established. However, the Commission's approach in favour of a narrow market definition is justified, as an over-specific analysis of markets structures is preferable to a broad approach which would introduce even higher elements of discretion to the interpretation of Art. 102 TFEU (Art. 82 ECT). Additionally, market structures and consumer preferences tend to shift over time so that high levels of similarity over a short period of time are adequate yardsticks for the assessment[338].

Finally, it has to be underlined, that the case law binds the notion of dominance to relevant product markets which indicates that the cross-subsidising powers of conglomerate undertakings which hold minor shares of large numbers of markets are neglected[339]. The relevant product market in energy is defined by the Commission for electricity as generation (generation in power plants, import and export of electricity through

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[333] CJEU Case C-6/72 *Europemballage Corp and Continental Can Co Inc v Commission* [1973] ECR 215 at p 247; CJEU Case C-322/81 *Nederlandse Banden Industrie Michelin v Commission* [1983] ECR 3461, at p 3508.

[334] E. Fox & D. Gerard, EU Competition Law (1st ed.)(Cheltenham, UK, Elgar, 2017) CH 6 B.4., p 242.

[335] A high level of cross elasticity of demand is available if a small increase in the price of product (A) makes a significant number of consumers shift to product (B). Supply Substitutability ends where a produce needs major investments in order to compete in neighbouring markets; e.g. the market for packages of fresh milk differs from UHT milk cartons owing to the expensive processes to sterilise the cartons which are covered by intellectual property rights: q.v. Commission Decision 88/501/EEC of 26 July 1988 Relating to A Proceeding under Articles 85 and 86 of The EEC Treaty, O. J. L 272 04/10/1988 p 27 (*Tetra Pak I and Liquipak*); I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.13 (1) (a) (i) p 677; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.724, p 703.

[336] CJEU Case C-27/76 *United Brands Company & Anor v Commission* [1978] ECR 207, at p 273.

[337] e.g. separate markets for different bulk vitamins: CJEU Case C-85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461 at p 514.

[338] q.v. Commission Decision 92/163/EEC of 24 July Relating to a Proceeding Pursuant to Article 86 of The EEC Treaty, O. J. L 072, 18/03/1992 p 1 (*Tetra Pak II*) paragraphs 17, 49 and 93.

interconnectors, the physical and financial sale of power on the wholesale markets to traders over the counter (OTC) or on a power exchange, to distribution companies or large industrial end users[340]), transmission via the high voltage grid (220 kV and above)[341] including cross-border flows via interconnectors[342], distribution via low voltage grids[343], which form as natural monopolies[344], retail supply to large industrial users, retail supply to commercial and small industrial users, retail supply to residential customers and the provision of balancing power services[345], which are objective transparent and non-discriminatory[346], and metering[347]. Financial trading may be separated in short-term (day-ahead, intra-day) and long-term (forwards) markets[348]. Regarding high-calorific and low-calorific natural gas, which are distinct markets[349], the following relevant product markets are established by the Commission: upstream (all activities until gas is sold to wholesalers (gas fired power plants, large industrial consumers[350]): exploration[351], development and production and sale to wholesalers, transmission through upstream gas pipelines or LNG ships, processing of gas; downstream (all activities after gas is sold to wholesalers): transmission via the high pressure pipeline grid, distribution via the low pressure grids, storage and trading and retail supply to small consumers (commercial customers and household customers)[352]. The relevant product markets for natural gas are separate from the electricity supply markets[353].

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[339] q.v. CJEU Case C-6/72 *Europemballage Corp and Continental Can Co Inc v Commission* [1973] ECR 215 at p 247; Commission Decision 85/609/EEC Relating to A Proceeding under Art. 86 of the EEC Treaty, O. J. L 374 31/12/1985 p 1 (*ECS v AKZO*).

[340] Commission Decision, *VEBA / VIAG*, Case IV/M. 1673, 2000 para 19; Commission Decision, ENI / EDP / GDP CASE IV/M. 3440; Commission Decision, *E.ON / MOL*, CASE IV/M. 3696; Commission Decision, *EDF / AEM / EDISON*, CASE IV/M. 3729; Commission Decision, *VATTENFALL / ELSAM AND E2 ASSETS*, CASE IV/M. 3867; Commission Decision, *TENNET / ELIA / GASUNIE / APX-ENDEX*, CASE IV/M. 5911; Commission Decision, *KGHM / TAURON WYTWARZANIE / JV*, CASE IV/M. 5979; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 12, marginal note 12.29, p 1590 and marginal note 12.34, p 1591.

[341] Commission Decision, *E.ON / MOL*, CASE IV/M. 3696 para 212; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 12, marginal note 12.30, p 1590.

[342] Art. 2 I Regulation (EC) No. 1228/2003 of the European Parliament and of the Council of 26/06/2003 on Conditions for Access to the Network for Cross-Border Exchanges in Electricity, O. J. 2003 L 176, p 1; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 12, marginal note 12.30, p 1591.

[343] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 12, marginal note 12.30, pp. 1590-1591.

[344] Commission Decision, *TENNET / ELIA / GASUNIE / APX-ENDEX*, CASE IV/M. 5911 para 39; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 12, marginal note 12.30, p 1590.

[345] Commission Decision, *GDF SUEZ / INTERNATIONAL POWER*, CASE IV/M. 5978; Commission Decision, *DONG / ELSAM / ENERGI E2*, CASE IV/M. 3868; Commission Decision, *VERBUND / ENERGIEALLIANZ*, CASE IV/M. 2947; Commission Decision, *SYDKRAFT / GRANINGE*, CASE IV/M. 3268; Commission Decision, *GAZ DE FRANCE / SUEZ*, CASE IV/M. 4180 para 683; Commission Decision, ENI / EDP / GDP CASE IV/M. 3440 para 51; P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 11 C. (1) (a) p 288; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 181, pp. 1254-1255; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 12, marginal note 12.28, p 1589, marginal note 12.33, p 1591 and marginal note 12.35, p 1591.

[346] I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 12 § 12.12 (2) (c) p 1409.

[347] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 185, p 1256.

[348] Commission Decision, *RWE / ESSENT*, CASE IV/M. 5467 para 23; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 12, marginal note 12.34, p 1591.

[349] Commission Decision, *GAZ DE FRANCE / SUEZ*, CASE IV/M. 4180 para 64-69 and 135; Commission Decision, *RWE / ESSENT*, CASE IV/M. 5467 para 329; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 12, marginal note 12.19, p 1587.

[350] Commission Decision, *GAZ DE FRANCE / SUEZ*, CASE IV/M. 4180 para 78-81 and 362-367; Commission Decision, *E.ON / MOL*, CASE IV/M. 3696 para 107-118; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 12, marginal note 12.24, p 1589.

[351] Commission Decision, *EXXON / MOBIL*, Case IV/M. 1383; Commission Decision, *KAZMUNAIGAS / ROMPETROL*, CASE IV/M. 4934; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 12, marginal note 12.21, p 1588.

[352] Commission Decision, *DONG / ELSAM / ENERGI E2*, CASE IV/M. 3868 para 71; Commission Decision, ENI / EDP / GDP CASE IV/M. 3440; P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 11 C. (1) (a) p 290; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 196, p 1259; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 12, marginal note 12.20, p 1587, marginal note 12.23, p 1588 and marginal note 12.24, p 1589.

[353] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 195, p 1259; Commission Decision EDP / Hidroelectrica del Cantabrico CASE IV/M. 3448.

The relevant geographic market for the development, production and upstream sale of natural gas is EEA-wide[354]. Electricity and natural gas supply markets are national, regional or local[355], whereas gas wholesale and retail supply markets are national in scope[356]. Concerning electricity markets, several trading zones are established (Nordic countries; central western Europe; central eastern Europe) which shall be integrated into a north western Europe market by 2014[357]. Geographic gas transport markets (transmission and distribution) are natural monopolies and thus the geographic market is limited to the balancing zones[358]. The same is true for electricity grids (transmission including interconnectors and distribution)[359]. Gas storage markets are either national (Denmark, Spain and Hungary) or regional (Germany)[360].

5.1.3 Substantial Part of the Common Market and Effects Doctrine

Finally, the relevant market must be at least a substantial part of the common market. This criterion depends generally on the number of marketers which means that the marketers engage in activities on either the world market, the community wide market, national markets of medium sized Member States, regional cross-border markets[361] or significant parts of domestic markets of large Members. However, the wording of Art. 102 TFEU (Art. 82 ECT) should prevent anyone from including domestic undertakings of small Member States[362].

It must not be neglected that this criterion is also extremely relevant to the extraterritorial application of EC competition law. According to the effects doctrine, it is sufficient for the application that the allegedly violating behaviour has a direct, immediate, substantial and foreseeable effect on relevant markets within the common market[363]. This aspect is relevant to concentrations in the energy industry although normally at least the acquirer or the target will already have significant business interests in the EU.

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354 Commission Decision, *EXXON / MOBIL*, Case IV/M. 1383 para 18; Commission Decision *BP AMOCO / ATLANTIC RICHFIELD*, CASE IV/M. 1532 para 16-17; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 12, marginal note 12.36, p 1592.

355 J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 12, marginal note 12.37, p 1592 and marginal note 12.42, p 1594.

356 Commission Decision, *DONG / ELSAM / ENERGI E2*, CASE IV/M. 3868 para 147-168 and 193; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 12, marginal note 12.39, p 1593.

357 J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 12, marginal note 12.40, p 1593.

358 Commission Decision, *E.ON / MOL*, CASE IV/M. 3696 para 97; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 12, marginal note 12.43, p 1594.

359Commission Decision, ENI / EDP / GDP CASE IV/M. 3440 para 34; Commission Decision, *TENNET / ELIA / GASUNIE / APX-ENDEX*, CASE IV/M. 5911 para 45; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 12, marginal note 12.44, p 1594.

360 Commission Decision, *DONG / ELSAM / ENERGI E2*, CASE IV/M. 3868 para 124; Commission Decision, *E.ON / ENDESA*, CASE IV/M. 4110 para 23; Commission Decision, *E.ON / MOL*, CASE IV/M. 3696 para 128-130; Commission Decision, *EXXON / MOBIL*, Case IV/M. 1383 para 262-263; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 12, marginal note 12.46, p 1594.

361CJEU Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others v Commission* [1975] ECR 1663 at p 1977.

362 Advocate General Warner was of the opinion that Luxembourg was a substantial part of the common market: CJEU Case C-77/77 *Benzine en Petroleum Handelsmaatschappij BV and Others v Commission* [1978] ECR 1513 at p 1537.

363 Commission Decision, O. J. L 195, 1969 p 11 (*Re Aniline Dyes Cartel*) at p 16; V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 3 III p 15; U. Immenga, Die Europäische Fusionskontrolle im wettbewerbspolitischen Kräftefeld (1st ed.) (Tübingen, Germany, Mohr, 1993) p 19; C. Koenig, K. Schreiber, Europäisches Wettbewerbsrecht (1st ed.) (Tübingen, Germany, Mohr, 2010) CH 7 III. 3., p 199; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. I. 3. d) p 284; I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 9 I., p 240; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.10 p 671; q.v. Commission Decision, *BOEING / MCDONNELL DOUGLAS*, CASE IV/M. 877 and Commission Decision, *GENCOR / LONRHO*, CASE IV/M. 619 and Commissin Decision, *GE / HONEYWELL*, CASE IV/M. 2220; q.v. I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.17 (5) pp. 726-727.

5.1.4 Dominant Position and Collective Dominance

A dominant position on the specified market is available if an undertaking may prevent the establishment or maintenance of effective competition by holding the power to behave independently from its competitors to a significant extent[364] so that the behavioural freedom of competitors is extremely limited. Although one could argue that the efficacy of competition and the ability to behave independently form two separate criteria, it is preferable to regard these phenomena as mere two aspects of the same criterion[365] owing to a their relation of close causality. Thereby, competition can no longer allocate goods and services in the most efficient manner. This concept is exemplified if an undertaking is able to significantly increase prices or worsen conditions without facing any reductions in demand. Additionally, competitors may abstain from counter-measures as they fear not to cope with retaliations. According to the case law the following methodology is used in order to analyse alleged dominant positions:

Firstly, a pure analysis of market shares is deemed to be sufficient to enable undertakings to behave independently as long as the market shares exceed certain thresholds[366]. The threshold seems to be a market share of 50% as the CJEU used additional criteria in order to analyse the alleged dominance of company having a market share of 45%[367].

Secondly, the analysis is based upon both market share and structural criteria based on a gap of power between the allegedly dominant entity and its closest competitors. The case law relies primarily on a remarkable difference between the market shares of the leading entity and its (minor) competitors[368]. However, several supplementary criteria are imaginable: inter alia

- a high degree of vertical integration of the allegedly dominant firm[369],
- technological advances[370],

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364 CJEU Case C-27/76 *United Brands Company & Anor v Commission* [1978] ECR 207 at p 277; CJEU C-85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461 at p 520; CJEU Case C-322/81 *Nederlandse Banden Industrie Michelin v Commission* [1983] ECR 3461, at p 3503; CJEU Case C-311/84 *Centre Belge d'études de marché - Télémarketing* (*CBEM) v SA Compagnie Luxembour-geoise de télédiffusion and Information Publicité Benelux (IPB)* [1985] ECR 3261 at p 3275; I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 2 F. III 1. p 192.

365 V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 9, p 87.

366 CJEU Case C-85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461 at p 527: Market Shares regarding the supply of bulk vitamins of either 93%, 84%, 75% or 65% are suitable values;
CJEU Case C-322/81 *Nederlandse Banden Industrie Michelin v Commission* [1983] ECR 3461, at p 3509: Market share of 57%.
CJEU Case C-66/86 *Akzo Chemie BV v Commission* [1991] ECR I 3359 paragraph 60: Market share of 50%.

367 CJEU Case C-27/76 *United Brands Company & Anor v Commission* [1978] ECR 207 at p 282.

368 Dominance is negated if a market share of 20 and 30 % is challenged by major competitors and imports: Commission Decision 90/363/EEC of 26 June Relating to A Proceeding pursuant to Art. 86 of The EEC-Treaty O. J. L 179 12/07/1990 p 41 (*Metaleurop SA*); conversely, large gaps to the allegedly dominant firm underline the finding of dominance: q.v. CJEU Case 322/81 *Nederlandse Banden Industrie Michelin v Commission* [1983] ECR 3461, at p 3509; CJEU Case C-85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461 at p 529; Commission Decision 92/163/EEC of 24 July Relating to a Proceeding Pursuant to Article 86 of The EEC Treaty, O. J. L 072, 18/03/1992 p 1 (*Tetra Pak II*) : Tetra Pak held 55% of the market for non-aseptic milk cartons whereas its competitors only accounted for 27%; Commission Decision 88/589/EEC of 4 November 1988 Relating to A Proceeding under Art. 86 of The EEC Treaty, O. J. L 317 24/11/1988 p 47 (*London European v Sabena*): Sabena maintained a computerised booking system that was used by the vast majority of Belgian travel agencies and airlines.

369 CJEU Case C-27/76 *United Brands Company & Anor v Commission* [1978] ECR 207 at p 278; Commission Decision 91/299/EEC of 19 December 1990 Relating to A Proceeding under Art. 86 of The Treaty, O. J. L 152 15/06/1991 p 21 p (*Soda-Ash v Solvay*)); Commission Decision 88/138/EEC of 22 December 1987 Relating to A Proceeding under Art. 86 of The EEC Treaty, O. J. L 65 11/03/1988 p 19 (*Eurofix-Bauco v Hilti*); General Court Case T-30/89 *Hilti v Commission* [1991] ECR II 1439; CJEU Case 53/92 P Hilti v Commission [1994] ECR I 667.

370 CJEU Case C-27/76 *United Brands Company & Anor v Commission* [1978] ECR 207 at p 279; CJEU Case C-85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461 at p 524; CJEU Case C-322/81 *Nederlandse Banden Industrie Michelin v Commission* [1983] ECR 3461, at p 3511.

- maturity of the market[371] so that new consumers can only be reached to the detriment of competitors, maintenance of costly (sales-)networks[372],
- strict quality controls,
- brand reputation[373],
- lack of potential competitors[374],
- product range,
- consumers who are in favour of domestic products.

Additionally, these criteria are also exemplified by Section 19 II GWB1998[375]. It has to be stressed that these terms have to be carefully interpreted and applied to every case due to their vagueness as otherwise minor competitive edges would be included.

Thirdly, a market share below a certain threshold is used as a negative criterion which generally excludes in itself any dominance[376].

Fourthly, the notion of dependence is introduced so as to constitute dominance. Basically, this concept recalls the idea of captive consumers that is applied to define narrow relevant markets. For instance, energy undertakings can become dominant undertakings in terms of extraordinary supply crises so that all consumers become dependent or captive if they cannot reasonably switch to alternative fuels.

This concept is very familiar to the essential facilities doctrine which makes it an offence against Art. 102 TFEU (Art. 82 ECT) if the owner of an essential facility (resources, gas or electricity networks, ports) that cannot be reasonably duplicated in economic terms by competitors on legal or factual grounds abstain either from supplying services/goods in long-term relations[377], from serving new consumers or from offering access to networks although now due reason is presented which implies that an obligation to enter into negotiations based on objective, transparent and non-discriminatory criteria applies.

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[371] Commission Decision 88/138/EEC of 22 December 1987 Relating to A Proceeding under Art. 86 of The EEC Treaty, O. J. L 65 11/03/1988 p 19 (*Eurofix-Bauco v Hilti*); General Court Case T-30/89 *Hilti v Commission* [1991] ECR II 1439; CJEU Case 53/92 P Hilti v Commission [1994] ECR I 667.

[372] CJEU Case C-85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461 at p 524; CJEU Case C-66/86 *Akzo Chemie BV v Commission* [1991] ECR I 3359 paragraph 60; Commission Decision 91/299/EEC of 19 December 1990 Relating to A Proceeding under Art. 86 of The Treaty, O. J. L 152 15/06/1991 p 21 p (*Soda-Ash v Solvay*).

[373] q.v. Commission Decision 87/500/EEC of 29 July 1987 Relating to a Proceeding under Art. 86 of the EEC Treaty, O. J. L 286 9/10/1987 p 36 (*BBI v Boosey & Hawkes*): It deals with the bass brand.

[374] CJEU Case C-27/76 *United Brands Company & Anor v Commission* [1978] ECR 207, at p 284; CJEU Case C-85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461 at p 524; CJEU Case C-66/86 *Ahmed Saeed Flugreisen & Anor v Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.* [1989] ECR I 803.

[375] Section 19 IV GWB1998 includes distinctions regarding financial power, superior access either to up- and downstream markets, concentrations, control of barriers to entry or exit, ability to amend products (technological leadership), cross-elasticity of demand and supply substitutability: Antitrust Act of 26 August 1998 [Gesetz gegen Wettbewerbsbeschränkungen], Federal Law Gazette 1998 I 2521, as Amended on 22 December 1999, Federal Law Gazette 1999 I 2626.

[376] CJEU Case C-210/81 Demo Studio Schmidt v Commission [1983] ECR 3045 at p 3065: A market share of 1%. Commission Decision 85/78/EEC of 12 December 1984 Relating to A Proceeding under Art. 85 of the EEC Treaty, O. J. L 35 07/02/1985 p 54 (*Mecaniver v PPG*): A concentration which raises the market share from 4 to 11% is insignificant in itself; CJEU Case C-26/76 *Metro SB-Großmärkte GmbH & Co. KG v Commission* [1977] ECR 1875 at p 1902: Saba's market shares of either 5-10 %, 6-7% were irrelevant.

[377] In terms of supply crises, a pro rata delivery is required. However, it is beyond the scope of this paper to analyse the introduction of this doctrine - which is based on American antitrust cases - to EC competition law. This is especially true for the latest potentially restrictive developments pursuant to the Bronner Judgement; R. Whish, D. Bailey, Competition Law (8th ed.) (Oxford, U.K., OUP, 2015) CH 23 7 (B), p 1032.

Three specific disputes can be found regarding the dominant positions of which the last one is of major relevance for the scope of the control of concentrations:

The first controversy refers to the question whether dominance shall be restricted to undertakings with operate successfully in the market concerned. Such a hypothesis was denied[378]. The second dispute deals with the question if a retained market share despite of powerful market entrants indicates dominance per se or not[379]. The third controversy questions whether a collective dominance doctrine can be established under Art. 102 TFEU (Art. 82 ECT). The collective dominance concept is interesting in analytic terms as oligopolistic structures[380] are a hybrid structure between mere cartels in terms of Art. 101 TFEU (Art. 81 ECT) and completely structural concentrations in terms of Art. 1 I; 3 I lit a or b; 3 II MR1997 so that a detailed analysis of in this thesis is justified. This is especially true if one considers the important role that this concept is playing in the concentration *VEBA/VIAG* which will be assessed later[381].

The Commission argued for a long time in favour of this concept[382]. A collective dominant position on a relevant market is available if a small group of undertakings co-operates so as to remove internal competition and so as to introduce joint external activities[383]. Thirdly, it is required that the group which externally acts as one entity does not leave any scope for effective competition of external undertakings. The rationale is that an oligopoly poses an additional threat to the viability of competition which can not be properly addressed by a sole application of Art. 101 TFEU (Art. 81 ECT). Additionally, due to the co-operative nature and the lack of entities receding from the relevant market, it is not feasible to interpret the situation as a concentration.

Whereas the CJEU initially disapproved the collective dominance doctrine[384], the General Court accepted the doctrine at least in theory. However, the tribunal invalidated it in practical terms with the argument that facts which support the prohibition of a cartel agreement under Art. 101 TFEU (Art. 81 ECT) cannot used twice so as to construct an additional inconsistency with Art. 102 TFEU (Art. 82 ECT) as a result of collective dominance[385].

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[378] CJEU Case C-27/76 *United Brands Company & Anor v Commission* [1978] ECR 207, at p 284.

[379] A per se rule was denied by the CJEU in CJEU Case C-85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461 at p 522; q.v. J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) A. III. 1. c) pp 17-18.

[380] V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 16 VI p 149-150; C. Koenig, K. Schreiber, Europäisches Wettbewerbsrecht (1st ed.) (Tübingen, Germany, Mohr, 2010) CH 7 IV 2. b), p 203.

[381] V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 16 VI p 150.

[382] Commission Decision 73/109/EEC of 2 Januray 1973 Relating to Proceedings under Art. 85 and 86 of the EEC Treaty, O. J. L 140 26/05/1973 p 17 (*Suiker Unie and Centrale Suiker Maatschappij*): Collective Dominance in the Dutch Sugar Industry; q.v. arguments regarding a group of oil suppliers in The Netherlands: Commission Decision 77/327/EEC of 19 April 1977 Relating to a Proceeding under Art. 82 of the EEC Treaty, O. J. L 117 09/05/1977 p 1 (*ABG/Oil Companies Operating in The Netherlands*); q.v. arguments of the Commission in the Alsatel Case: CJEU Case C-247/86 *Alsatel v SA Novasam* [1988] ECR 5987 at p 5994; q.v. Commission Decision 89/93/EEC of 7 December 1988 Relating to A Proceeding under Art. 85 and 86 of The EEC Treaty, O. J. L 33 04/02/1989 p 44 (*Flat Glass*); Commission Decision 92/262/EEC of 1 April 1992 Relating to A Proceeding pursuant to Art. 85 and 86 of The EEC Treaty, O. J. L 134 18/05/1992 p 1 (*French-West African Shipowners' Committees*); Commission Decision 93/82/EEC of 23 December 1992 Relating to A Proceeding Pursuant to Articles 85 (IV/32.448 and IV/32.450: *Cewal, Cowac and Ukwal*) and 86 (IV/32.448 and IV/32.450: *Cewal*) of The EEC Treaty, O. J. L 34 10/02/1993 p. 20; q.v. the expressive definition of oligopolistic groups in Section 19 II 2 and 1 GWB1998.

[383] I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.16 (1) p 706; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.767, p 713.

[384] CJEU Case C-85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461 paragraph 39; CJEU Case C-247/86 *Alsatel v SA Novasam* [1988] ECR 5987.

[385] General Court Joined Cases T-68/89, T-77/89 and T-78/89 *Società Italian Vetro & Ors v Commission* [1992] ECR II-1403 ('Italian Flat Glass').

In a recent appeal against a Commission decision[386] first the tribunal[387] and later the CJEU[388] honoured the doctrine more or less as it was applied by the Commission. The Commission found that a liner conference in terms of Art. 1 III lit b Regulation 4056/86/EEC[389] which includes services between Congo and the North Sea had violated Art. 101 I TFEU (Art. 81 I ECT), as the anti-competitive agreements were not justified under Art. 101 III TFEU (Art. 81 III ECT) because they exceeded the scope of the related block exemption[390]. Furthermore, it was held that the agreement interfered with Art. 102 TFEU (Art. 82 ECT) as the addressees implemented the practise "fighting ships"[391] and imposed a 100% loyalty obligation on the service users in contravention of Art. 5 II Regulation 4056/1986/EEC and that the conference could not justify this conduct with the defence of mandatory compliance with government orders as the infringements were a consequence of freely determined behaviour and not imposed by the host government[392].

5.1.5 Abuse

An abuse of the dominant position is available if a measure on own initiative causes an additional limitation of the behavioural freedom of either consumers or remaining competitors on the relevant market[393]. This assessment shall be exclusively based on objective criteria without any need to establish culpability[394]. According to the rationale of Art. 102 TFEU (Art. 82 ECT) a measure is included only if market dominance[395] is a necessary condition for a successful implementation of the strategy: in other words, a hypothetical non dominant entity pursuing a comparable action to the disadvantage of target undertakings would be affected by outstanding detrimental effects[396].

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[386] Commission Decision 93/82/EEC of 23 December 1992 Relating to A Proceeding pursuant to Articles 85 (IV/32.448 and IV/32.450: *Cewal, Cowac and Ukwal*) and 86 (IV/32.448 and IV/32.450: *Cewal*) of The EEC Treaty, O. J. L 34 10/02/1993 p. 20 (*Cewal, Cowac and Ukwal*) at p 31: The Commission stated that conference agreements between shipping companies.

[387] General Court Joined Cases T-24/93 to T-26/93 and T-28/93 *Compagnie Maritime Belge Transports and Others v Commission* [1996] ECR II-1201.

[388] CJEU Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports SA, Compagnie Maritime Belge SA and Dafra-Lines A/S v Commission*, judgement of 16 March 2000.

[389] A liner conference in terms of this regulation is an agreement by which several shipping companies co-ordinate the operation of services between ports of which at least one is located within the EC; q.v. Art. 1 III lit b and 1 II Council Regulation 4056/86/EEC Laying down Detailed Rules for the Application of Articles 85 and 86 of the Treaty to maritime transport, O. J. L 378, 31/12/1986 p 4, http://europa.eu.int/comm/competition/antitrust/legislation/405686_en.html.

[390] said regulation: Council Regulation 4056/86/EEC Laying down Detailed Rules for the Application of Articles 85 and 86 of the Treaty to maritime transport, O. J. L 378, 31/12/1986 p 4, http://europa.eu.int/comm/competition/antitrust/legislation/405686_en.html.

[391] Fighting ships denotes a conference's practise to threaten independent competitors by means of lowering freight rates especially in those periods close to the departure of ships of independent companies; q.v. CJEU Joined Cases C-395/96 P and C-396/96 P paragraph 5.

[392] The conference entered into an agreement with the former government giving it exclusive rights to operate liner services between certain ports. However, according to the facts the conference tried to persuade the government to enforce these clauses against competitors rather than being forced by governmental officials to exclude competitors; q.v. CJEU Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports SA, Compagnie Maritime Belge SA and Dafra-Lines A/S v Commission*, judgement of 16 March 2000; paragraph 80-83.

[393] q.v. CJEU Case C-85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461 at p 541; R. Streinz, Europarecht (4th ed.) (Heidelberg, Germany, C.F.Müller, 1999) marginal note 829; I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 2 F. III. 2. p 194; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 II p 192.

[394] CJEU Case C-6/72 *Europemballage Corp and Continental Can Co Inc v Commission*, [1973] ECR 215 at p 244.

[395] C. Koenig, K. Schreiber, Europäisches Wettbewerbsrecht (1st ed.) (Tübingen, Germany, Mohr, 2010) CH 7 IV 2., p 202; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) A. III. 3. b) p 24.

[396] q.v. regarding the interpretation of abuses of dominant positions in Section 19 GWB1998: V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 2 IV p 240.

A measure is freely determined if either statutes nor administrative orders directly oblige the entity to implement an abusive conduct or if tight legislation does not leave any room for non abusive conduct[397]. The Court made clear that it is not sufficient to exclude the attribution of behaviour in terms of Art. 102 TFEU (Art. 82 ECT) if a dominant entity persuades the authorities to enforce the exclusivity of a license to the detriment of potential/actual competitors[398].

According to the catalogue of Art. 102 II TFEU (Art. 82,2 ECT), several types of abuses can be distinguished: Firstly, Art. 102, 2 lit. a TFEU (Art. 82, 2 lit. a ECT) excludes pricing systems or general trading terms which cause undue harm to consumers/suppliers[399]. Due to its vagueness, further interpretation is needed to clarify the scope of this provision: For instance, systematic pricing below costs can be covered whereas sometimes it is additionally required that the undertaking intends to exclude a specific competitor. Other practices like fighting ships or mandatory 100% loyalty clauses have been already scrutinised[400]. Finally, public procurement authorities are likely to fulfill the example if they take discretionary decisions in a manner that favours bids of undertakings with certain political objectives.

Art. 102, 2 lit. b TFEU (Art. 82, 2 lit. b ECT) relates to practices with disadvantageous effects to the market structure and consumers without targeting a specific competitor[401]. The provision focuses on actions and investments that are intended to close down a product market. Firstly, a dominant entity may remove well a established cheap product from the market in order to boost demand for the expensive successor although a strong demand for the old one remains[402]. Secondly, a dominant player undertakes an investment in order to acquire the last remaining competitor. Thereby, the scope of Art. 102 TFEU (Art. 82 ECT) can be extended to a control concentrations[403].

Art. 102, 2 lit. c TFEU (Art. 82,2 lit. c ECT) deals with discriminatory trading terms and pricing systems whereas Art. 102,2 lit. d TFEU (Art. 82,2 lit d. ECT) considers agreements in which dominant undertakings combine the offer of the principal product with additional products that are not normally traded together so as to exploit the dependence of captive consumers[404].

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[397] CJEU Case C-359/95 P *Commission v Ladbroke Racing Ltd.*, judgement of 11 Nov 1997, paragraphs 21 and 33; CJEU Case C-41/83 *Italy v Commission* [1985] ECR 873, paragraphs 18 to 20; CJEU Case C-202/88 *France v Commission* [1991] ECR I-1223, paragraph 55; CJEU Case C-18/88 *GB-Inno-BM* [1991] ECR I-5941, paragraph 20); CJEU Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others v Commission* [1975] ECR 1663, paragraphs 36 to 72, and more particularly paragraphs 65, 66, 71 and 72).

[398] CJEU Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports SA, Compagnie Maritime Belge SA and Dafra-Lines A/S v Commission*, judgement of 16 March 2000; paragraphs 80-83.

[399] Art. 82, 2 lit a ECT. This provision is very similar to Section 19 IV No.1 GWB1998.

[400] q.v. the reported practise of "fighting ships" (supra).

[401] V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H. Beck, 2018) § 26 VII p 257, X p 263. This provision is subject to Section 19 I GWB1998 as no specific example in Section 19 IV is available.

[402] e.g. a software company removes old software or increases the price in order to increase demand for the new (but not necessarily more reliable) version.

[403] V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 26 X p 263.

[404] The former situation is reflected by Section 19 IV No. 2 - 3 GWB1998 whereas the latter is covered by Section 19 IV No.1 GWB1998.

5.1.6 Effect on Trade between Member States

If the measure is suitable to haven an effect on trade between Member States Art. 102 TFEU (Art. 82 ECT) is applicable[405]. The wording "between" supports that either exports to other members or imports from Member States are required. However, the economic rationale indicates, that even Member States' trade with third countries is included. In all other cases, only domestic provisions apply. It is controversial whether the rule of reason is relevant to Art. 102 TFEU (Art. 82 ECT) as well[406]. The impact of the effects doctrine has already been introduced[407].

5.1.7 Legal Consequences

Based on the direct applicability of Art. 102 TFEU (Art. 82 ECT[408]), the result of an infringement is that the conduct is legally invalid. This simplified result is obtained by means of the following complex methodology.

Although contested, it is still favourable to interpret EC Law as public international law[409]. The CJEU is of the opinion that EC law is of a specific nature "sui generis" with a rank superior to national law. However, it is superior to regard it as ordinary public international law: Primary EC law is still adopted by means of treaties in terms of public international law. As secondary law depends originally on a legal basis in primary law, it is highly persuasive to state secondary norms share the same legal nature. This opinion also permits to solve constitutional problems in those Member States of which the constitution requires treaties to be implemented to national law by primary legislation. Such a transformation bill must be consistent with the national constitution so that the constitution reserves the power to dominate EC law in areas which are very sensitive in terms of sovereignty or civil rights.

Additionally, it is disputed how public international law shall become effective within the national legal framework. According to the superior so-called modified transformation theory, international law is transformed to national law by means of national primary or secondary legislation which repeats the contents of international norms. If the international legal provision is revoked, the transformational statutes automatically become invalid, too. This result is achieved if one deems that the implementation law was enacted on the pre-condition of the international norm's efficacy.

However, the reported process is only relevant if the international norm fulfils the so-called "self-executing" or "direct applicability" criteria. Shortly, the provision must have a clear wording without various complex

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405 I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 2 F. III. 3. p 195.
406 q.v. R. Streinz, Europarecht (4th ed.) (Heidelberg, Germany, C.F.Müller, 1999) marginal note 829; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) A. III. 1. c) p 17.
407 effects doctrine: supra at 5.1.3 Substantial Part of the Common Market and Effects Doctrine.
408 Although controversial, it is favourable to interpret EC Law as public international law. The implementation of public international law is again disputed. According to the superior modified transformation theory, international law is transformed to national law by means of national provisions with identical contents. However, only so-called "self-executing" or "directly applicable" provisions can be transformed.
409 R. Streinz, Europarecht (4th ed.) (Heidelberg, Germany, C.F.Müller, 1999) marginal note 108 and 113.

exemptions, has to intend to serve private interests of individuals rather than mere public interests, must be accompanied by efficient judicial review and the relevant case must be within the scope of the norm.

Based on Art. 9 II 2nd Variant Regulation No. 17 [REG17 (COUNCIL Reg. (EC) NO. 1/2003)][410], the Commission has the (non-exclusive) power to issue a decision which states that a conduct violates against Art. 102 TFEU (Art. 82 ECT).

5.1.8 Concentration

After having introduced the logic behind the general pre-requisites for the application of Art. 102 TFEU (Art. 82 ECT), it will be evaluated if a broad interpretation is indeed viable that examines concentrations pursuant to this provision. If so, it will be discussed which major drawbacks are related to such a methodology.

5.1.8.1 Arguments Supporting Merger Control: The Continental Can Doctrine

In the Continental Can Judgement[411], the assessment of concentrations by means of Art. 102 TFEU (Art. 82 ECT) was considered and justified in legal terms by several arguments: Firstly, the catalogue of violations listed in Art. 82,2 lit a-d ECT was deemed to have an explanatory nature but not an exhaustive one[412]. This is underlined by the wording "in particular" in the chapeau of Art. 102,2 TFEU (Art. 82,2 ECT). Therefore, an extensive interpretation is facilitated.

Secondly, it was argued that the catalogue does not only cover measures directly to the detriment of competitors or either consumers or suppliers on the market, but also activities which impede the activities of said groups in an indirect manner[413]. This finding is supported by Art. 102,2 lit. c TFEU (Art. 82,2 lit. c ECT) as the mentioned specific trading terms do not in itself fulfill the example. Contrarily, the idea of abuse in this variant is based on the indirect argument that other traders received better covenants in comparable transactions of the past accompanied by the fact that no due reason for these discriminatory practices can be established. This reasoning can be extracted from Art. 102 TFEU (Art. 82,2 lit. d ECT) as well.

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[410] Regulation No.17: First Regulation Implementing Art. 85 and 86 of The Treaty, O. J. 013, 21/02/1962, p 204; as Amended by Regulation No.59 of The Council Amending Certain Provisions of Regulation No.17, O. J. 058, 10/07/1962, p 1655; as Amended by Regulation No.118/63/EEC of The Council of 5 November 1963 Amending Regulation No.17, O. J. 162, 07/11/1963, p 2696; as Completed by Regulation 2822/71/EEC of The Council of 20 December 1971 Supplementing The Provisions of Regulation No.17 Implementing Articles 85 and 86 of The Treaty, O. J. L 285, 29/12/1971, p 49; as Incorporated by Agreement on The European Economic Area - Protocol 37 Containing The List Provided for in Article 101, O. J. L 1, 03/01/1994, p 206; Council Reguation (EC) No.1/2003.
as Implemented by Commission Regulation 3385/94/EC of 21 December on The Form, Content and other Details of Applications and Notifications Provided for in Council Regulation No.17, O. J. L 377, 31/12/1994, p 28; as Amended by Council Regulation No.1216/1999/EC of 10 June 1999 Amending Regulation No.17: First Regulation Implementing Art. 81 and 82 of The Treaty, O. J. L 148, 15/06/1999 p 5.

[411] CJEU Case C-6/72 *Europemballage Corp and Continental Can Co Inc v Commission*, [1973] ECR 215; C. Koenig, K. Schreiber, Europäisches Wettbewerbsrecht (1st ed.) (Tübingen, Germany, Mohr, 2010) CH 7 I 1., p 188; W. Veelken, M. Karl, S. Richter, Die Europäische Fusionskontrolle (1st ed.) (Tübingen, Germany, Mohr, 1992) I pp 84; I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 9 III. 3. b), p 256; W. Kurzlechner, Fusionen Kartelle Skandale (1st ed.) (Munich, Germany, Redline Wirtschaft, 2008) CH 13, p 273; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.1 p 634.

[412] CJEU Case C-6/72 *Europemballage Corp and Continental Can Co Inc v Commission*, [1973] ECR 215 at p 245; T.A. Downes and J. Ellison, The Legal Control of Mergers in the European Communities (1st ed.) (London, U.K., Blackstone Press Limited, 1991) pp 3-4.

[413] CJEU Case C-6/72 *Europemballage Corp and Continental Can Co Inc v Commission*, [1973] ECR 215 at p 245.

As not a concentration as such poses any direct threats to consumers/competitors, it has an indirect effect on market structure, too: Solely, its later implementation and the combined entity's behaviour cause direct harm to competitors or trading partners.

Thirdly, it is feasible to rely on Art. 3 lit. b TFEU (Art. 3 lit. g ECT). This general provision can serve as a legal means for both the Commission and the CJEU in order to oversee new business developments that cause either entirely new risks to the common market or at least deepen existing risks which were regarded as hardly relevant during time of adoption of the more specific provisions of primary law, i.e. Art. 101 TFEU (Art. 81 et seq. ECT)[414].

Finally, the teleological interpretation of Art. 3 lit. b TFEU (Art. 3 lit. g ECT) backs the extensive interpretation of Art. 101 TFEU (Art. 81 et seq. ECT) because the neo-classical trade theory supports the idea of transnational merger control regimes. A supranational market can not develop trade and to the fullest extent by taking advantage of comparative advantages if severe distortions remain in place regardless of the relevant competition policy area of concern. Therefore, transnational competition policy would be out of balance if it was restricted to classic antitrust or state aids problems whereas the liberalisation of closed sectors in terms of Art. 106 TFEU (Art. 86 ECT) or potentially dangerous concentrations would be ignored[415]. Finally, a level supranational market requires a modern transnational competition law which addresses merger control.

Although the Continental Can decision of the Commission was overturned by the CJEU on ground of lack of evidence, the court accepted Art. 102 TFEU (Art. 82 ECT) as a genuine legal basis for the control of concentrations[416].

5.1.8.2 Application of the Continental Can Doctrine

The Continental Can Doctrine was later applied by the Commission to inaugurate a plethora of preliminary proceedings which can be separated in two different variants.

A predominant group of cases is characterised by the fact that the Commission refused to take a formal decision which would have been based on Art. 9 II REG17 (COUNCIL REGULFATION (EC) NO. 1/2003); 102 TFEU (Art. 82 ECT[417]). At first, an ex officio request for information was issued on the basis of Art. 11 I REG17 (COUNCIL REG (EC) NO. 1/2003). After having analysed the documents which were delivered, the Commission refused to initiate formal proceedings.

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414 J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. IV. 5. c) (1) p 520.
415 V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 19 I p 163.
416 W. Kurzlechner, Fusionen Kartelle Skandale (1st ed.) (Munich, Germany, Redline Wirtschaft, 2008) CH 13, p 273
417 e.g. Commission, 18th Report on Competition Policy (1988) Point 80 (*Irish Distillers Group*), Point 81 (*British Airways and British Caledonian*), Point 88 (*Klöckner Stahl, Krupp Stahl and Thyssen Stahl*); Commission 19th Report on Competition Policy (1989) Point 64 (*TWIL and Bridon*), Point 65.

However, in the second minor group of cases the Commission opened not only preliminary proceedings but also official ones which were closed by means of formal decisions:

In the Tetra Pak I decision[418], it was established - according to the general criteria of Art. 102 TFEU (Art. 82 ECT[419]) - that said company held a dominant position on the relevant market for non-aseptic milk cartons. Additionally, it was stated that an abuse of this dominant position was available pursuant to Art. 102,1 TFEU (Art. 82,1 ECT) when Tetra Pak acquired a small competitor - the Liquipak Group. This finding was a result of two arguments. Firstly, Liquipak held intellectual property rights regarding new sterilising procedures of major commercial relevance for the sector. Secondly, Tetra Pak was granted an exclusive license by Liquipak regarding the procedures simultaneous with the acquisition. Thereby, the acquirer could erect extraordinarily high barriers to market entry. The Commission restricted its finding of inconsistency with Art. 102 TFEU (Art. 82 ECT) to the exclusivity clause so that Tetra Pak was only ordered to abstain from the exclusivity clause of the license.

Later, the Commission scrutinised a merger of Preussag and Panarroya and initiated formal proceedings under REG17 (COUNCIL REGULATION (EC) NO. 1/2003) in order to analyse a potential violation of Art. 102 TFEU (Art. 82 ECT[420]). Although the decision states in paragraph 17 that none of the participants initially held a dominant position - so that the original Continental Can doctrine would exclude further investigations, a complete assessment of Art. 102 TFEU (Art. 82 ECT) as to the formation of prices on the relevant markets was undertaken in paragraph 18-19.

One could regard this methodology as a late victory of an extensive teleological interpretation of Art. 102 TFEU (Art. 82 ECT) as opposed to the prevailing narrow approach that was based on a static interpretation: The provision's wording abuse "abuse ... of a dominant position" had been traditionally interpreted as the abuse of an existing dominance on the market in question.

However, another opinion does not attribute such a significant shift of paradigms to the Metaleurop decision with two quite persuasive arguments. On the one hand, the new approach was taken after MR1989 had been adopted and shortly before it entered into force so that the Commission could take advantage of the principles of the new Regulation. On the other hand, such a late amendment of the principles of interpretation could be based on a very specific argument: that the Commission was interested in tackling those concentrations which

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Ibercombe and Outokumpu), Point 66 (*Plessey-Gec and Siemens*), Point 67 (*Rhone-Polenc and Monsanto*), Point 68 (*Consolidated Gold Fields and Minorco*), Point 69 (*Carnaud-Metal box Pechiney American Can*), Point 70 (*Stena and Houlder Offshore*); Commission 20th Report on Competition Policy (1990) Point 116 (*Air France and Air Inter Uta*), Point 118 (*Eurocar and Interrent*), Point 119 (*Enasa*).

[418] Commission Decision 88/501/EEC of 26 July 1988 Relating to A Proceeding under Articles 85 and 86 of The EEC Treaty, O. J. L 272 04/10/1988 p 27 (*Tetra Pak I and Liquipak*).

[419] q.v. supra at 5.1.1 to 5.1.6 .

intended to circumvent the new MR1989 in the latest moment. Clearly, this kind of supporting argument could never be generalised so as to re-write the criteria for a control of concentrations under Art. 102 TFEU (Art. 82 ECT).

Therefore, it is advisable to conclude that - wherever there is scope for a residual application of Art. 102 TFEU (Art. 82 ECT) with respect to the control of concentrations - the traditional Continental Can doctrine is still completely effective so as to govern any concentration with a Community dimension that can not be addressed under either MR1989 or MR1997.

5.1.8.3 Drawbacks of Merger Control under Art. 102 TFEU (Art. 82 ECT)

It was quickly established that Art. 102 TFEU (Art. 82 ECT) was quite an unsatisfactory means in order to control concentrations of undertakings.

As it has been elaborated above, it was repeated pursuant to the wording "abuse ... of a dominant position" of Art. 102 TFEU (Art. 82 ECT) that only those concentrations could be addressed in which at least one undertaking already held a dominant position[421]. Thus, mergers between non dominant players which create dominant entities can not be tackled.

Accordingly, an intelligent dominant player interested in a further acquisition could take advantage of such an incomplete control of concentrations.

Firstly, measures could be implemented which superficially divest those business interests of the dominant entity which are responsible for the potential judgement of dominance. Later, the parent could acquire both the group of divested entities and the original target. Such a strategy to circumvent merger control under Art. 102 TFEU (Art. 82 ECT) was facilitated by the fact that no clear definition existed as to the definitions of undertakings concerned in case of highly complex groups of undertakings[422].

However, this result is highly inconsistent with the rationale of merger control provisions. Unfortunately, neither an extensive teleological interpretation of Art. 102 TFEU (Art. 82 ECT) was chosen nor an analogy approach was taken so as to avoid discontentment in the Member States.

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[420] Commission Decision 90/363/EEC of 26 June 1990 Relating to A Proceeding pursuant to Art. 86 of the EEC-Treaty O. J. L 179 12/07/1990 p 41 (*Metaleurop SA*): A negative clearance was granted according to Art. 2 REG17 (COUNCIL REG (EC) NO. 1/2003).

[421] T.A. Downes and J. Ellison, The Legal Control of Mergers in the European Communities (1st ed.) (London, U.K., Blackstone Press Limited, 1991) p 7; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.1 (1) p 634; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.298, p 752; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.02, p 540; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 2. C. (ii), p 1091.

[422] This situation changed when the Commission issued notices explaining these undertakings which take part in a concentration: q.v. Commission Notice on the Notion of Undertakings Concerned under Council Regulation 4046/89/EEC of 21 December 1989 on the Control of Concentrations between Undertakings, O. J. C 385, 31/12/1994 p 12; Commission Notice on the Concept of Undertakings Concerned under Council Regulation 4046/89/EEC on the Control of Concentrations between Undertakings, O. J. C 66, 02/03/1998 p 10; C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 38, p 391.

Additionally, the nullity sanction of Art. 102,1 TFEU (Art. 82,1 ECT) is difficult to implement after a concentration is already implemented. This disadvantageous effect is even extended owing to the fact that Art. 102 TFEU (Art. 82 ECT does not provide for an obligation of prior notification of concentrations: Art. 9 REG17 (COUNCIL REG (EC) NO. 1/2003) is limited to practices possibly within the scope of Art. 101 TFEU (Art. 81 ECT). Therefore, an ex-ante-control of concentrations is missing[423].

Furthermore, a merger control proceedings based on Art. 9 II REG17 (COUNCIL REG (EC) NO. 1/2003), 102 TFEU (Art. 82 ECT) would be extremely detrimental to commercial interests of the undertakings involved. The reason is twofold. Firstly, practical experience with antitrust proceedings under REG17 (COUNCIL REGULATION (EC) NO. 1/2003) indicates that proceedings tend to be of excessive duration. This is extremely disadvantageous as the outstanding commercial value of the transactions which will implement a concentration is not compatible with time consuming investigations.

Secondly, accelerated decision-making is the best means to prevent the publication of sensitive commercial data so as to keep the high level of commercial secrecy[424] which is desired.

Hence, one needs to avoid significant disruptions on the equity markets due to long term phases without any trade in the shares of the undertakings concerned.

Consequently, only a specific legal framework can establish both legal certainty and the protection of undertakings.

Finally, legal uncertainty regarding the application of either Art. 101 or 102 TFEU (Art. 81 or 82 ECT) to certain concentrations could serve as a serious drawback to the efficacy of merger control under Art. 102 TFEU (Art. 82 ECT). This argument will be scrutinised within the next paragraph.

5.2 EC Merger Control under Art. 101 TFEU (Art. 81 ECT)

As a consequence of the mentioned Commission memorandum of 1966 it was conventional wisdom that a dichotomy existed between Art. 101 and 102 TFEU (Art. 81 and 82 ECT) with respect to concentrations. Therefore and according to the Memorandum, Art. 101 TFEU (Art. 81 ECT) was not applicable to concentration[425]. This view was disapproved, later in the BAT-judgement[426].

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[423] I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.1 (1) p 634.

[424] Parallel to MR1989, a practise is quite common in which lawyers act as agents of anonymous clients so as to discuss legal issues with Commission officials regarding the need to notify a "hypothetical case". The identity is revealed if the negotiations establish a need to notify the concentration.

[425]Commission of the European Communities, Le Problème de la Concentration dans le Marché Commun, (1966), Etudes CEE, Série Concurrence, No. 3; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.1 (1) p 634.

[426] I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.1 (1) p 634; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 2. C. (ii), p 1091.

5.2.1 Traditional View

According to the old dogmatic, measures which influence competition by means of alterations of the structures of undertakings - especially share deals[427] - were exclusively governed by Art. 102 TFEU (Art. 82 ECT). Therefore, a sales agreement by which a non-dominant vendee establishes a majority participation, an influential minority shareholding or a cross-shareholding were never addressed under Art. 101 TFEU (Art. 81 ECT) even if a dominant position was created.

Contrarily, Art. 101 TFEU (Art. 81 ECT) was exclusively applicable to agreements between independent undertakings.

The hypothesis was also backed by a logic conclusion pursuant to the Continental Can decision which did not take Art. 101 TFEU (Art. 81 ECT) into closer consideration[428]. The predominant objective of this clear-cut separation is obvious: It is bound to provide legal certainty.

5.2.2 New Doctrine Introduced by the BAT Judgement

However, it was rapidly revealed that reality is too complex too justify a clear-cut dichotomy. For instance, the implementation of hybrid structures is extremely probable: One can take advantage of structural alterations involving non-dominant players so as to exclude Art. 102 TFEU (Art. 82 ECT) in substantial terms and to formally preclude an analysis of Art. 101 TFEU (Art. 81 ECT) although the structural operation intends to implement parallel agreements which will reduce competition between the undertakings involved[429]. The acquisition of shares can sustain an anti competitive behaviour in terms of Art. 101 TFEU (Art. 81 ECT)[430].

This may be illustrated not only by certain types of JVs[431] but also by significant minority shareholdings and cross-shareholdings as these phenomena can provide for both: a long term structural amendment of the competitive situation by means of alterations of the undertakings' structures and a forum to discuss adapted behaviour or a platform to execute power over the target in order to implement concerted practices[432].

Consequently, the dogmatic dichotomy between Art. 102 and 101 TFEU (Art. 82 and 81 ECT) was overturned by the CJEU in the BAT judgement[433]. This judgement formulated several new principles based on the following facts:

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427 Commission, 14th Report on Competition Policy (1984) point 99.
428 R. Bechtold/W. Bosch/I. Brinker/S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) FKVO Einf. p 798.
429 J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. IV. 5. c) (1) p 520.
430 Q.v. C. Koenig, K. Schreiber, Europäisches Wettbewerbsrecht (1st ed.) (Tübingen, Germany, Mohr, 2010) CH 7 I 1., p 188.
431 q.v. the early Reports on Competition Policy as far as it relates to JVs Commission - e.g. 6th Report on Competition Policy (1976) point 55 - and the early case law as far as it relates to JVs which will be discussed later - e.g. Commission Decision 75/95/EEC of 20 December 1974 Relating to Proceedings under Art. 85 of the EEC Treaty O. J. L 38, 12/02/1975 p 14 (*IV/26.872 - SHV/Chevron*).
432 e.g. shareholder rights; rights arising from contracts related to company law issues like the right to appoint members of the board of directors or supervisory board members, rights as to the day to day management, specific majority rules, pre-emptory rights so as to expand current (minority) shareholdings in the future.
433 CJEU Cases C-142/84 & C-156/84 *BAT and Reynolds v Commission* [1987] 4487; W. Veelken, M. Karl, S. Richter, Die Europäische Fusionskontrolle (1st ed.) (Tübingen, Germany, Mohr, 1992) II p 5, I p 86; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. I. 2. a) p

The cigarette producer Philip Morris was interested in a sales agreement with the undertaking Rembrandt - the then exclusive owner of Rothmans International. According to the covenants of the agreement, Philip Morris was due to purchase a significant minority interest - 24.9 % - in Rothmans. As none of the undertakings concerned initially held a dominant position, an application of Art. 102 TFEU (Art. 82 ECT) was not feasible in accordance with the Continental Can doctrine[434]. The Commission backed the traditional view and was of the opinion that a "per se" rule existed so as to prevent the application of Art. 101 TFEU (Art. 81 ECT[435]) on the grounds of a lack of an agreement or practices that intend to or cause a prevention, reduction or distortion of competition on a relevant product market within a significant part of the common market if a structural measure is implemented, which is per se unreasonably[436] (e.g. agreements on prices, restrictions of production, market splitting, boycotts and interlinkings[437]).

Contrarily, the undertakings BAT and Reynolds which applied for a prohibition of said agreement were of the opinion that Art. 101 TFEU (Art. 81 ECT) should be considered[438].

Clearly, the basic criteria of Art. 101 TFEU (Art. 81 ECT) are met as two undertakings in terms of competition law are available which conclude a sales agreement which allegedly provides an additional platform for disguised implementation of concerted practises.

However, it is central whether such agreement intents or causes said anti-competitive effects on the relevant product markets and whether these phenomena can be separately analysed if they are attached to structural incidents like share deals: One could argue that any type of factual restrictions of competition accompanying a concentration are "ancillary restraints" and that these should be ignored if the concentration in itself is not inconsistent with Art. 102 TFEU (Art. 82 ECT). However, it seems to be superior to have a restrictive understanding. Ancillary restraints should be those measures which are attached to a concentration, designed to facilitate the concentration and of minor economic relevance compared with the concentration[439].

Another criticism could take advantage of the idea that the Commission could tackle the alleged concerted practises in separate proceedings in the future.

272; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 24 IV. 4. a) p 570; W. Kurzlechner, Fusionen Kartelle Skandale (1st ed.) (Munich, Germany, Redline Wirtschaft, 2008) CH 13, p 273.

434 q.v. supra at 5.1.8.1 Arguments Supporting Merger Control: The Continental Can Doctrine.

435 Commission, 14th Report on Competition Policy (1984) point 99; I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 9 III. 1. b), p 249.

436 I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 10 II.1.a), p 279.

437 I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 10 II.1.a), p 279.

438 CJEU Cases C-142/84 & C-156/84 *BAT and Reynolds v Commission* [1987] 4487, at p 4509; C. Koenig, K. Schreiber, Europäisches Wettbewerbsrecht (1st ed.) (Tübingen, Germany, Mohr, 2010) CH 7 I 1., p 188; I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 2 F. II 2. p 189; q.v. C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.313, pp. 757-758.

439 G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 203, p 649; q.v. Art. 8 I and 8 II and Recital 21 MR2004.

However, this is not a persuasive idea, as the deal establishing the minority shareholding provides the basic cause and institutional framework for facilitated and secretive concerted practices. Hence, it would difficult to monitor the practices. Furthermore, it would contravene the notion of legal certainty if the share deal is ignored but the genuine enforcement of the deal, i.e. the execution of shareholders' rights or contractual rights would be prohibited[440].

The applicants argued that the vendee would be able to determine the future competitive behaviour of the target Rothmans International in factual terms. This control would expand to an extent which is similar to powers of majority owners. Even minority shareholders can quite easily obtain sensitive commercial data so as to reveal competitive advantages of the target. Additionally, a significant minority interest can be easily extended into a majority control owing to long-term strategies between the shareholders who may co-ordinate their actions and establish pre-emptive rights.

The CJEU accepted the legal validity of those arguments at least in theory and concluded that structural incidents like share deals which transfer minority shareholdings are inconsistent with Art. 101 TFEU (Art. 81 ECT) if the case concerned sufficiently indicates that the shareholder's rights are used to determine the competitive behaviour of the "target" on the markets in question[441].

Alternatively, one could argue that this broad interpretation of Art. 101 TFEU (Art. 81 ECT) is needed so as to close those gaps that the restrictive interpretation of Art. 102 TFEU (Art. 82 ECT) has caused and that the economic value of minority shareholdings which are used as instruments to persistently affect the target company's conduct is nearly equivalent to the value of majority ownership of the target in legal terms as a result of mergers or acquisitions.

Nevertheless, the CJEU concluded that the specific circumstances did not give enough evidence to establish any kind of the alleged strategy. The acquirer of minority control Philip Morris neither obtained commercial control as Rembrandt remained the majority shareholder nor was any stringent prospect available that enabled Philip Morris to obtain additional shares in the near future.

5.2.3 Evaluation of the BAT Doctrine

The BAT doctrine certainly removes the loopholes which the dichotomy approach inevitably creates. It is also beneficial that the doctrine is restricted so as not to cover mere theoretical options to enter into collusions between acquirers and targets as specific evidence for future co-ordination is required[442].

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[440] Such an approach would interfere with the need of a consistent and easy enforcement of shareholder rights which is essential to operate corporations.
[441] CJEU Cases C-142/84 & C-156/84 *BAT and Reynolds v Commission* [1987] 4487, at p 4577.
[442] However, the Commission accepts that the acquisition of 35% equity of the leading competitor causes by Danish Fur Sales (DPA) is self-sufficient to apply Art. 81 ECT. The reason is obvious as Hudson's Bay had challenged the restrictive practices of DPA in Denmark previously q.v. Commission

However, two major drawbacks are caused: Firstly, it remains unclear how broad or restrictive the intensity of future co-ordination should be defined which is necessary to conclude that a concerted practise in terms of Art. 101 TFEU (Art. 81 ECT) is available between either the acquirer and the target or between the acquirer and the seller.

Furthermore, it was disputed whether the argument dealing with future collusions between the acquirer and the seller could be self-sufficient to justify an application of Art. 101 TFEU (Art. 81 ECT). If this was upheld, Art. 101 TFEU (Art. 81 ECT) would serve as a genuine instrument of control of institutionalised concentrations between sellers and buyers of shares as the target, i.e. object of decision making, has no influence on the outcome.

If one focuses on potential collusions between the acquirer and the target, Art. 101 TFEU (Art. 81 ECT) would remain a provision to control the behaviour between a restricted but still at least partly self-determinative target and the vendee.

One could argue that these considerations have lost any relevance since MR1989 entered into force. However, Art. 101 and 102 TFEU (Art. 81 and 82 ECT) remain nevertheless important for various reasons: Firstly, significant groups of cases are not within the scope of MR1989 owing to the high turnover thresholds. Secondly, a pre-requisite for the validity of secondary EC Law is that it is enacted without interference with the legal bases located in primary law. Therefore, secondary merger control law would go beyond its legal basis (Art. 103 TFEU (Art. 83 ECT) and 308 ECT) if it tried to narrow down well established principles regarding the application of Art. 101 - 102 TFEU (Art. 81-82 ECT). This approach is also backed by the term "to give effect to the principles set out in Art. 101 and 102 TFEU (Art. 81 and 82 ECT") pursuant to Art. 103 TFEU (Art. 83 I ECT): as any provisions narrowing the scope of Art. 101 TFEU (Art. 81 ECT) exceed a mere implementation of principles.

5.2.4 Gillette Case

The Gillette Decision[443] offers the second opportunity to discuss the complex application of Art. 101 (and 102) TFEU (Art. 81 and 82 ECT) to share deals and related agreements which intend to influence the behaviour of the target.

Prior to the evaluation of legal findings, the facts will be briefly reported. Initially, the Gillette Company holds a strong position on the relevant product market for wet shaving products[444] of which the geographic area

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Decision IP (88) 810 of 15 December 1988 (*Danish Fur Sales and Hudson's Bay*) and Commission Decision 88/587/EEC of 28 October 1988 Relating to A Proceeding pursuant to Article 85 of the EEC Treaty, O. J. L 316, 23/11/1988 p 43 (*IV/B-2/31.424, Hudson's Bay-Dansk Pelsdyravlerforening*).

[443] Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O. J. L 116 12/05/1993 p 21 (*Cases No IV/33.440 Warner-Lambert/Gillette and Others and No IV/33.486 BIC/Gillette and Others*); C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.314, p 758.

[444] It consists of traditional double-edged razors, system razors and disposable razors but excludes dry razors and other means: q.v. Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O. J. L 116 12/05/1993 p 21 (*Cases No.IV/33.440 Warner-Lambert/Gillette and Others and No.IV/33.486 BIC/Gillette and Others*) at paragraph 5-6.

includes the EC despite of minor differences as to consumer preferences[445]. Its only significant competitor is the "Wilkinson Sword" business which was once operated by Swedish Match AB[446]. Swedish Match was acquired by Stora Kopparbergs Bergslags AB[447] in 1988. In February 1988, Eemland Holdings NV was founded which includes inter alia managers of the Wilkinson business and Gillette U.K. Ltd.[448].

The sole purpose of Eemland was to acquire Stora's consumer products division and to resell the Wilkinson business - except the EC operations - to Gillette in December 1989[449] so that Eemland can be described as a shell company. As the U.S. antitrust authorities intervened, Eemland was obliged to retain the U.S. activities of Wilkinson[450]. At the same time, Gillette was interested in acquiring a minority loan stock, which reflects an equity interest of 22% in Eemland, that can be converted into ordinary shares in certain circumstances[451]. The proposed agreement regarding the acquisition of a minority interest sought to evade the application of European competition law by means of several features: Firstly, a board representation of Gillette was outlawed. Secondly, not only a right of presence of Gillette in shareholders' meetings but also voting rights were excluded[452]. Thirdly, Chinese Walls[453] were due to be erected so as to avoid any disclosure of sensitive information regarding the EC and US activities of Eemland.

However, these restrictions were largely circumvented owing to pre-emptive rights[454] and said conversion rights attributed to Gillette. Additionally, it has to be stressed that Gillette was as a major creditor of Eemland. Hence, the loan stock received interest payments which reflect the dividends of a hypothetical ordinary equity interest[455].

Finally, Gillette concluded three agreements with Eemland. The first one obliged Eemland to supply products to Gillette which could be marketed by Gillette under the Wilkinson brand on the markets outside the U.S. and the EC up to 1992[456]. The second one provided prevented Gillette from marketing its Non-US and Non-EC Wilkinson operations within the U.S. and EC markets whereas Eemland was prohibited to supply Wilkinson

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[445] Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O. J. L 116 12/05/1993 p 21 (*Cases No.IV/33.440 Warner-Lambert/Gillette and Others and No.IV/33.486 BIC/Gillette and Others*) paragraph 7 - 8.
[446] Swedish Match was a consumer products group offering toiletries, matches and lighters.
[447] Stora focused on forest products, diversified by creating a consumer product division which contained the activities of Swedish Match.
[448] Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O. J. L 116 12/05/1993 p 21 (*Cases No.IV/33.440 Warner-Lambert/Gillette and Others and No.IV/33.486 BIC/Gillette and Others*) paragraph 4 (ii), (iv) and 12.
[449] Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O. J. L 116 12/05/1993 p 21 (*Cases No.IV/33.440 Warner-Lambert/Gillette and Others and No.IV/33.486 BIC/Gillette and Others*) paragraph 10 and 18 .
[450] Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O. J. L 116 12/05/1993 p 21 (*Cases No.IV/33.440 Warner-Lambert/Gillette and Others and No.IV/33.486 BIC/Gillette and Others*) paragraph 11.
[451] Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O. J. L 116 12/05/1993 p 21 (*Cases No.IV/33.440 Warner-Lambert/Gillette and Others and No.IV/33.486 BIC/Gillette and Others*) paragraph 13
[452] Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O. J. L 116 12/05/1993 p 21 (*Cases No.IV/33.440 Warner-Lambert/Gillette and Others and No.IV/33.486 BIC/Gillette and Others*) paragraph 13-14.
[453] q.v. Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O. J. L 116 12/05/1993 p 21 (*Cases No.IV/33.440 Warner-Lambert/Gillette and Others and No.IV/33.486 BIC/Gillette and Others*) paragraph 14.
[454] Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O. J. L 116 12/05/1993 p 21 (*Cases No.IV/33.440 Warner-Lambert/Gillette and Others and No.IV/33.486 BIC/Gillette and Others*) paragraph 16.
[455] q.v. Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O. J. L 116 12/05/1993 p 21 (*Cases No.IV/33.440 Warner-Lambert/Gillette and Others and No.IV/33.486 BIC/Gillette and Others*) paragraph 14.

products outside said regions[457]. As a consequence of the second one, a trade mark separation agreement was concluded[458].

With respect to Art. 102 TFEU (Art. 82 ECT), the Commission established that Gillette's position on the market for wet shaving products was dominant according to market shares in terms of volume and value[459]. The dominance is underlined by the nature of a mature market with high barriers to entry[460]. The loan stock participation in the only significant competitor was deemed to be an abuse as the competitive structure of the market is limited to an additional extent[461]. This judgement is additional backed by the significant loans granted to the newly established company Eemland without sufficient resources to develop new products so that Eemland has to concentrate on medium range products[462]. Another element is contributed by the fact that pre-emptive rights prevent the remaining competitors BIC SA or Warner-Lambert from investing in Eemland at an economically viable price[463]. Finally, Gillette is obliged to divest its loan capital and to sell its loans to a third party pursuant to Art. 3 REG17 (COUNCIL REG (EC) NO. 1/2003)[464].

Regarding Art. 101 TFEU (Art. 81 ECT), the Commission applied the BAT doctrine[465] and found that the equity participation in Eemland (share deal) was accompanied by several ancillary agreements between the acquirer and the target which were indeed capable of violating Art. 101 TFEU (Art. 81 I ECT[466]) without being justifiable under Art. 101 III TFEU (Art. 81 III ECT[467]). The reason is that these agreements provided an ideal platform for the limitation of effective competition between said undertakings.

Firstly, the trademark separation agreement formed an agreement between two "independent" undertakings. Clearly, the contract intends and causes a reduction of competition between the participants as far as the Wilkinson Brand is concerned because Eemland has an important interest to satisfy its largest single consumer. The geographic separation of marketing regions is an obvious violation of Art. 101 I lit. b and c TFEU (Art. 81 I

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[456] Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O. J. L 116 12/05/1993 p 21 (*Cases No.IV/33.440 Warner-Lambert/Gillette and Others and No.IV/33.486 BIC/Gillette and Others*) paragraph 17 and 34.

[457] Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O. J. L 116 12/05/1993 p 21 (*Cases No.IV/33.440 Warner-Lambert/Gillette and Others and No.IV/33.486 BIC/Gillette and Others*) paragraph 18 and 34.

[458] Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O. J. L 116 12/05/1993 p 21 (*Cases No.IV/33.440 Warner-Lambert/Gillette and Others and No.IV/33.486 BIC/Gillette and Others*) paragraph 18 and 35.

[459] Gillette focused on high value products: 59% by volume and 70% by value: q.v. Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O. J. L 116 12/05/1993 p 21 (*Cases No.IV/33.440 Warner-Lambert/Gillette and Others and No.IV/33.486 BIC/Gillette and Others*) paragraph 8 and 22.

[460] Significant economies of scale have to be reached until viable operations are feasible because of high investments for further improvements of the products, q.v. Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O. J. L 116 12/05/1993 p 21 (*Cases No.IV/33.440 Warner-Lambert/Gillette and Others and No.IV/33.486 BIC/Gillette and Others*) paragraph 9.

[461] Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O. J. L 116 12/05/1993 p 21 (*Cases No.IV/33.440 Warner-Lambert/Gillette and Others and No.IV/33.486 BIC/Gillette and Others*) paragraph 23 and Art. 1.

[462] Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O. J. L 116 12/05/1993 p 21 (*Cases No.IV/33.440 Warner-Lambert/Gillette and Others and No.IV/33.486 BIC/Gillette and Others*) paragraph 25, 26, 30, 31.

[463] In case of low prices, Gillette would execute the pre-emptive rights.

[464] Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O. J. L 116 12/05/1993 p 21 (*Cases No.IV/33.440 Warner-Lambert/Gillette and Others and No.IV/33.486 BIC/Gillette and Others*) paragraph 42 and Art. 4.

[465] supra at 5.2.2 New Doctrine Introduced by the BAT Judgement.

[466] Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O. J. L 116 12/05/1993 p 21 (*Cases No.IV/33.440 Warner-Lambert/Gillette and Others and No.IV/33.486 BIC/Gillette and Others*) Art. 2.

lit b and c ECT). Finally, the geographic separation of trade mark Wilkinson leads to the result that both parties need to co-operate in order to prevent detriment to the brand as long as consistent products are manufactured[468].

A derogation from Art. 101 I TFEU (Art. 81 I ECT) pursuant to Art. 101 III TFEU (Art. 81 III ECT) was rejected, as none of the explicit criteria for derogations were met and it was found that the weak partner Eemland needed the opportunity at least to expand its operations to areas close to the EC[469].

5.2.5 E.ON / Ruhrgas

In the E.ON Ruhrgas case of 2001/2002, the MR1997 was not applicable due to the 2/3 rule under Art. 1 II MR1997[470]. But it was discussed by the German Monopoly Commission if the European Commission has to grant at first a positive exemption decision under Art. 81 III ECT (Art. 101 III TFEU) so that the national minister of the economy can sustain its compatibility decision overruling the negative decision by the Federal Cartel Office in that case[471]. The case involves a gas release programme of 200 bn kWh of gas and an auction[472].

5.2.6 Evaluation of the Application of Art. 101 TFEU (Art. 81 ECT) to Structural Amendments of the Competitive Environment with Indications of Future Collusion

Apart from the revealed dogmatic complexities that accompany the application of Art. 101 TFEU (Art. 81 ECT) to structural amendments of the competitive environment[473], which provide for ancillary agreements that restrain competition, procedural drawbacks are available. As these are very similar to those drawbacks the implementation of Art. 102 TFEU (Art. 82 ECT) faces with respect to concentrations, a repetition is redundant[474]. Especially, the limited duration of potential derogations pursuant to Art. 8 I REG17 (COUNCIL REGULATION (EC) NO. 1/2003) is absolutely inadequate for ancillary restraints because it is hardly feasible to revoke the basic structural amendments after a couple of years in order to recover the former competitive situation[475]. Finally, a rapid process including a prior notification procedure is missing.

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[467] Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O. J. L 116 12/05/1993 p 21 (*Cases No.IV/33.440 Warner-Lambert/Gillette and Others and No.IV/33.486 BIC/Gillette and Others*) Art. 3.

[468] Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O. J. L 116 12/05/1993 p 21 (*Cases No.IV/33.440 Warner-Lambert/Gillette and Others and No.IV/33.486 BIC/Gillette and Others*) paragraph 35

[469] Commission Decision 93/252/EEC of 10 November 1992 Relating to a proceeding pursuant to Art. 85 and 86 of the EEC Treaty O. J. L 116 12/05/1993 p 21 (*Cases No.IV/33.440 Warner-Lambert/Gillette and Others and No.IV/33.486 BIC/Gillette and Others*) paragraph 43 and Art. 5.

[470] I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 4 C. V. 5. p 285; CH 4 F. III. p 313; P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 B. (2) (b) p 384; CH 19 C. (2) (b) p 565; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1403, p 552; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.071, p 631.

[471] I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 4 C. V. 5. pp 285-286; CH 4 D. I. 2. b. p 304; P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 B. (2) (b) p 384; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1403, p 552 and marginal note 1552, p 613; W. Kurzlechner, Fusionen Kartelle Skandale (1st ed.) (Munich, Germany, Redline Wirtschaft, 2008) CH 12, pp. 252-253.

[472] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 D. (2) (b) pp 410-411.

[473] i.e. share deals and JVs.

[474] These restrictions were discussed supra, at 5.1.8.3 Drawbacks of Merger Control under Art. 82 ECT.

[475] Thereby, the nullity sanction of Art. 81 ECT is questionable if a violation of Art. 81 by ancillary restraints is discovered after a couple of years.

5.3 The Complex Assessment of Joint Ventures under Art. 102 and 101 TFEU (Art. 82 and 81 ECT)

An assessment of the control of concentrations under Art. 102 and 101 TFEU (Art. 82 and 81 ECT) would be highly incomplete if the impact on the competitive environment on relevant markets was ignored which is caused by the formation and implementation of JVs. A JV is per se a hybrid structure because - on the one hand - its formation incorporates elements of a structural concentration of undertakings in terms of the Continental Can doctrine under Art. 102 TFEU (Art. 82 ECT[476]), whereas - on the other hand - the element of joint control can provide for a platform for co-operation between the parents or between a parent and the JV on a scale that exceeds the economic relevance of the JV business by far so that Art. 101 TFEU (Art. 81 ECT) can sometimes be the more appropriate legal means to control "partial concentrations".

5.3.1 Legal Nature of JVs

A JV can be defined as a platform of co-operation between at least two undertakings in terms of competition law with the immediate and primary objective to pool or exchange resources so that this definition excludes commercial co-operations of which the primary goal relates to agency, distributorship, franchising or licensing agreements concerning intellectual property rights[477]. As it is beyond the scope of the doctoral paper to include an exhaustive analysis of the mediate objectives and legal issues accompanying the creation and successful operation of a JV, only a brief overview is given.

Attached to the immediate objectives, a JV shall pursue mediate common objectives[478], as defined by the parties, by sharing of control, responsibilities, expenditure and risks between the partners. Naturally, a JV competes against diverse business solutions, i.e. the formation of a 100% owned subsidiary, the abovementioned licensing of activities to an independent entity, franchising, a complete divestiture of the activities in question or an acquisition of businesses in order to obtain exclusive control. With Respect to the attainment of profits, profit oriented and research & development JVs can be separated[479].

According to the institutional framework on which the co-operation is based, one can distinguish between contractual JVs, partnership JVs and incorporated JVs.

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[476] i.e. the measures creating and implementing the JV which are based on company law. Those shall be analysed under Art. 82 pursuant to the Commission; q.v. Commission of the European Communities, Memorandum on the Concentration of Enterprises in the Common Market, EEC Competition Series, Study No.3 (1966).

[477] Kling, E. and B. Adkins, *Joint Ventures in The European Community*, in Joint Ventures in Europe (J. Ellison and E. Kling, eds., London, U.K., 1997) p 2-3; V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 17 I p 153.

[478] e.g. research & development, exploration of natural resources, exploitation of resources, production or manufacturing, marketing, property development, staff development, etc. .

[479] Allen & Overy, *Joint Ventures Key Legal Issues* (1997) 1.

A contractual JV is founded by means of an agreement solely based on general contract law. According to U.K. law, it is deemed that the rules governing partnerships are not applicable to contractual JVs[480]. However, a civil law jurisdiction may provide for provisions stating that either a civil law partnership or a more sophisticated form of an association becomes available automatically if parties agree on pursuing common objects in a co-ordinated manner[481].

If one analyses the U.K. dogmatic, it has to be stressed that a contractual JV is not only extremely flexible as the parties can - in general - freely determine which covenants they agree on but also demanding because they have to create a detailed legal framework unless one would argue that an analogous application of statutes governing partnerships was feasible.

The second type, the partnership JV, is created on the basis of the U.K. Partnership Act of 1890. In general, a partnership has no legal personality distinct from the parties[482] and the parties will be liable to potential losses without any limitation[483]. The liability will be joint and several, i.e. third parties can select the partner whom they ask for a complete satisfaction of the claim. After having honoured the external obligation, the partner can request internal compensation by fellow partners according to the partnership agreement.

Compared to contractual JVs, this construction is also very flexible, tax transparent and does not involve any duties to publish commercial data. However, the process to introduce new partners or to leave the partnership is burdensome.

Finally, a incorporated JV is available if the partners decide on forming a corporation, i.e. a separate legal entity which is either organised as a private limited company or a public limited company[484].

An incorporated solution is superior if significant businesses and resources shall be transferred to the JV on a long lasting basis because company law provides the most appropriate means to resolve disputes between either the shareholders (parents) or the parents and the management of the JV. Another advantage relates to the more transparent accounting, employment laws and the fact, that the parent undertakings are no longer legally bound to cover losses of the JV. However, the latter benefit will be partially void if potential creditors of the JV request additional guarantees issued by the parents. By the same token, the risk of adverse publicity may economically coerce the parents to honour the JV's obligations.

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480 Allen & Overy, *Joint Ventures Key Legal Issues* (1997) 1 and 5.

481 A civil law partnership is originally based on the "societas" in terms of Roman Law. According to German Law, it is governed by Sections 705 et seq., 145 et seq. BGB. It requires that the parties intend to achieve common objectives by means of co-ordinated actions.

482 Allen & Overy, *Joint Ventures Key Legal Issues* (1997) 3.

483 However, limited liability partnerships are common in the U.S.; q.v. Allen & Overy, *Joint Ventures Key Legal Issues* (1997) 4.

484 Corporations are based on the "universitas" according to Roman Law.

5.3.2 Assessment of Joint Control within Incorporated JVs

With respect to incorporated JVs, control[485] may be established by statutory rights, contractual rights or other means[486]. Joint control is available if a deliberate long term co-ordination between at least two shareholders is a necessary pre-requisite for the successful attainment of the corporate objectives[487]. Hence, two shareholders must execute a decisive influence on the strategic decisions of the business which is deemed to be available if important decisions can be blocked[488]. Out of a great variety of options, the appropriate mechanisms have to be selected carefully for each single project in order to combine co-operation with efficient decision making so that the risk of standstill in case of disputes is minimised: e.g. inter alia specific rights granted to minority shareholders regarding the unanimous consent, qualified majority votes or concerning rights to appoint members of the board of directors or the supervisory board, management rights, veto rights, preferential shares etc..

In order to evaluate whether a structure is indeed governed by joint control as opposed to exclusive control, it is important to stress that a cumulative assessment of the abovementioned factors is indispensable so that a single criterion approach is disapproved. In pursuing this analysis, the Commission concentrates on the actual power distribution within the entity so that the formal, legal power allocation, as indicated by shareholdings is less relevant[489].

These abovementioned factors of control can be either implemented in the articles of association or within a specific shareholders' agreement from the very beginning. Alternatively, joint control can be established later[490].

5.3.3 Competition Law Analysis of JVs under Art. 102 and 101 TFEU (Art. 82 and Art. 81 ECT)

The basic rationale of an assessment of JVs under Art. 101 and 102 TFEU (Art. 81 and 82 ECT) is that the parties must not use structural transactions as an elegant means of circumventing ordinary cartels that would be assessed under Art. 101 TFEU (Art. 81 ECT) beyond any doubt. Such an incentive is provided by the Continental

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485 The concept of control is later governed by Art. 3 III MR1989.

486 q.v. the later Commission Notice Regarding The Concentrative and Cooperative Operations under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations Between Undertakings, O. J. C 203, 14/08/1990 p 10 paragraph 10.

487 q.v. the forthcoming Notices: Commission Notice Regarding the Concentrative and Cooperative Operations under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings O. J. C 203 14/08/1990 p 10, paragraph 11; Commission Notice on The Distinction between Concentrative and Cooperative Joint Ventures under Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. C 385, 31/12/1994, p 10, paragraph 10-11; C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 37, p 385; C. Koenig, K. Schreiber, Europäisches Wettbewerbsrecht (1st ed.) (Tübingen, Germany, Mohr, 2010) CH 7. III 2. c) bb), p 194; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 IV 2. c) aa) p 197.

488 Kling, E. and B. Adkins, *Joint Ventures in The European Community*, in Joint Ventures in Europe (J. Ellison and E. Kling, eds., London, U.K., 1997) p 7.

489 Commission Decision 77/781/EEC of 23 November 1977 Relating to Proceedings under Art. 85 of The EEC Treaty, O. J. L 327 20/12/1977 p 26 (*GEC-Weir Sodium Circulators*); this view is upheld for the assessment of JVs under MR1989.

490 Commission Notice Regarding the Concentrative and Cooperative Operations under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings O. J. C 203 14/08/1990 p 10, paragraph 11. For instance a company may decide to transform a 100% subsidiary into a new entity which will be controlled with a partner. Additionally, two minority shareholders of a company - holding together > 50% - may decide to deliberately act together in order to govern the company so that a JV is initiated.

Can doctrine, as Art. 102 TFEU(Art. 82 ECT) is not efficient to structural deals if no party initially holds a dominant position.

Therefore, the Commission invented several criteria which limited the application of structural merger control rules with respect to joint ventures and which maintained the scope of Art. 101 TFEU (Art. 81 ECT).

A JV would be deemed to be a concentration and therefore beyond the scope of Art. 101 TFEU (Art. 81 ECT) only if it was a full function concentrative JV operating on a long lasting basis[491]. Such a JV was only caught by Art. 102 TFEU (Art. 82 ECT) in combination with the Continental Can doctrine. All other JVs would be covered by both provisions, i.e. Art. 101 and 102 TFEU (Art. 81 and 82 ECT).

5.3.3.1 JVs Exclusively Assessed under Art. 102 TFEU (Art. 82 ECT)

In order to be exclusively assessed under Art. 102 TFEU (Art. 82 ECT), a JV must be inter alia regarded as a concentration within the meaning of the Continental Can doctrine.

At least one of the parent undertakings has to hold a dominant position on a relevant product market within a significant part of the common market which has to be abused by means of the creation of the JV that forms a concentration.

5.3.3.1.1 Long Lasting Basis

With respect to JVs, a concentration was deemed to be available if the JV inter alia pursues long term economic objectives as only those can alter the competitive structure on the market for a significant period[492]. Therefore, short time JVs (mainly contractual ones) are out of the scope of Art. 102 TFEU (Art. 82 ECT).

5.3.3.1.2 Full Function

Secondly, it is argued, that the JV - should it be regarded as a concentration - must be able to perform the objectives of an independent economic entity autonomously[493] after the initial start-up period has passed[494]. This idea of a full- function JV is persuasive, as a concentration of undertakings only takes place if the alleged concentrated entity operates as a true market player: Such a player has managerial and financial resources to act independently, i.e. it sells not only to parents but also to third parties, purchases not only from the parents but also from third parties, carries out research, produces and markets based on own responsibility[495]. Again, the reason is that only an undertaking with the ability to improve its products is an entity with a long-lasting

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[491] C. Koenig, K. Schreiber, Europäisches Wettbewerbsrecht (1st ed.) (Tübingen, Germany, Mohr, 2010) CH 7. III 2 d), p 194; W. Veelken, M. Karl, S. Richter, Die Europäische Fusionskontrolle (1st ed.) (Tübingen, Germany, Mohr, 1992) IV 1 b p 17.

[492] E. Kling, B. Adkins, *Joint Ventures in The European Community*, in Joint Ventures in Europe (J. Ellison and E. Kling, eds., London, U.K., 1997) p 1; I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 2 E. II. p 169.

[493] Commission, 17th Report on Competition Policy (1987) *point 69* (*Montedison and Hercules*).

[494] Kling, E. and B. Adkins, *Joint Ventures in The European Community*, in Joint Ventures in Europe (J. Ellison and E. Kling, eds., London, U.K., 1997) p 8; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.1 (4) p 642.

effect on the competition structure of the market. Contrarily, a research & development JV which only serves the interests of the parents without external deals is not a concentration.

5.3.3.1.3 Concentrative JV

Thirdly, a JV was only regarded as a concentration, if it fulfils the criteria of a "concentrative JV"[496]. A concentrative operation will be available if two negative criteria are met. First of all, the JV must not be used as a platform for co-operation between either both parents or a parent and the JV. This criterion would be deemed to be fulfilled if both undertakings receded not only from the relevant market on which the JV was operating but also from the related up- and downstream markets[497]. This restriction to the definition of a JV as a concentration is justifiable on the grounds that a JV, competing fiercely against the parents, does not form a concentration of commercial power on the markets in question as the market power is weakened and the choice for consumers actually widens. This result is backed by the prevailing concept of dominance in terms of Art. 102 TFEU (Art. 82 ECT):

Market Power is solely attributed to the concrete influence on specific markets and not to general financial powers due to turnover thresholds or owing to the aggregated sums of small shares on diverse markets[498].

The second negative condition for a concentrative JV depends on the fact that the parents must not use the JV as a platform for co-ordination of their behaviour on third markets on which they compete against each other without any reference to the markets affected by the JV[499]. If this negative sub-criterion for a concentrative JV is not met, the JV will be coordinative and will generate a so-called "group-effect" or "spill-over effect".

The negative criterion excluding JVs with a group-effect relates to the rationale that the amendment of the competitive structure on a market due to a concentration based on a JV is of secondary importance if the primary and disguised target of the procedure is a commercial co-operation on other markets with higher economic relevance. In such cases, the procedure should be assessed under Art. 101 TFEU (Art. 81 ECT).

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[495] V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 17 III p 155.

[496] V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 17 III 2. pp 155-156; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 IV 2. d) pp 200-201.

[497] Commission, 6th Report on Competition Policy (1976) point 55. However, later it is carefully established that a concentration may be available even if not both parents recede: Commission Notice Regarding the Concentrative and Cooperative Operations under Council Regulation 4064/89/EEC of 21 December 1989 on the Control of Concentrations between Undertakings, O. J. C 203 14/08/1990 p 10 point 20-23. This approach is clarified, later so that it is sufficient if at least one parent undertaking recedes whereas the remaining entity must be an industrial leader. Later, the industrial leadership restriction was withdrawn. Then, both entities could remain active competitors on the market as long as no collusion between a party and the JV was available. In the latest stage, cooperative full function JVs are regarded as a concentration q.v. infra at 7.1.3 Inclusion of Classical Concentrative JVs and Coordinative Ones By Means of Art. 3 II MR1997 and Art. 2 IV MR1997.

[498] the so-called conglomerates.

[499] Commission, 6th Report on Competition Policy (1976) point 55.

A JV fulfilling all the abovementioned pre-requisites was regarded as a concentration and was analysed under Art. 102 TFEU (Art. 82 ECT) and in general not under Art. 101 TFEU (Art. 81 ECT) if one ignores ancillary restraints. For example, there are joint production JVs[500].

5.3.3.2 JVs Assessed under Art. 101 TFEU (Art. 81 ECT)

The remaining types of JVs should be organised as it follows:

- full-function concentrative JVs on a temporary basis
- full-function co-operative JVs on a lasting basis
- full-function co-operative JVs on a temporary basis
- non-full function JVs on a lasting or temporary basis.

All these types of JVs were assessed under Art. 101 TFEU (Art. 81 ECT). For example, there are joint selling JVs, joint purchasing JVs, joint research and development JVs[501]. It is preferable to assess co-operative JVs under Art. 101 TFEU (Art. 81 ECT) as the co-ordination between their parents is the primary aspect of their creation so that they intend to circumvent a mere cartel by means of a structural operation.

5.3.4 The Chevron Case

The abovementioned principles are exemplified by the Chevron Case[502]. Chevron Oil Europe, Inc. and Steenkolen-Handelsvereeniging NV formed a subsidiary called Calpam NV which fulfils the criteria of an incorporated JV with joint control pursuant to equal ownership[503].

The concentrative nature of the project was backed by the following arguments: Calpam is designed as a long lasting entity being vested with the rights to distribute petroleum products from Chevron and SHV for 50 years[504]. Secondly, it has the resources necessary to operate independently on the markets in order to sell the products to consumers because the present distribution activities of the parents are transferred[505]. Hence, both mothers abstain from competing with the JV or with each others on the relevant markets on a long lasting basis as - according to the general agreement - Calpam is solely responsible to market petroleum related products in

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[500] T.A. Downes and J. Ellison, The Legal Control of Mergers in the European Communities (1st ed.) (London, U.K., Blackstone Press Limited, 1991) p 150.
[501] T.A. Downes and J. Ellison, The Legal Control of Mergers in the European Communities (1st ed.) (London, U.K., Blackstone Press Limited, 1991) pp. 150-152.
[502] Commission Decision 75/95/EEC of 20 December 1974 Relating to Proceedings under Art. 85 of the EEC Treaty O. J. L 38, 12/02/1975 p 14 (*IV/26.872 - SHV/Chevron*); T.A. Downes and J. Ellison, The Legal Control of Mergers in the European Communities (1st ed.) (London, U.K., Blackstone Press Limited, 1991) pp. 24, 146, 148.
[503] Commission Decision 75/95/EEC of 20 December 1974 Relating to Proceedings under Art. 85 of the EEC Treaty O. J. L 38, 12/02/1975 p 14 (*IV/26.872 - SHV/Chevron*) paragraph I.
[504] Commission Decision 75/95/EEC of 20 December 1974 Relating to Proceedings under Art. 85 of the EEC Treaty O. J. L 38, 12/02/1975 p 14 (*IV/26.872 - SHV/Chevron*) paragraph I.
[505] e.g. plants, equipment; q.v. Commission Decision 75/95/EEC of 20 December 1974 Relating to Proceedings under Art. 85 of the EEC Treaty O. J. L 38, 12/02/1975 p 14 (*IV/26.872 - SHV/Chevron*) paragraph I.

the BeNeLux countries and Germany[506] and both parent companies ceased to compete on the relevant markets for a duration of 50 years without having obtained prior consent[507].

Fourthly, a group effect is unlikely, as SHV has no significant petroleum interests apart from those vested to the JV and exploration rights in the North Sea[508], which are irrelevant as no indication is given that SHV will sell them to Chevron or the JV under special conditions, whereas Chevron has no coal operations in the area of interest.

Consequently, the JV is regarded as concentrative so that Art. 101 TFEU (Art. 81 ECT) is not applicable[509]. Due to the lack of dominance, a violation of Art. 102 TFEU (Art. 82 ECT) was of no concern[510].

6. Control of Concentrations under MR1989

After having discussed the application of Art. 101 and 102 TFEU (Art. 81 and 82 ECT) to concentrations of undertakings, it has to be analysed to what extent MR1989 improved the drawbacks that were revealed and to which extent Art. 101 and 102 TFEU (Art. 81 and 82 ECT) are still relevant. The latter question is extremely important with respect to minority shareholdings and JVs as long as these provide for an institutional platform for concerted practises between the (minority) acquirer and the target or the parent companies. Although a complete analysis of MR1989 is inadequate for this doctoral thesis, it remains a valuable option to discuss at least the basic procedural and substantial provisions in order to generate a substantial basis for the assessment to which extent MR1989 overcame the drawbacks of a control of concentrations under Art. 101 and 102 TFEU (Art. 81 and 82 ECT).

6.1 Legal Basis of MR1989

According to the introduction of the Recitals and Recital 8 MR1989, the legal basis for MR1989 not only includes Art. 103 I, II lit. a-e TFEU (Art. 83 I, II lit. a-e ECT[511]) but also extends to Art. 308 ECT (Art. 352 TFEU) which nominates that the EC is granted additional competences by the Member States if the former are indispensable to implement expressive ones. The MR1989 was the successful implementation of the first draft

[506]Commission Decision 75/95/EEC of 20 December 1974 Relating to Proceedings under Art. 85 of the EEC Treaty O. J. L 38, 12/02/1975 p 14 (*IV/26.872 - SHV/Chevron*) paragraph II.
[507]Commission Decision 75/95/EEC of 20 December 1974 Relating to Proceedings under Art. 85 of the EEC Treaty O. J. L 38, 12/02/1975 p 14 (*IV/26.872 - SHV/Chevron*) paragraph I and II.
[508] Commission Decision 75/95/EEC of 20 December 1974 Relating to Proceedings under Art. 85 of the EEC Treaty O. J. L 38, 12/02/1975 p 14 (*IV/26.872 - SHV/Chevron*) paragraph II.
[509]Commission Decision 75/95/EEC of 20 December 1974 Relating to Proceedings under Art. 85 of the EEC Treaty O. J. L 38, 12/02/1975 p 14 (*IV/26.872 - SHV/Chevron*) Art. 1.
[510] Commission Decision 75/95/EEC of 20 December 1974 Relating to Proceedings under Art. 85 of the EEC Treaty O. J. L 38, 12/02/1975 p 14 (*IV/26.872 - SHV/Chevron*) paragraph II.
[511] W. Veelken, M. Karl, S. Richter, Die Europäische Fusionskontrolle (1st ed.) (Tübingen, Germany, Mohr, 1992) II p 5, III p 99: Art. 87 and Art. 235 EEC (Art. 83 and 308 ECT).

merger regulation from 1973[512]. It was unanimously adopted by the Council with a hearing of the EP on 21 December 1989 and entered into force 21 September 1990[513]. Clearly, any control of concentrations beyond the scope of Art. 102 TFEU (Art. 82 ECT) pursuant to the still prevailing narrow interpretation exceeds the scope of a mere implementation provision which would be sufficiently backed by Art. 103 TFEU (Art. 83 ECT). However, being both an exceptional norm and a potential threat to the efficacy of expressive competence definition under Art. 3 EUT and Art. 352 TFEU (Art. 2 et seq. ECT, Art. 308 ECT) and the MR1989 should be interpreted narrowly unless one can rely on the wording and rationale of the competences under Art. 3 TFEU (Art. 3 lit. g ECT)[514].

6.2 Recitals of MR1989

An analysis of the Recitals will reveal that they are of major relevance for the basic understanding and sophisticated interpretation of MR1989.

First of all, the recitals highlight that the development of the internal market is the most important objective of MR1989[515] with a view to increase the competitiveness of European Industries and raise the standards of living[516]. These programmatic issues are backed by the theory of comparative advantage and the notion that larger markets provide for greater economies of scale. The former facilitate the amortisation of additional investments in order to sustain greater levels of specialisation and rationalisation so that goods can be marketed cheaper to the benefit of consumers.

More specific, corporate re-organisations are backed by MR1989 as long as they contribute to the internal market development[517]. Hence, a concentration is beneficial if it is a proportionate instrument to facilitate the creation of undertakings with sufficient resources to invest into the expansion of operations in order to compete on the common market[518] without causing non justifiable long-term reductions of competition[519].

Recital 6 recognises the inadequacy of the prevailing application of Art. 101 and 102 TFEU (Art. 81 and 82 ECT) to concentrations[520].

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512 F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1362, p 538; q.v. O. J. EEC C 92, 31/10/1973 p 1; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 2. C. (i), p 1091.

513 C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.001, p 594; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.01, p 540; J. P. Terhechte (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.1, p 1815; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 2. C. (i), p 1091 and (iii) p 1092; M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 7 marginal note 7-001, p 347; E. Fox & D. Gerard, EU Competition Law (1st ed.)(Cheltenham, UK, Elgar, 2017) CH 6 A.1., p 235.

514 q.v. Recital 1 MR1989.

515 q.v. Recitals 1 and 2 MR1989.

516 Recital 4 MR1989; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 I p 191.

517 Recital 3 MR1989.

518 Recital 4 MR1989.

519 Recital 5 MR1989; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 I p 191.

520 The Deficiencies were discussed supra at 5.1.8.3 and 5.2.1-5.2.5; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 23 II. 1. p 530.

In order to limit the scope for jurisdictional disputes, the general rule is established that MR1989 is lex specialis to both Art. 101 and 102 TFEU (Art. 81 and 82 ECT) and domestic provisions as far as structural concentrations with cross-border effect are concerned[521]. Regarding Recital 8 it is stated that MR1989 is limited to significant structural changes with cross-border implications[522]. The latter effect will be assessed on the basis of two criteria: The first deals with the geographical scope of the relevant markets[523]. The second, the so-called "community dimension" criterion" asks whether revisable turnover thresholds are exceeded[524]. This is the case if the aggregated world-wide annual turnover of the undertakings concerned and the Community wide equivalent exceed specific figures unless each of the parties generate two thirds of their EC turnovers within one and the same Member State[525].

As far as the liberalisation of public undertakings or sectors with entities vested with public service obligations (PSO) like universal service, protection of consumers regarding transparency regarding contractual terms and the protection of weak consumers, social and economic cohesion and environmental protection[526], is concerned, Recital 12 governs a non discriminatory approach as to the turnover calculation.

In accordance with the abovementioned general objective of MR1989 - as laid down in Recitals 1-4 - the recitals 13-15 introduce to the basic criterion for the proper evaluation of concentrations with a Community dimension: whether or not a concentration is compatible with the development of the common market. Compatibility depends on both the need either to establish or maintain effective competition and the obligation to consider the Community policies in Art. 4 and 174 TFEU (Art. 2 ECT and Art. 158 et seq. ECT)[527] which may well conflict with Art .3-4 EUT (Art. 3 lit. g ECT).

This complex procedure of interpretation is facilitated by Recital 14 which establishes the general rule, that the creation or enhancement of dominant positions on relevant markets as a result of a given concentration is normally inconsistent with MR1989 if it causes an impediment of effective competition in a substantial part of the common market[528].

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[521] Recital 7 and 9 MR1989.
[522] T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 I p 191.
[523] Recital 10 MR1989.
[524] Recitals 10, 11 MR1989; the review took place in 1997; P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 B. (1) (b) p 373; K. Lange / T. Pries, Einführung in das europäische und deutsche Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2011) CH 4 § 2 II 1. a) p 180.
[525] Recital 11 MR1989; Art. 1 II MR1989/MR1997; Art. 1 III MR1997; U. Immenga, Die Europäische Fusionskontrolle im wettbewerbspolitischen Kräftefeld (1st ed.) (Tübingen, Germany, Mohr, 1993) p 10; P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 B. (1) (b) p 373; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.2 (2) (c) (ii) p 651.
[526] I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 12, §12.12 (3) pp. 1409-1410.
[527] social cohesion; Recital 13 MR1989; W. Veelken, M. Karl, S. Richter, Die Europäische Fusionskontrolle (1st ed.) (Tübingen, Germany, Mohr, 1992) IV 2 d p 21.
[528] A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 380, p 178.

Recital 15 offers further guidance, because concentrations involving undertakings with an aggregated market share below 25% are deemed not to impede effective competition in terms of Recital 14[529].

The obligation of undertakings being part of a concentration to notify the former prior to its implementation is mentioned by Recital 17 which states that a concentration is generally suspended[530] and becomes effective only if a compatibility decision is issued whereby the predominant drawbacks of the previous merger control regime are addressed which have been discussed earlier[531]. Prior notification with suspensive effect avoids long lasting damage to competition before a final decision is made after due legal assessment.

Furthermore, the time frame for investigations is fixed by two means: Firstly, the period of suspension is limited[532] and secondly, the Commission will be legally bound to initiate formal proceedings analysing the compatibility within narrow time limits[533] in order to protect commercial interests.

The protection of the stakeholders[534] is enhanced further by means of Recital 19 which grants a public legal right to them to be heard by the Commission before a final decision is taken[535]. The effectiveness of this right demands that the Commission will have to consider the arguments put forward by the parties even if they are disapproved.

The following passages deal with the co-operation between the Commission and competent authorities of the Member States[536] exacerbated by the Commission's right to obtain necessary assistance by Member States[537].

The 22nd Recital requests that MR1989 shall be enforced by means of decisions which impose fines[538] and periodic penalty payments[539] subject to review of the CJEU[540].

The next recitals take the complex relation between a control of concentrations and a control of cartels into consideration. This subject has already been discussed regarding the old merger control law entirely based on Art. 102 and 101 TFEU (Art. 82 and 81 ECT). Firstly, the basic rationale of merger control law is repeated, i.e. that the subject only deals with measures which are probable to cause a long lasting amendment of competition

[529] However, the clause does not exclude an assessment under Art. 81 and 82 ECT pursuant to it wording.
[530] However, an application for a waiver is feasible if immediate implementation is necessary.
[531] q.v. supra at The Deficiencies were discussed supra at 5.1.8.3 and 5.2.1-5.2.5. For instance it is positive that Art. 4 REG17 (COUNCIL REG (EC) NO. 1/2003) is no longer relevant as only a post notification of practices or agreements in the sense of Art. 81 ECT was required whereas potential violations of Art. 82 were not subject to mandatory notification at all. Therefore, it was unsatisfactory that Art. 3 REG17 (COUNCIL REG (EC) NO. 1/2003) decisions were issued quite late so that the efficient restoration of the competitive structure was more difficult.
[532] Recital 17 MR1989.
[533] Recital 18 MR1989; q.v. Art. 10 MR1989.
[534] member of the management board, the supervisory board, employee's representatives of the undertakings concerned and third parties with legitimate interests.
[535] q.v. Art. 18 MR1989.
[536] Recital 20 and Art. 12 MR1989.
[537] Recital 21 and Art. 19 MR1989.
[538] Art. 14 MR1989; I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 2 E VI 2. p 179.
[539] Art. 15 MR1989; I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 2 E VI 2. p 179.
[540] This jurisdiction is based on the authorisation pursuant to Art. 229 ECT.

on a relevant market by means of structural amendments of undertakings concerned[541]. Thereby, short term or perpetually dependent JVs are excluded. This idea was discussed earlier[542].

Secondly, operations are precluded of which the primary objective is related to behavioural restrictions of the parties that remain independent entities[543]. This provision allows to remove both co-operative JVs and minority shareholdings if their primary target relates to form a platform for discussions regarding behavioural restrictions between the acquirer and the (partly dependent) formally independent target. These incidents will be solely covered by Art. 101 and 102 TFEU (Art. 81 and 82 ECT) in combination with REG17 (COUNCIL REGULATION (EC) NO. 1/2003). The underlying rationale was elaborated earlier[544]. The following Recitals clarify the appropriate definition of a concentration. Firstly, the acquisition of a target undertaking by at least two parties agreeing on joint control is said to be within the scope of MR1989[545]. The reason is that this conduct represents a concentrative JV which was discussed above[546]. Secondly, it is underlined that MR1989 stays to be applicable if the parties of a future concentration accept certain restrictions regarding their future competitive behaviour provided that these obligations are not only directly related to but also indispensable for the effectuation of the concentration[547]. This means that said undertakings may be described as ancillary restraints which have minor economic relevance compared with the structural amendments. This concept tries assuring the one-stop shop principle so as to remove the need to initiate additional proceedings under REG17 (Council Regulation (EC) No. 1/2003) in order to implement Art. 101 TFEU (Art. 81 ECT)[548].

However, this provision hardly offers any guidance as to the interpretation how to distinguish duly between separable restraints which indeed require an additional REG17 (Council Regulation (EC) No. 1/2003) procedure and said ancillary restraints.

The next group of Recitals governs the principle that MR1989 is exclusively implemented by the transnational Commission. Parallel to Art. 9 III REG17 (COUNCIL REGULATION (EC) NO. 1/2003), the 26th recital grants the exclusive competence to apply MR1989 to the Commission. Accordingly, the next recital prevents the Member States from applying domestic laws to concentrations within the scope of MR1989[549] unless an expressive authorisation or a defined situation arises in which the Commission fails to implement MR1989 and a specific domestic detriment to competition is likely without other promising remedies under MR1989 being available.

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[541] Recital 23 MR1989; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. II. 1. c) (3) (a) p 297.
[542] supra at 5.3.3 Competition Law Analysis of JVs under Art. 82 and 81 ECT and sub-sections.
[543] Recital 23 MR1989.
[544] supra at 5.3.3 Competition Law Analysis of JVs under Art. 82 and 81 ECT and sub-sections.
[545] Recital 24 MR1989.
[546] supra at 6.3.2.1.10 Formation of Concentrative JVs.
[547] Recital 25 MR1989.
[548] I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.1 p 633.
[549] Recital 27 MR1989.

Furthermore, Member States are free to regulate concentrations if they pursue policies which are not addressed by the MR1989 in particular without being inconsistent with primary EC law in general[550]. Subsequently, Member States are empowered to request that the Commission initiates proceedings under MR1989 in a given case although it is without the scope of MR1989 if the case is likely to have a specific impact on competition within the applicant's territory[551].

Finally, the Commission receives the mandate to monitor the implementation of concentrations with an effect on the common market in non-member countries and to obtain a mandate for negotiations[552] and it is quoted that employees' rights are not derogated[553]. If an undertaking reaches a post transaction market share of less than 25%, effective competition is not deemed to be affected[554].

6.3 Scope for Merger Control pursuant to Art. 1; 3; 22 MR1989

In accordance with Art. 1 I MR1989, the regulation is generally applicable if a concentration takes place in terms of Art. 3 I-V MR1989 providing that it has a Community dimension in the sense of Art. 1 I-III MR1989[555]. However, the scope may be either extended by Art. 1 I in combination 22 III-V MR1989[556] or restricted by additional provisions, i.e. Art. 19; 9; 21 III MR1989 or Art. 101, 102, 109 TFEU (Art. 81, 82, 89 ECT), which modify the one-stop shop principle as laid down in Art. 21 I and II MR1989[557].

6.3.1 Concentration under MR1989

A concentration will be available in case of three different structures pursuant to Art. 3 I-V MR1989 owing to the lasting change of control[558]:

6.3.1.1 Merger

Firstly, a merger will be available pursuant to Art. 3 I lit. a MR1989 in combination with the 2nd Section of the Concentration Notice of 1994[559] if at least two partners engage in a legal or a factual merger[560]. The former is

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[550] q.v. Recital 28 MR1989; for instance, one can imagine concentrations close to national security particularly in the military supply industries.
[551] Recital 29 MR1989.
[552] Recital 30 MR1989.
[553] Recital 31 MR1989.
[554] Recital 32 MR1989; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. III. 4. a) (1) (a) p 390.
[555] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 B. (1) (b) p 373; K. Lange, Handbuch zum deutschen und europäischen Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2006) CH 8 § 1 II. 1. p. 506; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 IV 2. a) p 195; A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 363, p 170; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 1, p 508; M. Heße, Wettbewerbsrecht (2nd ed.)(Heidelberg, Germany, Springer, 2011) CH 4, p 199; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.003, p 595.
[556] Art. 22 MR1989 is lex specialis pursuant to the wording of Art. 1 MR1989 "notwithstanding".
[557] F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1373, p 544; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 3. C. (i), p 1109.
[558] Art. 3 I MR2004; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1383, p 546; A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 363, p 170; marginal note 364, p 170; J. P. Terhechte (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.4, p 1816.
[559] Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 385, 31/12/1994, p 5; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. II. 1. b) p 287.

established if two formerly independent undertakings in terms of competition law agree on being integrated completely with an absorption or the foundation of a new undertaking[561]: A new entity may be founded and both partners cease to exist as different legal entities[562]. Contrarily, one party may retain its legal personality and simply incorporate the assets of the second one (absorption)[563].

A factual merger is available if the partners engage in commercial activities which de facto create a single economic entity on a relevant market despite both partners retain their legal identities[564]. Normally but not necessarily, mergers are distinct from acquisitions by the higher relevance of self determination of the partners involved[565]. The shareholders of the target will be compensated by cash offers or share exchange programs. According to the case law, a merger is a rare incident compared with the plethora of acquisitions. Control may be executed owing to a share deal or asset deal[566].

6.3.1.2 Acquisition

Secondly, an acquisition[567] will be available pursuant to Art. 3 I lit. b; III-V MR1989 if either an entrepreneur in terms of Art. 3 I lit. a MR1989 or an undertaking in terms of Art. 3 I lit. b MR1989 acquires direct or indirect control over another entity in terms of Art. 3 II; III; IV lit. a-b MR1989[568]. In contrast to the former case law, a

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[560] C. Koenig, K. Schreiber, Europäisches Wettbewerbsrecht (1st ed.) (Tübingen, Germany, Mohr, 2010) CH 7. III 1., pp. 190-191; I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 2 E II p 169; K. Lange / T. Pries, Einführung in das europäische und deutsche Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2011) CH 4 § 2 IV 1. p 188; CH 4 § 2 IV. 2. pp 188-189; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 24 II. p 554; K. Lange, Handbuch zum deutschen und europäischen Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2006) CH 8 § 1 II. 1. a) p. 507; T.A. Downes and J. Ellison, The Legal Control of Mergers in the European Communities (1st ed.) (London, U.K., Blackstone Press Limited, 1991) p 35; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 IV 2. a) p 195; A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 365, p 171; J. P. Terhechte (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.5, p 1816.

[561] Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 385, 31/12/1994, p 5 at point 6 1st sentence; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 IV 2. b) and c) p 196; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 31, p 522.

[562] q.v. Commission Decision, Case IV/M. 18, 1990 (*Groupe AG/Amer*): Two holding companies decide to transfer relevant assets to two new daughter undertakings each depending on its mother. Then, each holding company obtains shares of the daughter undertaking belonging to the other holding. Thirdly, both subsidiaries' assets were pooled. However, it may be difficult to distinguish such a transaction from a JV. q.v. Commission Decision Case IV/M. 69, 1991 (*Kyowa/Saitama*); T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 IV 2. b) and c) p 196; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 2 .A, p 1085.

[563] Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 385, 31/12/1994, p 5 at point 6 2nd sentence; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 IV 2. b) and c) p 196.

[564] Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 385, 31/12/1994, p 5 at point 7; C. Koenig, K. Schreiber, Europäisches Wettbewerbsrecht (1st ed.) (Tübingen, Germany, Mohr, 2010) CH 7. III 1 pp 190-191; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 24 II. p 554-555; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 32, p 523.

[565] The reluctance of important branches within one of the parties may well cause a breakdown of negotiations even if major shareholders initiated the merger talks: q.v. Negotiations between Deutsche Bank AG and Dresdner Bank AG in spring 2000 inaugurated by the influential shareholder Allianz AG. Opposition of the successful investment business Dresdner Kleinwort Benson resulted in a breakdown.

[566] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. II. 1. c) (5) (a-b) pp 313, 316.

[567] Instead of acquisition the term hostile takeover may be used; C. Koenig, K. Schreiber, Europäisches Wettbewerbsrecht (1st ed.) (Tübingen, Germany, Mohr, 2010) CH 7. III 2., p 191; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. II. 1. c) p 288.

[568] q.v. R. Whish, D. Bailey, Competition Law (8th ed.) (Oxford, U.K., OUP, 2015) CH 20 3., p 855; I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 2 E II p 169; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. II. 1. c) (2) (a) (i) p 292; K. Lange / T. Pries, Einführung in das europäische und deutsche Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2011) CH 4 § 2 IV 3. p 189; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 24 III. 1. p 555; K. Lange, Handbuch zum deutschen und europäischen Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2006) CH 8 § 1 II. 1. b) p. 508; T.A. Downes and J. Ellison, The Legal Control of Mergers in the European Communities (1st ed.) (London, U.K., Blackstone Press Limited, 1991) p 35; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 IV 2. a) p 195; A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 366, p 171; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 34, p 524 and § 15 marginal note 72 pp. 550-551; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.026, p 605; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5,

more sophisticated assessment of control by statutory, contractual or other means was undertaken on the basis of Art. 3 III MR1989. A person is a public body, a private entity or an individual entrepreneur which/who controls an undertaking in terms of Art. 3 III MR1989 by statutory, contractual or other means, i.e. by having the ability to execute a decisive influence on strategic decisions of an undertaking owing to ownership or rights (Art. 3 II MR2004)[569] in terms of positive control to adopt decisions or negative control to block decisions[570]. The ability to influence the conduct is sufficient to generate control as no actual determination is required according to the wording of Art. 3 III MR1989[571] and clarified by two Commission notices[572]. The notion of decisive influence refers to strategic decisions. The relevant Commission Notice and the case law reveal, which mechanisms may provide for control: Legal Rights owing to shareholdings or assets[573], contractual rights[574] or other means like a crucial dependence on long term supply agreements or network access[575]. Moreover, the wording "in particular by" within Art. 3 III MR1989 (Art. 3 II MR2004) indicates that the list is of non exhaustive, explanatory character.

Legal rights like those attributed to majority shareholdings of ordinary shares will confer legal control if they actually transfer the majority of voting rights and are not circumvented by specific contractual rights of other stakeholders[576]. Legal Rights attributed to minority shareholdings will cause control if they are accompanied by other statutory rights, contractual rights or facilitated by de facto elements[577], e.g. owing to a high degree of

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marginal note 5.48, p 552; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.6, p 1817.

569 The link between decisive influence and strategic decisions is highlighted with regard to joint control in a notice: Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 385, 31/12/1994, p 5 point 22; The succeeding Notice expressively defines the notion of a person in terms of Art. 3 MR1997: Commission Notice on The Concept of Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 66, 02/03/1998, p 5, at paragraph 8; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 24 III. 1. p 555-557; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.50, p 553.

570 J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.50, p 553 and marginal note 5.78, p 558.

571 "confer the possibility of exercising decisive influence".

572 Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 385, 31/12/1994, p 5 at point 9 paragraph 2; Commission Notice on The Concept of Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 66, 02/03/1998, p 5, at paragraph 9 2nd sub-paragraph.

573 q.v. Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 385, 31/12/1994, p 5 at point 9 paragraph 1; e.g. Cases regarding asset deals inter alia include: Commission Decision, Case IV/M. 129, 1991 (*Digital/Philips*); Commission Decision, Case IV/M. 235, 1992 (*Elf Aquitaine/Thyssen/Minol*); Commission Decision, Case IV/M. 354, 1993 (*Cynamid/Shell*); K. Lange, Handbuch zum deutschen und europäischen Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2006) CH 8 § 1 II. 1. b) aa) p. 509; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.50, p 553.

574 e.g. Purchasing of securities, assets, contractual rights (e.g. right to appoint members of the board of directors, supervisory board, right to appoint and influence managers).

575 Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 385, 31/12/1994, p 5 at point 9 paragraph 1.

576 Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 385, 31/12/1994, p 5 at point 9 paragraph 13-14; q.v. also with respect to MR1997: Commission Notice on The Concept of Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 66, 02/03/1998, p 5, at paragraph 13.

577 Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 385, 31/12/1994, p 5 at point 14 paragraph 1 (legal rights), 2 (contractual rights) 3 (de facto control); q.v. also with respect to MR1997: Commission Notice on The Concept of Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 66, 02/03/1998, p 5, at point 14 sub-paragraph 1-3.

diversification of investors[578] or based on long term supply agreements reaching predominant economic influence[579].

The verb "to acquire" within Art. 3 I MR1989 indicates that a shift of external influence is a mandatory feature and that measures providing for internal restructuring can be generally ignored[580]. The mere enhancement of an existing sole or joint control is not a new concentration and the same is true for a shift from legal to factual control[581]. It has to be distinguished between sole and joint control and the acquisition of majority participations and minority participations which can nevertheless constitute control in specific cases[582]. Regularly control is acquired by share deals or asset deals (Art. 3 I lit. b and Art. 3 II MR2004)[583]. A factual majority in the general assembly is sufficient when the remaining share capital is split[584]. The undertakings concerned under Art. 3 lit. b MR2004 are the acquirer, the (full or partial) target undertaking and not the vendor/seller[585].

6.3.1.3 Concentrative JVs under MR1989

Finally, the creation of a full function JV of a concentrative nature is regarded as a concentration pursuant to Art. 3 II 2 MR1989[586] whereas Art. 3 II 1 MR1989 expresses that co-ordinative JVs were excluded from the scope of the regulation (q.v. full function JV owing to Art. 3 IV MR2004[587]).

In order to avoid any repetitions, the analysis of JVs under MR1989 will focus on those aspects of JV interpretation in EU merger control law that differ from the approach taken with respect to Art. 101 and 102 TFEU (Art. 81 and 82 ECT). The evolution of standards is accompanied by the first Commission Notice on

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578 e.g. Commission Decision, Case IV/M. 25, 1990 (*Arjomari-Prioux/Wiggins Teape Appleton plc*): A shareholding of 39% was sufficient because the remaining shares were held by more than 100,000 shareholders so that a co-ordinated opposition policy is highly unlikely; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.8, p 1817.

579 e.g. Commission Decision, Case IV/M. 258, 1992 (*CCIE/GTE*); Commission Decision, Case IV/M. 697, 1996 (*Lockheed Martin Corporation/Loral Corporation*); q.v. Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 385, 31/12/1994, p 5 at point 9 paragraph 1; Commission Notice on The Concept of Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 66, 02/03/1998, p 5, at point 9 paragraph 1.

580 Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 385, 31/12/1994, p 5 at point 8 paragraph 3. However, specific rules apply to public undertakings: A concentration will arise if such undertakings are acquired by another one owned by the same public body if the undertakings operated on different markets, i.e. are not members of the "same economic unit") q.v. id point 8 paragraph 4.

581 K. Lange, Handbuch zum deutschen und europäischen Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2006) CH 8 § 1 II. 1. b) dd) p 519.

582 A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 366, p 171; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.9, p 1817.

583 G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 36, p 525.

584 G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 42, p 529.

585 G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 73, p 551; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.5 (3) (a) p 658.

586 I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 2 E II p 169; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. II. 1. c) p 288; K. Lange / T. Pries, Einführung in das europäische und deutsche Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2011) CH 4 § 2 IV 1. p 188; K. Lange / T. Pries, Einführung in das europäische und deutsche Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2011) CH 4 § 2 IV 3. c) (1) p 191; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 IV 2. a) p 195.

587 F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1392, p 549; A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 367, p 172; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 29, p 521.

concentrative and co-operative operations[588] which was amended in 1994[589] according to dynamic shifts of interpretation as to the recession of parents from the relevant market of the JV.

6.3.1.3.1 Distinction between Operations Involving Inseparable or Separable Structural and Coordinative Aspects

The introduction of the first Commission notice on JVs stresses that operations which cause long lasting amendments of the competitive situation[590] by means of structural alterations of the undertakings concerned will be excluded from the scope of MR1989 if they are combined with any behavioural restrictions - that are not covered by the ancillary restrictions doctrine - between the parent undertakings unless the structural and behavioural aspects are separable[591]. Provided that this doctrine outlaws the application of MR1989, a case will have to be solved by means of Art. 102, 101 TFEU (Art. 82, 81 ECT) in substantial and REG17 (Council Regulation (EC) No. 1/2003) in procedural terms[592].

If structural operations - e.g. inter alia the formation of a JV - are severable from a collusion, the structural aspects are assessed under the merger control proceedings[593]. The potential collusion of the parents will be addressed within the same proceedings if it is covered by the ancillary restrictions doctrine[594]. Contrarily, a non-ancillary, severable collusion will be assessed in a separate administrative procedure under Art. 101 TFEU (Art. 81 ECT) in combination with REG17 (Council Regulation (EC) No. 1/2003) [595].

6.3.1.3.2 Joint Control

In contrast to the former case law, a more sophisticated assessment of joint control by statutory, contractual or other means was undertaken on the basis of Art. 3 III MR1989 and the relevant Commission Notice[596]. Similar to sole control[597], the mechanism providing for joint control may be based on legal or contractual rights or other

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588 Commission Notice Regarding the Concentrative and Cooperative Operations under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 203 14/08/1990, p 10.

589 Commission Notice on The Distinction between Concentrative and Cooperative Joint Ventures under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 385 31/12/1994 p 1; C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 37, p 385; The need for future review was indicated in Commission Notice Regarding the Concentrative and Cooperative Operations under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 203 14/08/1990, p 10 point 4.

590 I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 2 B II 6. p 77 (Art. 3 I 1 MR2004).

591 Commission Notice Regarding the Concentrative and Cooperative Operations under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 203 14/08/1990, p10 at point 1 paragraph 2, point 3.

592 Commission Notice Regarding the Concentrative and Cooperative Operations under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 203 14/08/1990, p 10 at paragraph 1 2nd sub-paragraph. The relevant principles were discussed supra at 5.3.3 Competition Law Analysis of JVs under Art. 82 and 81 ECT and sub-sections.

593 Commission Notice Regarding the Concentrative and Cooperative Operations under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 203 14/08/1990, p 10 at paragraph 1, 3rd sub-paragraph.

594 Commission Notice Regarding the Concentrative and Cooperative Operations under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 203 14/08/1990, p 10 at paragraph 1, arg e contrario to 3rd sub-paragraph.

595 Commission Notice Regarding the Concentrative and Cooperative Operations under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 203 14/08/1990, p 10 at paragraph 1, 3rd sub-paragraph.

596 q.v. Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentration between Undertakings, O. J. C 385, 31/12/1994, p 5 points 18-38. Additionally, the term was discussed above: 6.3.1.2 Acquisition; q.v. also for MR1997 Commission Notice on The Concept of Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 66, 02/03/1998, p 5; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. II. 1. c) (4) (b) p 304.

597 J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. II. 1. c) (4) (a) pp 300-304.

factual means[598]. The joint element of control is available if the co-operation of at least two stakeholders is necessary in order to execute a decisive influence on the venture and if this co-operation is not merely accidental but a part of a deliberate long term common commercial policy[599].

The abstract concept of joint control was further developed by the Commission in its notice and several cases: For instance, the Commission specified that a reciprocal blocking vote was generally self sufficient to generate joint control[600]. Provided that an absolute majority-minority structure is available - for instance a 60:40 ratio of ordinary shares or voting rights -, a shareholders' agreement granting specific contractual rights to the minority shareholders are suitable vehicles to establish joint control[601]. This idea is exemplified by the Gambogi/Cogei case in which a structure with a share ratio of 51:49 and without a shareholders' agreement was not regarded as a JV[602]. Moreover, the *Dräger/IBM/HMP* Case illustrates that a mandatory unanimity clause in a 30:30:40 ownership structure attributes to joint control[603]. Comparable to sole control, the quoted rights must refer to strategic decision-making[604]. Contrarily, exclusive powers of decision-making, which only affect the day-to-day running, are negligible[605].

A similar rationale applies to relative majority shareholdings that are not accompanied by specific contractual rights countering the ownership structure: sole control if other shareholdings are diversified and joint control if at least another minority shareholder deliberately co-operates with the largest shareholder so as to achieve

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[598] Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentration between Undertakings, O. J. C 385, 31/12/1994, p 5 point 18; q.v. also for MR1997 Commission Notice on The Concept of Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 66, 02/03/1998, p 5 point 18; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.037, p 612.

[599] Additionally, Joint Control is always accompanied by the possibility of deadlock situations in case of differences between the partners: q.v. Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentration between Undertakings, O. J. C 385, 31/12/1994, p 5 points 18-19; q.v. also for MR1997 Commission Notice on The Concept of Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 66, 02/03/1998, p 5 point 19; K. Lange, Handbuch zum deutschen und europäischen Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2006) CH 8 § 1 II. 1. b) bb) and cc) pp. 513-514; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 IV 2. c) aa) – bb) p 197 and § 6 IV 2. c) (4) cc) p 200.

[600] i.e. 50:50 relation of shareholders; q.v. Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentration between Undertakings, O. J. C 385, 31/12/1994, p 5 point 20; q.v. also for MR1997 Commission Notice on The Concept of Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 66, 02/03/1998, p 5 point 20.

[601] e.g. veto rights, board representation, specific bodies with specific quora for strategic decisionmaking and the former powers must be distinguished from the statutory rights of each minority shareholder against certain decisions of the majority shareholders: Commission Notice Regarding the Concentrative and Cooperative Operations under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 203 14/08/1990, p 10 points 21-23; q.v. also for MR1997: Commission Notice on The Concept of Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 66, 02/03/1998, p 5 points 21-23.

[602] Commission Decision, Case IV/M. 167,1991 (*Gambogi/Coget*).

[603] Commission Decision, Case IV/M. 101, 1991 (*Dräger/IBM/HMP*): mandatory unanimity decision-making.

[604] e.g. decisions concerning the budget, business plan, major investments, appointment of senior staff: Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentration between Undertakings, O. J. C 385, 31/12/1994, p 5 points 22-29; q.v. also for MR1997: Commission Notice on The Concept of Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 66, 02/03/1998, p 5 point 22-29.

[605] q.v. Commission Decision, Case IV/M. 160,1992 (*Elf Atochem/Rohm & Haas*); Commission Notice Regarding the Concentrative and Cooperative Operations under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 203 14/08/1990, p 10 point 23; q.v. also for MR1997: Commission Notice on The Concept of Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 66, 02/03/1998, p 5 point 23; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 145, p 624.

common objectives in the long term so that a co-ordinated execution of ordinary voting rights can establish joint control[606].

However, temporary and shifting alliances between varying minority shareholders will neither constitute a concentration nor a JV[607]. Finally, the parties may set up a specific holding company - in itself an incorporated JV - that will determine how the assets in the target venture are managed based on a common policy developed by the holding company[608].

6.3.1.3.3 Criteria for Full Function JVs

Hence, the principles establishing a JV implementing joint control[609] and performing objectives of an independent economic unit, have been defined more precisely compared to the former case law[610]. Thereby, three decisive criteria were established for a full function JV:

- sufficient resources regarding production[611], marketing[612], distribution[613], finance[614], management[615], research[616], employees[617], capital[618], intellectual property[619], licenses and know-how
- independent access to markets[620]
- independent strategic decision-making[621]

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606 For example an equity structure of 30:30:$X_{1 \text{ to } n}$; q.v. Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentration between Undertakings, O. J. C 385, 31/12/1994, p 5 point 30; q.v. also for MR1997: Commission Notice on The Concept of Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 66, 02/03/1998, p 5 point 30.

607 q.v. Commission Decision, Case IV/M. 207, 1992 (*Eureko*): Eureko is a daughter undertaking of several insurance companies with comparable minority shareholdings. Generally, no qualified majority decisions were necessary and no veto rights were granted; q.v. Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentration between Undertakings, O. J. C 385, 31/12/1994, p 5 point 14; q.v. also for MR1997: Commission Notice on The Concept of Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 66, 02/03/1998, p 5 point 14.

608 Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentration between Undertakings, O. J. C 385, 31/12/1994, p 5 point 31; q.v. also for MR1997: Commission Notice on The Concept of Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 66, 02/03/1998, p 5 point 31.

609 I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.2. (1) (c) (i) p 645,

610 J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. IV. p 472; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 IV 2. a) p 195; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1394, p 550; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.2. (1) (c) p 646 and § 7.2 (1) (c) (ii) p 648; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.006, p 596.

611 Commission Decision, Case IV/M. 72, 1991 (*Sanofi/Sterling Drug*); Commission Decision, Case IV/M. 160,1992 (*Elf Atochem/Rohm & Haas*); Commission Decision, Case IV/M. 198, 1992 (*Péchiney/Viag*): However, some facilities can remain under the control of the parent as some facilities may be used for diverse purposes; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.2. (1) (c) (ii) p 648.

612 Commission Decision, Case IV/M. 180, 1991 (*Steetley/Tarmac*).

613 Commission Decision, Case IV/M. 72, 1991 (*Sanofi/Sterling Drug*); Commission Decision, Case IV/M. 160,1992 (*Elf Atochem/Rohm & Haas*); Commission Decision, Case IV/M. 198, 1992 (*Péchiney/Viag*).

614 Commission Decision, Case IV/M. 102, 1991 (*TNT/Canada Post/DBP Postdienst/La Poste/PTT Post/Sweden Post*).

615 Commission Decision, Case IV/M. 180, 1991 (*Steetley/Tarmac*); I. and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.2. (1) (c) (ii) p 648.

616 Commission Decision, Case IV/M. 72, 1991 (*Sanofi/Sterling Drug*); Commission Decision, Case IV/M. 160,1992 (*Elf Atochem/Rohm & Haas*); Commission Decision, Case IV/M. 198, 1992 (*Péchiney/Viag*): However, some facilities can remain under the control of the parent as some facilities may be used for diverse purposes.

617 Commission Decision, Case IV/M. 101, 1991 (*Dräger/IBM/HMP*); Commission Decision, Case IV/M. 72, 1991 (*Sanofi/Sterling Drug*); I. and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.2. (1) (c) (ii) p 648.

618 Commission Decision, Case IV/M. 292, 1993 (*Ericsson/Hewlett-Packard*); I. and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.2. (1) (c) (ii) p 648.

619 Commission Decision, Case IV/M. 72, 1991 (*Sanofi/Sterling Drug*); Commission Decision, Case IV/M. 160,1992 (*Elf Atochem/Rohm & Haas*).

620 Commission Decision, Case IV/M. 180, 1991 (*Steetley/Tarmac*).

621 Commission Decision, Case IV/M. 180, 1991 (*Steetley/Tarmac*).

Sufficient resources are available if the necessary managerial, personal and substantial resources, i.e. tangible assets and intangible assets like intellectual property rights, licenses and know-how, are dedicated to the JV. These criterion is justified as an entity without the infrastructure cannot properly develop and implement strategies on its own. Additionally, only a permanent transfer of assets and know how provides for a long lasting amendment of the competitive situation as the threat of a re-entry of a parent is reduced.

The second aspect demands that a market access independent from the parents is a pre-requisite of a JV which is considered as a concentration of undertakings. It may be backed by Recital 23 MR1989 as long lasting amendments of the competitive situation are based on structures seeking to exploit comparative advantages by means of purchasing resources from and offering products to entities different from the parents[622].

The third indicator of independence relates to the fact if a JV has a minimum level of competences for strategic decision-making. It indicates the antagonism between joint control and strategic self determination of the JV. In short, the parents must limit themselves to purely financial considerations of institutional investors. If they sought strategic control over the JV business, a mere coordinative operation would be available.

6.3.1.3.4 Concentrative Operations: Recession of Parents and Group Effect

With respect to the still pending distinction between concentrations and a co-ordination, the next paragraph focuses on the question whether the interpretation under MR1989 amended the former case law. Indeed, the new cases indicate an approach quite different from the old doctrines as the criterion of the risk of co-ordination between the parties was interpreted more and more broadly so as to expand the scope of MR1989.

Analogous to the old case law, a concentration would be available, if both parents withdrew from the relevant market, neighbouring markets and related up- and downstream sectors[623] backed by the fact that the probability of re-entry is extremely limited pursuant to a long lasting transfer of know-how and commercial aspects like economies of scale[624]. The same finding applies to JVs entering new markets.

In contrast to the old case law, a per se rule[625] - which will deny a concentrative JV if both parents remain competitors of the JV - is no longer applicable. This finding is backed by the in depth analysis in relevant cases[626]. However, MR1989 would rarely apply if both parents remain in the relevant or neighbouring markets. The risk of co-ordination between each parent and the JV or between the parents was deemed to be

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[622] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. II. 1. c) (3) (a) p 297.

[623]Commission Notice Regarding the Concentrative and Cooperative Operations under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 203 14/08/1990, p 10 paragraph 20; q.v. Commission Decision, Case IV/M. .72, 1991 (*Sanofi/Sterling Drug*).

[624] Commission Decision, Case IV/M. .101, 1991 (*Dräger/IBM/HMP*).

[625] I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 7 VI 1., p 204; CH 9 III. 1. b), p 249.

[626] q.v. Commission Decision, Case IV/M. 58, 1991 (*Baxter/Nestlé/Salvia*).

predominant[627]. Additionally, the commercial value of co-ordination will be so outstanding that the structural aspects of the JV formation are generally overruled.

Thereby, the Commission considered a JV engaging in recycled glass as co-ordinative because of the maintained activities of the parents in upstream markets and the highly probable re-entry of the parents to the relevant market combined with insignificant research capability of the JV[628]. Exceptionally, MR1989 will apply if the parents which are still active in a relevant sector exclusively sell to the JV[629].

Backed on the clause permitting the development of new doctrines in the first Commission notice on joint ventures[630], the Commission derogates from the notice by means of the theory of industrial leadership. According to this concept, a JV is regarded as a concentrative operation if only one parent recedes from the relevant market on condition that the remaining partner holds the industrial leadership on the market in question[631]. The logic behind this finding is that competition is already dormant if a leading entity has important competitive advantages so that only one brand is successful at the present time.

Subsequently, such an undertaking remains active on the relevant market without factual detriment to competition. The second argument backing a concentration relates to the fact that the industrial leader's partner withdraws so as to avoid any scope for additional co-operation between the parents. Such a co-operation would be far more significant in economic terms than a co-ordination between the leading parent and the JV[632].

Sometimes, a third argument is used to negate the effect of remaining competition between the industrial leader and the JV. A JV would be regarded as a dependent entity which would not qualify as a self determined entity which could enter into concerted practices so as to challenge a concentration in comparison with Art. 3 II MR1989. However, this argument is inconsistent with the basic definition of a full function JV which must be per se an independent entity. Another case was accepted as the remaining parent was not competing actively on the relevant market[633].

Later, even the restrictive criterion that requires the remaining partner to be an industrial leader was withdrawn: An operation was regarded as a concentration even if the remaining parent was not considered as an industrial leader[634]. In 1994, the new doctrine is made more transparent by the revised standards included in the new Commission notice on JVs in 1994: In brief, concentrative operations will be possible either for sure, if both

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[627] This is especially true, if the JV only acquires parts of the operations of the mothers that are used to penetrate the relevant market: q.v. Commission Notice Regarding the Concentrative and Cooperative Operations under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 203 14/08/1990, p 10 point 27

[628] Commission Decision, Case IV/M. 168, 1991 (*Flachglas/Vegla*).

[629] Commission Decision, Case IV/M. 206, 1992 (*Rhône-Poulenc/SNIA*).

[630] Commission Notice Regarding the Concentrative and Cooperative Operations under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 203 14/08/1990, p 10 paragraph 4.

[631] q.v. Commission Decision, Case IV/M. 86, 1991 (*Thomson/Pilkington*); Commission Decision, Case IV/M. 157, 1992 (*Air France/Sabena*).

[632] q.v. V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 17 I p 153.

[633] Commission Decision, Case IV/M. 86, 1991 (*Thomson/Pilkington*).

parents are not active or recede completely, or at least generally probable, if a parent remains active or both parents remain active with minor activities[635].

Moreover, a JV should not be exposed to the risk that a parent re-enters markets, from which it withdrew, at least in the near future [636].

Finally, one has to bear in mind that the specific economic implications of the potential concentrative JV have to be considered in each case as the abovementioned aspects lead to a mandatory, complex multi-criteria assessment. As a result of such a weighted analysis, some concentrative aspects could overrule coordinative ones and vice versa.

6.3.1.4 Credit Institutions, Insurance Undertakings, Liquidators and Financial Holdings under MR1989

As credit and insurance undertakings often act as institutional investors or have a decisive influence on other undertakings while holding assets on commission although there is not the intention to affect the target's strategic behaviour, Art. 3 V MR1989 creates specific rules so as to measure control executed by these institutions[637]. A comparable rationale is true for liquidators (Art. 3 V lit. b MR2004)[638] and financial holding companies (Luxembourg Clause, Art. 3 V lit. c MR2004)[639].

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[634] q.v. A. Burnside, *Dance of The Veils? Reform of The EC Merger Regulation*, ECLR 373 (1996).

[635] Commission Notice on The Distinction between Concentrative and Cooperative Joint Ventures under Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. C 385, 31/12/1994, p 10, paragraph 18 sub-paragraph 1-2. Contrarily the 3rd sub-paragraph contains a strong indication of co-ordination, i.e. both parents maintain considerable businesses compared with the JV. The following sub-paragraphs contain medium presumptions for co-ordination; C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 37, p 385.

[636] e.g. indefinite duration Commission Decision, Case IV/M. 24,1990 (*Mitsubishi/Ucar*), Commission Decision. The more rapid the technological development the shorter this period can be without putting the concentrative nature at risk.

[637] The exemption is available if said institutions obtain securities as a part of normal activities for others' own accounts on a temporary basis with the intention of reselling in the near future. No voting rights must be used which could determine the competitive behaviour of the target, i.e. a vote is permissible if it facilitates the divestiture within one year of the acquisition.
However, the Commission may grant a longer period by means of a decision under Art. 3 V lit a MR1989; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 24 VII. 1. p 591; K. Lange, Handbuch zum deutschen und europäischen Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2006) CH 8 § 1 II. 1. e) p 526; T.A. Downes and J. Ellison, The Legal Control of Mergers in the European Communities (1st ed.) (London, U.K., Blackstone Press Limited, 1991) p 53; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 IV 2. a) p 195, § 6 IV 2. e) p 202 and § 6 IV 2. f) p 203; A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 368, p 172; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 81-83, pp 556-557; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.055, p 622; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.34, p 548 and marginal note 5.107, p 566; J. P. Terhechte, (ed.), Inter-nationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.22, p 1822; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 3. A. (iii), p 1101.

[638] Art. 3 V lit b MR1989; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 24 VII. 2. p 592; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.056, p 623; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.34, p 548 and marginal note 5.108, p 566.

[639] Art. 3 V lit c MR1989 in combination with Art. 5 III Fourth Council Directive 1978/660/EEC of 25 July 1978 on The Annual Accounts of Certain Types of Companies O. J. L 222, 14/08/1978 p 11, as lastly amended by Directive 84/569/EEC O. J. L 314, 04/12/1984 p 28: Its assets are exempted if voting rights are executed solely in order to elect board members and maintain the value of investments so as not to interfere with substantial business; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. II. 1. c) (6) (e) pp 336-340; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 IV 2. e) p 202; A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 368, p 172; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 83, p 557; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.057, p 623; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.34, p 548 and marginal note 5.109, p 566.

6.3.2 Community Dimension under Art. 1 MR1989

In order to establish the exclusive jurisdiction of the Commission under Art. 21 I-II MR1989, the concentration needs to have a community dimension under Art. 1 I-II MR1989[640] or which would be subject to merger proceedings within at least three member states owing to Art. 4 V MR2004[641]. The latter is available if four criteria are met pursuant to Art. 1 II; 5 II MR1989: the global turnover must exceed certain thresholds, likewise the community wide turnover of at least two undertakings and at least one undertaking must not fall within the two-thirds rule of Art. 1 II MR1989[642]. Finally, no derogation from the one-stop shop principle must be applicable, i.e. the unitary jurisdiction of the Commission must not be challenged by either Art. 19; 9; 21 III; 22 III-V MR1989 or the residual application of Art. 101 and 102 TFEU (Art. 81 and 82 ECT) in combination with Art. 105 TFEU (Art. 85 ECT). The merger regulation does not contain criteria like quantitative market shares or a detriment of trade between member states[643]. The draft merger regulations of 1973 contained a global turnover of 200 mio. EUR and of 1988 of 10 bn EUR[644].

6.3.2.1 Aggregated Global Turnover

First of all, it was necessary that the aggregated global turnover of the undertakings involved exceeded Euro 5,000 Million pursuant to Art. 1 II lit. a MR1989[645]. Art. 5 MR1989 clarifies how these turnover figures should be calculated[646].

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640 J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. II. p 285; P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 B. (1) (b) p 373; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 23 II. 1. p 530; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 IV 3. a) p 203; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1373, p 544; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 1, p 508; F. Ekay, Grundriss des Wettbewerbs- und Kartellrechts (5th ed.) (Heidelberg, Germany, C.F. Müller, 2016) marginal note 578; I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 9 III. 3. b), pp. 256-257; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.1 p 633, § 7.2 p 643 and § 7.2 (2) (a) p 649; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.35, p 548; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 1., p 1084; M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 7 marginal note 7-002, p 348; E. Fox & D. Gerard, EU Competition Law (1st ed.)(Cheltenham, UK, Elgar, 2017) CH 6 A.1., p 235.

641 C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.066, p 628 and marginal note 8.094, p 640; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.43, p 1829 and marginal note 73.51, p 1832; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 4. B. (iii), p 1125; E. Fox & D. Gerard, EU Competition Law (1st ed.)(Cheltenham, UK, Elgar, 2017) CH 6 A.1., p 236.

642 W. Veelken, M. Karl, S. Richter, Die Europäische Fusionskontrolle (1st ed.) (Tübingen, Germany, Mohr, 1992) III p 9, IV p 12; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. II. 2. a) (1) pp 340-341; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.070, p 630; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.34, p 548 and marginal note 5.256, p 601; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 3. B. (ii), p 1103.

643 G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 13, p 512.

644 G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 14, p 513.

645 R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 21, 3 (B) (i) (a) p. 859. V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 15 IV 1. p 136; C. Koenig, K. Schreiber, Europäisches Wettbewerbsrecht (1st ed.) (Tübingen, Germany, Mohr, 2010) CH 7 III 3., p 198; W. Veelken, M. Karl, S. Richter, Die Europäische Fusionskontrolle (1st ed.) (Tübingen, Germany, Mohr, 1992) III p 9; I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 2 B II 2. b. 2. p 74; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. II. 2. a) (1) pp 340-341; P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 B. (1) (b) p 373; K. Lange / T. Pries, Einführung in das europäische und deutsche Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2011) CH 4 § 2 II 1. a) p 179; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 23 IV. 1. a) p 537; K. Lange, Handbuch zum deutschen und europäischen Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2006) CH 8 § 1 II. 2. a) p 527; T.A. Downes and J. Ellison, The Legal Control of Mergers in the European Communities (1st ed.) (London, U.K., Blackstone Press Limited, 1991) pp. 54-55; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 IV 3. b) p 204; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1400, p 552; A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 370, p 173; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 15, p 513; W. Kurzlechner, Fusionen Kartelle Skandale (1st ed.) (Munich, Germany, Redline Wirtschaft, 2008) CH 13, p 276; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.2 (2) (b) (i) p 650; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.34, p 548 and

6.3.2.1.1 Calculation of Turnover from Ordinary Business Activities

The basic principle states that the turnover figures resulting from ordinary business activities with third parties of the undertakings concerned in the previous financial year[647] shall be added pursuant to Art. 5 I 1 and 5 IV lit a MR1989 minus VAT[648]. Two transactions within a two year period are treated as a single concentration[649].

6.3.2.1.2 Intra-Group Transactions Art. 5 I 2 MR1989

The reported principle is primarily modified by Art. 5 I 2 MR1989 so that turnovers resulting from transactions with undertakings mentioned in Art. 5 IV MR1989 - inter alia the undertakings concerned, daughter, (grand)parent and sister undertakings - are excluded[650].

6.3.2.1.3 Acquisition of Parts Art. 5 II MR1989

The second modification of the principle is a result of the lex specialis provision Art. 5 II MR1989. It orders that - in case of an acquisition of parts of a target undertaking - only the turnovers resulting from the sold parts have to be included unless the acquirer implements a series of partial acquisitions within two years[651].

6.3.2.1.4 Turnovers of Affiliated, Parent and Sister Undertakings

Even more specific, Art. 5 IV lit. b-e MR1989 regulates that the relevant turnover figures also include the turnovers of those undertakings which either control the undertakings concerned or which are currently controlled by the acquirer or the target[652], i.e.

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marginal note 5.158, p 578; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.25, p 1823; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 3. B. (ii), p 1103; E. Fox & D. Gerard, EU Competition Law (1st ed.)(Cheltenham, UK, Elgar, 2017) CH 6 A.1., p 235.

646 J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. II. 2. b) p 345; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 23 IV. 2. p 539; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 IV 3. d) p 205; A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 371, p 174; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 16, p 513; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.1 (4) p 642 and § 7.6 p 661.

647 Sometimes the definition of undertakings concerned is clouded with regard to subsidiaries acquiring other undertakings. Partly, the (im)mediate parent is considered as a relevant undertaking in terms of turnover calculation: q.v. Commission Decision, Case IV/M. 235, 1992 (*Elf Aquitaine-Thyssen/Minol*) Partly, the subsidiary itself is a relevant undertaking in terms of turnover calculation : q.v. Commission Decision, Case IV/M. 99, 1991 (*Nissan/Richard Nissan*); J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. II. 2. b) (2) pp 350-351; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.073, p 632; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.28, p 1824; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 3. B. (v), p 1106.

648 Rebates, VAT and turnover related taxes have to be deducted. Germany and the UK had demanded global turnover thresholds of EUR 10 bn: W. Veelken, M. Karl, S. Richter, Die Europäische Fusionskontrolle (1st ed.) (Tübingen, Germany, Mohr, 1992) IV p 14; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. II. 2. b) (2) (a) p 350; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 IV 3. d) p 205; A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 371, p 174; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 15, p 513 and § 15 marginal note 86-89, pp 559-561; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.6 (2) p 662; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.34, p 548 and marginal note 5.185, p 584; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.28, p 1824.

649 C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.076, p 633.

650 Thereby, the first third party sale of products or services is relevant. It can be either a direct sale to a consumer, via a distributor or via an agent. As subsidiaries of the undertakings concerned belong to the parties sales to them are excluded from the relevant turnover; q.v. M. Broberg, *The Geographic Allocation of Turnover under The Merger Regulation*, ECLR 104 (1997); G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 15, p 513 and § 15 marginal note 98, p 564; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.6 (3) (a) p 663 and § 7.6 (4) p 665; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.086, p 637.

651 Art. 5 II 2nd sentence MR1989. Such an approach is called "salami tactics"; q.v. C. Jones, *The Scope of Application of the Merger Regulation*, in International Mergers and Joint Ventures (B. Hawk, ed., Fordham University School of Law, New York, U.S., 1990) p 389; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.5 (3) (b) p 658; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.075, p 633; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 3. B. (v), p 1106.

- (im)mediate daughter undertakings in terms of Art. 5 IV lit b MR1989[653],
- (im)mediate parent undertakings Art. 5 IV lit. c MR1989[654],
- sister undertakings Art. 5 IV lit. d MR1989[655],
- jointly controlled daughters/parents with joint control regarding the undertakings concerned or sisters Art. 5 lit. e MR1989[656].

6.3.2.1.5 Turnovers of Jointly controlled Undertakings

Fourthly, Art. 5 V 1st sentence MR1989 excludes turnover figures of undertakings in terms of Art. 5 IV lit. e MR1989 arising from intra-group transactions whereas turnovers resulting from third party sales are divided[657].

6.3.2.1.6 Financial Institutions

Subsequently, specific rules applied and still apply to credit and insurance undertakings (Art. 5 III lit. a and b MR2004)[658].

6.3.2.1.7 De-Mergers (Break up of companies)

Furthermore, the basic principle of turnover calculation[659] has to be specified for situations which are not addressed in the wording of MR1989 because the rationale of some cases requires specific considerations so as to establish the undertakings concerned and the appropriate turnover figures.

In case of a de-merger or break up of companies, one should generally regard the consecutive mergers A'-B and A''-C as separate transactions unless a third party determines how the acquirers should implement the acquisition[660]:

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[652] J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.32, p 1826 and marginal note 73.34, p 1826; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 3. B. (v), p 1106.

[653] I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.6 (3) (a) p 663.

[654] i.e. "parent undertakings", "grandparent undertakings" etc.. The Commission is willing to discuss the accurate definition of undertakings relevant to the turnover calculation with the parties in the pre-notification stage; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.6 (3) (a) p 663; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.087, p 637.

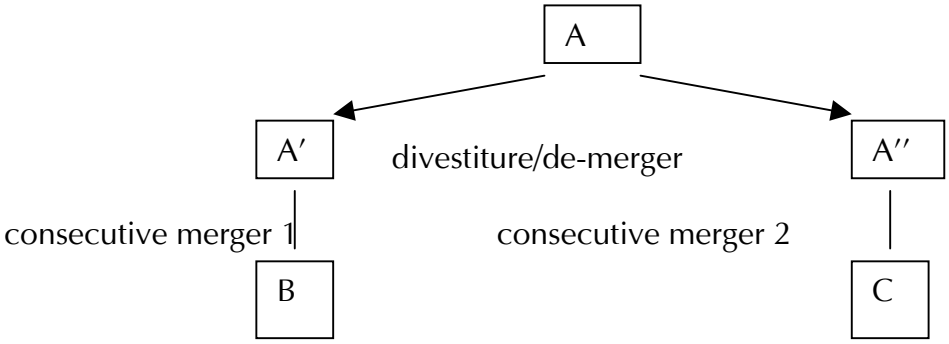
[655] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 15, p 513 and § 15 marginal note 22, p 516; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.6 (3) (a) p 663; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.087, p 637.

[656] It is questioned whether the notion of control in Art. 5 IV lit a-e MR1989 is identical with the term control in Art. 3 I lit b and 3 II MR1989 or not so that decisive influence may be required. The Commission uses both approaches so as to expand its jurisdiction q.v. S. O'Keeffe, *Merger Regulation Thresholds: An Analysis of the Community-Dimension Thresholds in Regulation 4064/89*, ECLR 22 and 24 (1994); T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 IV 3. d) p 205; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.6 (3) (a) p 664; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.087, p 637.

[657] Art. 5 V 2nd Sentence MR1989; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 IV 3. d) p 206; A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 371, p 174; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 15, p 513 and § 15 marginal note 99, p 564; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.6 (3) (d) p 664; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.37, p 1827.

[658] q.v. Art. 5 III MR1989; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. II. 2. b) (6)p 362; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 23 IV. 2. p 539; T.A. Downes and J. Ellison, The Legal Control of Mergers in the European Communities (1st ed.) (London, U.K., Blackstone Press Limited, 1991) p 53; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 IV 3. d) p 206; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 101, p 565 and § 15 marginal note 106, p 566; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn,

Divestiture/De-Merger



6.3.2.1.8 Joint Bids

With respect to joint bids, it is superior to argue that two separate acquisitions are available if A and B bid jointly for C provided that the acquirers agree to separate the assets immediately and do not to intend to implement a common policy on the relevant markets.

6.3.2.1.9 Asset Swaps

A comparable rationale is true for asset swaps - i.e. company A sells its A′ operations to B which in turn sells its B′ operations to A - provided that A and B will pursue independent policies as a result of the transaction[661].

6.3.2.1.10 Formation of Concentrative JVs

Relating to the formation of a concentrative full function JV under Art. 3 IV MR2004[662] and Art. 5 V MR2004[663], not only the jointly controlling parents[664] but also the assets of the new JV itself will attribute to the turnover calculation which is especially relevant if two parties acquire joint control in an existing undertaking that was under sole control[665]. Hence, it is not relevant whether the JV is formed by launching a new incorporated structure or - for instance - by joint acquisition of a target previously exclusively controlled by a minority shareholder[666]. However, turnovers of parents with minor stakes that do not qualify for joint control will be ignored pursuant to the above definition.

The Netherlands, Kluwer Law International, 2010) CH 7 § 7.8 pp. 668-669; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.28, p 1825.

[659] q.v. supra at *6.3.2.1.1 Calculation of Turnover from Ordinary Business Activities*.

[660] Commission Decision, Case No. IV/M197, 1991 (*Solvay-Laporte/Interox*); Commission Decision, Case No. IV/M258, 1992 (*CCIE/GTE*); I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.5 (7) p 660; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.052, p 620.

[661] I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.5 (8) p 660.

[662] A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 367, p 172.

[663] A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 371, p 174.

[664] Their number of joint controlling partners is not relevant: q.v. Commission Decision, Case IV/M. 101, 1991 (*Dräger/IBM/HMP*); Commission Decision, Case IV/M. 293, 1993 (*Philips/Thompson/Sagem*); Commission Decision, Case IV/M. 176 (*Sunrise*), 1991; Commission Decision, Case IV/M. 102, 1991 (*TNT/Canada Post/DBP Postdienst/La Poste/PTT Post/Sweden Post*); Commission Decision, Case IV/M. 116/1991 (*Kelt/American Express*): 8 partners.

[665] q.v. for the principles of turnover calculation in case of the formation of JVs: Commission Decision, Case IV/M. 229, 1992 (*Thomas Cook/LTU/West LB*); Commission Decision, Case IV/M. 277, 1992 (*Del Monte/Royal Foods/Anglo-American)*; Commission Decision, Case IV/M. 295, 1993 (*SITA-RPC/SCORI).*

[666] e.g. formation of a new JV, q.v. Commission Decision, Case IV/M. 12, 1991 (*Varta/Bosch*) paragraph 26; Commission Decision, Case IV/M. 72, 1991 (*Sanofi/Sterling Drug*); Commission Decision, Case IV/M. 133, 1991 (*Ericsson/Kolbe*); Commission Decision, Case IV/M. 236, 1992 (*Ericsson/Ascom*); sole

6.3.2.1.11 Acquisition of Unilateral Control by a JV Partner

Contrarily, if one of the JV partners acquires sole control of the venture, a concentration between the partner and the JV with an addition of the turnovers will take place[667]. At first sight, this may not be logic as the partner used to control parts of the JV. However, sole control is of distinct quality so as to justify a simple addition of turnovers.

6.3.2.1.12 Intermediary Companies

The most problematic category refers to intermediary companies controlled by large parents. Intermediary undertakings could be used so as to evade the turnover thresholds of MR1989. The wording of MR1989 does not cover this category. From the teleological point of view, it is a strict necessity to add the turnover figures of parent companies to any concentration arranged by subsidiaries unless a parent has a mere institutional investor's interest (financial portfolio acquisition) rather than a strategic or industrial interest in the business sector. These considerations can be based on Recital 24 MR1989. Therefore, the Commission will calculate the turnover including the turnover of the parents of the intermediary undertaking provided that the intermediary has been specifically designed for the acquisition, has no significant operations and assets on its own[668]. The application of this important concept is exemplified by the subsequent table. The cases mentioned will be scrutinised later on:

Application of the Concept of Intermediary Companies to Concentrations in The Energy Sector

EdF/London Electricity	▪ EdF group including ELEX (UK) Ltd ▪ Entergy group including London Electricity Holdings No.1
Gaz de France/BEWAG/GASAG:	▪ Gaz de France group including Gaz de France Deutschland GmbH
EdF/South Western	▪ EdF Group including London Electricity plc ▪ Southern Energy, Inc. including South Western Electricity plc
Preussen Elektra/EZH	▪ VEBA including inter alia Preussen Elektra and various mediate daughters including inter alia VEAG (together with Bayernwerk and RWE) and Schleswag

controlling entity divests a part so as to create two joint interests, q.v. Commission Decision, Case IV/M. 24,1990 (*Mitsubishi/Ucar*), Commission Decision, Case IV/M. 88, 1991 (*Elf/Enterprise*); exchange of partners in an existing JV, q.v. Commission Decision, Case IV/M. 82, 1991 (*ASKO/Jacobs/ADIA*); minor interest becomes new controlling interest, q.v. Commission Decision, Case IV/M. 63, 1991 (*Elf/Ertoil*), Commission Decision, Case IV/M. 98, 1998 (*Elf/BC/Cepsa*).

[667] Commission Decision, Case IV/M. 23, 1990 (*ICI/Tioxide*).

[668] Commission Decision, Case IV/M. 82, 1991 (*ASKO/Jacobs/ADIA*); Commission Decision, Case IV/M. 176 (*Sunrise*), 1991; Case IV/M. 102, 1991 (*TNT/Canada Post/DBP Postdienst/La Poste/PTT Post/Sweden Post*); Commission Decision, Case IV/M. 116/1991 (*Kelt/American Express*); Commission Decision, Case IV/M. 141/1991 (*UAP/Transatlantic/Sun/Life*); Commission Decision, Case IV/M. 277, 1992 (*Del Monte/Royal Foods/Anglo-American)*; Commission Decision, Case IV/M. 216/1993 (*CEA Industrie/France Telecom/Finmeccania/SGS Thomson*); Commission Decision, Case IV/M. 218, 1992 (*Eucom/Digital).*

	▪ Province of Zuid-Holland and Five Cities including EZH
VEBA/VIAG	▪ VEBA group including inter alia Preussen Elektra and mediate daughter undertakings ▪ VIAG group including Bayernwerk AG and mediate subsidiaries like BEWAG (JV by Bayernwerk and Southern Energy Beteiligungsgesellschaft which is itself a subsidiary of Southern Energy, Inc.)
Vattenfall/HEW	▪ Vattenfall HGV Holding GbR ▪ Vattenfall AB group including Vattenfall (Deutschland) GmbH ▪ Freie und Hansestadt Hamburg including Hamburgische Gesellschaft für Beteiligungsverwaltung mbH and HEW AG

Source: Commission Decision, Case IV/M. Case IV/M. .1346, 1999 (*EdF/London Electricity*) paragraph 1,5; Commission Decision, Case IV/M. Case IV/M. .1402, 1999 (*Gaz de France/BEWAG/GASAG*) paragraph I; Commission Decision, Case IV/M. 1606, 1999 (*EdF/South Western Electricity*) paragraph 3-4; Commission Decision, Case IV/M. Case IV/M. . 1659, 1999 (*Preussen Elektra/EZH*) paragraph 4; Commission decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 4-6; Commission Decision Case IV/M. 1842, 2000 (*Vattenfall/HEW*) paragraph 3-5.

6.3.2.2 Aggregated Community Wide Turnover

The second criterion for the establishment of a Community dimension required that at least two undertakings involved exceeded an aggregated turnover threshold of Euro 250 Million within the EU pursuant to Art. 1 II lit. b MR1989 unless two thirds of the EU wide turnover is generated within one and the same member state of all participating companies[669].

The term "aggregated turnover" is again clarified by Art. 5 I 1; II 1-2; III and IV MR1989 whereas the wording of Art. 5 I 2 MR1989 indicates that a turnover will result from EC operations if the vendee of a product is located within the EC. An alternative solution would be to ask whether the products are delivered to a location within the EC as this criterion is more relevant to competition law than the place where the domicile of a person is or a

[669] R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 21, 3. (B) (i) (a), p 860; G. Knieps, Wettbewerbsökonomie (3rd ed.) (Berlin, Germany, Springer, 2008) CH 6.1.7 pp 130-131; U. Immenga, Die Europäische Fusionskontrolle im wettbewerbspolitischen Kräftefeld (1st ed.) (Tübingen, Germany, Mohr, 1993) p 10; C. Koenig, K. Schreiber, Europäisches Wettbewerbsrecht (1st ed.) (Tübingen, Germany, Mohr, 2010) CH 7 III. 3., p 198; I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 2 B II 2. b. 2. p 74; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. II. 2. a) (1) pp 340-341; P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 B. (1) (b) p 373; K. Lange / T. Pries, Einführung in das europäische und deutsche Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2011) CH 4 § 2 II 1. a) p 179; K. Lange / T. Pries, Einführung in das europäische und deutsche Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2011) CH 4 § 2 II 1. a) p 180; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 23 IV. 1. a) pp 537-538; K. Lange, Handbuch zum deutschen und europäischen Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2006) CH 8 § 1 II. 2. a) p 527; T.A. Downes and J. Ellison, The Legal Control of Mergers in the European Communities (1st ed.) (London, U.K., Blackstone Press Limited, 1991) pp. 55-56; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 IV 3. b) p 204; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1400, p 552; A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 370, p 173; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 15, p 513 and § 15 marginal note 22, p 516; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.2 (2) (b) (i) p 650; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.34, p 548 and marginal note 5.158, p 578; J. P. Terhechte, (ed.), Internationales Kartell- und Fusions-kontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.25, p 1823; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 3. B. (ii), p 1103; E. Fox & D. Gerard, EU Competition Law (1st ed.)(Cheltenham, UK, Elgar, 2017) CH 6 A.1., p 235.

company is incorporated[670]. As a matter of fact, both interpretations do not question the extraterritorial application of MR1989 which is introduced by this criterion[671]. However, it is beyond the scope of the doctoral paper to discuss the geographic allocation of sales in tangible goods in greater detail[672].

With regard to services, the place of the consumer is generally relevant in accordance with the wording. This should be interpreted as the place where the consumer is provided with the service[673]. However, some exceptions apply[674].

6.3.2.3 Two-Thirds Rule Art. 1 II MR1989

Thirdly, a Community dimension is constituted by a negative criterion that must not be fulfilled according to the last part of Art. 1 II MR1989: MR1989 is inapplicable if all the relevant undertakings generate two-thirds of the EC turnover figures within one and the same single Member State[675]. In the case M. 3986 Gas Natural / Endesa the competence of the Commission was denied owing to the two-thirds rule and the Dutch clause was not applicable[676]. The same was true in the concentration RWE / VEW[677].

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670 M. Broberg, *The Geographic Allocation of Turnover under The Merger Regulation*, ECLR 104 (1997).

671 Any concentration involving a company with larger turnovers owing to sales to the EC is caught; q.v. S. O'Keeffe, *Merger Regulation Thresholds: An Analysis of the Community-Dimension Thresholds in Regulation 4064/89*, ECLR 22 (1994).

672 For instance it is suggested to alleviate the burden by means of several assumptions: Firstly, agents in a third country will generate external turnover (ignoring potential re-imports). Secondly the direct export country is relevant (even if a second re-export in another external country is possible). Thirdly, potential re-sales to community areas are ignored. Finally, sales of goods with a view of reselling prior to delivery are treated in accordance with the place of the purchaser q.v. M. Broberg, *The Geographic Allocation of Turnover under The Merger Regulation*, ECLR 104-105 (1997). Internet sales of tangible goods are solved on the basis of the point of delivery. Q.v. I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.7 p 665; q.v. J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.30, p 1825.

673 i.e. the place of residence of the consumer if the provider travels to the consumer or the residence of the provider if the consumer travels to the provider; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.7 p 665; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.30, p 1825.

674 With regard to transport of persons a 50-50 method or a point of sale criterion is more appropriate as there is no single place where services are provided. If telecommunications services are broadcast the residence of the consumer is relevant. With respect to mobile networks, the actual place of the consumer should be relevant so as to generate international turnovers of a network operator if a consumer uses roaming services abroad. Internet sales of intangible goods and services provided by means of downloads of music/software should be allocated by means of the place of the provider owing to the difficulties of the establishment of the consumer's location q.v. M. Broberg, *The Geographic Allocation of Turnover under The Merger Regulation*, ECLR 105-107 (1997); I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.7 p 666.

675 i.e. If undertaking V achieves 70% of turnover in Sweden and undertaking H 70% in Germany, a community dimension will be available. The application of the two-thirds rule is explained in the three Implementing Regulations: Annex I Guidance Note IV (Art.1) of Annex I Chapeau of Section 5 of Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O. J. L 336, 31/12/1993 p. 7; Annex I Guidance Note IV (Art. 1) of Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 377, 31/12/1994 p 1 including Annex I (Form CO); Annex I Guidance Note III (Art. 1) Commission Regulation 447/1998/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 061, 02/03/1998, p 1 Including Annex I (Form CO); C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339; W. Veelken, M. Karl, S. Richter, Die Europäische Fusionskontrolle (1st ed.) (Tübingen, Germany, Mohr, 1992) III p 9; I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 2 B II 2. b. 2. p 74; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. II. 2. a) (1) pp 340-341; P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 B. (1) (b) p 373; CH 14 B. (2) (b) pp 383-384; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 IV 3. b) p 204; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1400, p 552; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 177, p 1253; I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 9 III. 3. b), p 257; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.071, p 631; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.34, p 548 and marginal note 5.158, p 578; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.25, p 1823; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 3. B. (ii), p 1103.

676 J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. II. 2. a) (1) p 341; C. VI. 3. c) (4) p 588; P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 B. (2) (b) pp 386-388; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 170, p 716, § 34 marginal note 177, p 1253.

677 G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 177, p 1253; q.v. W. Kurzlechner, Fusionen Kartelle Skandale (1st ed.) (Munich, Germany, Redline Wirtschaft, 2008) CH 12, p 239.

6.3.3 Modifications of the One-Stop-Shop Principle: Art. 1 II; 22 III - V; 19; 9; 21 III MR1989 and the Residual Application of Art. 101 and 102 TFEU (Art. 81 and 82 ECT)

Lastly, the Community dimension and thereby the scope for the application of MR1989 may be either extended or limited by provisions which modify the one-stop shop principle as laid down in Art. 21 I and II MR1989[678].

6.3.3.1 One-Stop-Shop Principle

Art. 21 I MR1989 regulates that the Commission in general has an exclusive jurisdiction as to the control of abovementioned concentrations - subject to a review by the CJEU (one-stop-shop)[679]. Consequently, it is unlawful for national authorities to apply MR1989 in national merger control proceedings. The concept is completed by the prohibition of domestic authorities to initiate national merger control proceedings with a view to apply national competition laws under Art. 21 II MR1989[680].

Both provisions are very similar to Art. 9 I REG17 (COUNCIL REGULATION (EC) NO. 1/2003)[681] and the concept is justifiable as it prevents legal uncertainty owing to parallel lengthy transnational and national proceedings with the risk of inconsistent results[682]. However, several provisions within or outside MR1989[683] modify the principle so as to take specific interests into account to the detriment of legal certainty.

6.3.3.2 Mandatory Co-operation under Art. 19 MR1989

Art. 19 MR1989 (Art. 19 MR2004) contains the most relevant limitations of the one-stop shop principle. The provision obliges the Commission not only to communicate notifications and related materials to the authorities of the Member State concerned[684] but also to co-operate as to the proceedings[685] and to consult the "Advisory Committee on Concentrations" before a decision under Art. 8 I-VI, Art. 14 and 15 MR2004 is taken (Art. 19 III MR2004)[686].

The communication of notifications and documents facilitates a close monitoring process of the factual developments on the common market by domestic authorities. Thereby, they are enabled to control the legal

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678 R. Bechtold/W. Bosch/I. Brinker/S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) FKVO Einf. p 799.

679 I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 2 B I 1 pp 69-70; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. I. 3. a) (1) p 276; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1373, p 544; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 3, p 510 and § 15 marginal note 10 p 512; A. Ezrachi, EU Competition Law (5th Ed.) (London, UK, Bloomsbury, 2016) CH 9, p 400; E. Fox & D. Gerard, EU Competition Law (1st ed.)(Cheltenham, UK, Elgar, 2017) CH 6 A.1., p 235.

680 W. Veelken, M. Karl, S. Richter, Die Europäische Fusionskontrolle (1st ed.) (Tübingen, Germany, Mohr, 1992) IV 3 a p 22; I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 2 B I 1 pp 69-70; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. I. 2. a) p 272, C. I. 3. a) (1) p 276; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1373, p 544; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 3, p 510; § 15 marginal note 5, p 510..

681 i.e. the sole competence to apply derogations from Art. 81 I ECT under Art. 81 III ECT.

682 the so-called double jeopardy problem.

683 i.e. Art. 19; 9; 21 III; 1 II in combination with Art. 22 III-V MR1989 on the one hand and Art. 81, 82, 89 ECT on the other hand.

684 Art. 19 I MR1989; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 VII 5. p 230; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5 marginal note 5.300, p 609.

685 Art. 19 II MR1989.

686 Art. 19 III-VII MR1989; I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 2 E VI 3. p 180; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 23 VI. 9. b) p 551; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 VII 5. p 230; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck,

interpretation of the cases in the early stages of a case. As a matter of fact, these procedural rights will - a priori - influence the substantial decision making of the Commission as the latter will try to reduce the scope for conflicts to the maximum extent.

Secondly, the Commission is coerced by Art. 19 II 1 MR1989 to co-operate closely with national authorities when proceedings are carried out, especially with regard to obtaining information by means of investigations. As far as a potential referral decision under Art. 9 MR1989 is concerned[687], it shall provide for hearings so that national authorities can express their views and has to grant access to the file[688]. The referral may be initiated even before the notification (Art. 4 IV MR2004 Referral from the Commission to a member state)[689]. Thereby, Art. 19 II MR1989 repeats and completes the rationale behind Art. 19 I MR1989. The Committee has no pro-active role as it is not consulted in the first phase of proceedings under Art. 6 MR1989 which is sometimes criticised[690].

Contrarily, as far as the Commission intends to issue 2nd stage decisions[691], impose sanctions[692] or use powers based on Commission legislation implementing MR1989[693], the Advisory Committee[694] has to be briefed and consulted in a joint meeting pursuant to Art. 19 III; V MR1989. Its opinion will be attached to the draft decision[695] and the Commission is legally obliged to consider the arguments put forward by the Committee[696]. However, as the Commission is only bound to take the opinion into "utmost account" and as it is mandatory to indicate to which extent the arguments were honoured, an implicit power to derogate from the opinion must exist. Therefore, it is persuasive to argue that the Commission can overrule the opinion with due reasoning. This result is backed by the Varta-Bosch case[697]. Finally, the Committee's role is slightly strengthened by the fact that it may recommend a publication of its opinion which is especially relevant to dissenting positions[698].

2008) § 17 marginal note 105, p 692 and § 17 marginal note 191, p 723; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.30 (3) p 772.

687 Commission Notice on case referral in respect of concentrations O. J. C 56, 2005, p 2; V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 14 III 2. p 132; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 1, p 509; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.011, p 598.

688 Q.v. Commission Notice on the rules for access to the file regarding the application of Art. 81 and 82 EC, Art. 53, 54 and 57 EEA and the MR2004, O. J. C 325 of 22/12/2005, p 7.

689 G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 1, p 509; § 17 marginal note 174 p 718; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.090, p 638; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.34, p 548 and marginal note 5.226, p 596 and marginal note 5.232, p 597; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontroll-verfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.43, p 1829; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 4. B. (ii), p 1125; A. Ezrachi, EU Competition Law (5th Ed.) (London, UK, Bloomsbury, 2016) CH 9, p 401; E. Fox & D. Gerard, EU Competition Law (1st ed.)(Cheltenham, UK, Elgar, 2017) CH 6 A.1., p 236.

690 W. Elland, *The Merger Control Regulation and its Effect on National Merger Controls and The Residual Application of Articles 85 and 86 ECT*, ECLR 25 (1991).

691 Art. 8 II-V MR1989.

692 Art. 14, 15 MR1989.

693 the legal basis for secondary Commission legislation is Art. 23 MR1989.

694 established under Art. 19 IV MR1989.

695 Art. 19 VI 3 MR1989.

696 Art. 19 VI 4 MR1989.

697 The Commission ignored the Committee's opinion in favour of an incompatibility decision; q.v. Commission Decision, Case IV/M. 12, 1991 (*Varta/Bosch*).

698 The Commission, however, has discretion, whether or not to publish arg ex Art. 19 VII MR1989 "may recommend".

The further internal proceedings of the Commission provide for a submission of the statement of objections and the preliminary draft decision to its juridical service, the chief-economist and to inter-Commission service meetings[699].

6.3.3.3 German Clause pursuant to Art. 9 MR1989

The clarity of the scope of transnational merger control law is weakened by the fact that Commission may refer a notified concentration - although it fulfils the abovementioned turnover thresholds and the two-thirds rule - to competent national authorities pursuant to a complex assessment pursuant to Art. 9 II 1 lit. b MR1989 - the so-called German Clause[700] - provided that national authorities apply on time and allege that the concentrations creates a new or strengthens an existing dominant position which causes detriment to the efficacy of competition on a relevant geographic market[701] that must be a distinct national market which is not an essential part of the common market[702]. Contrary to the former merger control law on the basis of Art. 102 and 101 TFEU (Art. 82 and 81 ECT), it must be stressed that it is not important whether the relevant, distinct market is a significant part of the common market or not[703]. The clause is an expression of the subsidiarity principle under Art. 5 EUT[704] and has to be interpreted as a narrow exception[705].

If the Commission backs the allegations, the Commission may issue a discretionary decision under Art. 9 III 1 lit. a-b MR1989 whether or not to refer the case subject to the review of the CJEU[706]. If it disapproves either the detrimental effects of the concentration or negates a separation of markets, a decision under Art. 9 III 2 MR1989

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699 G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 107, p 693.

700 It was introduced because Germany insisted on a referral based on the unstained fear that the Commission would ignore specific domestic results of a concentration; q.v. W. Elland, *The Merger Control Regulation and its Effect on National Merger Controls and The Residual Application of Articles 85 and 86 ECT*, ECLR 20 (1991); I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 2 B I 2 b. bb. p 71; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. I. 2. a) p 272; C. I. 3. b) (2) pp 279-280; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 23 V. 2. pp 542-543; K. Lange, Handbuch zum deutschen und europäischen Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2006) CH 8 § 3 III. p 647; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 III p 194; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1405, p 553; I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 9 III. 3. b), p 258; W. Kurzlechner, Fusionen Kartelle Skandale (1st ed.) (Munich, Germany, Redline Wirtschaft, 2008) CH 13, p 276; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.003, p 595; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.34, p 548 and marginal note 5.239, p 598.

701 I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 6 2. b)(3)(a), p 188; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.4 (2) p 654; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.214, p 706; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.59, p 1834.

702 Art. 9 II MR1989. A distinct market is defined in Art. 9 VII MR1989. V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 14 III 2. p 132; U. Immenga, Die Europäische Fusionskontrolle im wettbewerbspolitischen Kräftefeld (1st ed.) (Tübingen, Germany, Mohr, 1993) p 11; W. Veelken, M. Karl, S. Richter, Die Europäische Fusionskontrolle (1st ed.) (Tübingen, Germany, Mohr, 1992) III p 11, IV 3 b pp 23-24, IV 3 b (1) (c) and (2) p 26; I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 2 B I 2 b. bb. p 71; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. VI. 3. p 565; K. Lange / T. Pries, Einführung in das europäische und deutsche Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2011) CH 4 § 2 II 3. a) pp 183-184; T.A. Downes and J. Ellison, The Legal Control of Mergers in the European Communities (1st ed.) (London, U.K., Blackstone Press Limited, 1991) pp. 79-80, 180, 211; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 145-146, p 705; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.100, p 642; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 3. C. (iii) a., p 1111; A. Ezrachi, EU Competition Law (5th Ed.) (London, UK, Bloomsbury, 2016) CH 9, p 400; E. Fox & D. Gerard, EU Competition Law (1st ed.)(Cheltenham, UK, Elgar, 2017) CH 6 A.1., p 236.

703 q.v. the last bid of Art. 9 II MR1989.

704 Q.v. Art. 5 ECT; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 142, p 704.

705 G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 147, p 706.

706 V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 14 III 2. p 132; U. Immenga, Die Europäische Fusionskontrolle im wettbewerbspolitischen Kräftefeld (1st ed.) (Tübingen, Germany, Mohr, 1993) p 11.

is due to be issued. A failure to act leads to the legal assumption that the case is referred[707]. The rationale behind the clause relates to the fear that the Commission might not spend due attention to national market structures as it traditionally focused on potential violations of Art. 81 and 82 ECT (Art. 101 and 102 TFEU) affecting the common market generally by means of cross border transactions. However, this rationale is no longer adequate because the determination of purely national markets becomes less relevant with growing convergence. Therefore, the Commission interprets this clause extremely restrictive so that is hardly relevant in practical terms despite of a series of applications[708]. This includes a separation of the relevant markets in distinctive and international markets so that a partial referral of a concentration is justifiable[709]. For example, the German federal cartel office applied for a referral in the *VEBA/VIAG* case[710]. The UK authorities did the same in the case *EdF/London Electricity* case[711]. Both applications were rejected. Both cases will be discussed later. If the Commission fails to issue a decision under Art. 9 III 2nd sentence, IV lit. b, V MR2004 within 65 days it is deemed to have referred the case to the member state[712].

6.3.3.4 Safeguard under Art. 21 III MR1989

Art. 21 III 1 MR1989 contains a third challenge for a clear distinction of jurisdictions between the Commission and domestic authorities as the provision vests Member States with the power to control concentrations that fulfill the global and community wide turnover criteria including the two-thirds rule providing that legitimate interests beyond the scope of MR1989 are concerned and on the condition that the interests do not interfere with the general principles of EC law[713]. The second sentence defines these interests as public security, media plurality or prudential rules regarding the control of credit and insurance undertakings[714]. Regarding the energy sector, the derogation related to public security is of predominant concern. However, the scope of the public security exemption is limited: As the structure of markets immediately related to national security (e.g. weapon procurement) is already exempted from EC Law by means of Art. 346 I lit. b TFEU (Art. 296 I lit b ECT), it is persuasive to argue that Art. 21 III 2 1st variant MR1989 should be applied restrictively. It should be solely relevant to markets dealing with strategic resources thus having a mediate influence on strategic industries.

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[707] Art. 9 V MR1989.
[708] e.g. for failed applications: Commission Decision, Case IV/M. 12, 1991 (*Varta/Bosch*); Commission Decision, Case IV/M. 165, 1991 (*Alcatel/AEG Kabel*); Commission Decision, Case IV/M. 222, 1992 (*Mannesmann/Hoesch*); Commission Decision, Case IV/M. 238, 1992 (*Siemens/Philips*).
[709] q.v. Commission Decision, Case IV/M. 180, 1991 (*Steetley/Tarmac*).
[710] I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 2 B I 2 b. bb. p 71.
[711] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 149, p 706.
[712] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 157, p 709.
[713] T.A. Downes and J. Ellison, The Legal Control of Mergers in the European Communities (1st ed.) (London, U.K., Blackstone Press Limited, 1991) pp. 65-66, 212; I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 9 III. 3. b), p 258; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.2 (2) (a) p 649.
[714] q.v. W. Elland, *The Merger Control Regulation and its Effect on National Merger Controls and The Residual Application of Articles 85 and 86 ECT*, ECLR 24 (1991); I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 9 III. 3. b), p 258.

Thereby, the provision's meaning is co-ordinated with Art. 36 TFEU (Art. 30 ECT) as it was applied to the Campus Oil case[715].

The very existence of Art. 23 III 3 MR1989 gives evidence that this list of legitimate interests is not an exhaustive one. However, additional interests are only considered as legitimate ones after they were communicated to the Commission and got an approval.

The scope for additional interests is narrowed by Art. 21 III 1 MR1989 in combination with Art. 2 I lit. a-b and Recital 13 MR1989 as the latter provisions include broad public interest aspects[716] beyond the scope of traditional competition policy.

As a matter of fact, the restrictive approach is backed by the rationale of an efficient transnational merger control law which demands that the term legitimate interest should be defined as narrow as possible so as to avoid contradictory yardsticks for the assessment of concentrations. This is true for both listed interests and the ones which could be accepted by means of an approval.

Thus, it was not surprising that the Commission refused to refer the Case *EdF/London Electricity* to UK authorities[717] as merger control law is distinct from proper national industry regulation.

6.3.3.5 Dutch Clause Art. 22 III-V MR1989

Based on the fear of Member States which had not established comprehensive domestic merger control laws, Art. 22 III-V MR1989 was introduced[718]. The so-called Dutch Clause is lex specialis to Art. 1 I MR1989 based on the latter provision's wording[719] and affects concentrations owing to Art. 3 MR1989/2004 without a community dimension in terms of Art. 1 II-III MR1989/MR2004 and with cross-border effects on trade between member states and threatens competition in the applying member state[720]. The Dutch clause is available if a concentration reaches a global turnover of 2 bn EUR and a turnover of at least EUR 100 million in at least three member states[721]. It has been applied 35 times[722].

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715 CJEU Case C-72/83 *Campus Oil Ltd and others v Minister of Industry and Energy and others* [1984] ECR 2727.

716 Especially industrial policy aspects in Art. 2 I lit b "economic progress" and in Recital 13 "economic and social cohesion".

717 G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 149, p 706.

718 It represents a compromise between Member States who insisted on high turnover criteria to limit the scope of MR1989 and those who insisted on low thresholds so as to expand the jurisdiction of the Commission. V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 14 III 2. p 132; W. Veelken, M. Karl, S. Richter, Die Europäische Fusionskontrolle (1st ed.) (Tübingen, Germany, Mohr, 1992) III p 11, IV 3 d p 30; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. I. 2. a) p 272; C. I. 3. a) (2) pp 276-277, C. VI. 3. p 565; C. VI. 3. c) p 582; P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 B. (1) (d) p 377; T.A. Downes and J. Ellison, The Legal Control of Mergers in the European Communities (1st ed.) (London, U.K., Blackstone Press Limited, 1991) pp. 180, 184.

719 Art. 1 I MR1989: "Without prejudice to Art. 22 ..."

720 T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 III p 194; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1406, p 553; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 166, p 714; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.107, p 647; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5 marginal note 5.266, p 603; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.73, p 1838; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 3. D. (iii) a., p 1120; A. Ezrachi, EU Competition Law (5th Ed.) (London, UK, Bloomsbury, 2016) CH 9, p 401; E. Fox & D. Gerard, EU Competition Law (1st ed.)(Cheltenham, UK, Elgar, 2017) CH 6 A.1., p 236.

721 G. Knieps, Wettbewerbsökonomie (3rd ed.) (Berlin, Germany, Springer, 2008) CH 6.1.7 p 131; C. Koenig, K. Schreiber, Europäisches Wettbewerbsrecht (1st ed.) (Tübingen, Germany, Mohr, 2010) CH 7 V. 1., p 215; W. Veelken, M. Karl, S. Richter, Die Europäische Fusionskontrolle (1st ed.) (Tübingen, Germany, Mohr, 1992) II p 90; K. Lange / T. Pries, Einführung in das europäische und deutsche Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und

Pursuant to an application[723] put forward by domestic officials who think that national authorities will not be able to deal with a concentration that does not meet the turnover thresholds or the two-thirds rule, the Commission may issue a decision in order to obtain jurisdiction over the case[724]. As the artificial application of MR1989 is limited to Art. 2 I lit a-b; 5; 6; 8, 10-20 MR1989, the proceedings will differ slightly from the ordinary ones[725]. It is important to stress that the (in)compatibility decision must focus on cross-border aspects and has to comply with the proportionality test[726].

6.3.3.6 Residual Application of Art. 101, 102 pursuant to Art. 109 TFEU (Art. 81, 82 pursuant to Art. 89 ECT)

Finally, the unitary jurisdiction of the Commission under Art. 21 I-II MR1989 could be threatened if either national courts on individual requests, domestic competition authorities under Art. 104 TFEU (Art. 84 ECT) or the Commission under Art. 105 TFEU (Art. 85 ECT) insist on a residual application of Art. 101 and 102 TFEU (Art. 81 and 82 ECT) with respect to concentrations regardless whether the turnover criteria of MR1989 are fulfilled or missed[727].

First of all is has to be examined whether and how Art. 102 TFEU (Art. 82 ECT) is applicable to concentrations. It has been well established above, under which conditions and accompanied by which drawbacks Art. 102 TFEU (Art. 82 ECT) - enjoying direct effect - was applicable to concentrations prior to the adoption of MR1989 according to the Continental Can doctrine[728]. Therefore, the only question that was not addressed is if MR1989 has the legal power to exclude Art. 102 TFEU (Art. 82 ECT) for concentrations either within or outside its scope based on the attainment or failure to meet the turnover criteria[729].

First of all, the Art. 21 I-II MR1989 does not intend to disapply substantive norms like Art. 101 et seq. TFEU (Art. 81 et seq. ECT) as the wording only lists procedural regulations[730] although the teleological interpretation

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Wirtschaft, 2011) CH 4 § 2 II 3. c) p 186; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 166, p 714; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.4 (3) p 655 and § 7.4 (4) p 656.

[722] http://ec.europa.eu/competition/mergers/statistics.pdf (28/02/2019). Q.v. 4 times; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. VI. 3. c) p 582.

[723] Art. 22 III MR1989.

[724] U. Immenga, Die Europäische Fusionskontrolle im wettbewerbspolitischen Kräftefeld (1st ed.) (Tübingen, Germany, Mohr, 1993) p 15; I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 2 B I 2 b. cc. p 72.

[725] e.g. no prior notification requirement under Art. 4; no suspensive effect under Art. 7 MR1989; no exclusive jurisdiction under Art. 21 I-II MR1989.

[726] Art. 22 III and V MR1989; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. VI. 3. c) (2) p 584.

[727] E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 23 II. 2. pp 531-532; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 3. E. (i), p 1122.

[728] supra at 5.1.8.1 Arguments Supporting Merger Control: The Continental Can Doctrine; W. Veelken, M. Karl, S. Richter, Die Europäische Fusionskontrolle (1st ed.) (Tübingen, Germany, Mohr, 1992) IV 4 b p 33.

[729] q.v. this issue was discussed for Art. 81 ECT: supra at 5.2.3.

[730] REG17 (COUNCIL REG (EC) NO. 1/2003) and Council Regulation 4056/86/EEC Laying down Detailed Rules for The Application of Art 85 and 86 of The Treaty to Maritime Transport, O. J. L 378, 31/12/1986, p 4 and Council Regulation 3975/87/EEC Laying Down the Procedure for The Application of the Rules on Competition to Undertakings in the Air Transport Sector, O. J. L 374, 31/12/1987, p 1.

strongly demands an exclusion of Art. 101 and 102 TFEU (Art. 81 and 82 ECT) at least regarding concentrations in terms of Art. 3 MR1989 which are consistent with the relevant thresholds[731].

From the systematic point of view, MR1989 represents a lex specialis which normally excludes the application of general norms on concerted practices and abuses of dominant positions[732]. However, this finding is not persuasive as it is only valid for leges speciales and leges generales sharing the same legal rank.

Indeed, the legal rank of Art. 102 TFEU (Art. 82 ECT) - belonging to primary EC law - is without any doubt higher than the one of secondary EC legislation. Thereby, MR1989 has no power to exclude Art. 102 TFEU (Art. 82 ECT). A second thought backs this finding: MR1989 would exceed its legal basis, i.e. Art. 103 and 352 TFEU (Art. 83 ECT and 308 ECT) as secondary legislation which excludes primary law is quite the opposite of a norm that shall implement said primary law pursuant to the wording of Art. 103 I, II lit. a-b TFEU (Art. 83 I[733]; II lit a-b ECT). Finally, it is not persuasive to try to circumvent this idea by means of a broad interpretation of Art. 352 TFEU (Art. 308 ECT): Art. 352 TFEU (Art. 308 ECT) would be extended beyond its due scope if it was used as a legal means for a discussed circumvention of the wording of existing treaty law.

Consequently, MR1989 is not a lex specialis provision to a control of concentrations under Art. 102 TFEU (Art. 82 ECT). Such control can be implemented on the basis of the Continental Can doctrine regardless whether a given concentration meets or fails to meet the turnover criteria of MR1989.

Therefore, everyone retains the right to initiate domestic courts proceedings with a view to assess any kind of concentration on the basis of Art. 102 TFEU (Art. 82 ECT). However, a protocol statement of the Commission and the Council from 19/11/1989 regularly excludes the application of Art. 101 and 102 TFEU to concentrations[734].

Alternatively, any individual may ask the Commission to assess a concentration under Art. 102 TFEU (Art. 82 ECT). It is interesting to note that the procedural law that the Commission has to apply in order to deal with such a request will differ: The Commission is prevented from applying REG17 (Council Regulation (EC) No. 1/2003) and certain other regulations[735] to concentrations which cope with the thresholds of MR1989 as a result of Art. 22 II MR1989. Therefore, the Commission has to rely on the weak and subsidiary procedure that is

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[731] q.v. W. Elland, *The Merger Control Regulation and its Effect on National Merger Controls and The Residual Application of Articles 85 and 86 ECT*, ECLR 25-26 (1991).

[732] F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1374, p 544.

[733] The limited relevance of Art. 83 as a legal basis for MR1989 is discussed by W. Elland, *The Merger Control Regulation and its Effect on National Merger Controls and The Residual Application of Articles 85 and 86 ECT*, ECLR 28 (1991).

[734] F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1374, p 544.

[735] and other regulations, i.e. Council Regulation 4056/86/EEC Laying down Detailed Rules for The Application of Art 85 and 86 of The Treaty to Maritime Transport, O. J. L 378, 31/12/1986, p 4 and Council Regulation 3975/87/EEC Laying Down the Procedure for The Application of the Rules on Competition to Undertakings in the Air Transport Sector, O. J. L 374, 31/12/1987, p 1.

provided by Art. 105 TFEU (Art. 85 ECT[736]) if it wants to enforce Art. 102 TFEU (Art. 82 ECT) in high turnover cases.

Sometimes, it is suggested that Art. 101 and 102 TFEU (Art. 81 and 82 ECT) should be implemented in case of concentrations regardless of their turnover figures on the exclusive basis of Art. 105 TFEU (Art. 85 ECT) so that the relevance of Art. 22 II MR1989 is extended to concentration in terms of Art. 3 MR1989 even if the thresholds of Art. 1 II; 5 MR1989 are not exceeded[737]. Thereby, REG17 (Council Regulation (EC) No. 1/2003) and the other procedural regulations would be ignored.

However, an alternative idea seems persuasive: that the Commission may initiate proceedings to implement Art. 102 TFEU (Art. 82 ECT) under REG17 (Council Regulation (EC) No. 1/2003) if a concentration in terms of Art. 3 MR1989 does not exceed the thresholds of Art. 1 II; 5 MR1989 as the meaning of Art. 22 MR1989 cannot go beyond the scope of MR1989. However, this procedural dispute is less relevant as the Commission indicated that it will be reluctant to apply Art. 101-102 TFEU (Art. 81-82 ECT) to concentrations with minor figures[738].

If the individual's application for proceedings on either procedural base is rejected by the Commission, one could raise a court proceeding on the grounds on the grounds of failure of the Commission to act pursuant to Art. 232 ECT. If proceedings are initiated but result is not adequate, the applicant could challenge the decision under Art. 263 TFEU (Art. 230 ECT).

However, the legal remedies based on a residual application of Art. 102 TFEU (Art. 82 ECT) will often not generate satisfactory results due to the substantive restrictions of a control regime under Art. 102 TFEU (Art. 82 ECT) as it was concluded above[739].

These findings - backing a substantive residual application of Art. 102 TFEU (Art. 82 ECT) to concentrations either governed by REG17 (COUNCIL REGULATION (EC) NO. 1/2003) or Art. 105 TFEU (Art. 85 ECT) - are transferable to a residual application of Art. 101 TFEU (Art. 81 ECT) to concentrations as well owing to the comparable rationale as to Art. 103 and 352 TFEU (Art. 83 and 308 ECT) as the legal bases of MR1989.

The most difficult question that remains is whether and to which extent Art. 101 TFEU (Art. 81 ECT) will be indeed applicable to concentrations. As this controversial question was exhaustively discussed above[740], it can be summarised that it is persuasive to argue that the approach chosen by the CJEU in the BAT case is still a

[736] i.e. The Commission has to examine potential violations ex officio or on request of Members pursuant to Art. 85 I 1 ECT. If an inconsistency is indeed established, it will suggest a remedy (Art. 85 I 2 ECT). Provided that the suggestion is ignored, the Commission issues a decision stating a violation (Art. 85 II 1 ECT). Moreover, the decision may vest a Members State with the power to implement measures strictly necessary to terminate the infringement (Art. 85 II 2 ECT).

[737] q.v. W. Elland, *The Merger Control Regulation and its Effect on National Merger Controls and The Residual Application of Articles 85 and 86 ECT*, ECLR 27 (1991).

[738] Commission, 19th Report on Competition Policy (1989) p 268 (statements in the minutes of the EC Council concerning MR1989).

[739] supra at 5.1.8.3 Drawbacks of Merger Control under Art. 82 ECT.

[740] supra at 5.2 EC Merger Control under Art. 81 ECT and sub-sections 5.2.1- 5.2.5.

valuable doctrine[741]. Therefore, it is superior to conclude that this doctrine is still a due legal basis for dealing with concentrations under Art. 101 TFEU (Art. 81 ECT) that are used as instruments for the disguised establishment of platforms for restrictive practices between parent undertakings which remain independent.

However, it should be noted that the procedural weaknesses to control concentrations by means of either REG17 (COUNCIL REGULATION (EC) NO. 1/2003) or Art. 105 TFEU (Art. 85 ECT) are so predominant that it remains highly unlikely that a valuable decision is issued on time. Additionally, it is a contestable idea to rely on national courts which can hardly apply the difficult BAT doctrine as it was established by the CJEU without frequent and time consuming preliminary hearing proceedings under Art. 267 TFEU (Art. 234 ECT) in combination with the hearing regulation[742].

With regard to domestic competition authorities, is can be stated that they cannot successfully apply Art. 102 or 101 TFEU (Art. 82 or Art. 81 ECT) to concentrations on the legal basis of Art. 104 TFEU (Art. 84 ECT). The reason is that Art. 104 TFEU (Art. 84 ECT) is subsidiary to transnational proceedings based on secondary EC law pursuant to its wording. As MR1989 provides for merger control proceedings for concentrations meeting the turnover criteria and REG17 (COUNCIL REGULATION (EC) NO. 1/2003) will be applicable to the remaining ones below the thresholds, no room is left for national proceedings under Art. 104 TFEU (Art. 84 ECT).

6.3.3.7 Evaluation

Having discussed the one-stop shop principle that is based on the community dimension criteria of Art. 1 II; 5 MR1989 in combination Art. 21 I-II MR1989 and the numerous derogations under Art. 9[743]; 19; 21 III; 22 III-V[744] and the residual application of Art. 101 and 102 TFEU (Art. 81 and 82 ECT), it is coercive to conclude that distinction of jurisdictions as to merger control is at least from the legal point of view not as clear as desirable. The situation could be remedied if a revision of the ECT included at least a provision or a chapter on merger control. Such a provision would share the same legal rank with Art. 101 and 102 TFEU (Art. 81 and 82 ECT). Therefore it would become legitimate to regard such a provision as an exhaustive lex specialis which removes any loopholes for a highly complex residual application of Art. 101 and 102 TFEU (Art. 81 and 82 ECT). Although it is mandatory from the doctrinal point of view to argue that either a national court on individual request or the CJEU - on the basis of individuals who challenge potential refuses of the Commission to initiate proceedings under Art. 101, 102 TFEU (Art. 81, 82 ECT), REG17 (COUNCIL REGULATION (EC) NO. 1/2003) with regard to concentrations below the thresholds or under Art. 101, 102, 105 TFEU (Art. 81, 82, 85 ECT)

[741] q.v. supra at 5.2.2 New Doctrine Introduced by the BAT Judgement.
[742] Commission Regulation (EC) No. 2842/1998 on the Hearing of Parties in Certain Proceedings under Art. 101 and 102 TFEU, O. J. L 354, 30/12/1998, p 18.
[743] V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 14 III 2. p 132.

regarding concentrations above the thresholds - can invoke Art. 101 TFEU (Art. 81ECT) at the present stage, it is too complex an option to be justifiable from the point of legal clarity.

6.4 Pre-Notification Stage

The next sections will not only analyse how the parties may proceed and enter into negotiations in the pre-notification stage so as to prepare a notification under the (short) form CO[745]. Additionally, it will be reported how informal phase one proceedings are initiated and in which manner examinations are conducted by the Commission so as to prepare a decision in terms of Art. 6 I lit. a-c MR1989[746]. Thirdly, if an initiation of formal phase two proceedings decision has been taken pursuant to Art. 6 I lit. c MR1989, it will be reported how the Commission formally examines the case so that the substantive criteria are established that govern which final decision under Art. 8 II-VI MR1989 will be issued[747].

6.4.1 Obligation to Notify a Concentration

First of all, Art. 4 I MR1989 (Art. 4 I-II MR2004) governed that the merging entities or the entities acquiring control (the notifying parties, not the vendor and the target) were obliged to notify a concentration)[748] that has a community dimension under Art. 1 II-III MR2004[749] not later than one week after a concentration has been effectuated[750] unless a derogation is granted by the Commissioner under Art. 7 III MR2004[751]. The contents of the application is fixed by Art. 2 and 3 Commission Implementing Regulation (EU) 1269/2013 and its attached form CO[752]. Form CO consists of pieces of information on the parties, the concentration, the relevant markets, the structure of competition (market shares, degree of concentration, structure of demand and supply, barriers to

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744 V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 14 III 2. p 132.
745 I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.25 p 751; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.118, p 654 and marginal note 8.128, p 659; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.84, p 1842 and marginal note § 73.116, p 1850.
746 V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 18 III p 160; R. Bechtold/W. Bosch/I. Brinker/S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) FKVO Einf. p 800; A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 393, p 185.
747 q.v. § 40 III GWB; T. Lettl, Kartellrecht (4th ed.) (München, Germany, Beck, 2017) § 10 VII 4. p 377.
748 Art. 1 I; 3; 4 II MR2004; Art. 11 (a) Commission Implementing Regulation (EU) No. 1269/2013 of 5 December 2013 amending Commission Regulation (EC) No.802/2004 implementing Council Regulation (EC) No.139/2004 on the control of concentrations between undertakings, O. J. L 336, 14.12.2013, pp. 1-36; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1368, p 542 and marginal note 1434, p 566; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 1, p 660, § 17 marginal note 109, p 694; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.004, p 595 and marginal note 8.121, p 656; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.345, p 619; J. P. Terhechte (ed.), Internationales Kartell- und Fusionskontrollverfahrens-recht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.1, p 1815; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 4. A., p 1123.
749 Art. 1 I-II; 5 MR1989.
750 Art. 4 I MR1989; i.e. an agreement is negotiated, a public bid is announced or a controlling interest is purchased. R. Whish, D. Bailey, Competition Law (8th ed.) (Oxford, U.K., OUP, 2015) CH 20, 6 (C), p 866, CH 21 4. (A) p 900; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 13, p 664; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.22 p 746.
751 J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.349, p 620 and marginal note 5.392, p 631.
752 Commission Implementing Regulation (EU) No. 1269/2013 of 5 December 2013 amending Commission Regulation (EC) No.802/2004 implementing Council Regulation (EC) No.139/2004 on the control of concentrations between undertakings, O. J. L 336, 14.12.2013, pp. 1-36**;** F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1434, p 566; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 18-20, p 665; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.23 p 747; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.011, p 597; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.84, p 1842.

entry and market characteristics), the context of the concentration and possible efficiencies triggered by the concentration[753]. Affected markets are those where the parties hold more than 20% and vertical relations where the parties hold more than 30%[754]. Art. 4 II MR1989 states that in case of mergers both partner undertakings are required to submit a joint notification (notifying parties) and in case of an acquisition the acquirer[755]. Compliance with Art. 4 MR1989 is backed by the Commission's authority to impose a fine on those undertakings which fail to comply with said obligations pursuant to Art. 11 I lit. a MR1989.

The details of the notification procedure are governed by an implementing regulation on the basis of Art. 23 MR1989[756]. The rationale of the implementing regulation is to boost legal certainty inter alia by means of prescribing that a specific number of notifications has to be submitted that have to use the standard of the so-called "Form CO"[757]. Form CO consists of 11 sections[758]. Thereby, procedural efficiencies are generated and a yardstick is provided as to the substance of information that is due to be revealed[759]. A Commission notice governs the simplified procedure with a short form CO (Annex II)[760]. Short form CO applies if a conglomerate

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753 J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.405, p 634.

754 J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.405, p 634.

755 J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.82, p 1841.

756 The first implementing regulation was enacted in 1990 and amended in 1993. It was later repealed by the second implementing regulation in 1994 that was itself repealed in 1998 by the third implementing regulation: q.v. Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O. J. L 336, 31/12/1993 p. 7; Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 377, 31/12/1994 p 1 including Annex I (Form CO); Commission Regulation 447/1998/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 061, 02/03/1998, p 1 including Annex I (Form CO); C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339.

757 Recital 4 and Art. 2 Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O. J. L 336, 31/12/1993 p. 7; Recital 4 and Art. 2 Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 377, 31/12/1994 p 1 including Annex I (Form CO); Recital 4 and Art. 2 Commission Regulation 447/1998/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 061, 02/03/1998, p 1 Including Annex I (Form CO); C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339; R. Whish, D. Bailey, Competition Law (8th ed.) (Oxford, U.K., OUP, 2015) CH 20, 6. (C), p 866, CH 21 4. (A) (i) p 901; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. VI. 2. a) (2) (a) pp. 545-549; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal notes 73.84-115, pp. 1842-1850.

758 I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.23 (2) pp. 747-748; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal notes 73.84-115, pp. 1842-1850.

759 Recital 2 and Art. 3 Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation (EEC) No. 4064/1989 on The Control of Concentrations between Undertakings, O. J. L 219, 14/08/1990 p 5 including Annex I (Form CO); Recital 2 and Art. 3 Commission Regulation 3384/1994/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation (EEC) No. 4064/1989 on The Control of Concentrations between Undertakings, O. J. L 377, 31/12/1994 p 1 including Annex I (Form CO); Recital 2 and Art. 3 Commission Regulation 447/1998/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation (EEC) No. 4064/1989 on The Control of Concentrations between Undertakings, O. J. L 061, 02/03/1998, p 1 Including Annex I (Form CO); C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339.

760 Commission Implementing Regulation (EU) No. 1269/2013 of 5 December 2013 amending Commission Regulation (EC) No.802/2004 implementing Council Regulation (EC) No.139/2004 on the control of concentrations between undertakings, O. J. L 336, 14.12.2013, pp. 1-36 ; Commission Notice on a Simplified Procedure for Treatment of Certain Concentrations under MR2004, O. J. C 366 of 14/12/2013, p 5; Commission Notice on a Simplified Procedure for Treatment of Certain Concentrations under MR2004, O. J. 2005, C 56 p 32; Commission Notice on a Simplified Procedure under MR1989 O. J. C 217, 2000, p 32; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.24 p 749; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.011, p 598; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.408, p 635 and marginal note 5.507, p 656; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.116, p 1850.

concentration is applicable or if the affected horizontal markets have a market share of less than 15% and in case of vertical affected markets the market shares are less than 25%[761].

6.4.2 Secretive Talks Regarding Draft Notifications

As it is often questionable whether a concentration with a community dimension is available (Art. 3 and 1 II-III MR2004) the Merger Task Force of the Commission, which was dissolved in 2002[762], is prepared to offer secretive guidance to representatives of anonymous future notifying and other involved parties (merger parties or the acquirer, Recital 11 Implementing Regulation[763]) to discuss the intended concentration[764]. Submitted draft notifications will be discussed in order to determine whether a certain transaction should be notified in reality[765] and if so, which information has to be provided and whether an application for a dispense regarding certain highly confidential matters would be permissible. It has to be stressed that these talks may limit the amount of information that has to be provided[766]. This is in the interest of both the parties and the Commission. Additionally, it may be discussed whether one should apply for a comfort letter[767] or a formal derogation from Art. 101 I TFEU (Art. 81 I ECT) based on Art. 101 III TFEU (Art. 81 III ECT) and Art. 4 I REG 17[768].

However, it remains questionable whether the results of a secretive discussion of the case with potential case-handlers will be of any legal value if a disputes arises in later stages in which the applicant claims that the outcome of the phase one proceedings is inconsistent with statements of officials during the pre-notifications meetings without having given due reason for the alterations.

In spite of this drawback, it should be generally desirable to notify a case under Art. 4 MR1989 rather than under Art. 2 or 4 I REG17 (COUNCIL REG (EC) NO. 1/2003) for several reasons: The merger control procedures are faster, the Commission tends to expand its jurisdiction under MR1989 by means of expansive interpretation. Finally, the proceedings are likely to be closed by means of formal decisions under either Art. 6 or 8 MR1989

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[761] J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.119, p 1851.

[762] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.08, p 542.

[763] Recital 11 Commission Regulation (EC) No. 802/204 of 07 April 2004 Implementing Council Regulation (EC) No.139/2004 on the control of concentrations between undertakings, O. J. L 133, p. 1; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.362, p 624.

[764] J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.123, p 1852.

[765] Recital 8 Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O. J. L 336, 31/12/1993 p. 7; Recital 8 Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 377, 31/12/1994 p 1 including Annex I (Form CO); Recital 8 Commission Regulation 447/1998/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 061, 02/03/1998, p 1 Including Annex I (Form CO); C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 10, p 663.

[766] Annex I Form CO Introduction A. The Purpose of this Form paragraph 3 of Commission Regulation 447/1998/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 061, 02/03/1998, p 1 Including Annex I (Form CO); C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339.

[767] Art. 2 REG17 (COUNCIL REG (EC) NO. 1/2003).

[768] The bases are Art. 4 REG17 (COUNCIL REG (EC) NO. 1/2003) in combination with Art. 81 III ECT.

which are more valuable than informal comfort letters that a conduct does not interfere with Art. 101 TFEU (Art. 81 ECT) because the latter do not prevent national authorities or courts from coming to altering solutions. However, there is no procedural risk, as the Commission is obliged to treat a notification under Art. 4 I MR1989 as an application under Art. 2 or 4 REG17 (COUNCIL REGULATION (EC) NO. 1/2003) if no concentration is found[769]. Moreover, it can be discussed if a Community Dimension is available (Art. 1, 6 I lit. a MR2004), prepares the preparation of Form CO, familiarizes the Commission with the relevant markets, identifies potential remedies under Art. 6 II and 8 II MR2004, provides the opportunity to refer the case to national competition authorities (Art. 4 IV, 9, 22 MR2004 and identifies the scope for derogations from the suspensive effect under Art. 7 III MR2004[770]. The timing for pre-notification contacts extends from two weeks prior to the notification to a few months[771]. The Commission is obliged to strict secrecy (Art. 17 MR2004)[772].

6.5 Phase One

If a concentration is notified, the so-called phase one begins. In this stage multiple considerations are required which relate to the temporal suspension of the implementation, the organisation of the informal proceedings by the former Merger Task Force so as to prepare decisions under Art. 6 MR1989[773]. Additionally, the substantive prerequisites either for a non-applicability, a compatibility or an initiation of formal phase two[774] proceedings decision under Art. 6 MR1989 will be of concern. Lastly, an evaluation will be given.

6.5.1 Suspension of the Concentration

Before and after the notification, the parties were generally prevented from implementing the concentration within the three weeks following a complete notification in accordance with Art. 7 I MR1989[775]. The rationale behind this principal provision is that the Commission can initiate preliminary investigations and spend the necessary time on the due assessment of the facts in order to prepare a decision pursuant to Art. 6 MR1989: The

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[769] Art. 5 Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O. J. L 336, 31/12/1993 p. 7; Art. 5 Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 377, 31/12/1994 p 1 including Annex I (Form CO); Art. 5 Commission Regulation 447/1998/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 061, 02/03/1998, p 1 Including Annex I (Form CO); C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339

[770] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.362, p 625; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.43, p 1829.

[771] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.366, p 625.

[772] Art. 18 Commission Regulation (EC) No.802/2004 implementing Council Regulation (EC) No.139/2004 on the control of concentrations between undertakings, O. J. L 133, 07/04/2004, p 1; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.371, p 627.

[773] V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 18 III p 160; K. Lange, Handbuch zum deutschen und europäischen Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2006) CH 8 § 1 IV. p 575; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1368, p 542.

[774] R. Bechtold/W. Bosch/I. Brinker/S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) FKVO Einf. p 800.

[775] V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 18 I p 158; W. Veelken, M. Karl, S. Richter, Die Europäische Fusionskontrolle (1st ed.) (Tübingen, Germany, Mohr, 1992) III p 10; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1437, p 566; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 39, p 671; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 4. C., p 1126.

quality of the Commission's assessment would be reduced and the mandatory period of Art. 10 I MR1989 would be useless if the parties either executed the notified concentration or continuously altered the concentration or created irreversible facts with intention immediately after the notification. The period of 25 working days starts to run when the notification is complete[776].

As Art. 7 I MR1989 is lex generalis to Art. 7 II-V MR1989, the Commission has the power to extend the legal suspension of Art. 7 I MR1989 by means of a decision under Art. 7 II MR1989 - so as to avoid amendments of the status quo until an incompatibility decision is taken[777]. Contrarily, public bids overrule suspensions in terms of Art. 7 I-II MR1989 providing that the conditions of Art. 7 III MR1989 are met (written reasoned application[778]). In order address extraordinary needs for immediate implementation, the Commission is empowered by the hardship clause of Art. 7 IV MR1989 to grant a discretionary derogation from Art. 7 I-III MR1989.

Finally, the legal validity of transactions circumventing the suspension depends on the outcome of the case although transactions involving securities are valid[779].

6.5.2 Procedural Aspects of Decision-making within Phase One

Based on MR1989 and the implementing regulation, the Commission developed a sophisticated methodology for its preliminary investigations that consists of six or seven stages:

Firstly, a public version of the notification will be published[780]. Secondly, mandatory liaison with Member States concerned is sought[781]. Thirdly, the Merger Task Force will pursue an initial screening so as to establish the concentrative nature of the case. Fourthly, the data submitted to the Commission within the notification will be examined[782] and - if necessary - additional pieces of information may be requested from the parties or complementary analyses are conducted[783]. The fifth stage involves informal hearings granted to the notifying undertakings or to third parties with a legitimate interest, e.g. consumers, suppliers, competitors. Then, a preliminary report will be composed by the officials responsible for the case. The report which will be discussed on a first meeting of Commission officials[784] and according to the findings a final report and a draft

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776 Art. 10 I 2nd sentence MR2004; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 32, p 668; M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 7 marginal note 7-004, p 351.

777 F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1438, p 567; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 43, p 672.

778 However, voting rights must not be executed unless the value of the investment is at stake; V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 18 I p 158; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1438, p 567.

779 Art. 7 V 2nd sentence MR1989.

780 i.e. the notification, the names of the parties, the nature of the concentration and the economic sector according to Art. 4 III MR1989.

781 Art. 19 MR1989. This provision was discussed earlier: supra at 6.3.3.2.

782 e.g. by means of a market analysis or inquiries concerning competitors' opinions.

783 The Commission may also ask national authorities to carry out investigations under Art. 12 MR1989.

784 including the legal service of the Commission.

decision will be prepared subject to the approval by the second inter-services meeting[785]. In case of draft compatibility decisions under Art. 6 I lit. b MR1989, the Commission may decide in a seventh stage to attach undertakings so as to remove certain anti-competitive aspects of a given concentration following additional hearings of the parties and interested individuals with a legitimate interest[786]. Even if not mentioned in the wording and highly disputed, such obligations could be based on Art. 6 I lit. b MR1989 backed by a teleological arguments and a systematic arg. a maiore ad minus as Art. 8 II MR1989 expressively provides for undertakings[787] (q.v. Art. 6 II MR2004).

6.5.3 Inapplicability Decision Art. 6 I lit. a MR1989

Having discussed the procedural aspects of decision-making in phase one, the next sub-sections deal with the substantive pre-requisites which determine whether the Commission will issue a non-applicability decision under Art. 6 I lit. a MR1989 by the Commissioner[788], a compatibility decision pursuant to Art. 6 I lit. b MR1989 by the Commissioner or in a simplified procedure by the General of DG Competition[789] or an initiation of formal phase two proceedings by the Commissioner under Art. 6 I lit. c MR1989[790].

The Commission will take a non-opposition decision as to disapply the regulation pursuant to Art. 6 I lit. a MR1989, if one concludes that the notified concentration in terms of Art. 1 I; 3 MR1989 lacks a community dimension as defined by Art. 1 II; 5 MR1989 and Art. 1 III MR1997[791] in combination with the potential derogations from the unitary jurisdiction of the Commission, i.e. Art. 19; 9; 21 III; 22 III MR1989 on the one hand and the residual application of Art. 101 and 102 (Art. 81 and 82 ECT) that was already discussed on the

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785 Comment of Colin Overbury, former Head of the Merger Task Force; q.v. P. Donoghy, *The EC Merger Task Force: Interview with Colin Overbury*, Lawyers in Europe, 4-5 (Sep./Oct. 1991).

786 C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.149, p 670.

787 This approach was highly contested. However, Art. 6 I lit. b 2nd sentence MR1997 solves the dispute sustaining the presented opinion which will be discussed infra at 7.3; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 85, p 685.

788 R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 21 4 .(C) (i) (a), p 879; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 VII 1. b) p 226; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1408, p 554; A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 363, p 170 and marginal note 393, p 185; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 20, p 516; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.149, p 670; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.349, p 620 and marginal note 5.430, p 641; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.143, p 1859; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 4. D. (i), p 1128.

789 This decision may be accompanied by undertakings. The power to add undertakings to decisions under Art. 6 I lit b MR1989 was disputed. However, Art. 6 I lit b 2nd sentence MR1997 solves the dispute by expressively granting this power to the Commission (q.v. supra); T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 VII 1. b) p 226; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1408, p 554; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.149, p 670; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.349, p 620; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollver-fahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.144, p 1859.

790 V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 18 III p 160; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 VII 1. b) p 226; A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 395, p 185; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.149, p 671; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.349, p 620; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.145, p 1859.

791 G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 22, p 516; F. Ekay, Grundriss des Wettbewerbs- und Kartellrechts (5th ed.) (Heidelberg, Germany, C.F. Müller, 2016) marginal note 579; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.2 (2) (b) (ii) p 651.

other hand[792]. Art. 6 I lit. a MR2004 decisions are de facto no longer relevant owing to the pre-notification phase[793]. The concentration may be subject to merger control proceedings of the Member States[794].

Contrarily, phase one decisions under Art. 6 I lit. b or lit. c MR1989 are issued if a concentration is available that has a community dimension under Art. 2 MR1989/2004[795]. However, both decisions are mutually exclusive as they are based on the finding that said concentration either creates or strengthens a dominant position on a relevant market in accordance with Art. 2 I-III MR1989 or not[796]. A concentration that significantly impedes effective competition on the internal marked in particular by the creation or strengthening of a dominant position shall be declared incompatible with the common market (Art. 2 III MR2004; SIEC-Test[797])[798]. A concentration that does not significantly impede effective competition shall be declared compatible with the common market (Art. 2 II MR2004)[799]. The creation of a concentrative JV will be assessed under Art. 2 IV and 3 IV MR 2004 (Art. 2 III MR1989) if it has as its object or effect the co-ordination of the competitive behaviour of the undertakings (MR2004 in combination with Art. 101 TFEU)[800] and reaches a community dimension. Pursuant to a finding of dominance owing to Art. 2 III MR1989, a decision under Art. 6 I lit. c MR1989 may be taken that initiates formal phase two proceedings: Said formal proceedings enable the Commission to take a decision under Art. 8 I-III MR1989 after an exhaustive assessment of the case in a period of four months at

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[792] supra, at 6.3.3 Modifications of The One-Stop Shop Principle: Art. 1 II; 22 III-V; 19; 9; 21 III MR1989 and The Residual Application of Art. 81 and 82 ECT; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 83, p. 685.

[793] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. VI. 2. c) (1) p 559.

[794] F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1368, p 542; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 21, p 516.

[795] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 84, p 685.

[796] T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 V 1. p 207 and § 6 V 3. p 210; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 5. A., p 1131.

[797] Significantly Impediment of Effective Competition (SIEC-test); q.v Recital 25 MR2004; V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 2 I p 6, § 16 I p 138, § 16 III p 142; § 16 VI p 151; § 16 VII p 152; § 36 I 1 GWB 2013; C. Koenig, K. Schreiber, Europäisches Wettbewerbsrecht (1st ed.) (Tübingen, Germany, Mohr, 2010) CH 7 IV. 3., pp. 208-209; I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 2 E III 2. p 172; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. III. 2. p 383; P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 B. (1) (a) p 372; CH 14 B. (1) (e) p 381; K. Lange / T. Pries, Einführung in das europäische und deutsche Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2011) CH 4 § 2 V. 1. pp 196-197; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 V 3. p 210; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1370, p 543; A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 373, p 175; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 2, p 570, § 16 marginal note 9, p 573, § 16 marginal note 53-54, pp. 586-587; § 16 marginal note 88 p 601; § 16 marginal note 200 p 648; F. Ekay, Grundriss des Wettbewerbs- und Kartellrechts (5th ed.) (Heidelberg, Germany, C.F. Müller, 2016) marginal note 579; I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 6 V 2. a), pp 174-175; CH 6 2. a) (8), p 186; CH 9 III. 3. b), p 257; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.1 p 633, § 7.1 (3) (b) p 637, § 7.10 p 672 and § 7.14 p 686; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.205, p 702; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.105, p 565; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 5. B., p 1133; A. Ezrachi, EU Competition Law (5th Ed.) (London, UK, Bloomsbury, 2016) CH 9, p 402; M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 7 marginal note 7-001, p 348; E. Fox & D. Gerard, EU Competition Law (1st ed.) (Cheltenham, UK, Elgar, 2017) CH 6 A.1., p 237.

[798] R. Whish, D. Bailey, Competition Law (8th ed.) (Oxford, U.K., OUP, 2018) CH 21 5. p 882; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 25 I. 1. p 594; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 V 1. p 207 and § 6 V 3. p 210; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 90, p 602 and § 16 marginal note 92, p 603; § 34 marginal note 198, p 1261; I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 13 III., p 364 and CH 13 IV.2., p 388; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.006, p 596 and marginal note 8.216, p 707.

[799] R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 21 5., p 882; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 25 I. 2. pp 594-595; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 V 1. p 207; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 2, p 570.

[800] T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 V 1. p 207; § 6 V 5. a) p 218; A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 387, p 182; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.19 (1) p 733.

most[801]. The SIEC-Test has the following order: Establishment of the relevant product, geographic and temporal market[802]; establishment of the type of concentration; assessment whether the concentration impedes effective competition on the relevant product market and in particular results and creates or strengthens a dominant position on that market[803].

The period for any of the three decisions under Art. 6 I MR1989 is usually 25 working days according to Art. 10 I MR2004[804] and 35 days in case of a conditional clearance decision under Art. 6 II MR2004[805] or when a member states expresses a special interest in the case owing to Art. 9 II MR2004[806]. The decisions under the provision are notified to the parties and Member States[807] and are usually published[808]. If the Commission did not issue a timely decision the concentration is deemed to be compatible with the common market (Art. 10 VI MR2004)[809]. The Commission shall notify its decision under Art. 6 I-IV and 10 I MR2004 to the parties and the competent authorities of the member states without delay (Art. 6 V MR2004)[810].

6.5.4 Compatibility Decision under Art. 6 I lit. b MR1989

If the Commission finds that a concentration in terms of Art. 1 I; 3 MR1989 is available that has a community dimension thus providing for unitary exclusive jurisdiction of the Commission, it will issue a compatibility decision on the basis of Art. 6 I lit. b MR1989 provided that said concentration meets the substantive criteria of Art. 2 II; 2 I MR1989[811]: It must neither create nor strengthen a dominant position on a relevant market within at least a significant part of the common market as a result of which competition would be significantly impeded. Art. 2 I MR1989 offers further guidance regarding the criteria on which said assessment shall depend. The

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[801] The details are discussed later.

[802] A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 375-377, p 177.

[803] K. Lange / T. Pries, Einführung in das europäische und deutsche Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2011) CH 4 § 2 V 2. p 197; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 V 2. p 208; A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 373, p 175; I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 6 2. b)(3)(c), p 189; q.v. Recital 25-26 MR2004.

[804] However, in case of requests of Member States to refer the case to domestic authorities under the German Clause of Art. 9 MR1989, the period is 35 days according to Art. 10 I 2nd sentence MR2004 or 6 weeks under Art. 10 I MR1989; I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 2 E V. 2. b. p 177; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1439, p 567; A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 396, p 186; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 53, p 675; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 4. D., p 1127.

[805] Art. 10 I sub-paragraph 2 MR2004; A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 396, p 186; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 190, p 644 and § 17 marginal note 53 p 675; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.419, p 638; E. Fox & D. Gerard, EU Competition Law (1st ed.)(Cheltenham, UK, Elgar, 2017) CH 6 A.1., p 237.

[806] A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 396, p 186; Art. 10 III MR2004; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH § 7.1 (3) (b) p 639; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 4. D., p 1127.

[807] notification under Art. 6 II MR1989.

[808] The publication usually takes place in the O. J. C on a voluntary basis as the law is silent insofar.

[809] Not withstanding Art. 9; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 58-59, pp. 677-678; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.150, p 671; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 4. D. (iv), p 1128.

[810] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 90, p 687.

[811] R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 21 4. (C) (i) (a) p 879; V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 18 III p 160; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. VI. 2. c) (1) p 560; A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 393, p 185; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 84, p 685; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.430, p 641; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 4. D. (ii), p 1128.

analysis of dominance is broadly similar to the assessment the Commission undertakes when it examines alleged abuses of dominant positions under Art. 102 (Art. 82 ECT[812]). As the relevant methodology was introduced above[813], the particular focus will be on the differences between Art. 102 TFEU (Art. 82 ECT) and Art. 2 MR1989. This decision is the most often used one[814].

6.5.4.1 Definition of the Relevant Market

Parallel to Art. 102 TFEU (Art. 82 ECT), the first step of the implicit analysis will identify the product or service market that will be affected by the concentration owing to Art. 2 MR1989[815]. Again, three criteria are used so as to define the relevant product, temporal and geographic market[816]. The functional aspect defines a market by asking which objectives an ordinary marketer may want to attain if he orders a specific product or service. A similar product or service will be included if it is deemed to be interchangeable as to price, quality, intended use and characteristics[817] by an average consumer provided that exchanges do not cause major difficulties[818]. Such a result is called demand side substitutability[819]. The given criteria are fulfilled if the market analysis indicates a significant value of cross-elasticity of demand[820]. Alternatively, it is assessed which groups of consumers are deemed to be interchangeable from the commercial perspective of an average supplier: supply side substitutability[821]. A comparable rationale is relevant to the accurate definition of both the geographic

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812 q.v. T.A., Downes and D.S. MacDougall, *Significantly Impeding Effective Competition: Substantive Appraisal under the Merger Regulation*, unpublished CEPMLP Paper, p 1 (1993).

813 supra at 5.1.4 Dominant Position and Collective Dominance.

814 J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. VI. 2. c) (1) p 560

815 J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. III. 1. p 365; K. Lange, Handbuch zum deutschen und europäischen Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2006) CH 8 § 1 III. 2. p 537; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 7, p 572 and § 16 marginal note 23-24, pp. 576-577.

816 Commission Notice on the Definition of the Relevant Market for the Purpose of Community Competition Law, O. J. C 372, 09/12/1997 p 5; I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 6 2. b)(3)(c), p 189; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.13 (1) (a) p 675; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.589, p 675.

817 However, a plethora of specific criteria is used to distinguish between markets according to product specification of which an analysis would be beyond the scope of this paper: q.v. market for original products and refurbished ones (e.g. tyres or notebook computers); q.v. CJEU, Case C-322/81, *NV Nederlandse Banden Industrie Michelin v EC Commission* [1983] ECR 3461 paragraph 37-38; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. III. 1. p 366; C. III. 1. b) p. 367; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.591, p 675.

818 Annex I Chapeau of Section 5 of Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O. J. L 336, 31/12/1993 p 7; Annex I Section 6 Market Definitions I. Relevant Product Markets of Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 377, 31/12/1994 p 1 including Annex I (Form CO); Annex I Section 6 Market Definitions I. Relevant Product Markets of Commission Regulation 447/1998/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 061, 02/03/1998, p 1 Including Annex I (Form CO); C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.591, p 675.

819 Commission Notice on the definition of the relevant market for the purpose of community competition law, O. J. C 372, 09/12/1997 p 5; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.13 (1) (a) p 675.

820 q.v. Commission Decision, Case IV/M. 214, 1993 (*Du Pont/ICI*) paragraph 23: e.g. low substitutability indicates different markets for polypropylene and nylon carpet fibres id at paragraph 28; Commission Decision, Case IV/M. 68, 1991 (*Tetra Pak/Alfa Laval*): Different markets for either aseptic or non aseptic milk cartons; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.1 (3) (a) p 636 and § 7.18 (4) pp. 730-731; Commission Decision, Case IV/M. 190, 1992 (*Nestlé/Perrier*): different markets for sparkling water bottled at source and soft drinks owing to clear price differences.

821 G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 24-25 p 577; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.13 (1) (a) p 675.

scope[822] and temporal definition of the market. The geographic market comprises an area in which the undertakings concerned are involved in the supply and demand of products and services in which the conditions of competition are sufficiently homogenous and can be distinguished from neighbouring areas[823].

Compared with the case law regarding Art. 102 TFEU (Art. 82 ECT), it is mandatory for the parties to notify and for the Commission to consider affected markets within the common market which include up- and downstream markets. However, the definitions of affected markets were amended: The first implementation regulation would require to take horizontal markets and related up- or downstream markets into account if the individual or combined market shares exceeded 10%[824]. The second and third implementation regulation fix a horizontal threshold of 15% and vertical ones of 25%[825].

Another inconsistency with the old case law relates to the finding that it is mandatory that the Commission assesses barriers to entry[826]. Again, the finding is true that the more specific the objectives considered are the narrower the market definition will be and the easier a dominant position will be established[827].

However, due to the mandatory tight temporal framework within phase one, the Merger Task Force is often prevented from entering into a thorough relevant market analysis based on abovementioned economic criteria[828]. As a matter of fact, a compatibility decision without detailed market analysis is only justifiable on the grounds of speedy implementation in a case in which accuracy is of minor relevance as even the most

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[822] Annex I Chapeau of Section 5 of Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O. J. L 336, 31/12/1993 p. 7; Annex I Section 6 Market Definitions II Relevant Geographic Market Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 377, 31/12/1994 p 1 including Annex I (Form CO); Section 6 Market Definitions II Relevant Geographic Market Commission Regulation 447/1998/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 061, 02/03/1998, p 1 Including Annex I (Form CO). However, a closer assessment of geographic limitations of a market is beyond the scope of the analysis (e.g. regional consumer preferences, buy national preferences, entry barriers, different market stages regarding expansion, maturity, consolidation etc); C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339; q.v. P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 B. (1) (e) p 380; K. Lange, Handbuch zum deutschen und europäischen Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2006) CH 8 § 1 III. 2. p. 538; CH 8 § 1 III. 2. b) p 542; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.13 (1) (b) p 681; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.602, p 678.

[823] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.602, p 678.

[824] Annex I Chapeau of Section 5 of Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O. J. L 336, 31/12/1993 p. 7.

[825] Annex I Section 6 Market Definitions III Affected Markets lit. a-b Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 377, 31/12/1994 p 1 including Annex I (Form CO); Annex I Section 6 Market Definitions III Affected Markets lit. a-b Commission Regulation 447/1998/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 061, 02/03/1998, p 1 Including Annex I (Form CO); C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339.

[826] Annex I Section 6.4 of Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O. J. L 336, 31/12/1993 p. 7; Annex I Section 8 General Conditions in Affected Markets Market Entry 8.6 - 8.8 Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 377, 31/12/1994 p 1 including Annex I (Form CO); Annex I Section 8 General Conditions in Affected Markets Market Entry 8.7-8.9 Commission Regulation 447/1998/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 061, 02/03/1998, p 1 Including Annex I (Form CO); C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339.

[827] q.v. the highly detailed market definition regarding markets for civil turboprop aircraft: Commission Decision, Case IV/M. 237, 1993 (*DASA/Fokker*) and Commission Decision, Case IV/M. 53, 1991 (*Aérospatiale-Alenia/de Havilland*) paragraph 8.

[828] q.v. J.B. Alonso, *Market Definition in The Community's Merger Control Policy*, ECLR 196 (1994).

narrow interpretation will not sustain a finding of dominance. Contrary to the old case law, it is established that an ex ante analysis is more relevant whereas present or past market structures are less important.

Therefore, it is questioned whether a domestic market is likely to be fully integrated into a true community wide market for the products in question in the near future which depends crucially not only on a mere legal liberalisation of public sectors but on its factual implementation[829]. Finally, the SSNIP-test (Small but Significant, Non-transitory Increase in Price) establishes if consumers will switch to other products owing to a price increase of 5-10%[830]. In phase one proceedings, the Commission will generally leave the scope of the relevant product or geographic market open in cases where no competition concerns arise under any reasonable market definition[831].

6.5.4.2 Assessment of Dominance in terms of Art. 2 II MR1989

The second step of the analysis under Art. 2 II MR1989 will reveal whether a dominant position on the relevant market is either created or enhanced[832]. In principal, the notion of dominance is similar to Art. 102 TFEU (Art. 82 ECT).

6.5.4.2.1 Elements of Dominance in Art. 2 I MR1989 Differing from the Notion of Dominance Relevant to Art. 102 TFEU (Art. 82 ECT)

However, a relevant inconsistency between Art. 2 I MR1989 and Art. 102 TFEU (Art. 82 ECT) has to be underlined: An interference with Art. 102 TFEU (Art. 82 ECT) is not solely based on the element of dominance: It is only the abuse of a dominant position that is unlawful. It is the dependence of Art. 102 TFEU (Art. 82 ECT) on two main criteria which makes it sustainable to broadly interpret the notion of dominance[833] because a narrow interpretation of the abuse is feasible so as to duly limit the provision's scope. Contrarily, as dominance is the predominant criterion within Art. 2 II MR1989, the term should be more narrowly interpreted.

According to the relevant case law, this is indeed the solution in practice. This approach is backed by the very limited importance of the clause "as a result of which effective competition would be significantly impeded" (SIEC-test since MR2004[834]). This sentence does not introduce an independent second aspect of the examination

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829 e.g. A community wide market was rejected in the following cases for the near future Commission Decision, Case IV/M. 63, 1991 (*Elf/Ertoil*); Commission Decision, Case IV/M. 111, 1991 (*BP/Petromed*); Commission Decision, Case IV/M. 126, 1992 (*Accor/ Wagon-Lits*); Commission Decision, Case IV/M. 222, 1992 (*Mannesmann/Hoesch*).

830 I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.13 (1) (a) (i) p 678; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.612, p 679.

831 I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.13 (2) p 685.

832 F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1412, p 555; M. Heße, Wettbewerbsrecht (2nd ed.)(Heidelberg, Germany, Springer, 2011) CH 4.2, p 200.

833 e.g. Dominance in terms of Art. 82 ECT is accepted with respect to market shares above 41 %: q.v. CJEU Case C-27/76 *United Brands Company & Anor v Commission* [1978] ECR 207, at p 282.

834 C. Koenig, K. Schreiber, Europäisches Wettbewerbsrecht (1st ed.) (Tübingen, Germany, Mohr, 2010) CH 7 IV., p 200 and VI. 3., pp. 208-209; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1413, p 555; I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 6 2. a), p 175.

but only reiterates the general consequences attached to every finding of dominance. However, the clause will have its own significance if the Commission is of the opinion that a dominant position is due to be equalised by market developments in the foreseeable future[835]. In this case, an extremely high market share can be deprived from its power to indicate future dominance. The creation or enhancement of a dominant position according to MR1989 is no longer the only cause for a prohibition[836].

The Commission uses a list of criteria for the assessment of concentrations:

- market structure[837],
- actual and potential competition[838],
- market position of the undertakings concerned[839] exceeding 25%[840] and increased market power, i.e. the ability of the parties to increase prices, reduce output, choice or quality of goods and services, diminish innovation or otherwise influence the parameters of competition[841],
- economic and financial power of the undertakings concerned[842],
- available alternatives of supplies and consumers[843],
- barriers to market entry[844],
- offer and demand trends[845],
- interests of consumers[846],

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835 The residual relevance includes cases involving rapidly expanding markets. In these markets, the Commission is ready to accept temporal dominant positions if it is likely that they will not last on the grounds that effective competition is only impeded by means of long term developments; q.v. Commission Decision Commission Decision, Case IV/M. 53, 1991 (*Aérospatiale-Alenia/de Havilland*) paragraph 8 paragraph 53 and 60.

836 F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1413, p 556.

837 G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 9 pp. 572-573; F. Ekay, Grundriss des Wettbewerbs- und Kartellrechts (5th ed.) (Heidelberg, Germany, C.F. Müller, 2016) marginal note 579; I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 9 III. 3. b) (1), p 261; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.15 p 687; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.204, p 701; E. Fox & D. Gerard, EU Competition Law (1st ed.)(Cheltenham, UK, Elgar, 2017) CH 6 A.2., p 238.

838 G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 9 pp. 572-573; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.15 (7) (a) p 694; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.204, p 701; E. Fox & D. Gerard, EU Competition Law (1st ed.)(Cheltenham, UK, Elgar, 2017) CH 6 A.2., p 238.

839 Art. 2 I lit. b MR2004; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 V 4. b) p 212; F. Ekay, Grundriss des Wettbewerbs- und Kartellrechts (5th ed.) (Heidelberg, Germany, C.F. Müller, 2016) marginal note 579; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.204, p 702; E. Fox & D. Gerard, EU Competition Law (1st ed.)(Cheltenham, UK, Elgar, 2017) CH 6 A.2., p 238.

840 Recital 32 MR2004; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 V 4. b) aa) p 212; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 9 pp. 572-573.

841 Commission Guidelines on the Assessment of Horizontal Mergers of 16/12/2003, O. J. C 31, 05/02/2004, p 5, para 8; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 5. D. (i), p 1137.

842 Art. 2 I lit. b MR2004; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 V 4. b) p 212; F. Ekay, Grundriss des Wettbewerbs- und Kartellrechts (5th ed.) (Heidelberg, Germany, C.F. Müller, 2016) marginal note 579; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.204, p 702; E. Fox & D. Gerard, EU Competition Law (1st ed.)(Cheltenham, UK, Elgar, 2017) CH 6 A.2., p 238.

843 Art. 2 I lit. b MR2004; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 V 4. b) p 212 and § 6 V 4. b) bb) p 213; F. Ekay, Grundriss des Wettbewerbs- und Kartellrechts (5th ed.) (Heidelberg, Germany, C.F. Müller, 2016) marginal note 579; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.204, p 702; E. Fox & D. Gerard, EU Competition Law (1st ed.)(Cheltenham, UK, Elgar, 2017) CH 6 A.2., p 238.

844 Art. 2 I lit. b MR2004; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 V 4. b) p 212 and § 6 V 4 b) cc) p 214; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 9 pp. 572-573; F. Ekay, Grundriss des Wettbewerbs- und Kartellrechts (5th ed.) (Heidelberg, Germany, C.F. Müller, 2016) marginal note 579; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.204, p 702.

- development of technological and economic progress[847].

6.5.4.2.2 The Need to Maintain and Develop Effective Competition Art. 2 I lit. a MR1989

Luckily, the assessment of missing dominance under Art. 2 II MR1989 is facilitated by Art. 2 I MR1989 that provides for two important factors on which the finding of creation or enhancement of dominance on a relevant market may be based:

- the need to maintain or develop effective competition pursuant to Art. 2 I lit. a MR1989[848] and
- the market position of the undertakings concerned accompanied by

  additional criteria under Art. 2 I lit. b MR1989[849].

The first criterion, stating the efficacy of competition at a predominant position within Art. 2 MR1989 can be contrasted against merger control systems with the broad task of considering the public interest in general[850]. The criterion depends inter alia[851] on the following sub-factors:

- structure of the market concerned[852],
- actual competition from enterprises located either within or outside the EC[853],
- potential competition from said sources[854].

The first sub-factor clarifying the need to develop competition on a relevant market refers not only to aspects of horizontal[855] but also to aspects of vertical[856], and to a less extent, aspects of conglomerate competition. The

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845 Art. 2 I lit. b MR2004; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 V 4. b) p 212; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.204, p 702.

846 Art. 2 I lit. b MR2004; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 V 4. b) p 212; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.204, p 702; E. Fox & D. Gerard, EU Competition Law (1st ed.)(Cheltenham, UK, Elgar, 2017) CH 6 A.2., p 238.

847Art. 2 I lit. b MR2004; G. Knieps, Wettbewerbsökonomie (3rd ed.) (Berlin, Germany, Springer, 2008) CH 6.1.7 p 131. U. Immenga, Die Europäische Fusionskontrolle im wettbewerbspolitischen Kräftefeld (1st ed.) (Tübingen, Germany, Mohr, 1993) p 6; C. Koenig, K. Schreiber, Europäisches Wettbewerbsrecht (1st ed.) (Tübingen, Germany, Mohr, 2010) CH 7 IV., p 200; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 V 4. b) p 212 and § 6 V 4 b dd) p 215; F. Ekay, Grundriss des Wettbewerbs- und Kartellrechts (5th ed.) (Heidelberg, Germany, C.F. Müller, 2016) marginal note 579; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.204, p 702; E. Fox & D. Gerard, EU Competition Law (1st ed.)(Cheltenham, UK, Elgar, 2017) CH 6 A.2., p 238.

848 T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 I p 191 and § 6 V 4 p 21; A. Ezrachi, EU Competition Law (5th Ed.) (London, UK, Bloomsbury, 2016) CH 9, p 402; M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 7 marginal note 7-001, p 347; E. Fox & D. Gerard, EU Competition Law (1st ed.)(Cheltenham, UK, Elgar, 2017) CH 6 A.2., p 238.

849 A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 373, p 176; A. Ezrachi, EU Competition Law (5th Ed.) (London, UK, Bloomsbury, 2016) CH 9, p 402; M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 7 marginal note 7-001, p 347; E. Fox & D. Gerard, EU Competition Law (1st ed.)(Cheltenham, UK, Elgar, 2017) CH 6 A.2., p 238.

850 e.g. Section 84 of the UK Fair Trading Act of 1973.

851 arg. ex Art. 2 I lit a MR1989: "among other things".

852 Art. 2 I lit. a 1st Variant MR1989; G. Knieps, Wettbewerbsökonomie (3rd ed.) (Berlin, Germany, Springer, 2008) CH 6.1.7 p 131; A. Ezrachi, EU Competition Law (5th Ed.) (London, UK, Bloomsbury, 2016) CH 9, p 402; M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 7 marginal note 7-001, p 347.

853 Art. 2 I lit. a 2nd Variant MR1989; A. Ezrachi, EU Competition Law (5th Ed.) (London, UK, Bloomsbury, 2016) CH 9, p 402; M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 7 marginal note 7-001, p 347.

854 Art. 2 I lit. a 3rd Variant MR1989; A. Ezrachi, EU Competition Law (5th Ed.) (London, UK, Bloomsbury, 2016) CH 9, p 402.

855 Once, a market was horizontally affected if at least two undertakings concerned operate on that relevant market and achieve a combined market share of at least 10%; q.v. Annex I Section 5 Affected Markets lit. a of Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O. J. L 336, 31/12/1993 p. 7. Then, the definition was altered to 15%: Annex I Section 6 III Affected Markets Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 377, 31/12/1994 p 1 including Annex I (Form CO).

856 Once, a market was vertically affected if one of the undertakings concerned operates on a related up- or downstream market and has a minimum market share of 10%; q.v. Annex I Section 5 Affected Markets lit. b of Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O. J. L 336, 31/12/1993 p. 7. Then, the definition was altered to 25%: Annex I

first implementing regulation of MR1989 stated that conglomerate considerations were less relevant owing to the formal subsidiarity of Section 5.11 of Annex I Regulation 2367/90/EEC and the minimum market share that was increased compared with horizontal or vertical concentrations[857]. The economic reasons were explained above[858].

However, the second and third implementing regulations provide for a further reduction of conglomerate aspects as these were removed from the relevant markets sections to the less important chapter of general matters[859].

The second sub-factor deals with actual horizontal competitors. Normally, a large difference between the market shares of the allegedly dominant concentration and the largest horizontal competitor is a significant indicator to measure the power distribution[860]. However, under extraordinary circumstances, the case law takes other criteria into account as the ability to prevent the maintenance of effective competition on a relevant market and to behave independently from competitors to a significant extent may be counterbalanced by a remaining competitor which may be powerful despite of its small market shares at presence[861]. For instance, the small competitor may control important transmission or distribution networks so that he could easily expand its consumer base rapidly if desired so that the present dominant service provider has every incentive to offer reasonable services.

Alternatively, the small competitor may be an extremely powerful global player like AT&T or Ericsson in conglomerate terms so that even a concentration leading to a market share of 81% or 83% is cleared[862]. Additionally, available spare capacity or high technology products by minor competitors will undermine the difference of market shares providing that said products have a competitive advantage.

The third sub-factor clarifying the need to develop effective competition on an affected market in terms of Art. 2 I lit. a MR1989 reflects the influence of potential competitors, i.e. companies operating either on upstream, on

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Section 6 III Affected Markets Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 377, 31/12/1994 p 1 including Annex I (Form CO).

[857] A conglomerate aspect is available if neither horizontal nor vertical relations exist between the product markets exist ("in the absence of ...") and if an undertaking concerned holds a market share of at least 25% on that relevant product market; q.v. Annex I Section 5 Affected Markets 5.11 of Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O. J. L 336, 31/12/1993 p. 7.

[858] Arguments allegedly supporting minor relevance of conglomerates: supra at 2.1.3; 5.1.2.

[859] i.e. the relevant "Section 6 Market Definitions" does no longer deal with the subject. Conglomerate Aspects are dealt with under Section 9 "General Matters Market - Data on Conglomerate Aspects": q.v. Annex I Section 6 Market Definitions III Affected Markets and Annex I Section 9 General Matters Market Data on Conglomerate Aspects 9.1-9.2 of Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 377, 31/12/1994 p 1 including Annex I (Form CO); q.v. Annex I Section 6 Market Definitions III Affected Markets and Annex I Section 9 General Matters Market Data on Conglomerate Aspects 9.1-9.2 of Commission Regulation 447/1998/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 061, 02/03/1998, p 1 Including Annex I (Form CO); C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339.

[860] e.g. Commission Decision, Case IV/M. 126, 1992 (*Accor/ Wagon-Lits*) paragraph 25: Market share of 89% whereas the largest competitor only holds 18% (difference of 71 percentage points); A combined market share of 44 % establishes dominance if the largest competitors consist of SMEs without significant resources: Commission Decision, Case IV/M. 12, 1991 (*Varta/Bosch*) paragraph 32 and 58.

[861] Commission Decision, Case IV/M. 42, 1991 (*Alcatel/Telettra*) at paragraph 40.

downstream or unrelated markets which threaten to enter the relevant product markets on which the concentration will be implemented. Compared to the analysis of actual competitors, the same considerations will basically apply to potential ones. However, the relevance of arguments relating to potential competitors will depend on the likelihood of rapid market entry and the financial resources so as to seriously attack the allegedly dominant firms which implement a concentration.

Additionally, the significant legal barriers[863] to enter the relevant markets will affect the examination. This is also true for factual[864] barriers.

6.5.4.2.3 Market Position of the Undertakings Concerned

The market position of the undertakings concerned criterion pursuant to Art. 2 I lit. b 1st Variant MR1989 has to be primarily evaluated by means of market shares on the relevant and affected markets[865] and a market position of 50% indicates a dominant position and a market position below 25% excludes a dominant position[866]. This finding is systematically backed by the fact that the criterion is listed at the beginning of Art. 2 I lit b MR1989. Compared to the old case law, a quantitative assessment of market shares is usually not longer sufficient to conclude the microeconomic assessment of the undertakings concerned. Consequently, additional qualitative criteria are included pursuant to Art. 2 I lit b 2nd to 8th Variant MR1989.

Beginning with the quantitative examination of market shares, it should be stressed that the market share analysis is only twofold in opposition against the threefold structure governing the finding of dominance in Art. 102 TFEU (Art. 82 ECT): Basically, the approach towards exorbitant market shares is different. Although these may represent present dominance and are accordingly a powerful indicator of future dominance, they will never be self-sufficient to establish such a finding for the future owing to the primary ex ante nature of merger control[867].

The contrary approach is underlined by the different rationale of Art. 2 MR1989 and Art. 102 TFEU (Art. 82 ECT) as proceedings under the latter provision are normally investigations focusing on an ex post investigation. Moreover, the new concept allows to address expanding markets or rapidly changing markets of transition

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862 e.g. Commission Decision, Case IV/M. 42, 1991 (*Alcatel/Telettra*) at paragraph 40.

863 legal monopolies: q.v. the energy judgements of the CJEU of 1997; licensing requirements if the license is awarded under discriminatory terms: Commission Decision, Case IV/M. 126, 1992 (*Accor/ Wagon-Lits*) paragraph 25); technical standards that may have well disguised discriminatory effects, obligations to appoint high numbers of staff so as only major operations will become viable; intellectual property rights preventing a market entry: Commission Decision, Case IV/M. 68, 1991 (*Tetra Pak/Alfa Laval*) at paragraph 42.

864 technological barriers; strong national purchase preferences; economies of scale barriers related to network bound industries in the utility sectors of oil, gas, power, water; significant spare capacities in the market; low technology products so that technological advances leading to competitive advantages are not likely; maturity of the market making increases of demand unlikely: Commission Decision, Case IV/M. 53, 1991 (*Aérospatiale-Alenia/de Havilland*) paragraph 8.

865 G. Knieps, Wettbewerbsökonomie (3rd ed.) (Berlin, Germany, Springer, 2008) CH 6.1.7 p 131; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 58, p 588; A. Ezrachi, EU Competition Law (5th Ed.) (London, UK, Bloomsbury, 2016) CH 9, p 402; M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 7 marginal note 7-001, p 347.

866 F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1419, p 559; q. v. Commission Guidelines on the assessment of horizontal mergers of 16/12/2003, O. J. C 31, 05/02/2004, p 5, marginal note 17; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 10 p 573.

immediately after privatisation measures: those would not be properly judged if one applied a simple examination of present market shares [868]. Similarly, the perspective of declining market shares must not be ignored when assessing concentrations[869].

The remainder of cases without extraordinary market shares, i.e. those well below 50% which nevertheless exceed 25% of combined market power will be solved by means of a mixed criteria analysis. These principles are exemplified by numerous cases in which market shares between 43% and 90% were deemed not to violate Art. 2 MR1989[870]. Moreover, a combined market share below 25% will be self-sufficient for a negative assessment of dominance pursuant to Recital 15 MR1989.

6.5.4.2.4 Economic And Financial Power of the Undertakings Concerned

The qualitative assessment of the market power of the undertakings concerned begins with the 2nd Variant of Art. 2 I lit. b MR1989[871]. However, the analysis of economic and financial power of the parties is similar to the approach taken with regard to Art. 102 TFEU (Art. 82 ECT) and will consider the probable effects of conglomerate concentrations as well so it is justifiable not to elaborate the details.

6.5.4.2.5 Alternatives for Consumers or Suppliers

The third variant of Art. 2 I lit. b MR1989 deals inter alia with the situation that potential dominance is circumvented if consumers have access to alternative products from different markets[872]. Said products must not be complete substitutes in terms of the relevant market definition. In this case they would belong to the relevant product market that can logically never provide for alternative products. Contrarily, said alternative products must belong to different markets and must satisfy some interests of the consumers of a product from the relevant market so that he may switch to such a product.

A comparable rationale is true from the perspective of suppliers which may switch from consumers on the relevant product market to alternative consumers in order to satisfy some of the commercial targets they pursue when they enter the relevant market.

Clearly, availability of alternative products or consumers will limit the scope for a finding of dominance as the market power of the concentration is reduced. This finding is sustained by the case law: The Commission

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867 Commission Decision, Case IV/M. 222, 1992 (*Mannesmann/Hoesch*).

868 q.v. Commission Decision, Case IV/M. 57, 1991 (*Digital/Kienzle*) at paragraph 20.

869 q.v. Commission Decision, Case IV/M. 235, 1992 (*Elf Aquitaine/Thyssen/Minol*). The former state monopolist Minol was predicted to lose its strong position. The Case is discussed infra: 6.5.3.2.11 The Minol Case.

870 e.g. an aggregated market share of 90% for non-aseptic milk cartons was not persuasive owing to strong competitors: Commission Decision, Case IV/M. 68, 1991 (*Tetra Pak/Alfa Laval*) at paragraph 38-39; e.g. aggregated market share of 76% for petroleum distribution in Eastern Germany in 1991: Commission Decision, Case IV/M. 235, 1992 (*Elf Aquitaine/Thyssen/Minol*); combined market share of 100% from London Gatwick to Lyon and 98.6% London Gatwick-Paris: Commission Decision, Case IV/M. 259, 1992 (*British Airways/TAT*).

871 G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 67, p 592; A. Ezrachi, EU Competition Law (5th Ed.) (London, UK, Bloomsbury, 2016) CH 9, p 402; M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 7 marginal note 7-001, p 347.

argued in *Accor/ Wagon-Lits* that smaller Companies for motorway catering services are not regarded as being in the same market like the merged entity. However, even if this was the case, the Commission argued that alternative small suppliers (for instance located close to highways) would limit the behavioural freedom of the new entity[873]. A similar argument is used with respect to neighbouring markets for yarn that prevents the merged entity from behaving independently[874].

6.5.4.2.6 Access to Supplies and Markets

The fourth aspect of Art. 2 I lit. b MR1989 introduces the concept that a finding of dominance is facilitated if the relevant undertakings are able to expand to related up- or downstream markets so that the access of competitors of the relevant undertakings to upstream or downstream markets or of consumers or suppliers to said markets is limited[875]. The basic idea is that the more probable an expansion by a concentration to supply markets or to downstream markets is, the smaller the scope becomes for independent behaviour of undertakings competing either on the relevant markets or operating on related up- or downstream which focus on a single level of the supply chain.

However, superior market power of a given concentration on a relevant market power that has the financial and technological means to expand to downstream markets can nevertheless be equalised if the merged entities have an important interest to serve few large consumers who consume an important ratio of the total production. Competing against the powerful undertakings on downstream markets may cause commercial threats to the relevant undertakings which may well be greater than the likely opportunities. In accordance with this argument, a concentration of wholesale suppliers is less dangerous if it faces a monopolistic wholesale consumer or an oligopoly[876]. However, it should be pointed out that it will be problematic in the long run if existing concentrations on the demand side are used as a justification to back additional concentrations on the supply side[877]. Clearly, this arguments is even more true if one plans to liberalise a business sector: It would be detrimental to justify concentrations between the future market players on the grounds of existing concentrations owing to public undertakings up to now vested with services in the general economic interest. Contrarily, it is superior to privatise and divest the latter structures at the same time. In this case, no new private market entrant can argue that additional concentration is needed to equalise overwhelming power on the

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[872] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 76, p 596; M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 7 marginal note 7-001, p 347.
[873] Commission Decision, Case IV/M. 126, 1992 (*Accor/ Wagon-Lits)* paragraph 25.
[874] Commission, Case IV/M. 113, 1991 (*Courtaulds/SNIA*).
[875] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 69, p 593 and § 16 marginal note 77, p 597; A. Ezrachi, EU Competition Law (5th Ed.) (London, UK, Bloomsbury, 2016) CH 9, p 402; M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 7 marginal note 7-001, p 347.
[876] q.v. Commission Decision, Case IV/M. 42, 1991 (*Alcatel/Telettra*) at paragraph 38.
[877] The same logic applies vice versa if one justifies future concentration of the demand side with existing concentration of the supply side.

demand side. Therefore, it is crucial not only to privatise undertakings formerly incorporated under public law but also to divest them so as to create several competing entities[878].

6.5.4.2.7 Barriers to Entry

The fifth sub-criterion of Art. 2 I lit. b MR1989 deals with the legal or factual barriers to entry markets that could broadened by means of a concentration[879].

The more significant legal or factual barriers to entry the relevant market are, the easier a finding of dominance will be established. It has to be stressed that barriers are often related to technological edges which cause microeconomic benefits often protected by intellectual property rights. Hence, enormous financial resources, which are needed to compete on the market owing to enormous economies of scale, might distinguish a concentration from its competitors[880]. As a logical consequence, the technological leader will always focus on high margin products whereas weaker competitors have to concentrate on low margin product groups[881].

6.5.4.2.8 Supply and Demand Trends

As to supply and demand trends under Art. 2 I lit. b 6th Variant MR1989, it has to be noticed that a concentration is less relevant to emerging market with expanding demand and a high ratio of technological developments whereas a finding of dominance is facilitated on a mature market which is characterised by constant or even declining demand in terms of value and quantity[882]. The latter finding is true for the German electricity market in Europe in accordance with the VEBA/VIAG decision that is due to be assessed, later.

6.5.4.2.9 Interests of Intermediary and Final Consumers

The 7th variant of Art. 2 I lit. b MR1989 expands the 3rd variant so as to specifically take the interests of intermediary and final consumer of the products or services into account, which are provided by undertakings active on the relevant market[883]. Again, the larger the ability and willingness is to switch to alternative offers of comparable quality and price, the more limited will be the market power of the concentration.

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878 This is an important lesson from the privatisation of British Gas Corporation in 1986 so that the privatised British Gas Plc could maintain a private monopoly for several years until liberalisation and unbundling took place.

879 G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 71, p 594; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.15 (8) (a) p 697; A. Ezrachi, EU Competition Law (5th Ed.) (London, UK, Bloomsbury, 2016) CH 9, p 402; M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 7 marginal note 7-001, p 347.

880 I. Van Bael and J.-F. Bellis, Competition Law of the European Community (3rd ed.) (Bicester, U.K., CCH Editions Limited, 1994) p 464.

881 q.v. This was true for the global market for personal computer central processing units. Intel was the technological leader for a decade and used to focus on high value chips whereas the competitor AMD struggled. Intel used to lower prices for chips when AMD managed to manufacture a product with similar characteristics. Recently, AMD generated CPUs exceeding Intel's best models. q.v. Commission Decision, Case IV/M. 68, 1991 (*Tetra Pak/Alfa Laval*) at paragraph 39.

882 G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 78, p 597; A. Ezrachi, EU Competition Law (5th Ed.) (London, UK, Bloomsbury, 2016) CH 9, p 402; M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 7 marginal note 7-001, p 347.

883 G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 79, p 598; A. Ezrachi, EU Competition Law (5th Ed.) (London, UK, Bloomsbury, 2016) CH 9, p 402; M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 7 marginal note 7-001, p 347.

6.5.4.2.10 Technical and Economic Progress

From the very beginning, several opinions existed whether and to which extent a concentration may be justified on the grounds that it can improve technical and economic progress to the proportionate benefit of consumers in terms of Art. 2 I lit. b 8th Variant MR1989[884]. In practice, the case law does not indicate, that market developments and industrial policy arguments were of any major importance so as to justify a concentration which is not justifiable on grounds based on classical competition law analysis[885]. This is backed by the systematic evaluation of Art. 2 I lit. b 8th Variant MR1989 because the variants do not form an independent exemption like Art. 101 III TFEU (Art. 81 III ECT). Contrarily, the variant only represents one out of eight factors that determine a complex but nevertheless single consideration of compatibility.

6.5.4.2.11 Efficiency Gains

A concentration may be cleared if it produces causal efficiency gains which are concentration specific and to the benefit of consumers and verifyable (efficiency defence like economies of scale that lead to lower prices for consumers)[886].

6.5.4.2.12 The Minol Case

If one combines the logic of the third and the fourth criterion of Art. 2 I lit. b MR1989, it will be easily established that it is a strong indicator of dominance if a concentration of undertakings not only prevents final consumers from alternative supplies and wholesale suppliers from alternative retailers (intermediate consumers) but also competitors from expanding to upstream activities as the merged entity will obtain significant control over up-stream operations. Such influence will impede the efficacy of competition on related up- or downstream markets[887]. Additionally, the undertakings concerned will sooner or later be provided with the opportunity acquire the weakened up- or downstream companies on very favourable conditions[888].

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884 G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 80, p 598; I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 9 III. 3. b), p 258; A. Ezrachi, EU Competition Law (5th Ed.) (London, UK, Bloomsbury, 2016) CH 9, p 402 and p 406; M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 7 marginal note 7-001, p 347.

885 especially the De Havilland Decision: Commission Decision, Case IV/M. 53, 1991 (*Aérospatiale-Alenia/de Havilland*) paragraph 8; q.v. L. Hawkes, *The EC Merger Control Regulation: Not an Industrial Policy Instrument: the De Havilland Decision* ECLR 35 (1992); T.A., Downes and D.S. MacDougall, *Significantly Impeding Effective Competition: Substantive Appraisal under the Merger Regulation*, unpublished CEPMLP Paper, p 14 (1993).

886 Recital 29 MR2004; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 82, p 599; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.928, p 744 and marginal note 5.956, p 749.

887 the so-called foreclosure effect.

888 The analysis of vertical aspects was provided by Annex I Section 5 Affected Markets Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O. J. L 336, 31/12/1993 p. 7. Since then, it was dealt with by Annex I Section 6 III Affected Markets lit. b in the 2nd and third implementing Regulation; q.v. Annex I Section 6 III Affected Markets lit. b Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 377, 31/12/1994 p 1 including Annex I (Form CO); q.v. Annex I Section 6 III Affected Markets lit. b Commission Regulation 447/1998/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 061, 02/03/1998, p 1 Including Annex I (Form CO); C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339.

The importance of these considerations is exemplified by the Minol Case[889]. The concentration allegedly threatened to dominate the network for petroleum distribution and storage.

The German privatisation Agency Treuhandanstalt[890] sought to sell the Mineralölhandel AG (MINOL) to Elf Mineralöl GmbH[891] (98%) and Thyssen Handel Berlin GmbH (2%) on the condition that the acquirers sets up a company Leuna 2000[892] which invests DM 4.5 billion so as to erect a new refinery and to operate the existing one until the new one enters into operation[893]. Additionally, Leuna 2000 would acquire a 52.5% stake in Mineralölverbundleitung GmbH which operates the petroleum pipeline and storage facilities in Eastern Germany. The Commission quickly establishes a concentration with a Community dimension and denies the creation of a dominant position on the relevant market for petroleum distribution[894] on the grounds that the acquirers' current position on the sub-markets in Western Germany does not exceed 10% on whereas the then high market share of Minol - 896 out of 1340 petrol stations - was predicted to decrease rapidly pursuant to new powerful competitors, restitution claims regarding fully owned petrol stations, short term termination clauses regarding filling station joint ventures. As far as refinery capacity is concerned, the Commission did not oppose the transaction after the Treuhandanstalt promised to monitor whether Leuna 2000 would enter into quid pro quo agreements even when dealing with affiliated companies so as to limit the commercial scope of the Treuhandanstalt's offer to bear losses of the refinery businesses.

With regard to the storage capacity, Minol has a predominant capacity of 504,900m^3 compared with 240,000m^3 of competitors. This finding is underlined by the then bad road network so that petroleum stations depended crucially on access to a depot in a distance not exceeding 150 km. The Commission required the informal undertaking that the acquirer sends a legally binding offer to competitors regarding the access to Minol's storage capacity on prudential terms based on a cost + margin pricing methodology. The Commission took note of a downward trend in the market shares of the parties[895]. After Elf complied with the undertaking the concentration was declared compatible under Art. 6 I lit. b MR1989.

6.5.4.2.13 The Air France/Sabena Case

Secondly, the Air France/Sabena case will provide for another example of anti-competitive aspects of vertical market power if a concentration threatens to exclude competitors from a relevant owing to superior vertical

[889] Commission Decision, Case IV/M. 235, 1992 (*Elf Aquitaine/Thyssen/Minol*).
[890] The Treuhandanstalt held not only the assets of state-owned undertakings created under public law in the former GDR but also the shares of such companies after they had been transferred to private or public limited liability companies. It acted as a trustee of the federal state with a view to privatise the undertakings, reorganise them to facilitate privatisation and to administer the remaining assets.
[891] Elf Mineralöl GmbH is a German subsidiary of Société National Elf Aquitaine (SNEA).
[892] The share capital is split as follows: 2/3 Elf Mineralöl GmbH; 1/3 Thyssen Handel Berlin.
[893] Commission Decision, Case IV/M. 235, 1992 (*Elf Aquitaine/Thyssen/Minol*).
[894] As state above, the Commission is reluctant to avoid stringent market definition unless this is crucial for the evaluation of the concentration: q.v. Commission Decision, Case IV/M. 235, 1992 (*Elf Aquitaine/Thyssen/Minol*).paragraph 10, 11, 14.

access to airport facilities, take-off slots and landing slots on the airport of Brussels regarding certain destinations[896]. Firstly, the Commission is of the opinion that the operation caused SABENA to become a concentrative JV between the Belgian State and Air France as far as SABENA's aerial transport business is concerned[897]. As a remedy against abovementioned threats, the Commission obliged the parties to grant access to said facilities and to limit the future number of slots held by the concentration as a pre-requisite for issuing a compatibility decision pursuant to Art. 6 I lit. b MR1989.

6.5.4.2.14 Case VIAG/Continental Can

Thirdly, the case *VIAG/Continental Can* underlines the significance of opportunities of a concentration to prevent competitors from accessing supply markets. VIAG, already controlling a leading producer of aluminum, acquired companies active on the markets for packaging of beverages[898]. The Commission established that no single market for beverages is available which would include glass, cans or plastic. Contrarily, it found specified markets for beer, soft drinks depending on the packaging materials owing to different consumer preferences, varying packaging technologies and cost diversities[899]. It was analysed whether the control over a leading aluminum producer combined with control over companies manufacturing metal packaging materials would prevent competing packaging undertakings from access to aluminum supplies. However, the foreclosure effect was deemed to be negligible as aluminum packaging only forms 30% of the market for metal packaging of beverages as tinplate packaging is a substitute to aluminum[900]. Additionally, 40% of aluminum is supplied by independent suppliers not being vertically integrated[901].

6.5.4.2.15 Rule of Reason under Art. 2 II; I MR1989

In addition to the wording of Art. 2 I lit. b MR1989, three issues require due attention for the finding of dominance: the scope for a rule of reason, the notion of collective dominance and ancillary restraints.

Firstly, it should be briefly noted that the Commission applies - according to the case law - a rule of reason to Art. 2 I MR1989 that is similar to the construction under Art. 101 TFEU (Art. 81 ECT[902]).

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[895] I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.15 (1) (c) p 689.
[896] e.g. market share of the concentration will be 100% between Brussels - Lyon; Brussels - Paris; Brussels-Nice: Commission Decision, Case IV/M. 157, 1992 (*Air France/Sabena*) paragraph 12-14; exclusion of other sectors: paragraph 29.
[897] Commission Decision, Case IV/M. 157, 1992 (*Air France/Sabena*) paragraph 12-14; exclusion of other sectors: paragraph 22.
[898] Commission Decision, Case IV/M. 157, 1992 (*Air France/Sabena*) paragraph 12-14; exclusion of other sectors: paragraph 41.
[899] Commission Decision, Case IV/M. 81, 1991 (*VIAG/Continental Can*) paragraph 10 - 14.
[900] Commission Decision, Case IV/M. 81, 1991 (*VIAG/Continental Can*) paragraph 43.
[901] Commission Decision, Case IV/M. 81, 1991 (*VIAG/Continental Can*) paragraph 51.
[902] The complex rationale of the rule of reason and its controversial subordinated rules it was developed under Section 1 of the Sherman Act is discussed by O. Black, *Per Se Rules and Rules of Reason: What Are They*, ECLR 145 (1997); J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) A. III. 1 c) p 17; I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 7 VI 2., p 205; CH 9 III. 1. b), p 249.

According to the rule of reason in American antitrust law, only those agreements violate the law, which unreasonably restraint the economic freedom to act[903]. For instance, a concentration will be declared compatible if the acquirer's market share is not likely to increase significantly owing to the concentration[904].

The substantive test under MR1989 is available where a merger would create or strengthen a dominant position, as a result of which effective competition would be significantly impeded (or a merger is prohibited where it will substantially lessen competition (SLC in US and UK[905])). The test war amended in MR2004: the question is now whether the merger would significantly impede effective competition (SIEC), in particular as a result of creating or strengthening of a dominant position[906].

6.5.4.2.16 Joint Dominance under Art. 2 II; I MR1989

The second unwritten issue refers to a controversy whether the establishment of joint dominance - i.e. market power attributed to a small group of independent competitors that co-ordinate their external conduct in the long term by means of a quick adaptation of the other entity's behaviour so as to imitate a single entity and remove internal competition within the group - should be regarded as a creation of dominant position under Art. 2 MR1989 or not[907]. Collective Dominance differs from concerted practices in terms of Art. 101 TFEU (Art. 81 ECT) as an oligopolistic concentration does not require a formal, explicit legally or morally binding consent between the entities involved:

Unilateral reaction to the other entity's action, which is governed by the principles of game theory, is sufficient[908].

The first opinion disapplies MR1989 to situations of collective dominance based on a narrow interpretation of the wording of Art. 2 MR1989[909], a narrow interpretation of Art. 103 TFEU (Art. 83 ECT) as a legal basis for secondary law that merely implements Art. 101-102 TFEU (Art. 81-82 ECT) and an argumentum e contrario as only Art. 82 ECT supports abuses of dominant positions by "more" undertakings. Moreover, the courts used to ignore arguments based on collective dominance in cases dealing with Art. 101-102 TFEU (Art. 81-82 ECT) and stated that a concerted practise can generally not be used twice so that a potential violation of Art. 101 TFEU

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903 I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 10 II.1.a), p 279.
904 Commission Decision, Case IV/M. 68, 1991 (*Tetra Pak/Alfa Laval*).
905 I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 2 E III 2. p 171.
906 R. Whish, D. Bailey, Competition Law (8th ed.) (Oxford, U.K., OUP, 2015) CH 20 6. (C), p 866, CH 21 2. (A), p 873; C. Koenig, K. Schreiber, Europäisches Wettbewerbsrecht (1st ed.) (Tübingen, Germany, Mohr, 2010) CH 7 IV. 3., pp. 208-209.
907 q.v. D. Ridyard, *Joint Dominance and The Oligopoly Blind Spot under The EC Merger Regulation*, ECLR 161 (1992); A. Winckler and M. Hansen, *Collective Dominance under The EC Merger Control Regulation*, CMLR 787 (1993); D. Ridyard, *Economic Analysis of Single Firm and Oligopolistic Dominance under The European Merger Regulation*, ECLR 255 (1994). R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 21, 3. (A) (ii) (c) –(iv), pp. 856-857; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.767, p 713.
908 J.B. Alonso, *Economic Assessment of Oligopolies under The Community Merger Control Regulation*, ECLR 3 (1993); D. Ridyard, *Economic Analysis of Single Firm and Oligopolistic Dominance under The European Merger Regulation*, ECLR 259 (1994):Joint Dominance is facilitated if the market is major, transparency is great, high concentration is available, high barriers to entry and exit are available so that a repeated, stable game of familiar partners is likely in which provocations are answered with efficient retaliations leading to a zero sum game.

(Art. 81 ECT) will generally not sustain an additional violation of Art. 102 TFEU (Art. 82 ECT) under the aspect of collective dominance[910]. This opinion was honoured by initial decisions of the Commission which ignored the doctrine of joint dominance[911].

Contrarily, a later decision refused to decide on the issue[912]. According to a 2nd opinion an inclusion of collective dominance to Art. 2 MR1989 is indeed sustainable.

Firstly, the recent case law of the Tribunal regarding Art. 101 and 102 TFEU (Art. 81 and 82 ECT) indicates that joint dominance is a suitable instrument to invoke Art. 102 TFEU (Art. 82 ECT) in case of proven economic links between the parties[913]. Secondly, the recent case law of the Commission considers aspects of joint dominance[914].

Even though the wording of Art. 2 MR1989 does not clearly address the subject, a broad approach of unilateral and collective dominance is backed by the legal basis of MR1989 as it includes Art. 352 TFEU (Art. 308 ECT).

Additionally, it is highly persuasive to argue, that the prognostic elements of merger control justify a new approach that differs from the old findings related to Art. 101 - 102 TFEU (Art. 81-82 ECT[915]).

Consequently, it is argued that the concept of joint dominance can be incorporated in the meaning of dominance in terms of Art. 2 MR1989 and the doctrine was applied to merger control with the argument that broad interpretation is needed as the detrimental effects of joint dominance are often identical to those of single firm dominance[916].

In fact, a concentration of two companies - A and B - on a mature market with few active competitors - C and D - will create a platform for future collusion between the concentration (A+B), C or D even though the

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[909] Amendments of the drafts of MR1989 suggest that aspects collective dominance known from US and German Law were discussed. The fact that the topic is not expressively addressed in the wording can therefore be interpreted as an intentional silence of the law. This would rule out a broad interpretation of Art. 2 MR1989; q.v. A. Winckler and M. Hansen, *Collective Dominance under The EC Merger Control Regulation*, CMLR 805 (1993).

[910] CJEU Case C-85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461 paragraph 39; CJEU Case C-247/86 *Alsatel v SA Novasam* [1988] ECR 5987; General Court Joined Cases T-68/89, T-77/89 and T-78/89 *Società Italian Vetro & Ors v Commission* [1992] ECR II-1403 (Italian Flat Glass Judgement); This has been already discussed with respect to Art. 81-82 ECT: supra at 5.1.4 Dominant Position and Collective Dominance.

[911] Commission Decision, Case IV/M. 4, 1990 (*Renault/Volvo*). The merger was cleared as the concentration will neither dominate Mercedes nor Iveco. However, the HHI would increase to 2998 points and the scope for collusion between Renault/Volvo and the competitors is immense; Commission Decision, Case IV/M. 98, 1991 (*Elf/BC/CEPSA*); Commission Decision, Case IV/M. 12, 1991 (*Varta/Bosch*).

[912] Commission Decision, Case IV/M. 165, 1991 (*Alcatel/AEG Kabel*): The German authorities requested a referral under Art. 9 II MR1989 so as to apply the domestic assumption of collective dominance under the Antitrust Act of 1990. However, the Commission refused and cleared the concentration and it did not decide whether Art. 2 MR1989 should be interpreted broadly so as to include joint dominance.

[913] Commission Decision 89/93/EEC of 7 December 1988 Relating to A Proceeding under Art. 85 and 86 of The EEC Treaty, O. J. L 33 04/02/1989 p 44 (*Flat Glass*); General Court Joined Cases T-68/89, T-77/89 and T-78/89 *Società Italian Vetro & Ors v Commission* [1992] ECR II-1403 (Italian Flat Glass Judgement). However, the Tribunal overruled the Commission decision on factual grounds as the economic links were not proved.

[914] Commission Decision, Case IV/M. 190, 1992 (*Nestlé/Perrier*): Collective dominance is found as the acquirer Nestlé and BSN would hold 82.3% of the market for source bottled ground waters in terms of value if Perrier SA was acquired; Commission Decision, Case IV/M. 202, 1992 (*Thorn EMI/Virgin Music*): Aspects of collective dominance were assessed but rejected.

[915] e.g. Considerations of market shares - extremely relevant to abuses under Art. 82 ECT - should not be decisive for the purpose of Merger Control and a new case law is predicted q.v. Sir L. Brittan, *The Law and Policy of Merger Control in the EEC*, EL Rev 354 (1990); q.v. A. Winckler and M. Hansen, *Collective Dominance under The EC Merger Control Regulation*, CMLR 806 (1993).

[916] Commission Decision, Case IV/M. 190, 1992 (*Nestlé/Perrier*), O. J. L 356, 1992, p 1 paragraphs 112-114; Opinion of the Advisory Committee on Concentrations, O. J. C 319, 1992, p 3.

concentration (A+B) may be not powerful enough to unilaterally dominate the market in terms of Art. 2 MR1989[917].

The doctrine is not only backed on the grounds of consistent decision-making as the Commission used the concept to approach to the comparable issue under Art. 102 TFEU (Art. 82 ECT) but also the wording of various domestic antitrust laws mention this phenomenon[918]. The concept will be reviewed again with respect to the case *VEBA/VIAG*.

6.5.4.2.17 Ancillary Restraints

The third issue - mentioned by Recital 25 and Art. 6 I lit. b, Art. 8 II 3rd Sentence MR1989[919] and not expressively governed by Art. 2 of MR1989 - relates to the so-called ancillary restraints[920]. Firstly, the term will be defined, then the procedural aspects are considered before the substantive criteria for the assessment are discussed.

A restraint will be available if the undertakings concerned agree on behavioural restrictions which intent or cause a reduction or distortion of competition on a relevant market in terms of Art. 101 TFEU (Art. 81 ECT) and Regulation 1/2003/EC[921]. Such a restraint will be ancillary, if it is directly related to the concentrations and if it its enforcement is deemed to be necessary for a successful implementation of the concentration[922]. This term of direct relation is specified in a Commission notice[923]: In short, the restriction is directly related if it is of minor economic relevance compared with the concentration[924] and if the concentration is the original reason to agree on the concerted practices. Secondly, the necessity criterion asks whether the practices are consistent with a

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917 This is exemplified by the fact that commercial decisions (e.g. pricing) inevitably become interdependent if few companies penetrate the market and a "tacit collusion" will occur: q.v. F.M. Scherer and D. Ross, Industrial Market Structure and Economic Performance (3rd ed.) (Cambridge, U.S., Harvard University Publishing, 1991) p 226; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 104, p 607.

918 e.g. Commission Press Release of 22 July 1992, IP (92) 617. e.g. for Germany: Section 19 GWB1998.

919 Recital 21, Art. 6 I 3rd sentence, Art. 8 I 2nd sentence and Art. 8 II 3rd sentence MR2004.

920 Commission Notice on restrictions directly related and necessary to concentrations O. J. C 56, 05/03/2005 p 24; R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 21 5. (G) (i), p 904; V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 18 V p 162; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 142, p 704; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.20 (1) p 739; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.009, p 596 and marginal note 8.302, p 753; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.34, p 548 and marginal note 5.152, p 577.

921 R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 21 5. (G) (i), p 904.

922 V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 18 V p 162; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. V. p 522; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 24 VI. 2. p 588; T.A. Downes and J. Ellison, The Legal Control of Mergers in the European Communities (1st ed.) (London, U.K., Blackstone Press Limited, 1991) pp. 48-49; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 205, p 650; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.20 (2) (a) pp. 739-740; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 5. F. p 1194.

923 Commission Notice on Restrictions directly related and necessary to concentrations, O. J. 2005 C 56/24 replacing the previous Notice O. J. 2001 C 188, p 5; C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 40, p 417; CH 41 p 422; Commission Notice on restrictions directly related and necessary to concentrations O. J. C 56, 05/03/2005 p 24, replacing the previous Notice 2001 C 188/5; Commission Notice Regarding Restrictions Ancillary to Concentrations, O. J. C 203, 14/08/1990, p 5; C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 40, p 417; CH 41 p 422; e.g. non competition clauses between the target's parent and the acquirer; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 24 VI. 1. p 586; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 205, p 650.

924 Commission Notice on restrictions directly related and necessary to concentrations O. J. C 56, 05/03/2005 p 24, replacing the previous Notice 2001 C 188/5; Section II 4 Commission Notice Regarding Restrictions Ancillary to Concentrations, O. J. C 203, 14/08/1990 p 5; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.20 (2) (b) pp. 740-741.

complete proportionality test[925]. Consequently, a restraint should be of limited duration as unlimited ones are rarely justifiable[926].

In procedural terms, it must be stressed that ancillary restrictions are exempted from the need to initiate formal proceedings under REG17 (COUNCIL REGULATION (EC) NO. 1/2003) so that no application for an informal comfort letter[927] or a derogation under Art. 101 III TFEU (Art. 81 III ECT) is required[928]. This finding is a result of Recital 25, Art. 8 II 3rd Sentence MR1989 considered together with Art. 22 II MR1989.

However, the wording of MR1989 does not expressively define the substantive criteria which will govern whether ancillary restraints will be lawful or not.

The Commission strictly pursued the opinion that the criteria of Art. 101 I and III TFEU (Art. 81 I and III ECT) are not relevant to merger control proceedings[929]. This leads to the result, that the dominance test of Art. 2 I-III MR1989 provides for the appropriate yardstick: The restraint is one of the factors determining whether to block a decision or to issue a conditional clearance.

Alternatively, one could argue that the Merger task force should examine ancillary restraints during the merger control proceedings to the end whether the reported behavioural restrictions are inconsistent Art. 101 TFEU (Art. 81 I ECT) and - if so - whether they are justifiable under Art. 101 III TFEU (Art. 81 III ECT) and to attach undertakings in case of an interference so as to assure compliance with Art. 101 I OR III TFEU (Art. 81 I or III ECT[930]).

The first approach avoids contradictory interpretations of Art. 101 TFEU (Art. 81 ECT) by different groups of casehandlers in the Commission.

The second opinion overlooks that Art. 8 II MR1989 does not vest the Commission with the right to unilaterally impose self invented undertakings that could enforce Art. 101 TFEU (Art. 81 ECT)[931]. Therefore, the approach taken by the Commission with regard to the yardstick of the assessment of ancillary restraints is generally sustainable. However, the substantive criteria of Art. 101 I and III TFEU (Art. 81 I and III ECT) will be clearly

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[925] Commission Notice on restrictions directly related and necessary to concentrations O. J. C 56, 05/03/2005 p 24, replacing the previous Notice 2001 C 188/5; q.v. Section II.5 Commission Notice Regarding Restrictions Ancillary to Concentrations, O. J. C 203, 14/08/1990 p 5.

[926] q.v. Commission Decision, Case No. IV/M197, 1991 (*Solvay-Laporte/Interox*).

[927] i.e. an informal statement that the Commission does not find that the mentioned conduct is within the scope of Art. 81 I ECT.

[928] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 204, p 649.

[929] Commission Notice on restrictions directly related and necessary to concentrations O. J. C 56, 05/03/2005 p 24, replacing the previous Notice 2001 C 188/5; "Under the Regulation [i.e. MR1989] such restrictions must be assessed in relation to the concentration, whatever their treatment might be under Articles 85 and 86 if they were to be considered in isolation or in a different economic context": paragraph I.2 of Commission Notice Regarding Restrictions Ancillary to Concentrations, O. J. C 203, 14/08/1990 p 5; q.v. paragraphs III.A.6 and III.B.3 ; q.v. C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 40, p 417; CH 41 p 422; q.v. Commission Explanatory Memorandum Treatment of Ancillary Restraints under The Merger Regulation, pdf.file downloadable from http://europa.eu.int/comm/competition/mergers/legislation/draft_notices/ paragraph 4; q.v. also Ahlborn and V. Turner, *Expanding Success? Reform of The E.C. Merger Regulation*, ECLR 259 (1998): The inconsistency of the assessment of ancillary restraints and of cooperative aspects of coordinative JVs under MR1997 is criticised by Ahlborn and V. Turner, *Expanding Success? Reform of The E.C. Merger Regulation*, ECLR 258-259 (1998).

[930] This approach is similar to the treatment of coordinative JVs under MR1997 pursuant to Art. 82 IV MR1997 as exemplified by Draft Commission Notice on Commitments Submitted to The Commission under Regulation 4064/89/EEC and under Commission Regulation 447/1998/EC at paragraph 15; pdf.file downloadable from: http://europa.eu.int/comm/_competition/mergers/legislation/draft_notices/; C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339.

applicable if the Commission has to assess coordinative aspects of coordinative JVs under Art. 2 IV MR1997, i.e. a collusion between each parent and the JV or between the parents, which is discussed later[932]. An example of ancillary restraints are restrictions on competition between the parties for up to two years[933] or an indefinite time in case of the formation of a JV between the mother undertakings[934]. Other restraints are the grant of licences and duties to delivery and supply and to accept services[935] and duties to confidentiality for up to three years[936]. Ancillary restraints in phase one are now governed by Art. 6 II 4th sentence MR2004[937]. Common types of ancillary restraints are limited duration and geographical non-competition clauses, transitional period purchase and supply agreements and license agreements[938].

6.5.5 Initiation of phase two decisions based on Art. 6 I lit. c MR1989

If the Commission finds that a concentration within its jurisdiction is likely to be incompatible with common market pursuant to Art. 6 I lit. c MR1989 in combination with Art. 2 III MR1989, a decision will be taken that initiates phase two proceedings[939]. In order to establish the necessary finding of dominance, Art. 2 III MR1989 refers - from a contrary point of view - to the substantive criteria of Art. 2 I MR1989. The former criteria have already been discussed in the context of a decision based on Art. 6 I lit. b MR1989 so that a further assessment is redundant. In procedural terms, the initiation of phase two proceedings decision may be accompanied by a prolongation of the suspension under Art. 7 II MR1989. The wording of MR1989 does not provide for a publication of an initiation decision to third parties but one could argue that a number of publications may generate customary law. Alternatively, it is persuasive to argue that a regular publication of initiation decisions in the Official Journal creates a consistent lawful practise from which the Commission can only derogate with due reason as otherwise the principle of non discrimination would be violated. If the concentration is abandoned the case is closed without a decision under Art. 8 I-IV MR2004 pursuant to Art. 6 I lit. c 2nd sentence MR2004[940].

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931 q.v. § 40 III GWB; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 10 VII 4. p 377.
932 q.v. Art. 2 IV; 3 II and 8 III MR1997; Draft Commission Notice on Commitments Submitted to The Commission under Regulation 4064/89/EEC and under Commission Regulation 447/1998/EC Paragraph 15; pdf.file downloadable from: http://europa.eu.int/comm/competition/mergers/legislation/draft_notices/; C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339.
933 G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 210, p 652.
934 G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 213, p 653.
935 G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 214-217, pp. 654-655.
936 G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 218, p 655.
937 G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 86, p 686.
938 I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.20 (2) (a-d) pp. 741-745.
939 R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 21 4. (C) (ii) (a), p 880; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. VI. 2. c) (1) p 560; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 87, p 686; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 4. D. (iii), p 1128; M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 7 marginal note 7-004, p 351.
940 G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 84a, p 558.

6.5.6 Evaluation of Phase One Decisions under Art. 6 I MR1989

The importance of decisions under Art. 6 I MR1989 following informal phase one proceedings must not be underestimated. The vast majority of cases is unconditionally declared compatible with the common market, a less significant number is declared compatible on conditions and only a small proportion is referred to formal phase two proceedings in which it will be highly probable to obtain a conditional clearance, sometimes an unconditional one and in extremely rare circumstances a prohibition will be issued[941].

This result indicates the need to establish whether the Commission's powers to interpret indefinite vague blanket terms within the law - especially as to the finding of a concentration, the community dimension, the market definition, the finding of dominance - and to take advantage of provisions vesting it with discretionary powers are used in a way that boosts legal certainty. Additionally, if principles of predictability are ignored, the question of efficient judicial review arises.

Although most of the blanket terms are clarified by flexible but strictly teleological interpretation, the analysis shows an inconsistent approach to certain definition for example the inconsistent approach towards collective dominance under Art. 2 MR1989. However, it would not be fair to blame the Commission alone as the Courts are partly responsible due to their differentiated analyses under Art. 101 and 102 TFEU (Art. 81 and 82 ECT). This may have persuaded certain acquirers to push forward with concentrations which were designed to circumvent a single firm dominance by means of minor divestitures under the expectation that the Commission would fail to solve the issue properly.

From the perspective of undertakings interested in implementing a concentration it is important to note that a concentration may be justified not only by means of an extremely broad definition of the relevant product market but also by means of focusing on qualitative factors in Art. 2 I lit. b MR1989 which may overrule the strict solution based on quantitative market share analysis.

However, a final assessment is not feasible, as the question has to be discussed in the next sections how the secretive negotiations between the parties and the Commission should be assessed after the Commission revealed that it intends to issue a statement of objections and the parties suggested concessions and restrictions safeguarding the transaction.

[941] q.v. An evaluation of the legal basis of the merger cases sustains this finding. The legal bases are published on the merger section of DG competition's website. Prohibition in the case Commission Decision EDP / ENI / GDP CASE IV/M. 3440.

6.6 Phase Two

If the Commission establishes serious concerns as to the incompatibility of a given concentration, it will initiate formal proceedings in order to scrutinise the case in greater detail (Art. 6 I lit. c, Art. 2 III MR2004)[942]. This section concentrates on the procedural aspects of decision-making in phase two before the substantive requirements are discussed for a compatibility decision[943] eventually accompanied by undertakings[944]. Alternatively, a prohibition decision is taken. An order may be attached to the latter which will demand that assets will be divested or joint control abandoned if the unlawful concentration is already implemented[945]. In this context, the provisions will be evaluated which enable the Commission to revoke a positive decision in terms of Art. 8 II MR1989 pursuant to Art. 8 V-VI MR1989. A critical assessment of the procedural and substantial aspects of phase two is incorporated as well.

6.6.1 Procedural Aspects of Decision-making within Phase Two

If the Commission takes a decision to initiate formal proceedings on the basis of Art. 6 I lit. c MR1989, it will apply a methodology with multiple stages that is broadly similar to the one that is relevant to phase one proceedings. Possible decisions include a decision on compatibility with the common market (Art. 8 I MR2004)[946], which is rare owing to the prior decision under Art. 6 I lit. c MR2004[947], in particular after subject to commitments (Art. 8 II MR2004)[948], on incompatibility (Art. 8 III MR2004 in combination with Art. 2 III MR2004)[949] and on reversal if a given concentration is contrary to MR2004 and already implemented (Art. 8 IV MR2004 in combination with the blocking decision or in a separate decision)[950]. The Commission has so far blocked 29 concentrations until 28/02/2019 under Art. 8 III MR2004[951].

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[942] R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 21 4. (C) (ii) (a), p 880; K. Lange, Handbuch zum deutschen und europäischen Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2006) CH 8 § 1 IV. p 575; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.430, p 641 and marginal note 5.437, p 642.
[943] Art. 8 II 1st sentence MR1989.
[944] Art. 8 II 2nd sentence MR1989.
[945] Art. 8 II-IV MR1989.
[946] R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 21 4. (C) (ii) (a) p 880; V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 18 IV p 161; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. VI. 2. c) (2) p 560.
[947] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 128, p 698.
[948] R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 21 4 (C) (ii) (a) p 880; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. VI. 2. c) (2) p 561; q.v. § 40 III GWB; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 10 VII 4. p 377; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1425, p 562; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 163, p 634.
[949] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. VI. 2. c) (2) p 561; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1428, p 564.
[950] R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 21 4. (C) (ii) (a) p 880; V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 18 III p 160; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. VI. 2. c) (2) p 561; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1445, p 570; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 138, p 702.
[951] http://ec.europa.eu/competition/mergers/statistics.pdf (28/02/2019). F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1428, p 564 (24 decision until 2014).

6.6.1.1 Requests for Information Art. 11 MR1989

Firstly, the Commission may ask certain addressees[952] to submit pieces of information necessary for the due completion of the analysis[953]. Due to the vagueness of the term "necessary information", the Commission will have considerable discretion as to the definition what data may be requested. These powers of interpretation are limited by two factors: Firstly, the Commission has to submit copies to domestic authorities[954]. Secondly, the Commission has to state the legal basis and the purpose of any request accompanied by a reference to the potential sanctions for non-compliance[955]. According to systematic analysis of Art. 11 I and V MR1989, the initial request is an informal act accompanied with a temporal framework for compliance[956]. However, a formal decision may be issued if the addressee fails to comply with the request to full extent[957]. As any delay resulting from addressees ignoring the requests should not undermine the efficacy of the proceedings, the Commission is entitled to extend the proceedings pursuant to Art. 10 IV MR1989 and its 90-day period for investigations is impeded (stop the clock)[958]. The Commission may offer state of play meetings with the parties so as to discuss the aspects of decision-making[959].

6.6.1.2 Investigations pursuant to Art. 13 MR1989

Additionally, the Commission will be empowered by Art. 13 I MR1989 to initiate certain investigations and inspections[960] into undertakings and associations provided that they are necessary[961]. According to the proportionality principle, such an investigation will be indispensable if a mere request of information under Art.

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952 The correct addressees are Member States' governments, domestic authorities, natural persons acting as entrepreneurs in terms of Art. 3 I lit b; undertakings (i.e. parties, group undertakings and third undertakings), associations of undertakings pursuant to Art. 11 I MR1989; P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 B. (1) (c) pp 375-376; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 69, p 680.

953 T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 VII 3. p 229; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 95, p 689; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.12 p 673, § 7.27 (4) (a) p 756 and § 7.30 (2) p 772; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.192, p 695; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.545, p 665; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.137, p 1857; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 4. F., p 1129.

954 The authorities of a Member State have to be informed under Art. 11 II MR1989 if the addressee of the request is resident in that State (or has its corporate seat there). Regarding corporate seats, it is disputed whether the location of incorporation is relevant or the place where the factual business activities are concentrated.

955 Art. 14 III MR1989.

956 J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. VI. 4. p 594.

957 Art. 11 V MR1989; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 74, p 681.

958 q.v. Art. 10 IV MR2004; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 74, p 681; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.28 (2) p 762; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.195, p 696; M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 7 marginal note 7-005, p 351.

959 G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 95, p 689.

960 Art. 13 I MR1989: right to an examination of business records, right to a request for copies, right to oral explanations, right to the entering of premises; P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 B. (1) (c) p 375; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1440, p 567; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.27 (4) (b) p 757 and § 7.30 (2) p 772; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.194, p 696; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.544, p 665.

961 T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 VII 3. p 229; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 77, p 682; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.12 p 674.

11 MR1989 is not deemed to be efficient[962]. It could be disputed whether an ex ante or an ex post analysis would be more appropriate if the conduct of the Commission was to be reviewed. Art. 13 II MR1989 lays down how the Commission shall indicate the investigative powers of an official[963] to the addressees and deals with the liaison with domestic cartel authorities[964]. If the less formal investigations under Art. 13 I-II MR1989 are not effective, the Commission may issue a formal decision that orders an investigations pursuant to Art. 13 III MR1989 to which the abovementioned and additional safeguards apply[965].

6.6.1.3 Substantive Analysis and Early Indication of the Course of Action

After having completed the collection of facts, the emphasis shifts to the economic and legal assessment of the case pursuant to the criteria of Art. 2 I-III MR1989. This has already been discussed with respect to compatibility decisions in phase one.

If the complex analysis is completed, the officials in charge will indicate to the parties whether they intend to argue in favour of an unconditional clearance in terms of Art. 8 II 1st Sentence MR1989. In that case, it is announced that a draft decision regarding unconditional clearance will be prepared. Contrarily, if the Commission takes a critical approach to the concentration, it will communicate to the parties that it considers to issue a statement of objections on the basis of the relevant implementing regulation[966]. Said statement of objections will precede either a conditional clearance or an incompatibility decision.

The rationale behind this indication is that an early revelation of the Commission's intention to impose restrictions or to block the concentration provides the parties with a crucial opportunity of discussing alterations of the concentration and to submit these proposals to the Commission on time as they have the right to make themselves heard[967]. As a result of promised alterations, the Commission might remove undertakings, ease their scope or transform a plan of prohibition into an intention to grant a conditional clearance.

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[962] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. VI. 4. p 594.

[963] The official has to provide a written statement that introduces the subject, the purpose and the potential penalties to the addressee pursuant to Art. 13 II 1st Sentence MR1989.

[964] Art. 13 II MR1989: The Member State must be informed well in advance; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.12 p 674.

[965] The decision has to define the subject, the purpose of the investigation, the date of investigations, the penalty and the right to judicial review (Art. 13 III MR1989). National Authorities have to be informed and heard (Art. 13 IV MR1989). The Commission can ask domestic authorities to enforce compliance with the former's orders (Art. 13 V-VI MR1989).

[966] Art. 12 II Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O. J. L 336, 31/12/1993 p. 7; Art. 13 II Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 377, 31/12/1994 p 1 including Annex I (Form CO); Art. 13 II Commission Regulation 447/1998/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 061, 02/03/1998, p 1 Including Annex I (Form CO); C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339.

[967] q.v. This right is granted at any time up to the consultation of the Advisory Committee on Concentrations pursuant to Art. 18 I MR1989.

6.6.1.4 Unconditional Clearance Draft Decision or Statement of Objections

Provided that the Commission undertook a favourable analysis of the concentration in the previous stage, a draft clearance decision is released and submitted to the advisory committee on concentrations which will be discussed in the next sections[968].

However, if the Commission intends to conditionally clear or block the concentration, it will have to honour several procedural steps before a draft decision can be formulated: Firstly, the Commission will enact a statement of objections as it was predicted in the previous stage[969]. The latter statement has four functions: Firstly, it indicates that the Commission plans either to grant a conditional clearance by imposing restrictions pursuant to the 2nd phrase of Art. 8 II MR1989 or to declare the concentration incompatible under Art. 8 III MR1989[970]. Secondly, it limits the scope of the proceedings insofar as it exhaustively defines these aspects of the concentration which sustain a finding of incompatibility from the Commission's point of view[971].

Thirdly, it forms the framework for the parties' written observations[972] and for later discussions during the mandatory hearings that precede any decision based on Art. 8 II 2nd Sentence or Art. 8 III MR1989[973].

Finally, the statement of objectives will fix a period within the parties must submit their written commentaries[974].

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968 q.v. infra at 6.6.1.7 .

969 I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.28 (3) p 762; M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 7 marginal note 7-004, p 351.

970 q.v. Art. 12 I Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O. J. L 336, 31/12/1993 p. 7; q.v. Art. 13 I Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 377, 31/12/1994 p 1 including Annex I (Form CO); Art. 13 I Commission Regulation 447/1998/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 061, 02/03/1998, p 1 Including Annex I (Form CO); C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339.

971 Art. 18 III MR1989.

972 q.v. Art. 12 IV Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O. J. L 336, 31/12/1993 p. 7; q.v. Art. 13 IV Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 377, 31/12/1994 p 1 including Annex I (Form CO); q.v. Art. 13 IV Commission Regulation 447/1998/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 061, 02/03/1998, p 1 Including Annex I (Form CO); C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339.

973 q.v. Art. 12 I Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O. J. L 336, 31/12/1993 p. 7; q.v. Art. 18 MR1989; q.v. Art. 13 I Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 377, 31/12/1994 p 1 including Annex I (Form CO); q.v. Art. 13 I Commission Regulation 447/1998/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 061, 02/03/1998, p 1 Including Annex I (Form CO); C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339; q.v. § 40 III GWB; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 10 VII 4. p 377.

974 Art. 12 II and IV Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O. J. L 336, 31/12/1993 p. 7; q.v. Art. 18 MR1989; Art. 13 II and IV Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 377, 31/12/1994 p 1 including Annex I (Form CO); q.v. Art. 13 II and IV Commission Regulation 447/1998/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 061, 02/03/1998, p 1 Including Annex I (Form CO); C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339.

Clearly, the threat to impose conditions or to block the merger forms a formidable incentive for the parties to propose alterations of the concentration so as to increase the element of market conformity and to decrease the scope for dominance.

Said proposals will be discussed during the hearings with a view to establish whether they are sufficient to remove the stated concerns of the Commission[975]. To that end, a consecutive series of proposals that increasingly limit the market power of the concentration may be necessary. However, the Commission is not restricted to a passive role: It may also issue a communication that proposes alterations which will remove the concerns.

6.6.1.5 Access to the File

If the parties receive the abovementioned statement of objections, they can apply for access to the file under Art. 18 III 2nd sentence MR2004 and Art. 12 III/13 III of the relevant implementing regulation in order to prepare their written observations under the fourth paragraph[976] which will facilitate substantive discussions during the later stage of hearings[977].

6.6.1.6 Hearings

The next stage of the phase two proceedings involves non-public hearings under Art. 18 MR1989[978] (Art. 18 MR2004) when the process leads to a statement of objections against the concentration[979] and the parties replied to the statement of objections[980]. The rationale of this provision is to provide the parties with an opportunity of communicating their views to the Commission if the Commissions intends to release a decision that contravenes the parties' commercial interests[981]. The Commission is obliged to take the arguments put forward into consideration as Art. 18 III MR1989 coerces the Commission not to base any negative finding on

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975 M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 7 marginal note 7-004, p 351.

976 Art. 12 III and IV Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O. J. L 336, 31/12/1993 p. 7; Art. 13 III and IV Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 377, 31/12/1994 p 1 including Annex I (Form CO); Art. 13 III and IV Commission Regulation 447/1998/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 061, 02/03/1998, p 1 Including Annex I (Form CO); C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 99, p 690.

977 I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.28 (4) pp. 764-765.

978 E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 23 VI. 7. a) p 549; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 VII 4. p 229 and § 6 VII 6. p 232; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1440, p 567; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.28 (6) pp. 766-767; M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 7 marginal note 7-004, p 351; Art. 11-16 Commission Implementing Regulation (EU) No.1269/2013 of 5 December 2013 amending Commission Regulation (EC) No.802/2004 implementing Council Regulation (EC) No.139/2004 on the control of concentrations between undertakings, O. J. L 336, 14.12.2013, pp. 1-36.

979 Art. 18 III 1st sentence MR2004; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 96, p 689.

980 I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.28 (5) p 766

arguments which were not presented to the parties in advance. This provision would be useless if the Commission was entitled to ignore the observations made by the parties.

As far as ordinary phase two proceedings are concerned, Art. 18 MR1989 is applied after the parties submitted their observations concerning a statement of objections given by the Commission. In general, Art. 13 I of the implementing regulation clarifies that parties will be only heard if they request an oral hearing and show significant interest[982].

Hearings are held by a specific hearing officer and they are not public[983]. Additionally, third parties may be heard[984]. After the hearing, the Commission formulates its draft decision which will be submitted to the Advisory Committee on Concentrations.

6.6.1.7 Preliminary Draft Decision and Advisory Committee on Concentrations

The next stage deals with the consultation of the Advisory Committee on Concentrations. After the Committee received a preliminary draft decision - either pursuant to short proceedings owing to an initial positive view of the Commission or pursuant to the procedures following a statement of objections - the Advisory Committee on Concentrations will discuss the case in a joint meeting at the invitation of the Commission[985]. The committee consists of representatives of national cartel authorities and comments on the draft decision and may ask for a publication[986].

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[981] i.e. Art. 18 MR1989 requires mandatory hearings prior to decisions regarding extensions of suspensions (Art. 7 II; 7 IV MR1989), conditional clearances (Art. 8 II 2nd sub-paragraph MR1989), prohibitions (Art 8 III MR1989), divestitures and cessation of joint control (Art. 8 IV MR1989), revocations (Art.8 V MR1989); sanctions (Art. 14 and 15 MR1989).

[982] However, in case of decisions regarding sanctions, it is not necessary to show such interest: Art. 13 I Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O. J. L 336, 31/12/1993 p. 7; Art. 14 III Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 377, 31/12/1994 p 1 including Annex I (Form CO); Art. 14 III Commission Regulation 447/1998/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 061, 02/03/1998, p 1 Including Annex I (Form CO); C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339.

[983] q.v. Art. 14 I and IV Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O. J. L 336, 31/12/1993 p. 7; Art. 15 I and IV Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 377, 31/12/1994 p 1 including Annex I (Form CO); Art. 15 I and IV Commission Regulation 447/1998/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 061, 02/03/1998, p 1 Including Annex I (Form CO). According to FT, the Hearing Officer Temple-Lang recently resigned owing to conflicts regarding a greater impact of hearing on the substantial evaluation of the case. However, the details are beyond the scope of this paper; C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 101, p 691.

[984] Art. 15 Commission Regulation 2367/90/EEC of 25 July 1990 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 219, 14/08/1990 p 5 including Annex I (Form CO); as amended by Regulation 3666/93/EC O. J. L 336, 31/12/1993 p. 7; Art. 16 Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 377, 31/12/1994 p 1 including Annex I (Form CO); Art. 16 Commission Regulation 447/1998/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 061, 02/03/1998, p 1 Including Annex I (Form CO); C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339.

[985] Art. 18 V MR1989. The Commission also chairs the meeting; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.28 (9) p 769.

[986] However, the Commission has discretion whether to publish the opinion or not arg ex Art. 19 VII 2nd Sentence MR1989: "may".

6.6.1.8 Final Decision

Prior to developing the final draft decision, the Commission has to take the committee's opinion into "utmost account" but the vague meaning of this blanket term and the wording of the 2nd Sentence of Art. 19 VI MR1989 clearly indicate, that the Commission is vested with discretionary powers to derogate from the opinion as long as it gives due reasons. Finally, the Commissioners will decide on the case by absolute majority vote[987]. The decision will be valid after its publication[988].

6.6.1.9 Evaluation

As a summary of the procedural aspects of phase two, one could state that the law is hardly transparent or consistent as the initial implementing regulation was not only amended in 1993, but also repealed in 1994 by its successor. The successor was repealed in 1998 by the third regulation and there is still an ongoing discussion regarding the revision of the guidance notices accompanying the Form CO of the third implementing regulation.

However, this first sight analysis is not persuasive as the key features of implementation regarding phase two proceedings were either not altered or merely clarified[989].

It has to be stressed how great the focus on the parties' proposals and initiatives is and how important the parties' right to be heard prior to each procedural step are. The provisions go far beyond a mere mandatory hearing in which a commented statement of objections may be discussed: First of all, the parties are informed at an early stage about any legal assessment potentially contrary to their commercial interests. Secondly, the parties can play a pro-active role by means of inventing of new options and by proposing these amendments of the concentration to the Commission which will give a quick response so as to explain the likely legal effect of a hypothetical realisation of the proposition. Thirdly, it is important that the Commission is prevented from introducing new counter-arguments in its later draft decision without having provided the parties with the opportunity of making observations. Moreover, the Commission must consider the presented arguments in its reasoning. Finally, it would be disproportional to insist on public hearings as the legitimate interest in confidentiality overwhelms the public interest as long as the final decisions are published and explain the reasoning and give appropriate details.

6.6.2 Unconditional Clearance Decision Art. 8 I 1st Sentence MR1989

Having already discussed the procedural aspects of decision-making in phase two in the previous section and taking into account that the substantive criteria for an unconditional clearance decision in terms of Art. 8 I 1st

[987] The proceedings depends on the consent at the level of the Commissioner's chefs de cabinet. If consent is available, no detailed discussion is necessary.
[988] q.v. Art. 20 I; 8 II-V MR1989.

Sentence MR1989 in combination with Art. 2 II MR2004 do hardly involve additional substantive aspects compared to those criteria that were already discussed in respect to the unconditional compatibility decision within phase one[990], it is feasible to shorten the substantive analysis: Firstly, it is simply relevant that the concentration is modified in a manner that removes the probability of market dominance[991] so that compatibility is available. Secondly, the case must be distinct from Art. 8 II 2nd sub-paragraph MR1989, i.e. the Commission must not be obliged to attach incidental provisions so as to safeguard the compatibility of the concentration[992]. The Art. 8 I MR2004 decision is made by the College of Commissioners[993].

6.6.3 Conditional Clearance Decision Art. 8 II 1-2 MR1989

This section will address both the formal and substantive prerequisites for a conditional clearance decision under Art. 8 II 1-2 MR1989[994].

6.6.3.1 Formal Criteria of Conditional Clearance (Art. 8 II MR1989)

In accordance with the previous sections, it is justifiable not to repeat the procedural aspects of decision-making in phase two in general but to focus on the specific issues of negotiating alterations of the concentration which will lead to incidental provisions later. The predominant procedural finding related to Art. 8 II 2nd sub-paragraph MR1989 is that the Commission has not the legal power to propose an alteration of the concentration plan, precisely define the alteration ex officio and to impose said alteration on the parties as a part of its conditional clearance decision[995]. De lege lata, this thesis is backed by the literal analysis of the section. It may also be supported by teleological arguments: The former merger task force had neither the personal capacity nor the managerial expertise nor the due time to invent appropriate options which may efficiently remove anti-

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989 However, it was reported that conglomerate aspects are less relevant to notifications according to the present form CO.

990 Art. 6 I lit. b MR1989; Art. 8 I MR2004; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 23 VI. 3. p 547; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 VII 1. c) p 227; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.28 (11) p 770; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.500, p 654; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrens-recht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.160, p 1864; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 4. E., p 1129; M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 7 marginal note 7-005, p 352.

991 C. Koenig, K. Schreiber, Europäisches Wettbewerbsrecht (1st ed.) (Tübingen, Germany, Mohr, 2010) CH 7 IV. 2., p 202.

992 The discretion that the Commission enjoys under Art. 8 II 2nd subparagraph as to the attachment of undertakings will be reduced to zero if an undertaking is the only remedy to defend the market against a concentration of considerable significance that may ignore the alterations proposed during the phase two proceedings; q.v. § 40 III GWB; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 10 VII 4. p 377; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 163, p 634; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.171, p 681.

993 J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.349, p 620.

994 q.v. § 40 III GWB; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 10 VII 4. p 377; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1425, p 562-563; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.28 (11) p 770; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.500, p 654; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.160, p 1864; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 4. E., p 1129; M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 7 marginal note 7-005, p 352.

995 q.v. Art. 8 II 2nd sub paragraph MR1989; also Art. 6 I lit. b 2nd sub paragraph MR1997 and Art. 6 II 2nd sub paragraph MR1997; q.v. Draft Commission Notice on Commitments Submitted to The Commission under Regulation 4064/89/EEC and under Commission Regulation 447/1998/EC Paragraph 16-17; pdf.file downloadable from: http://europa.eu.int/comm/ competition/mergers/legislation/draft_notices/; C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 VII 1. c) p 228.

competitive aspects without unduly limiting the commercial interests involved in the transactions. Given the size, economic power and managerial competence of the acquirers participating in concentration with a community dimension, it can be superior if only the parties themselves are empowered to prepare different sets of alterations and propose the less harmful alteration at first. Contrarily, public pressure could be reduced by ex officio incidental provisions.

Consequently, it depends on the parties to suggest amendments of the concentration[996] in order to address the criticisms communicated by the Commission to the parties. Since the second implementing regulation was enacted, the proposals for amendments must be submitted not later than three months after the initiation of proceedings[997]. Clearly, the parties should develop the abovementioned sets of diverse options well in advance so as to proceed quickly with "salami tactics": The alteration causing the least detrimental commercial effect should be suggested at the beginning. In case of ongoing concerns of the Commission officials, the 2nd best option can be quickly presented up to the least best solution that would be acceptable for the parties[998].

This approach is backed by the opinion of the Commission that subsequent restructuring proposals are subject to the same time limit of three months[999].

One could question whether such a stringent interpretation is necessary to safeguard the interest of the Commission to react to the proposal. However, the requirement is insofar sustainable from the parties' point of view, as a dense series of consecutive proposals is extremely likely to put quickly increasing pressure on the Commission to clear the concentration. A conditional clearance decision under Art. 8 II MR2004 is taken by the College of Commissioners[1000].

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[996] The alterations must refer to assets involved in the original concentration plan according to the restrictive wording of Art. 8 II 2 MR1989. However, Art. 8 II 2 MR1997 is more flexible; q.v. infra 7.7 Conditional Phase Two Clearances Art. 8 II 1-2 MR1997; U. Immenga, Die Europäische Fusionskontrolle im wettbewerbspolitischen Kräftefeld (1st ed.) (Tübingen, Germany, Mohr, 1993) p 29.

[997] Whereas the first implementing regulation is silent on this matter, the second and third regulations address the topic: Art. 18 I of the second one addresses the topic: Art. 18 I Commission Regulation 3384/94/EC of 21 December 1994 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 377, 31/12/1994 p 1 including Annex I (Form CO); Art. 18 II Commission Regulation 447/1998/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 061, 02/03/1998, p 1 Including Annex I (Form CO); C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339.

[998] This procedure can be described as a poker game in which the parties are always the dealer; q.v. Overbury, C., *Politics or Policy? The Demystification of EC Mercer Control, Annual Proceedings of the Fordham Corporate Law Institute*, International Antitrust Law & Policy, 557 (1993).

[999] The Commission states that even additional proposals are subject to the tight schedule and that it might grant derogations only under extraordinary circumstances: Paragraph 36 Draft Commission Notice on Commitments Submitted to The Commission under Regulation 4064/89/EEC and under Commission Regulation 447/1998/EC Paragraph 16-17; pdf.file downloadable from: http://europa.eu.int/comm/competition/mergers/legislation/draft_notices/; The purpose of the time limit securing sufficient time for reactions is expressed in an introductory note on 1994 measures on the merger regulation published in Merger Control Law in the European Union: http://europa.eu.int/comm/dg04/lawmerg/en/intrir94.htm; C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339.

[1000] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.349, p 620.

6.6.3.2 Substantive Criteria of Conditional Clearance

The following section will focus on the substantive criteria for a conditional clearance decision under Art. 8 II 1st-2nd subparagraph MR1989[1001].

6.6.3.2.1 Incidental Provisions Assuring Compliance with Commitments Proposed by the Parties and Accepted by The Commission

The Commission will be entitled to attach an incidental provison or so-called undertaking - i.e. a condition[1002] or an obligation[1003] - to the compatibility decision only if the incidental provision chosen aims to assure that the parties honour their specific commitments[1004]. As mentioned above with regard to the proceedings[1005], those commitments were voluntarily made during the negotiations with the Commission, which had accepted the parties' proposals for alterations of the concentration as sufficient to remove the creation or enhancement of a dominant position.

Consequently, the Commission is not allowed to invent new conditions or obligations in order to address newly established negative aspects of the concentration not previously discussed with the parties. However, as long as the Commission limits itself to incidental provisions pursuing to enforce the commitments that were proposed by the parties, the Commission enjoys discretion as to define the appropriate incidental provisions: According to the legal principle of constitutional state that can be applied to transnational organisations as well on the basis of the effet utile doctrine, each discretionary decision has to honour specific standards. The most relevant standard consists of the proportionality principle. Thereby, the Commission has to define incidental provisions, that pursue objectives consistent with the law. Secondly, the provision must be suitable to speedily enforce the commitment[1006] on a long lasting basis[1007] in order to avoid present and future structural dominance[1008]. Thirdly, the incidental provisions must comply with the necessity test in the broad sense, i.e. the Commission must not

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[1001] T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 VII 1. c) p 227 and § 10 VII 4. p 377; q.v. § 40 III GWB; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.171, p 681.

[1002] A condition is an incidental provision, i.e. a provision which has a complementary function, specifying the intentions of the main provision and attached to it. Failure to comply with a condition causes the main provision either not to become valid (suspensive condition) or to lose its validity (condition subsequent). However, there is no legal obligation for the addressees to comply with a condition as opposed to an obligation.

[1003] An obligation denotes an incidental provision that requests the addressees to comply. In case of non compliance the Authorities may coerce the parties to honour the obligation. Alternatively, the Authorities can fix a date for the implementation of the undertaking. Failure to comply will enable the Administration to revoke the basic administrative order.

[1004] U. Immenga, Die Europäische Fusionskontrolle im wettbewerbspolitischen Kräftefeld (1st ed.) (Tübingen, Germany, Mohr, 1993) pp 29-30; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 23 VI. 5. p 548; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 VII 1. c) p 228.

[1005] q.v. 6.6.3.1 Formal Criteria of Conditional Clearance.

[1006] The Commission stresses that any incidental provision chosen must facilitate a rapid solution of the negative aspects of a given concentrations: q.v. Draft Commission Notice on Commitments Submitted to The Commission under Regulation 4064/89/EEC and under Commission Regulation 447/1998/EC Paragraph 37; pdf.file downloadable from: http://europa.eu.int/comm/ competition/mergers/legislation/draft_notices/; C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339.

[1007] The Commission underlines that the given incidental provision must remove the negative aspects of a given concentration on a lasting basis: q.v. Draft Commission Notice on Commitments Submitted to The Commission under Regulation 4064/89/EEC and under Commission Regulation 447/1998/EC Paragraph 10; pdf.file downloadable from: http://europa.eu. int/comm/ competition/mergers/legislation/draft_notices/; C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339.

[1008] e.g. It is not sufficient if the parties promise not to abuse their dominant position or if the proposed divestiture would create another dominant player: q.v. Draft Commission Notice on Commitments Submitted to The Commission under Regulation 4064/89/EEC and under Commission Regulation 447/1998/EC Paragraph 10, 12; pdf.file downloadable from: http://europa.eu. int/comm/ competition/mergers/legislation/draft_notices/; C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339.

impose a certain restriction if an alternative exists that addresses the competition problem in manner less detrimental to the parties without being far less effective. Finally, any incidental provision attached must not harm antagonistic interests of third parties to an extent that exceeds the beneficial legal value of the incidental provision in terms of competition law[1009].

Based on these considerations, the Commission emphasises that two groups of incidental provisions should be distinguished:

The primary and preferential group of incidental provisions consists of undertakings that intend to remove the negative aspects of a given concentration by means of restoring the status quo ante on the relevant market, i.e. the situation prior to the concentration[1010]. These measures imposed are designed to reduce the ability of the concentration to execute market power in the near future. For instance, there are structural amendments, which will reduce the market share of the companies concerned[1011]:

- divestiture of subsidiaries acting on the relevant markets, especially the activities of the target company on these markets[1012]
- divestiture of equity stakes[1013]
- separation of businesses that are not legally independent at present
- sale of key-intellectual property rights and technology (<-> licensing)[1014].

Thereby, an opportunity is generated that a new competitor with sufficient market power as to balance the concentration will successfully operate on said markets on a lasting basis. More specific, the parties have to propose interim programmes which are designed to safeguard the commercial values of the assets that are due to be transferred[1015]. Additionally, the Commission has to approve the vendee of the assets in question. The purchaser must neither be too weak to become an active competitor nor too strong so as to obviously create

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[1009] the so-called principle of necessity in the narrow sense.

[1010] Draft Commission Notice on Commitments Submitted to The Commission under Regulation 4064/89/EEC and under Commission Regulation 447/1998/EC Paragraph 7-8; pdf.file downloadable from: http://europa.eu.int/comm/_competition/mergers/legislation/draft_notices/; C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339.

[1011] I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 2 E IV. p 175.

[1012] q.v. Draft Commission Notice on Commitments Submitted to The Commission under Regulation 4064/89/EEC and under Commission Regulation 447/1998/EC Paragraph 21; pdf.file downloadable from: http://europa.eu.int/comm/competition/mergers/legislation_/draft_notices/; C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339;I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 2 E IV. p 175; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.164, p 1865.

[1013] e.g. The Commission required that a third party, the purchaser of the merging parties Alcatel and Telettra sells its shareholdings in these entities so as to remove any incentive to purchase solely from the future concentration and to impede new competitors: Commission Decision, Case IV/M. 42, 1991 (*Alcatel/Telettra*) at paragraph 54-55; e.g. Varta was required to sell its stake in the entity which would be the strongest competitor after the concentration was implemented: Commission Decision, Case IV/M. 12, 1991 (*Varta/Bosch*) paragraph 30-32; e.g. Nestlé had to sell several brands: Commission Decision, Case IV/M. 190, 1992 (*Nestlé/Perrier*).

[1014] J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.164, p 1865.

[1015] This programmes must assure tangible assets, managerial capacities, credit lines: Draft Commission Notice on Commitments Submitted to The Commission under Regulation 4064/89/EEC and under Commission Regulation 447/1998/EC Paragraph 41; pdf.file downloadable from: http://europa.eu.int/comm/_competition/mergers/legislation/draft_notices/; C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339.

another threat of market dominance[1016]. For instance, the Commission required in the Case *Nestlé/Perrier*, that the purchaser should become a third force on the market and that the companies implementing the concentrative JV should not attempt to acquire the entity that is due to be created out of the divested assets within period of ten years[1017].

The second and less preferential group of undertakings consists of measures that intend to promote competition from third parties on the relevant market without demanding that the assets of the companies concerned are sold or transferred[1018].

This group of provisions is considered if a divestiture of assets would not be an effective means of countering market dominance owing to specific nature of the assets that are responsible for the incompatibility with the common market.

Consequently, measures within the second group intend to remedy the detrimental aspects attributed to the market power by means of limiting the significance of certain business assets[1019]. The following examples clarify the concept:

- an obligation that a mandatory licensing regimes for key-intellectual property rights in inaugurated on non discriminatory terms[1020],
- behavioural provisions assuring fair, transparent and non discriminatory access to essential facilities and infrastructure[1021],
- a mandatory termination of exclusive long term supply agreements or service contracts[1022].

Thereby, barriers to entry on the relevant product markets are removed or limited. Finally, it can be summarised that the draft notice on commitments reflect a highly sophisticated approach of the Commission to clarify the substantive pre-requisites for the imposition of conditions and obligations on the parties. The notice reveals the

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[1016] Draft Commission Notice on Commitments Submitted to The Commission under Regulation 4064/89/EEC and under Commission Regulation 447/1998/EC Paragraph 47; pdf.file downloadable from: http://europa.eu.int/comm/ competition/mergers/legislation/draft_notices/; C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339; C. Koenig, K. Schreiber, Europäisches Wettbewerbsrecht (1st ed.) (Tübingen, Germany, Mohr, 2010) CH 7 IV. 2., p 202.

[1017] Commission Decision, Case IV/M. 190, 1992 (*Nestlé/Perrier*).

[1018] i.e. the detrimental consequences attributed to high market shares are countered.

[1019] Draft Commission Notice on Commitments Submitted to The Commission under Regulation 4064/89/EEC and under Commission Regulation 447/1998/EC Paragraph 7 and 9; pdf.file downloadable from: http://europa.eu.int/comm/competition/mergers/legislation/draft_notices/; C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339.

[1020] J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.164, p 1865.

[1021] It is beyond the scope of this paper to discuss the doctrine of essential facilities in greater detail. It includes assets of which the duplication is either not feasible in legal or economic terms or not economically viable so that it would contravene to Art. 82 ECT if no access was granted. e.g. ports, pipelines, airport slots, railroad networks, telecommunications networks, sport stadiums etc.; q.v. Draft Commission Notice on Commitments Submitted to The Commission under Regulation 4064/89/EEC and under Commission Regulation 447/98/EC Paragraph 24; pdf.file downloadable from: http://europa.eu.int/comm/ competition/mergers/legislation/ draft_notices/; Whish, D. Bailey, Competition Law (8th ed.) (Oxford, U.K., OUP, 2015) CH 23 7. (B), p 1032; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrens-recht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.164, p 1865.

[1022] Draft Commission Notice on Commitments Submitted to The Commission under Regulation 4064/89/EEC and under Commission Regulation 447/1998/EC Paragraph 23; pdf.file downloadable from: http://europa.eu.int/comm/competition/mergers/legislation/ draft_notices/; C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.164, p 1865.

differentiated rank of incidental provisions limiting the market share of the concentration and those subsidiary undertakings merely facilitating market entry.

6.6.3.2.2 Incidental Provisions Covering Ancillary Restraints

In addition to Art. 8 II 2nd Sentence MR1989, it has to be underlined, that the 3rd sentence MR1989 empowers the Commission to address ancillary restraints in its decision imposing incidental provisions on the parties according to the parties' voluntary proposals. As it was concluded above[1023], it is superior to regard Art. 2 I-III MR1989 as the appropriate exclusive yardstick for this analysis.

6.6.3.2.3 Excursus: Conditional Clearance and New Yardsticks for the Assessment of JVs under MR1997

In contrast to the abovementioned general rules for the substantive assessment of conditional clearances under Art. 8 II MR189 in combination with Art. 2 I-III MR1989, a more specific solution is applicable for JVs under MR1997: As far as a concentrative JV is concerned, Art. 8 II 1st Sentence MR1997 makes clear that this operation should be generally assessed under the substantive criteria of Art. 2 I-II MR1997 and ancillary restraints are addressed pursuant to Art. 8 II 3 MR1997, too[1024].

As far as co-operative JVs[1025] are concerned, Art. 8 II 1 MR1997 makes clear that these operations should be generally assessed under the substantive criteria of Art. 2 I-III MR1997 as well, e.g. the aspects of JV formation and the power of the JV on the market. However, to the extent that the JV provides for a platform of co-ordination either between each parent and the JV or between the parents, Art. 8 II 1 MR1997 makes clear that these aspects shall be assessed by means of the criteria of Art. 101 I and III TFEU (Art. 81 I and III ECT) rather than on the base of Art. 2 I-III MR1997[1026].

Finally, the Commission will have to consider a release of incidental provisions under Art. 8 II 3rd Sentence MR1997, if coordinative aspects interfere with Art. 101 I TFEU (Art. 81 I ECT) without being justifiable under Art. 101 III TFEU (Art. 81 III ECT). Said incidental provisions must assure either compliance of the operations with Art. 101 I TFEU (Art. 81 I ECT) or at least with Art. 101 III TFEU (Art. 81 III ECT). Clearly, the appropriate yardstick for such an analysis must be Art. 2 I-III MR1997. This view is elaborated by the Commission in its draft notice on commitments[1027]. The rationale behind the new concept is discussed later on.

[1023] supra at 6.5.4.2.17 Ancillary Restraints owing to Art. 6 I 3rd sentence, Art. 8 I 2nd sentence and Art. 8 II 3rd sentence MR2004.
[1024] R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 21 3. (A) (ii) (c) –(iv), pp. 856-857.
[1025] Cooperative JVs are included by means of Art. 3 II MR1997 and Art. 2 IV MR1997. The implications are discussed below.
[1026] q.v. The wording of Art. 2 IV MR1997 is indicative: "to the extent that the creation of a joint venture constituting a concentration pursuant to "Art. 3 II MR1997". Additionally Art. 8 II 1 and III MR1997; q.v. C. Ahlborn and V. Turner, *Expanding Success? Reform of The E.C. Merger Regulation*, ECLR 252 and 257 (1998).
[1027] Draft Commission Notice on Commitments Submitted to The Commission under Regulation 4064/89/EEC and under Commission Regulation 447/1998/EC Paragraph 15; pdf.file downloadable from: http://europa.eu.int/comm/competition/mergers/legislation/draft_notices/; C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339.

6.6.3.2.4 Implementation of Incidental Provisions and Evaluation

The final sub-section addresses the question which methodology the Commission applies in order to safeguard the implementation of the incidental provisions imposed on the parties of a given concentration.

The solutions offered by the wording of MR1989 are poor: Failure to comply with either a condition precedent or a subsequent one will prevent the Commission's decision from entering into force. This result may not be desirable as it is difficult - if not impossible - to restore the status quo ante after the non compliance of the parties is once established.

Secondly, the Commission has no legal means at present to use methods of administrative enforcement law in order to coerce the parties to implement an obligation attached to its decision. It remains a theoretical question whether the Commission could invoke Art. 23 MR1989 in order to amend the implementing regulation so that it could provide for rules of administrative enforcement of orders based on MR1989.

Thirdly, Art. 8 V-VI MR1989 will empower the Commission to revoke its unconditional clearance decision, if the former is based on incorrect information based on parties' responsibilities or deceit, or to revoke its conditional clearance if the parties fail to comply with the obligations[1028]. This remedy is weak on two grounds: It is not only rarely feasible to efficiently restore the status quo ante after the reasons are established that would justify a revocations, but it is also rarely consistent with the proportionality principle to revoke a decision if the incorrect information or the breaches of obligations extend only to minor aspects of the transaction. In such a case the Commission would be obliged not to revoke the entire decision. De lege ferenda, such a situation could be partly remedied by altering Art. 8 V MR1989 so that is allows a partial revocation of the decision.

However, one could argue that the Commission's powers are well designed even in the presented situation as it may impose fines or periodic penalty payments for non-compliance with incidental provisions[1029].

This view is not persuasive, because it is well worthy to imagine a situation of a minor breach of obligations in which a revocation under Art. 8 VI MR1989 is not proportionate and in which a monetary sanction under Art. 14-15 MR1989 would not be deemed to be sufficient as a structural sanction is indispensable.

In fact, the Commission invented a strategy as to partly solve the complex problem of implementing incidental provisions: During the discussion whether a certain amendment of the transaction is sufficient to remove the concerns of dominance the Commission may indicate that the proposal would be indeed acceptable if the parties additionally proposed to install a trustee that will monitor the implementation of the proposed

[1028] The deadlines of Art. 10 MR1989 are not applicable owing to Art. 8 VI MR1989.

[1029] Fines under Art. 14 II lit. a 2nd Variant MR1989; 8 II 2nd sub paragraph MR1989 and periodic payments under Art. 15 II lit. a 2nd Variant MR1989; 8 II 2nd sub paragraph MR1989.

amendments[1030]. Then, the Commission will accept the package of commitments and is empowered to issue incidental provisions governing the speedy and long lasting implementation of commitments including the duties of an installed trustee. Failure of the parties to honour the obligations will empower the trustee to take control of the business and to implement the commitments.

The Commission points out that the trustee should be an investment bank guaranteeing significant managerial competence as to the monitoring. Moreover, it should work in general on an irrevocable basis and is paid by the parties[1031].

De lege lata, this approach is the best solution available. However, it would be superior to introduce a provision that authorises the Commission to impose subsequent obligations on the parties if they fail to address the commitments. This is even more true, as the basic conditions can well change significantly in the period between the conditional clearance decision and the implementation of the concentration accompanied by a failure to address certain obligations.

A final question remains unsolved regarding the jurisdiction of the departments of the Commission: Should the Merger task force be competent to regulate the behaviour between undertakings which implement a concentration provided that behavioural restrictions occurred that were not foreseeable at the moment in which the conditional clearance decision was taken or shall the antitrust departments be competent in these cases? For the sake of simplicity and consistent decision making, the general distribution of competence should prevail so that the antitrust departments will be competent.

6.6.4 Incompatibility Decision and Implementing Orders Art. 8 III-IV MR1989

An incompatibility Decision is taken pursuant to Art. 8 III MR1989 by the College of Commissioners, if the results of the phase two proceedings give evidence that the concentration contravenes Art. 2 III MR1989 (Art. 2 III MR2004) in combination with Art. 2 I MR1989[1032]. As the pre-requisites of the latter provisions were already discussed[1033], a further elaboration is redundant. In addition to the blocking decision under Art. 8 III MR1989, a divestiture decision pursuant to Art. 8 IV MR2004 might be issued by the College of Commissioners, if the

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[1030] q.v. Draft Commission Notice on Commitments Submitted to The Commission under Regulation 4064/89/EEC and under Commission Regulation 447/1998/EC Paragraph 37; pdf.file downloadable from: http://europa.eu.int/comm/ competition/mergers/legislation/draft_notices/; C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339.

[1031] Draft Commission Notice on Commitments Submitted to The Commission under Regulation 4064/89/EEC and under Commission Regulation 447/1998/EC Paragraph 43-46; pdf.file downloadable from: http://europa.eu.int/comm/ competition/mergers/legislation/draft_notices/; C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339.

[1032] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. VI. 2. c) (2) p 561; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 23 VI. 3. p 547; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 137, p 702; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.28 (11) p 770; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.171, p 681; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.349, p 620 and marginal note 5.500, p 654; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.160, p 1864; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 4. E., p 1129; M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 7 marginal note 7-005, p 352.

parties implemented the illegal concentration in either the pre-notification stage, in phase one, two or even later so that the concentration is dissolved[1034]. The dissolution order is backed by fines and periodic penalty payments (Art. 14 II lit. c and Art. 15 I lit. d MR2004)[1035]. In twelve cases fines were imposed[1036].

6.6.5 Revocation of Clearance Decisions and Subsequent Incompatibility Decision under Art. 8 V-VI MR1989

After having established that an unconditional clearance decision was awarded on the basis of fraud or incorrect information attributable to the parties or having established a failure to honour obligations, the Commissioner can revoke a decisions under Art. 8 II 1st-2nd paragraph MR1989 pursuant to Art. 8 V MR1989 (interim measures to be confirmed by the College of Commissioners)[1037]. This provision has already been discussed with regard to the enforcement of incidental provisions[1038]. The Commission may apply interim measures so as to restore the competitive situation prior to a contested concentration (a suspension owing to Art. 7 MR2004 is violated or a concentration is implemented without honouring incidental provisions (Art. 6 II and Art. 8 II-III MR2004) pursuant to Art. 8 V MR2004[1039]. Moreover the College of Commissioners may revoke a decision in terms of Art. 8 I-II MR2004, if the declaration of compatibility is based on incorrect pieces of information or the parties commit a breach of an obligation (Art. 8 VI MR2004)[1040]. In phase one, the legal base for revocations of decisions due to breaches of obligations is Art. 6 III MR2004[1041].

6.7 Professional Secrecy under Art. 17 MR1989

Art. 17 MR1989/2004 obliges the Commission to use pieces of information acquired in the course of its investigation solely for the purpose of the relevant investigation[1042].

6.8 Participation of Private Third Persons under MR1989

The MR1989 grants few rights to private third persons which are affected by the implementation of a future concentration (for example the seller, competitors, suppliers and consumers, representatives of the employees,

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[1033] q.v. the assessment of compatibility decisions (Art. 6 I lit. b MR1989) and of initiation decisions (Art. 6 I lit. c MR2004).
[1034] e.g. divestiture of assets, cessation of joint control. E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 23 VI. 3. p 547; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 138, p 702; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.171, p 681; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.349, p 620 and marginal note 5.502, p 655; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 4. E., p 1129.
[1035] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 139, p 703; § 17 marginal note 196, p 725; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.005, p 596 and marginal note 8.202-8.203, pp. 700-701; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.548, p 665 and marginal note 5.554, p 667.
[1036] http://ec.europa.eu/competition/mergers/statistics.pdf (28/02/2019); q.v. G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 196, p 725.
[1037] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.349, p 621.
[1038] q.v. supra at *6.6.3.2.4 Implementation of Undertakings and Evaluation*.
[1039] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 140, p 703.
[1040] q.v. Art. 6 III lit. a-b MR2004 for the phase one decision; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 141, p 703; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.349, p 621, marginal note 5.542, p 664 and marginal note 5.1118, p 787.
[1041] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.1118, p 787.
[1042] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 90, p 683.

consumer associations)[1043]. Art. 18 IV MR1989 grants the right to decide based on discretion of the Commission whether a private third person may be heard during the Phase One or Phase Two proceeding showing a sufficient interest[1044]: such as an economic interest as competitors, suppliers or consumers of the parties of the concentration[1045]. Some authors restrict the right of being heard to the phase two of merger control decision-making[1046] but the practice of the Commission is different as the former asks third persons to comment on the concentration when the application for a merger control decision is published in the Official Journal within ten days[1047]. Private third persons enjoy no right of being heard in the first informal phase of merger control proceedings owing to criteria of professional secrecy in that phase[1048]. The Commission may hear third persons owing to Art. 18 IV MR2004 informing them in writing of the nature and subject of the procedure and shall set a time limit within which they make known their views in writing or may afford them to participate in a formal oral hearing[1049].

Hence, private third persons do not enjoy a right of access to the file under Art. 18 MR1989[1050]. But the general public has a right to access to the file under Regulation (EC) 1049/2001 providing that no exemption under Art. 4 II Regulation (EC) 1049/2001 is applicable (business secrets, court action, legal advice and preparatory documents)[1051].

Moreover, private third persons do not enjoy legal review under Art. 16 MR1989[1052] and do not have the right of actions for failure to act under TFEU but enjoy the right to actions for annulment under the TFEU being affected by a decision of the Commission in immediate, individual and direct manner[1053].

The plaintiff may only demand to be heard in front of the Commission as procedural rights in front of the Court do not go beyond the rights under Art. 18 MR1989[1054].

The position as a competitor is enough to install an action for annulment under the TFEU being directly, immediately and individually affected from a decision of the Commission[1055].

[1043] Art. 11 lit. c Regulation (EC) No. 802/2004. J. P. Terhechte (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.210, p 1880.

[1044] W. Veelken, M. Karl, S. Richter, Die Europäische Fusionskontrolle (1st ed.) (Tübingen, Germany, Mohr, 1992) II 1. p 40; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. VI. 6. b) p 614; P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 B. (1) (c) p 376; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 23 VI. 7. b) p 549; T.A. Downes and J. Ellison, The Legal Control of Mergers in the European Communities (1st ed.) (London, U.K., Blackstone Press Limited, 1991) p 118; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.356, p 622 and marginal note 5.458, p 647.

[1045] W. Veelken, M. Karl, S. Richter, Die Europäische Fusionskontrolle (1st ed.) (Tübingen, Germany, Mohr, 1992) II 4. a. bb. (3) p 60.

[1046] q.v. W. Veelken, M. Karl, S. Richter, Die Europäische Fusionskontrolle (1st ed.) (Tübingen, Germany, Mohr, 1992) II 4. b. bb. pp 62-63 Marginal Note 66.

[1047] q.v. W. Veelken, M. Karl, S. Richter, Die Europäische Fusionskontrolle (1st ed.) (Tübingen, Germany, Mohr, 1992) II 4. b. cc. p 67; J. P. Terhechte (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal notes 73.211-212, p 1880.

[1048] Q.v. W. Veelken, M. Karl, S. Richter, Die Europäische Fusionskontrolle (1st ed.) (Tübingen, Germany, Mohr, 1992) II 4. c. pp 67.

[1049] Art. 16 Regulation (EC) No. 802/2004; J. P. Terhechte (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.217, p 1881.

[1050] W. Veelken, M. Karl, S. Richter, Die Europäische Fusionskontrolle (1st ed.) (Tübingen, Germany, Mohr, 1992) II 3 p 45.

[1051] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. VI. 6. d) p 622; C. VI. 6. d) (2) (a) p 624; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.131, p 660.

[1052] W. Veelken, M. Karl, S. Richter, Die Europäische Fusionskontrolle (1st ed.) (Tübingen, Germany, Mohr, 1992) III 1. p 70.

[1053] W. Veelken, M. Karl, S. Richter, Die Europäische Fusionskontrolle (1st ed.) (Tübingen, Germany, Mohr, 1992) III 3. p 72.

7. Amendments of the Merger Regulation in 1997

The following chapter discusses the amendments of EC merger control law which were introduced in June 1997[1056]. The most significant alterations relate to

- the notion of a concentration as far as the reform of the assessment of JVs is concerned (Art. 3 IV MR2004)[1057],
- the community dimension of a concentration pursuant to Art. 1 III MR1997 (global aggregated turnover of EUR 2,5 bn of all undertakings, turnover of all relevant undertakings exceeds EUR 100 mio. in each of at least three member states and in each of at least three member states the aggregate turnover of at least two of these undertakings exceeds EUR 25 mio. and if the community wide turnover of at least two these undertakings exceeds EUR 100 mio. unless the two-thirds rule applies (Art. 1 III MR2004)[1058],
- the phase one compatibility decision addressing ancillary restraints under Art. 6 I lit. b 2nd Sentence MR1997,
- the new subsidiarity of initiation of phase two decisions under Art. 6 I lit. c MR1997 owing to the new provision Art. 6 II MR1997[1059],
- the expressively regulated conditional clearance decision in phase one under Art. 6 II MR1997[1060],
- the enforcement of incidental provisions attached to conditional clearances in phase one pursuant to Art. 6 II-IV MR1997,
- modifications of the suspensive effect of concentrations according to Art. 7 MR1997,
- the amendments of Art. 8 II and III MR1997[1061],

1054 W. Veelken, M. Karl, S. Richter, Die Europäische Fusionskontrolle (1st ed.) (Tübingen, Germany, Mohr, 1992) III 3. b. pp 74-75.
1055 W. Veelken, M. Karl, S. Richter, Die Europäische Fusionskontrolle (1st ed.) (Tübingen, Germany, Mohr, 1992) III 3. b. bb. p 76
1056 J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.05, p 541.
1057 I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.1 (2) p 635.
1058 V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 15 IV 1. p 136; I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 2 B II 3. p 74; K. Lange / T. Pries, Einführung in das europäische und deutsche Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2011) CH 4 § 2 II 1. a) pp 179-180; K. Lange, Handbuch zum deutschen und europäischen Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2006) CH 8 § 1 II. 2. a) pp. 527-528; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 IV 3. c) pp 204-205; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1402, p 552; A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 370, p 173; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 17, pp. 514-515 and § 15 marginal note 22, p 516; F. Ekay, Grundriss des Wettbewerbs- und Kartellrechts (5th ed.) (Heidelberg, Germany, C.F. Müller, 2016) marginal note 579; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.1 (2) p 635 and § 7.2 (2) (b) (ii) p 651; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.070, p 630 and marginal note 8.071 p 631; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.34, p 548 and marginal note 5.161, p 579; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 3. B. (iii), p 1104; M. Walker & S. Bishop, The Economics of EC Competition Law (3rd ed.) (London, U.K., Sweet & Maxwell, 2010) CH 7 marginal note 7-002, pp. 348-349.
1059 V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 18 III p 160; q.v. § 40 III GWB; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 10 VII 4. p 377; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 85, pp. 685-686.
1060 K. Lange, Handbuch zum deutschen und europäischen Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2006) CH 8 § 1 IV. 4. p 583; A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 394, p 185.
1061 q.v. § 40 III GWB; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 10 VII 4. p 377.

- the new time limits for phase one proceedings as a result of proposals for commitments pursuant to Art. 10 I 2 MR1997[1062],
- the general exclusion of REG17 (COUNCIL REG (EC) NO. 1/2003) under Art. 22 MR1997 and
- the Commission's power to issue implementing provisions under Art. 23 MR1997.

However, the doctoral paper will not address issues modifying the turnover calculation[1063], referrals to Member States[1064], the submission of commitments to domestic authorities[1065] and the entry into force of this regulation by virtue of accession[1066].

7.1 Concentration in Terms of Art. 1 I; 3 I-V MR1997

The first sub section will evaluate to what extent the definition of a concentration differs between MR1989 and MR1997. The principal criteria of Art. 1 I in combination with Art. 3 I and III-V MR1989 are maintained[1067]. Especially, the relevant Commission notice on concentrations of 1998[1068] differs hardly from its predecessor of 1994[1069]. As these subjects haven been elaborated above, it is preferential now to focus on the differences which relate to the treatment of JVs in accordance with Art. 3 II MR1997 and in combination with Art. 2 IV MR1997. It has been discussed by some authors, if an unwritten criterion sustaining the effects of a concentration on the internal market has to be added to the criteria of Art. 1 II-III MR2004[1070].

7.1.1 The New Assessment of JVs under Art. 3 II; 2 IV MR1997

With regard to the assessment of JVs under MR1997, it is important to note that Art. 3 II MR1997 broadens the scope of JVs which may be regarded as a concentrative operation compared with Art. 3 II MR1989 and the relevant JV notices of the Commission of 1990 and 1994[1071]. As far as coordinative JVs are concerned, it is remarkable that Art. 2 IV MR1997 provides for a specific twofold yardstick for the substantive analysis.

Finally, it has to be stressed, that the subsequent sections will concentrate on those aspects of the evaluation of JVs which derogate from the principles that were laid down above with respect to the assessment of JVs

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1062 T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 VII 1. b) p 227; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 53, p 675.

1063 e.g. A new criterion was introduced which replaces the turnover criterion in case of mergers of financial institutions pursuant to Art. 5 III MR1997 and amendments under Art. 5 IV MR1997. It is explained by C. Ahlborn and V. Turner, *Expanding Success? Reform of The E.C. Merger Regulation*, ECLR 251 (1998).

1064 Art. 9 MR1997.

1065 Art. 19 I 2 MR1997.

1066 Art. 25 III MR1997.

1067 T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 IV 2c p 196.

1068 Commission Notice on The Concept of Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 66, 02/03/1998, p 5.

1069 Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 385, 31/12/1994, p 5.

1070 G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 25, pp. 517-518.

1071 J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. I. 2. b) p 273; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.1 (2) p 635.

pursuant to merger control under either Art. 101 - 102 TFEU (Art. 81-82 ECT[1072]I or Art. 3 II MR1989[1073] whereby undue repetitions are avoided.

7.1.1.1 Basic JV Definition

First of all, the legal and economic criteria contributing to the definition of any kind of a JV, i.e. the pooling of scarce resources and the sharing of control, capital, responsibilities and expenditure, were maintained. Equally, the term of the acquisition of joint control is upheld pursuant to Art. 3 I; III-V MR1997.

Especially and as far as the term of joint control is concerned, the relevant Commission notice on Full-Function JVs of 1998 largely refers to the Commission notice on the concept of a concentration of 1998[1074] which is again largely identical with its predecessor of 1994[1075].

7.1.1.2 Full Function JVs

Secondly, the basic meaning of a full function JV which is able and designed to perform objectives of an independent economic entity on a lasting basis was upheld although the significance of this argument increased substantially increased because the following restrictive criterion relating to the concentrative nature of the operation were at first weakened and then abandoned[1076].

7.1.1.3 Classic Concentrative JVs and the Inclusion of Coordinative Ones By Means of Art. 3 II MR1997 and Art. 2 IV MR1997

Prior to the entry into force of MR1989, it was well established that it was a prerequisite of a structural concentration in terms of Art. 102 TFEU (Art. 82 ECT) that both parents must recede from the relevant market of

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[1072] q.v. supra at 1.1.1 Undertaking in Terms of Merger Control Law, 5.2.2 New Doctrine Introduced by the BAT Judgement, 5.3 The Complex Assessment of Joint Ventures under Art. 82 and 81 ECT, 5.3.1 Legal nature of JVs, 5.3.2 Assessment of Joint Control within Incorporated JVs, 5.3.3 Competition Law Analysis of JVs with A View to Apply Art. 82 ECT.

[1073] q.v. supra at: 6.3.1.3 Concentrative JV: Joint Control, Independence, Recession of Parents and Group Effect, 6.3.2.1.5 Turnovers of Jointly controlled Undertakings, 6.3.2.1.10 Formation of Concentrative JVs.

[1074] Notice on the concept of a concentration; C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 35, p 371; q.v. Commission Notice on The Concept of Full-Function Joint Ventures under Council Regulation 4064/89/EEC on The Control of Concentration between Undertakings, O. J. C 66, 02/03/1998, p 1: Paragraph 10 refers to Paragraphs 18-39 of the Commission Notice on The Concept of Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 66, 02/03/1998, p 5. Therefore, the assessment of sole control and joint control under MR1989 is still relevant and the references in the relevant sections above also include quotations of 3rd Commission Notice on Joint Ventures.

[1075] q.v. on the one hand Commission Notice on The Concept of Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 66, 02/03/1998, p 5 paragraphs 18-39 and on the other hand Commission Notice on The Notion of A Concentration under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 385, 31/12/1994, p 5 paragraphs 18-39.

[1076] V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 17 III p 155; § 17 IV p 157; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. IV. 1. b) p 479; C. IV. 2. b) (3) 495; R. Bechtold/W. Bosch/I. Brinker/S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) FKVO Einf. p 800; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 47, p 534; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfah-rensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.16, p 1820; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 3. A. (ii) b., p 1100; E. Fox & D. Gerard, EU Competition Law (1st ed.)(Cheltenham, UK, Elgar, 2017) CH 6 A.1., p 236.

the JV on a lasting basis[1077] so as to remove any potential for collusion either between each parent and the JV or between the parents - the so called group effect[1078].

Since the entry into force of MR1989, it this view was initially backed by the wording of the first Commission notice on joint ventures[1079]. However, this Notice was not designated to preclude a new doctrine according to the expected case law[1080]. In fact, the former merger task force's practice derogated from the quoted notice very quickly. The decisions indicate that an operation can be regarded as a concentrative JV even if one parent remains active on the relevant market of the JV provided that this parent was an industrial leader on that market[1081]. The argument was that industrial leaders are by definition not exposed to intense competition so that a JV may be an operation that even has a pro-active function for competition rather than a restrictive one. Behavioural restrictions between the parents and the JVs would be justifiable if they met the criteria of the Ancillary Restraints Notice[1082].

Subsequently, the approach to concentrative operations taken by the former Merger Task Force derogated further from the abovementioned notice: From then, an operation was regarded as a concentration even if the remaining parent was not considered as an industrial leader[1083]. In 1994, the new doctrine was made more transparent as the revised standards were incorporated to the second Commission notice on the subject in 1994[1084]: In brief, an operation will be interpreted as concentrative for sure, if both parents are not active or recede completely. A concentration will be probable at least in general, if a parent remains active or both parents remain active with minor activities[1085].

Additionally, it is established that both parents may retain activities on the relevant product market of the JVs as long as behavioural restrictions between each parent and the JV are covered by the ancillary restraints doctrine.

[1077] Commission, 6th Report on Competition Policy (1976) point 55; q.v. supra at 5.3.3 Competition Law Analysis of JVs with A View to Apply Art. 82 ECT.

[1078] Commission, 6th Report on Competition Policy (1976) point 55; q.v. supra at 5.3.3 Competition Law Analysis of JVs with A View to Apply Art. 82 ECT; V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H. Beck, 2018) § 17 III p 156; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 24 IV. 1. p 564-565.

[1079] q.v. Commission Notice Regarding The Concentrative and Cooperative Operations under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations Between Undertakings, O. J. C 203, 14/08/1990 p 10 paragraph 22.

[1080] Commission Notice Regarding the Concentrative and Cooperative Operations under Council Regulation 4064/89/EEC of 21 December 1989 on The Control of Concentrations between Undertakings, O. J. C 203 14/08/1990, p 10 paragraph 4.

[1081] q.v. Commission Decision, Case IV/M. 86, 1991 (*Thomson/Pilkington*); Commission Decision, Case IV/M. 157, 1992 (*Air France/Sabena*).

[1082] Commission Notice on restrictions directly related and necessary to concentrations O. J. C 56, 05/03/2005 p 24, replacing the previous Notice 2001 C 188/5; Commission Notice Regarding Restrictions Ancillary to Concentrations, O. J. C 203, 14/08/1990, p 5; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.011, p 598.

[1083] q.v. A. Burnside, *Dance of The Veils? Reform of The EC Merger Regulation*, ECLR 373 (1996).

[1084] Commission Notice on The Distinction between Concentrative and Cooperative Joint Ventures under Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. C 385, 31/12/1994, p 10, paragraph 18 sub-paragraph 1-2; C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 37, p 385.

[1085] Commission Notice on The Distinction between Concentrative and Cooperative Joint Ventures under Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. C 385, 31/12/1994, p 10, paragraph 18 sub-paragraph 1-2. Contrarily the 3rd sub-paragraph contains a strong indication of co-ordination, i.e. both parents maintain considerable businesses compared with the JV. The following sub-paragraphs contain medium presumptions for co-ordination; C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 37, p 385; q.v. C. Ahlborn and V. Turner, *Expanding Success? Reform of The E.C. Merger Regulation*, ECLR 252-253 (1998).

However, this approach seems to under represent the potential for collusions between the parents that is provided by the JV as a platform of agreeing on mutual policies and that was addressed by means of Art. 101 TFEU (Art. 81 ECT) under the BAT doctrine of the CJEU.

Art. 3 II MR1997 represents the latest stage of this development of extension of the scope of merger control proceedings to JVs. From the entry into force of MR1997 on, all full function JVs are regarded as concentrative operations[1086]. However, it would be wrong to argue that a distinction between co-operative and concentrative JVs is no longer relevant. The only unitisation relates to the jurisdiction and the competence of the former Merger Task Force which no longer depend on classic concentrative JVs. The substantive assessment of a concentrative JV will be made on the basis of Art. 2 I-III MR1997/MR2004 either in phase one or phase two decisions. Said assessment will include potential ancillary restraints and was discussed above with respect to MR1989. If non severable coordinative aspects of equal or major economic importance are available, the whole operation will be assessed under REG17 (COUNCIL REGULATION (EC) NO. 1/2003).

In contrast to classic concentrative JV, the structural aspects of a co-operative JV are assessed in both phases on the basis of Art. 2 I-III MR1997, i.e. the formation of the JV and its impact on the relevant product market.

As far as the co-operative aspects are concerned like collusions between each parent and the JV or between the parents, a co-operative JV will be assessed by means of Art. 2 IV MR1997/MR2004 in combination with Art. 101 I and III TFEU (Art. 81 I and III ECT[1087]): The competent merger task force will assess the compatibility of a given coordinative aspect by means of the procedural provisions of MR1997, but the substantive analysis of the compatibility will insofar not depend on the basis of Art. 2 I-III MR1997. Contrarily, the assessment will be founded on Art. 101 I and III TFEU (Art. 81 I and III ECT) to which Art. 2 IV MR1997 refers. Consequently, the first step is to establish the co-operative nature of a full function JV. Secondly, the concentrative aspects are assessed under Art. 2 I-III MR1997. Thirdly, each coordinative aspect is assessed whether it interferes with Art. 101 TFEU (Art. 81 ECT) or not. This will depend on the individual case as no per se rule[1088] exists that every coordinative JVs automatically fulfils the criteria of a cartel or concerted practise in terms of Art. 101 I TFEU (Art. 81 I ECT[1089]). A coordinative aspect not within the scope of Art. 101 I TFEU (Art. 81 I ECT) will be cleared. If one has established an interference with Art. 101 I TFEU (Art. 81 I ECT), one needs to solve whether the co-operative JV fulfils the substantive prerequisites of an individual or block exemption under Art. 101 III TFEU

[1086] E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 24 V. 1. p 574.
[1087] q.v. also C. Ahlborn and V. Turner, *Expanding Success? Reform of The E.C. Merger Regulation*, ECLR 249 and 252 (1998); Commission Notice on The Concept of Full-Function Joint Ventures under Council Regulation 4064/89/EEC on The Control of Concentration between Undertakings, O. J. C 66, 02/03/1998, p 1 paragraph 15; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 5. E, p 1192.
[1088] I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 7 VI 1., p 204.
[1089] q.v. V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 17 III-IV pp 155-157. As Art. 81 I ECT was discussed above, a closer assessment of the provision is not necessary.

(Art. 81 III ECT). If the result is positive, the JV will be insofar unconditionally cleared pursuant to Art. 6 I lit. b 1 MR1997 or Art. 8 II 1 MR1997. Contrarily, a negative outcome will make the Commission release a statement of objections. It will be up to the parties to propose modifications designed to make the operation compatible with Art. 101 I TFEU (Art. 81 I ECT) (or at least justifiable under Art. 101 III TFEU (Art. 81 III ECT)[1090]). Having accepted the proposals as sufficient, the Commission will conditionally clear the coordinative JV based on Art. 6 II MR1997 in phase one or Art. 8 II MR1997 in phase two[1091].

Art. 2 IV 2 MR1997 offers further guidance which elements will be most relevant for the assessment whether the JV is compatibility with Art. 101 I TFEU (Art. 81 I ECT) or not: The Commission must assess whether and - if so - to which extent the parties remain competitors on the relevant market of the JV and if the undertakings are provided with the power to significantly restrict competition on the relevant market or affected neighbouring, up- or downstream markets. As a result of the wording "in particular"[1092], additional considerations are applicable which may either expand or reduce the anti-competitive aspects mentioned in the explanatory catalogue of Art. 2 IV 2 MR1997. In the assessment of Art. 101 III TFEU (Art. 81 III ECT), the focus will be on the final criterion that asks whether the concerted practices enable the participants to prevent effective competition on a significant part of the relevant market[1093]. From the procedural point of view, the merger task force will invite a casehandler from the department dealing with antitrust proceedings under Art. 101 TFEU (Art. 81 ECT) if a full-function JVs is likely to have co-operative aspects. If these allegations are indeed verified, the merger task force will refer the whole test of common market compatibility of a given concentration to the antitrust section which will assess not only the coordinative aspects under Art. 2 IV MR1997/Art. 101 TFEU (Art. 81 ECT) but also the dominance criterion regarding concentrative aspects[1094].

7.1.2 Evaluation

Finally, it shall be interrogated if the extension of concentrative operations to co-operative JVs is sustainable or if it causes new difficulties which overwhelm the former problems regarding the proper distinction of concentrative or coordinative ventures.

[1090] q.v. Draft Commission Notice on Commitments Submitted to The Commission under Regulation 4064/89/EEC and under Commission Regulation 447/1998/EC at paragraph 15; pdf.file downloadable from: http://europa.eu.int/comm/ competition/mergers/legislation/draft_notices/; C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339; q.v. C. Ahlborn and V. Turner, *Expanding Success? Reform of The E.C. Merger Regulation*, ECLR 255 (1998).

[1091] q.v. § 40 III GWB; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 10 VII 4. p 377.

[1092] q.v. chapeau of Art. 2 IV 2 MR1997.

[1093] Additionally, the second justification may be of interest. In case of a collusion between the each parent and a JV operating on distinct markets the question arises to which extent it is justifiable by means of Art. 81 III 2nd criterion to impose costs on consumers in market one to the benefit of those in market two: the "welfare-transfer" problem; q.v. C. Ahlborn and V. Turner, *Expanding Success? Reform of The E.C. Merger Regulation*, ECLR 258 (1998).

[1094] q.v. C. Ahlborn and V. Turner, *Expanding Success? Reform of The E.C. Merger Regulation*, ECLR 252 (1998).

7.1.2.1 Legal Certainty

Clearly, every Joint Venture is a hybrid phenomenon that combines structural elements of formation with behavioural aspects of joint control and pooling of resources so as to minimise risks and capital invest. For the sake of consistent interpretation of the law, it is desirable that the merger task force is enabled to treat classic concentrative and coordinative operations under the same set of procedural rules.

7.1.2.2 Simplicity and Speed

Moreover, it is a great simplification for the parties who no longer need to worry whether to notify the operation as a concentration by means of Form CO on the basis of Art. 4 MR1989, to apply for a comfort letter stating the non-interference with Art. 101 I TFEU (Art. 81 I ECT)/Art. 4 REG17 (COUNCIL REGULATION (EC) NO. 1/2003) or to seek a formal decision on derogation from Art. 101 I TFEU (Art. 81 I ECT) on the basis of Art. 101 III TFEU (Art. 81 III ECT) and Art. 9 REG17 (COUNCIL REGULATION (EC) NO. 1/2003). As a matter of fact, the parties will also benefit that coordinative JVs are assessed under the more sophisticated procedural framework of MR1997 rather than relying on the burdensome and lengthy REG17 (COUNCIL REGULATION (EC) NO. 1/2003) procedures. However, this idea leads to the critical question why to shift an ambivalent structure if one could simply improve the procedural provisions of REG17 (COUNCIL REGULATION (EC) NO. 1/2003)[1095].

7.1.2.3 Exchange of Blanket Terms as to Jurisdiction

However, the positive aspects are partly offset as one vague term is omitted on the costs of boosting the relevance of another one: The blanket term of full function operations will become more relevant as it is the only restrictive aspect that remains applicable.

7.1.2.4 Ongoing Relevance of the Distinction Between Concentrative and Coordinative JVs for The Material Assessment

Another major drawback of the new law refers to the fact that the classic distinction of concentrative and co-operative operations is still relevant to the substantive analysis whether a full-function JV is a classic concentrative one or a coordinative one of which the concentrative aspects are solved by the dominance assessment of Art. 2 I-III MR1997 whereas the co-operative aspects are addressed by Art. 2 IV MR1997/Art. 101 TFEU (Art. 81 ECT) as mentioned earlier.

[1095] A reform of REG 17 will be adopted, soon. This criticism is discussed by C. Ahlborn and V. Turner, *Expanding Success? Reform of The E.C. Merger Regulation*, ECLR 261 (1998).

7.1.2.5 Reserved Right to Revoke Clearances Based on a Derogation pursuant to Art. 101 III TFEU (Art. 81 III ECT)

As a third negative aspect, it may be criticised that the Commission reserved the right to revoke derogations from Art. 101 I TFEU (Art. 81 I ECT) on the substantive basis of Art. 101 III TFEU (Art. 81 III ECT) issued within merger control proceedings involving of coordinative full function JVs if the co-operative aspect is no longer justifiable under Art. 101 III 1 TFEU (Art. 81 III 1st to 4th variant ECT[1096]). In fact, it is questionable how the Commission can benefit from its legal power to revoke a derogation as this authority is based on Art. 8 REG17 (COUNCIL REGULATION (EC) NO. 1/2003) but Art. 22 MR1997 disapplies REG17 (COUNCIL REGULATION (EC) NO. 1/2003).

7.1.2.6 Uncertainty as to The Assessment of Concentrative Full-Function JVs below the Thresholds

Additionally, a difficult question remains to be solved. It is not evident how full function JVs are assessed that are not caught by the turnover thresholds. The only evidence relates to finding, that MR1989 is neither directly applicable nor in analogy as the specification of turnover thresholds prevents anyone from arguing that the legislator negligently overlooked a case with a comparative rationale.

As far as a classic concentrative JV is concerned, the old Continental Can doctrine will be applicable to duly assess the concentration under Art. 102 TFEU (Art. 82 ECT).

It has to be stressed that both the EC organs and domestic authorities and courts are able to apply Art. 102 TFEU (Art. 82 ECT). As a matter of fact, domestic merger control law will deal with the case as well. This leads to the protracted question which legal system will prevail. As the old double barrier theory stating that a measure is only legal if it meets both EC and national requirements is no longer sustainable, it should be concluded that Art. 102 TFEU (Art. 82 ECT)/REG17 (COUNCIL REGULATION (EC) NO. 1/2003) will generally prevail pursuant to the effet utile doctrine: Neither negative finding of EC Law nor a positive clearance may be circumvented by domestic law. One exception applies: If Art. 102 TFEU (Art. 82 ECT) is inapplicable owing to a lack of an affection of trade between member states, the domestic law is free to assess the case.

However, one could argue that the thresholds in MR1997 will also define the thresholds of a relevant affection of trade between Member States within the scope of merger control. This would free domestic laws but it is not desirable to maintain different sets of concentration rules if one wants to create a level playing field.

[1096] Ahlborn and V. Turner, *Expanding Success? Reform of The E.C. Merger Regulation*, ECLR 258 (1998).

7.1.2.7 Uncertainty as to the Assessment of Co-operative Full-Function JVs below the Thresholds

As far as co-operative JVs are concerned, one could again apply the former merger control law established by the Continental Can doctrine as amended in the BAT doctrine. Again, the same considerations as to the legal rank of EC law and domestic statutes will apply on the basis of the effet utile concept.

However, if one honours the old dichotomy argument of the Continental Can doctrine, one will solely apply Art. 101 TFEU (Art. 81 ECT) to the whole operation. Again, the effet utile principle governs the relation between EC and national law.

7.1.2.8 Uncertainty as to the Assessment of Non-Full-Function JVs

Non full-function JVs will be assessed whether they are consistent with Art. 101 TFEU (Art. 81 ECT) pursuant to the BAT doctrine without any reference to their turnover.

7.1.2.9 De Facto Co-ordination of Authorities?

A persuasive solution to this complex question is far from evident. The best solution seems to stick to the systematic and teleological analysis of MR1997 and to discuss with domestic authorities on a case by case basis that EC authorities and national ones implement a consistent strategy as to the assessment of concentrations. The level of convergence should be at the maximum level consistent with the different sets of legal norms. The liaison provisions of Art. 19 MR1997 could provide for the organisational platform of co-ordination.

7.2 Community Dimension

Based on the authorisation of Art. 1 III MR1989, the turnover thresholds of Art. 1 I-II MR1989 that were discussed above[1097], were reviewed in 1997 (Art. 1 III MR1989).

The review was accompanied by a major controversy between the Commission and the Member States. The Commission's Green Paper suggested a reduction of global turnover to Euro 2 billion and of Community wide turnover to Euro 100 million[1098], whereas the later Commission's proposal was less ambitious and advocated figures of Euro 3 billion and Euro 250 million respectively[1099] and included the multiple filing mechanism as an alternative solution subsidiary to any reduction of thresholds. According to this concept, the regulation should become applicable to concentrations provided that the turnover figures exceeded Euro 2 billion and were lower

[1097] q.v. supra at at 6.3.2 Community Dimension under MR1989 and sub-sections.
[1098] Commission, *Green Paper on The Review of The Merger Regulation*, Com (96) 19 final of 31 January 1996.
[1099] Commission Press Release IP/96/628.

than 3 billions and that the concentration was in the substantive scope of at least three national merger control systems[1100].

The concept was criticised for its complexity and the serious question whether the wording of Art. 1 III MR1989 would back the introduction of such a régime[1101].

As a result of a major controversy between the Commission and the Member States, the Art. 1 I-II MR1989 were not amended and the new Art. 1 III MR1997 accompanied by a new review mechanism in Art. 1 IV-V MR1997. The new threshold will catch concentrations of an aggregated global annual turnover exceeding Euro 2,5 billion[1102] providing that specific criteria are met which assure that a concentration will not be covered unless it involves considerable cross-border aspects[1103]. Finally, the principles of turnover calculation are maintained in general[1104].

Although it is the intention of Art. 1 III MR1997 to expand the jurisdiction of the Commission and to avoid multiple notifications of concentrations pursuant to national merger control statutes[1105], it remains extremely questionable whether this objective can be met, as Art. 1 III MR1997 contains so many cumulative criteria. The overall effect of these preconditions is as restrictive as the high turnover thresholds of Art. 1 II MR1997. Thus a community dimension is available if the global turnover of all undertakings exceeds EUR 2,5 bn, if the turnover of all the undertakings in each of at least three member states exceeds EUR 100 Mio., if two undertakings generate a turnover of more than EUR 25 Mio., if the community wide turnover of at least two undertakings exceeds EUR 100 Mio, unless all undertakings generate more than two thirds of their community wide turnover in one and the same member state[1106].

[1100] R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 21 3. (B) (i) (b), p 860; V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 15 IV 1. p 136; R. Bechtold/W. Bosch/I. Brinker/S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) FKVO Einf. p 801.

[1101] q.v. A. Burnside, *Dance of The Veils? Reform of The EC Merger Regulation*, ECLR 371 (1996).

[1102] Art. 1 III lit. a MR1997. V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 15 IV 1. p 136; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. II. 2. a) (2) p 342; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 23 IV. 1. b) p 538; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 IV 3. c) p 204; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.26, p 1824; E. Fox & D. Gerard, EU Competition Law (1st ed.)(Cheltenham, UK, Elgar, 2017) CH 6 A.1., p 236.

[1103] q.v. Art. 1 III lit. b-d MR1997: The aggregated turnovers of least three partners exceeds Euro 100 million in at least three Member States and the individual turnover figures of at least two of said undertakings in said countries must exceed Euro 25 million. At least two parties must have a Community wide turnover higher than Euro 100 million. Finally, the two thirds is applicable; P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 B. (1) (b) p 373.

[1104] Turnover Calculation is still governed by Art. 5 MR1997. Alterations in specific sectors pursuant to Art. 5 III-IV MR1997 are not relevant to the paper.

[1105] q.v. C. Ahlborn and V. Turner, *Expanding Success? Reform of The E.C. Merger Regulation*, ECLR 249 and 251 (1998). The new Art. 1 III MR1997 is elaborated further in the article on p 250.

[1106] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. II. 2. a) (2) p 342; P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 B. (1) (b) p 373; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 23 IV. 1. b) p 538; K. Lange, Handbuch zum deutschen und europäischen Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2006) CH 8 § 1 II. 2. a) pp. 527-528; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 IV 3. c) p 204; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 22, p 516; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.26, p 1824; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 3. B. (iii), p 1104.

7.3 Conditional Phase One Clearances under Art. 6 I 1 lit. b; Art. 6 II 2 MR1997

Basically, Art. 6 MR1997 authorises the Commission to release three different types of decisions which were already discussed above: a non-applicability decision pursuant to Art. 6 I lit. a MR1997, a compatibility decision under Art. 6 I lit. b MR1997 and an initiation of formal phase two proceedings decision under Art. 6 I lit. c MR1997 in case of serious concerns against the compatibility[1107]. However, the legislator took two former controversies into account: First, Art. 6 I lit. b 2 MR1997 expressively states that a compatibility decision is allowed to rule on ancillary restraints so as to copy the solution of Art. 8 II 3 MR1989.

Secondly, the controversy was solved whether the Commission may or not be enabled to enact conditional clearances in phase one decisions how these have to be enforced: Under the former law it was disputed whether the Commission could rely on an analogy to Art. 8 II 2; 8 V; 14 and 15 MR1989 to accept and enforce commitments[1108]. Alternatively, it was argued that the Commission could rely on implied powers to issue an implementing Regulation dealing with the subject[1109]. A third approach insisted, that the Commission was able to conclude a private or public law agreement with the parties covering commitments and that the latter contract should be enforced by the CJEU under Art. 272 TFEU (Art. 238 ECT[1110]).

To solve the controversy, Art. 6 II 1-2; 6 III-IV MR1997 were introduced[1111]. If the Commission's necessarily broad analysis in phase is nevertheless able to reveal that a specified element will render the concentration incompatible with the common market, the Commission will issue a statement of objections and the parties may propose commitments[1112] similarly to the established practice in phase two proceedings. Having accepted the proposals as sufficient, a clearance decision is released accompanied with incidental provisions assuring that the parties comply with their commitments. However, the Commission will only choose the conditional phase one decision if both the aspect of the concentration that contradicts Art. 2 I-III MR1997, the potential remedy, i.e. the commitment, and the latter's efficacy are sufficiently clear[1113]. Commitments under Art. 6 II MR2004 shall be usually forwarded to the Commission within 20 days of the notification of the

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[1107] V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 18 III p 160.

[1108] q.v. H. Krause, *Article 6 I lit. b EC Merger Regulation: Improving The Reliability of Commitments*, ECLR 209 (1994); R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 21 6. (A) p 907; q.v. § 40 III GWB; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 10 VII 4. p 377.

[1109] The implied powers doctrine enables the Commission to issue a Commission Regulation that implements a Council Regulation without written authorisation on the following conditions: 1) The rules must be so detailed that it is not reasonable to ask the Council to deal with them 2) The rules must honour the teleology of the Council Regulation 3) The rules must be stricty necessary for an efficient enforcement of the Council Regulation; q.v. CJEU, Case C-8/55 *Fédéchar v High Authority* [1955-1956] ECR 292, paragraph 299 et seq.

[1110] H. Krause, *Article 6 I lit. b EC Merger Regulation: Improving The Reliability of Commitments*, ECLR 209 (1994).

[1111] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.430, p 641.

[1112] It is interesting to note that the wording of Art. 6 I lit. b; 6 II MR1997 or 8 II 2 MR1997 is broader than the equivalent of Art. 8 II 2 MR1989 so that commitments no longer need to refer to the assets involved in the original concentration plan. However, the Commission's practise was more flexible even under MR1989: q.v. Commission Decision, Case IV/M. 308, 1993 (*Kali+Salz / MdK/Treuhand*); I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH § 7.1 (3) (b) p 637.

[1113] Recital 8 MR1997.

concentration[1114] and commitments under a decision owing to Art. 8 II MR2004 within 65 working days from the date at which proceedings were initiated[1115].

7.4 The New Subsidiarity of Initiation of Formal Phase Two Proceedings Decisions pursuant to Art. 2 I lit. c MR1997

If neither the threat to competition on relevant markets nor the potential remedies become sufficiently clear during the phase one investigations, a decision will be enacted pursuant to Art. 2 I lit. c MR1997 in order to initiate formal phase two proceedings. Supported by this reasoning and by the wording of Art. 6 I lit. c MR1997 "Without prejudice to [Art. 6] paragraph 2" which deals with conditional clearances under Art. 6 I lit. b in combination with Art. 6 II MR1997[1116], Art. 2 I lit. c MR1997 is reduced to legal subsidiarity so that it became a lex generalis provision compared with Art. 2 I lit.b/2 II MR1997.

7.5 Enforcement of Phase One Commitments

The enforcement of incidental provisions is regulated similarly to the existing solution within Art. 8 MR1989 so that the same mechanisms and drawbacks apply. Consequently, it is in general sufficient to refer to the prior analysis[1117]. However, one derogation applies as the Commission is not enabled to impose fines owing to the failure to comply with phase one commitments. It seems that the legislator simply forgot to add references to Art. 6 I lit. b, 6 II MR1997 in Art. 14 II and 15 II MR1997.

7.6 Suspensive Effect of a Notification Under Art. 7 MR1997

In contrast to Art. 7 I MR1989, an ex ante suspension of a concentration with a community dimension is no longer limited to a period of three weeks and subject of an extension decision. From now on under Art. 7 I MR1997 (Art. 7 I MR2004), the suspensive effect lasts in general until the operation was expressively declared compatible either within phase one (Art. 6 I lit. b MR1997) or two (Art. 8 I-II MR1997)[1118] unless a derogation under Art. 7 IV MR1997 is granted based on a "reasoned application"[1119] or the Commission is tacitly deemed to

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[1114] Art. 19 I Commission Regulation (EC) No. 802/2004 implementing MR2004 as amended by Commission Regulation (EC) No. 1033/2008 and Commission Regulation (EU) No. 1269/2013; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 5. G. (i), p 1195.
[1115] Art. 19 II Commission Regulation (EC) No. 802/2004 implementing MR2004 as amended by Commission Regulation (EC) No. 1033/2008 and Commission Regulation (EU) No. 1269/2013; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 5. G. (i), p 1195.
[1116] q.v. § 40 III GWB; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 10 VII 4. p 377.
[1117] q.v. supra at 6.6.3.2.4 Implementation of Undertakings and Evaluation.
[1118] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. VI. 1. p 530; K. Lange / T. Pries, Einführung in das europäische und deutsche Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2011) CH 4 § 2 VI. 1. p 208; CH 4 § 2 VI. 3. p 210; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 23 VI. 8. a) p 550; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 VII 2. p 229; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.26 (1) p 751; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.137, p 663; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.15, p 544; J. P. Terhechte (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.1, p 1815 and marginal note 73.203, p 1877.
[1119] q.v. Art. 12 Regulation (EC) No. 802/2004; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 23 VI. 8. b) p 550; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.26 (2) p 751; J. P. Terhechte (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.209, p 1879.

have cleared the concentration (Art. 10 VI MR2004)[1120]. As a matter of fact, this boosts legal certainty and takes the complexities of the economic and legal assessment undertaken by the Commission into better account. For instance, EdF was granted an exemption in the case *Edf/London Electricity*, as the shares of the target were due to be auctioned. Art. 7 II MR2004 exempts certain securities transactions from the prohibition of implementation providing that a notification of the concentration is done and voting rights are suspended[1121].

7.7 Conditional Phase Two Clearances Art. 8 II 1-2 MR1997

In general, Art. 8 MR1997 vests the Commission with powers that are similar to Art. 8 MR1989: a compatibility decision pursuant to Art. 8 II 1 MR1997, eventually accompanied by incidental provisions under Art. 8 II 2 MR1997[1122] and eventually addressing ancillary restraints pursuant to Art. 8 II 3 MR1997. Contrarily, an incompatibility decision under Art. 8 III MR1997 may be taken. Art. 8 IV MR1997 dealing with divestiture of unlawfully implemented concentrations and Art. 8 V-VI MR1997 dealing with revocation of clearance decisions are not altered. Consequently, one can generally refer to the earlier discussions on theses subjects.

The first alteration of existing standards relates to Art. 8 II 1 MR1997. As coordinative JVs are now included to the scope of MR1997 by means of Art. 3 II MR1997, Art. 8 II 1MR1997 states that the latter should be evaluated on the basis of Art. 2 IV MR1997/Art. 101 I, III TFEU (Art. 81 I, III ECT) rather than by means of Art. 2 I-III MR1997. A minor amendment of Art. 8 II 2 MR1997 highlights that the parties proposals are only eligibly for a Commission's approval if they intend to make the concentration compatible with the Common market. Finally, the criteria of a blocking decision under Art. 8 III MR1997 mirror Art. 8 II 1 MR1997 insofar as the assessment of coordinative JVs will be based on Art. 2 IV MR1997 and Art. 101 TFEU (Art. 81 ECT). However, the drawbacks related to the enforcement of commitments under MR1989 were ignored.

7.8 Time Limits

Art. 10 I MR1997 makes clear that the time limit for an assessment of concentrations in phase one is extended from 25 to 35 working days (formerly six weeks) if commitments are submitted on time in order to prepare a

[1120] C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.137, p 663; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.15, p 544; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 4. C., p 1126.

[1121] J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.207, p 1878.

[1122] q.v. § 40 III GWB; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 10 VII 4. p 377; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 163, p 634.

conditional clearance under the new Art. 6 I lit. b; II MR1997[1123]. For conditional clearances under Art. 8 II MR2004, the period is 65 days after the initiation of phase two proceedings[1124].

7.9 Exclusive Application of MR1997

Although the general principle of an exclusive application of MR1997 to all concentrations beyond the turnover thresholds and the preclusion of REG17 (COUNCIL REGULATION (EC) NO. 1/2003) is maintained, the new Art. 22 MR1997 clarifies for the sake of simplicity and legal certainty following the inclusion of coordinative JVs, that REG17 (COUNCIL REGULATION (EC) NO. 1/2003) will remain exclusively applicable to coordinative JV without a community dimension.

7.10 Implementing Provisions

Finally, Art. 23 I 2 MR1997 regulates that the Commission is empowered to formulate secondary legislation so as to define the preconditions which have to met by commitment proposals of the parties intending to render a concentration compatible with the common market. At present, a draft notice on commitments is available[1125]. Having concluded the assessment of the merger regimes of Art. 66 ECSCT, of Art. 101 - 102 TFEU (Art. 81-82 ECT), the original MR1989 and its review in 1997, it is feasible to assess how these concepts influence concentrations in the period of the liberalisation of energy industries.

8. Amendments of the Merger Regulation in 2004, Exempted and Specific Economic Sectors and Legal Protection

MR1997 was amended by MR2004 on 20 January 2004 and it entered into force on 01/05/2004[1126]. The scope of MR2004 has been altered (Art. 2 II MR2004) so that a concentration shall be declared compatible with the common market if it does not significantly impede effective competition in the common market or in a substantial part of it even if it occurs as a result of the creation or strengthening of a dominant position (SIEC-Test)[1127].

[1123] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 53, p 675; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.27 (1) p 754; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrens-recht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.129, p 1854.

[1124] Art. 19 II Implementing Regulation (EU) No. 1269/2013; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 102, p 692.

[1125] Draft Commission Notice on Commitments Submitted to The Commission under Regulation 4064/89/EEC and under Commission Regulation 447/1998/EC at paragraph 15; pdf.file downloadable from: http://europa.eu.int/comm/ competition/mergers/legislation/draft_notices; C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339.

[1126] C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.001, p 594; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.09, p 542.

[1127] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. I. 2. c) pp 275; R. Bechtold/W. Bosch/I. Brinker/S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) FKVO Einf. p 801; FKVO Art. 2 p 826: F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1370, p 543; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.09, p 542.

Art. 3 IV MR2004 states that a JV performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of Art. 3 IV, 3 I lit. b, 2 IV and 2 V MR2004 (concentrative JV; full function JV) [1128]. If a JV performs more than 50% of its turnover with third parties it is deemed to be full function whereas a JV implementing less than 20% of its turnover with third parties it is deemed to be non full function[1129]. The criterion that a JV must not object or effect the co-ordination of the competitive behaviour of the parent undertakings has been abolished[1130].

Art. 4 I 1st sub-paragraph 1 MR2004 states that concentrations with a community dimension shall be notified to the Commission prior to their implementation and following the conclusion of the agreement, the announcement of the pubic bid or the acquisition of a controlling interest[1131]. The 2nd and 3rd sub-paragraphs regulate that a notification may also be made where the undertakings concerned demonstrate to the Commission a good faith intention to conclude an agreement. For the purposes of the MR2004 the term notified concentration shall also cover intended concentrations notified pursuant to the 2nd subparagraph.

New provisions are Art. 4 IV-VI MR2004. Prior to the notification of a concentration, the persons or undertakings referred to in paragraph 2 may inform the Commission that the concentration may significantly affect competition in a market within a member state which presents all the characteristics of a distinct market (Art. 4 IV first sub-paragraph MR2004)[1132]. This concentration shall be examined by the member state. Such a submission shall be sent to all member states without delay.

Unless the relevant member state disagrees, the Commission may decide to refer the whole or a part of the concentration to the competent authorities of said member state where it considers that a distinct market exists on which the competition is restricted[1133]. The decision on the referral shall be taken within 25 working days.

[1128] R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 21 3. (A) (ii) (c) –(iv) pp. 856-857 and CH 21 5. (F), p 902; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. IV. 1. b) pp 479-480; R. Bechtold/W. Bosch/I. Brinker/S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) FKVO Art .3 IV p 862; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 24 IV. p 563; K. Lange, Handbuch zum deutschen und europäischen Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2006) CH 8 § 1 II. 1. c) p 521; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 IV 2. d) p 200; A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 367, p 172; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 47, p 534, § 15 marginal note 60, p 539 and § 15 marginal note 61 p 540; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 3. A. (ii) b., p 1100.

[1129] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.34, p 548 and marginal note 5.135, p 573.

[1130] A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 3. A. (ii) b., p 1101.

[1131] R. Bechtold/W. Bosch/I. Brinker/S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) FKVO Art. 4 I 1 p 872; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 13, p 664; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH § 7.1 (3) (b) p 638, § 7.21 p 746 and § 7.22 p 746; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.79, p 1840.

[1132] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 177, p 719; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.34, p 548 and marginal note 5.232, p 597; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.43-44, p 1829; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 3. C. (iv), p 1115 and 4. B. (ii), p 1125; A. Ezrachi, EU Competition Law (5th Ed.) (London, UK, Bloomsbury, 2016) CH 9, p 401; E. Fox & D. Gerard, EU Competition Law (1st ed.)(Cheltenham, UK, Elgar, 2017) CH 6 A.1., p 236.

[1133] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 177, p 719.

The Commission will inform the other member states of its decision. If the Commission does not take a decision, it will be deemed to have adopted such a decision on the referral[1134].

Once the Commission has decided or has deemed to decide about the referral the national competition law will exclusively apply. Art. 9 VI to IX MR2004 are applicable mutates mutandis[1135].

Art. 4 V 1st sub-paragraph MR2004 states that a concentration in terms of Art. 3 MR2004 that does not have a Community dimension in terms of Art. 1 II-III MR2004 shall be dealt with by the Commission if it is exposed to domestic merger control law of at least 3 member states by a reasoned submission[1136].

The Commission will transmit this submission to all member states (Art 4 V 2nd sub-paragraph MR2004)[1137]. The Member states in question have 15 working days stating its objection against the referral of the case (Art. 4 V 3rd sub-paragraph MR2004). If a member state states its objection against the referral of the case within 15 working days, the case will not referred (Art. 4 V 4th sub-paragraph MR2004)[1138].

Art. 4 V 5th sub-paragraph MR2004 states that where no member state answered its objection against the referral the case will be deemed to have a community dimension[1139].

Art. 4 VI MR2004 obliges the Commission to report to the Council by 1 July 2009 on the application of Art. 4 IV and V MR2004.

Art. 7 II MR2004 deals with the suspension of concentrations. The implementation of a concentration is not prevented by which control within the meaning of Art. 3 MR2004 is acquired from various sellers, providing that the concentration is notified to the Commission pursuant to Art. 4 MR2004 without delay and the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain he full value of its investments based on a derogation granted by the Commission under paragraph Art. 7 III MR2004.

Art. 6 I point c MR2004 obliges the Commission to initiate proceedings if a concentration falls within the scope of MR2004 and raises serious doubts as to its compatibility with the common market[1140]. Such proceedings shall

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[1134] Q.v. Art. 4 IV sub-paragraph 2; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 176, p 719.

[1135] V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 14 III 2. p 132; Art. 4 IV and Art. 9 MR2004; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH § 7.1 (3) (b) p 637.

[1136] R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 21 3. (E)(i), p. 869; R. Bechtold/W. Bosch/I. Brinker/S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) FKVO Art. 4 pp. 877-879; K. Lange, Handbuch zum deutschen und europäischen Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2006) CH 8 § 3 IV. p 655; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 179-180, p 720; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.4 (3) p 655; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.34, p 548 and marginal note 5.223, p 595 and marginal note 5.256, p 601; J. P. Terhechte, (ed.), Internationales Kartell- und Fusions-kontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.43, p 1829; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 3. D. (iv), p 1122 and 4. B. (iii), p 1125; A. Ezrachi, EU Competition Law (5th Ed.) (London, UK, Bloomsbury, 2016) CH 9, p 401; E. Fox & D. Gerard, EU Competition Law (1st ed.)(Cheltenham, UK, Elgar, 2017) CH 6 A.1., p 236.

[1137] I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH § 7.1 (3) (b) p 638.

[1138] J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.54, p 1833; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 4. B. (ii), p 1126.

[1139] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 180, p 720.

[1140] R. Bechtold/W. Bosch/I. Brinker/S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) FKVO Art. 6 I lit. c p 896.

be closed by means of a decision as provided for in Art 8 I-IV MR2004 unless the undertakings concerned have demonstrated to the satisfaction of the Commission that they have abandoned the concentration.

Art. 8 I and II MR2004 deal with powers of decision of the Commission[1141]. According to Art. 8 I MR2004 the Commission shall issue a decision declaring the concentration compatible with he common market if it finds that a notified concentration fulfils the criterion laid down in Art. 2 II MR2004[1142]. A decision declaring a concentration compatitible with the common market shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration.

Art. 8 II MR2004 regulates that where the Commission finds that following modification by the undertakings concerned a notified concentration fulfils the criterion laid down in Art. 2 II MR2004 it is cleared[1143]. If the case is referred according to Art. 2 IV MR2004 the criteria laid down in Art. 101 III TFEU (Art. 81 III ECT) it shall take a decision declaring the concentration compatible with the common market[1144].

Art. 8 V MR2004 deals with the power of decisions of the Commission, i.e. with the interim measures that the Commission is taking with a view to maintaining conditions of effective competition[1145]. As a pre-requisite a concentration has been implemented in contravention of Art. 7 MR2004 where the decision as to the compatibility with the common market has not been taken; where a concentration has been implemented in contravention of a condition attached to a decision under Art. 6 I (b) or II of Art. 8 MR2004; where a concentration has been implemented and declared incompatible with the common market pursuant to Art. 8 V lit (c) MR2004.

Art. 8 VI MR2004 regulates that the Commission may revoke its decision under Art. 8 I-II where the declaration of compatibility is based on incorrect information (Art. 8 VI lit. (a) MR2004) or where the undertakings concerned commit a breach of an obligation attached to the decision (Art. 8 VI lit (b) MR2004)[1146].

According to Art. 8 VII MR2004 the Commission may take a decision owing to Art 8 I-III MR2004 without being bound by time limits under Art. 10 III MR2004 (usually 90 working days since the adoption of an Art. 6 I lit. c decision or 105 working days for a Commission decision under Art. 8 II MR2004[1147]) where the Commission

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[1141] V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 18 IV p 161; R. Bechtold/W. Bosch/I. Brinker/S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) FKVO Art. 8 I p 907.

[1142] V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 18 IV p 161.

[1143] Commission Notice on Remedies, O. J. 2008, C 267/1; R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 21 6. (A) p 907; V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 18 IV p 161; C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 45 p 443; R. Bechtold/W. Bosch/I. Brinker/S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) FKVO Art. 8 II p 908.

[1144] R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 21 6. (A) p 907.

[1145] R. Bechtold/W. Bosch/I. Brinker/S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) FKVO Art. 8 V p 922.

[1146] R. Bechtold/W. Bosch/I. Brinker/S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) FKVO Art. 8 VI p 923.

[1147] F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1439, p 567; A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 396, p 186; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 54, p 675, § 17 marginal note 65 p 679; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.437, 5.440 and 5.441, pp. 642-643; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.135, p 1856.

finds that a concentration has been implemented in contravention of a condition attached to the decision under Art. 6 I lit. (b) MR2004 or it finds that a concentration has been implemented in contravention of a condition attached to the decision taken under Art. 8 II MR2004[1148] and Art. 10 II MR2004 which has found that in the absence of the condition the concentration would raise serious doubts as to is compatibility with the common market, or a decision has been revoked owing to Art. 8 VI MR2004.

Art. 8 VIII MR2004 states that the Commission should notify its decision to the undertakings concerned and the competent authorities of the member states without delay.

Art. 9 X MR1989 has been removed. It dealt with the re-examination of said Art. 9 MR1997 at the same time in which the turnover threshold under Art. 1 MR1997 are re-calculated.

Art. 10 III MR2004 deals with the notification of concentrations in not more than 90 working days of the date on which the proceedings are initiated[1149]. An extension to 105 working days is feasible if the parties submit commitments pursuant to Art. 8 II MR2004 unless these commitments have been offered less than 55 working days after the initiation of proceedings[1150].

This norm states that Art. 20 IV 1st sub-paragraph shall also apply to the period referred to in Art.9 IV (b) MR2004 (suspension of periods set by Art. 10 I and III in extraordinary circumstances). According to Art. 20 MR2004, decisions of the Commission under Art. 8 I-VI, 14 and 15 are published in the Official Journal[1151].

Art. 10 V 2nd sub-paragraph MR2004 regulates that the concentration will be re-examined in the light of current market conditions[1152].

The 3rd sub-paragraph deals with the submission of a new notification where the original notification becomes incomplete by reason of intervening changes in market conditions without delay.

Art. 10 V 5th sub-paragraph MR2004 makes Art. 6 IV MR2004 and Art. 8 VII MR2004 applicable to concentrations in terms of Art. 10 V 2nd and 3rd sub-paragraph MR2004.

Art. 11 II MR2004 deals with formal requests for information[1153]. When sending a request to the addressee the Commission shall nominate the legal basis, the purpose of the request and specify what information is required and fix the time limit as well as the fines for supplying incorrect information.

[1148] q.v. § 40 III GWB; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 10 VII 4. p 377.
[1149] R. Bechtold/W. Bosch/I. Brinker/S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) FKVO Art. 10 III p 936.
[1150] R. Bechtold/W. Bosch/I. Brinker/S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) FKVO Art. 10 III p 936; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 54, p 675.
[1151] F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1442, p 568.
[1152] R. Bechtold/W. Bosch/I. Brinker/S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) FKVO Art. 10 III p 937; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 23 VI. 4. p 547.
[1153] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. VI. 4. p 594; C. VI. 4. a) (2) p 596; R. Bechtold/W. Bosch/I. Brinker/S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) FKVO Art. 11 I p 941; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 23 VI. 6. p 548.

Art. 11 IV 1st sentence MR2004 deals with requests for information. The owner of an undertaking shall supply the information requested on behalf of the undertaking concerned.

Art. 11 IV 2nd and 3rd sentences state that a person duly authorised to act may supply the information on behalf of their clients. The clients shall remain fully responsible if the information supplied is incomplete, incorrect or misleading.

This provision obliges the Commission to forward a copy of any decision taken pursuant to Art. 11 III MR2004 to the competent authorities of the member states in whose territory the residence of the person or he seat of the undertaking is situated, and to the competent authority of the member state whose territory is affected. The Art. 11 III MR2004 decision is taken by the Director General of DG Competition[1154].

Art. 11 III MR2004 deals with requests for information. Where the Commission requires a person or undertaking to supply information by decision, it shall state the legal base and the purpose of the request. It shall specify what information is required and fix the time limit within which it is to be provided. The Commission shall indicate the penalties under Art. 14 I-II MR2004 with an amount not exceeding 1% or 10% of the aggregate turnover (Art. 5 MR2004)[1155] and indicate or impose periodic penalty payments pursuant to Art. 15 MR2004[1156] and it shall indicate the right to have the decision reviewed by the CJEU.

Art. 11 V MR2004 also deals with requests for information. The Commission shall forward a copy of any decision taken pursuant to Art. 11 III MR2004 to the competent authorities of the member state in whose territory the residence of the person is situated and to the competent authority whose territory is affected.

Art. 11 VI MR2004 regulates that the Commission may request the competent authorities of the member states to forward all the necessary information to carry out the duties assigned to it by MR2004.

Art. 11 VII 1st sub-paragraph MR2004 allows the Commission, in order to carry out its functions, to interview any natural or legal persons who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation[1157]. The Commission shall state the legal basis and the purpose of the interview.

Art 11 VII 2nd sub-paragraph deals with interviews not conducted on the premises of the Commission or by telephone or other electronic means. Said interview shall be submitted in advance to the competent authority of

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[1154] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.349, p 621.

[1155] I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 2 E VI 2. p 179; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 47, p 673; § 17 marginal note 196-197, pp. 725-726; § 17 marginal note 199, p 726..

[1156] I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 2 E VI 2. p 179; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 206, p 728.

[1157] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. VI. 4. b) p 600; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.140, p 1858.

the member state in whose territory the interview takes place. In case the competent authority requests to be heard, the officials of said member state shall take part in the interview.

Art. 13 I and II MR2004 deal with the commission's power of inspection[1158]. In order to carry out the duties assigned to the commission it may conduct all necessary inspections of undertakings and associations of the former.

Art. 13 II MR2004 lists the power of inspection by officials authorised by the Commission.

According to Art. 13 II lit. a) b) c) d) e) MR2004, the officials may enter premises, examine books and take copies from books, seal business premises and ask any representative of the undertaking concerned for explanation on facts or documents[1159].

Pursuant to Art. 13 III MR2004 the officials authorised by the Commission to conduct an investigation shall exercise their powers upon production of a written authorisation. In good time before the inspection, the Commission shall give notice of the inspection to the competent authority of the relevant member state.

Art. 13 IV MR2004 requires undertakings to submit to inspections ordered by decision of the Commission. Said decision by the Director General of DG Competition shall specify the subject and purpose of the inspection and appoint the date on which it is to begin and indicate the penalties under Art. 14 and 15[1160] and indicate the right to have the decision reviewed by the CJEU.

The Commission shall take such decisions after consulting the competent authority of the member state in whose territory the inspection has to take place.

Pursuant to Art. 13 V MR2004 the competent authority of the member state in which territory the inspection is to be conducted shall actively assist the Commission[1161]. To this end, the officials shall enjoy the powers specified in Art 13 II MR2004.

Art. 13 VI MR2004 obliges the member states in question, where the officials authorised by the Commission find that an undertaking opposes an inspection, to afford them the necessary assistance.

Art. 13 VI 2nd sentence MR1989 has obliged the Commission to take the necessary measures within one year of the entry into force of MR1989 to that end (i.e. where an undertaking opposes an investigation and the member state concerned shall afford the necessary assistance to the officials authorized by the Commission).

[1158] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. VI. 4. c) p 601; R. Bechtold/W. Bosch/I. Brinker/S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) FKVO Art. 13 II p 950.

[1159] R. Bechtold/W. Bosch/I. Brinker/S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) FKVO Art. 13 II pp 950-951.

[1160] I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 2 E VI 2. p 179; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.349, p 621.

[1161] R. Bechtold/W. Bosch/I. Brinker/S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) FKVO Art. 13 V p 951.

According to Art. 13 VII MR2004 and if the assistance provided for in Art 13 VI MR2004 required authorisation by a judicial authority pursuant to national rules such authorisation shall be applied for as a precautionary measure.

Pursuant to Art. 13 VIII MR2004 and where authorisation under Art. 13 VII MR2004 is applied for the national judicial authority shall ensure that the Commission decision is authentic. In its control of proportionality of the coercive measures the national judicial authority may ask the Commission for detailed explanation relating to the subject matter of the inspection. However, the national authority may not call into question the necessity for he inspection nor demand that it be provided with the information in the Commission`s file. The lawfulness of its decision shall be subject to review only by the CJEU.

Art. 14 II point (a) MR2004 deals with fines[1162]. The College of Commissioners may by decision impose fines not exceeding 10% of the aggregate turnover of the undertaking concerned within the meaning of Art. 5 MR2004 or the undertaking concerned where they fail to notify a concentration in accordance with Art. 4 or 22 III MR2004 prior to is implementation unless they are expressly authorised to do so by Art. 7 II MR2004 or by a decision pursuant o Art. 7 III MR2004[1163].

Art. 14 I point (a) MR2004 deals with fines, too[1164]. The Commission may by decision impose on the persons referred to Art. 3 I b MR2004 undertakings fines not exceeding 1% of the aggregate turnover of the undertaking concerned within the meaning of Art. 5 MR2004 where they supply incorrect or misleading information in a submission, certification, notification or supplement owing to Art. 4, Art. 10 V or Art. 22 III MR2004[1165].

Art. 14 I point (b) MR2004 is available if they supply incorrect or misleading information in response to a request made owing to Art. 11 II MR2004.

Art. 14 I point (c) MR2004 is available if they supply in response or a request made by decision adopted pursuant to Art. 11 III MR2004 incorrect or incomplete or misleading information within the required time limit.

Art. 14 I point (e) is applicable, if they, in response to a question asked in accordance with Art. 13 II (e) MR2004, they give an incorrect or misleading answer, fail to rectify within a time limit set by the Commission an incorrect, incomplete or misleading answer given by a member of state or they fail or refuse to provide a complete answer on facts pursuant to Art. 13 IV MR2004.

[1162] I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 2 E VI 2. p 179; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. VI. 5. p 602; R. Bechtold/W. Bosch/I. Brinker/S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) FKVO Art. 14 II p 954; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 23 VI. 6. p 548; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 VI 2 p 224.

[1163] I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH § 7.1 (3) (b) p 639; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.349, p 621.

[1164] I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 2 E VI 2. p 179; R. Bechtold/W. Bosch/I. Brinker/S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) FKVO Art. 14 I lit. a) p 954.

[1165] T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 VI 2. p 224.

Art. 14 I point (f) MR2004 is applicable where seals affixed by officials or other accompanying persons authorised by the Commission in accordance with Art 13 II (d) MR2004 have been broken.

Art. 14 II point (d) deals with the imposition of fines by the commission not exceeding 10% of the aggregate turnover of the undertaking concerned where they fail to comply with a condition or an obligation imposed by decision owing to Art. 6 I (b), 7 III or 8 II 2nd subparagraph MR2004.

Art. 15 I MR2004 is about periodic penalty payments [1166]. These may in general the College of Commissioners impose on the persons referred to in Art. 3 I (b) MR2004 (periodic penalty payments not exceeding 5 % of the average daily aggregate turnover of the undertakings within the meaning of Art. 5 MR2004, in order to compel them to comply with an obligation imposed by decision owing to Art 6 I (b), 7 III or 8 II 2nd sub-paragraph MR2004 (Art. 15 I point (c) MR2004) or in order to comply with any measures ordered by decision pursuant to Art. 8 IV or V MR2004[1167].

Art. 15 II MR2004 deals with periodic penalty payments, too. In particular where the persons referred to in Art 3 I (b) MR2004 or undertakings have satisfied the obligation which the periodic penalty payment was intended to enforce, the Commission may fix the amount of the payments at a figure lower than that which would arise under the original decision[1168].

Art. 21 I-II MR2004 deals with the application of the regulation and jurisdiction. Subject to the review by the CJEU, the Commission shall have sole jurisdiction to take the decisions provided for in this regulation[1169]. It statutes a derogation from the applicability of the Regulation (EC) No. 1/2003[1170].

Art. 21 III MR2004 deals again with the application of the regulation and jurisdiction. Therefore, no member state shall apply its national legislation on competition to any concentration that has a community dimension[1171]. The 2nd sub-paragraph states that the first sub-paragraph shall be without prejudice to any member state's power to carry out any enquiries necessary for the application of Art. 4 IV MR2004, 9 II MR2004 after referral owing to Art. 9 III first sub-paragraph indent (b) or Art. 9 V MR2004 to take the measures

[1166] R. Bechtold/W. Bosch/I. Brinker/S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) FKVO Art. 15 I p 957; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 23 VI. 6. p 548.

[1167] V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 18 IV p 161; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH § 7.1 (3) (b) p 639; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.349, p 621.

[1168] R. Bechtold/W. Bosch/I. Brinker/S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) FKVO Art. 15 p 950.

[1169] E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 23 I. p 529; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1373, p 544; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 5, p 510.

[1170] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 6, p 511.

[1171] R. Bechtold/W. Bosch/I. Brinker/S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) FKVO Art. 21 III p 977; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 23 I. p 529; CH 6 § 23 V. p 540; K. Lange, Handbuch zum deutschen und europäischen Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2006) CH 8 § 3 I. p 641; ; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 III p 193.

strictly necessary for the application of Art. 9 VIII MR2004[1172]. National laws stay applicable if the MR2004 is not applicable due to a lack of a community dimension or a missing concentration[1173].

Art. 21 IV 1st sub-paragraph MR2004 is again about the application of the regulation and jurisdiction[1174]. Notwithstanding Art. 21 paragraphs II and III MR2004 the member states may take appropriate measures to protect legitimate interests other than taken into consideration by MR2004 and compatible with the general principles of Community law[1175].

The 2nd sub-paragraph lists examples of legitimate interests in terms of Art 21 IV 1st-sub-paragraph like public security, plurality of the media and prudential rules[1176]. Public security is interpreted narrowly as military security[1177] and the security of energy supply for oil, gas and electricity and telecommunications[1178]. Any other public interest must be communicated to the Commission by the member state concerned and is recognized by the Commission after an assessment of its compatibility with of EU law[1179]. Other legitimate interests include public water supply[1180], banking industries[1181] and the control of foreign direct investments[1182]. They shall be recognised by the Commission after an assessment of compatibility with the general principles of Community law (principles of proportionality and non-discrimination)[1183]. The former principles are applicable before the measures referred to above may be taken and the Commission shall inform the relevant member state within 25 working days of that communication.

[1172] V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 14 III 2. p 132; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 23 V. p 540; CH 6 § 25 III. 3. p 605; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 3. C. (iii) a., p 1111.

[1173] K. Lange, Handbuch zum deutschen und europäischen Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2006) CH 8 § 3 II. pp 644-645.

[1174] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. I. 3. b) (3) pp 280-281; R. Bechtold/W. Bosch/I. Brinker/S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) FKVO Art. 21 p 977; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.4 (1) p 653 and § 7.30 (4) p 773; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.003, p 595.

[1175] K. Lange, Handbuch zum deutschen und europäischen Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2006) CH 8 § 3 II. p 646; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 1, p 509; § 15 marginal note 11 p 512 and § 15 marginal note 26, p 518; q.v. Recital 19 MR2004; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.4 (1) p 653; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.111, p 649; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 3. C. (v), p 1116; A. Ezrachi, EU Competition Law (5th Ed.) (London, UK, Bloomsbury, 2016) CH 9, p 401.

[1176] R. Bechtold/W. Bosch/I. Brinker/S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) FKVO Art. 21 IV pp 978-980; K. Lange / T. Pries, Einführung in das europäische und deutsche Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2011) CH 4 § 2 II 3. b) p 185; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 23 V. 4. p 544; ; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 6 III p 193; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 1, p 509; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.4 (1) p 653; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.112, p 650; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.22, p 545; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 3. C. (v), p 1117.

[1177] Q.v. Art. 346 TFEU; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5 marginal note 5.294, p 609; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 3. C. (v), p 1117 with further references.

[1178] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5 marginal note 5.285, p 607.

[1179] Art. 21 IV sub-para 3 MR2004. A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 3. C. (v), p 1116.

[1180] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 28, p 519; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5 marginal note 5.293, p 608; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 3. C. (v), p 1118.

[1181] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5 marginal note 5.293, p 608.

[1182] C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.113, p 651.

[1183] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5 marginal note 5.288, p 608.

Art. 21 I MR2004 deals with the application of this regulation and jurisdiction[1184]. Art 21 I MR2004 states that this regulation alone shall apply to concentrations as defined in Art 3 MR2004 and Regulation (EC) No. 1/2003; Regulation (EEC) No. 1017/1968, Regulation (EEC) No. 4056/1986 and Regulation (EEC) No. 3975/1987 shall not apply[1185] except in relation to JVs that do not have a community dimension and which have as their object or effect the coordination of the competitive behaviour of undertakings that remain independent.

Art. 22 III MR1989 and MR1997 have as subject the application of this regulation. If the Commission finds, at the request of a member state or at the joint request of two or more member states, that a concentration as defined in Art. 3 MR1989 has no Community dimension and creates or strengthens nevertheless a dominant position as a result of which effective competition would be significantly impeded within he territory of the Member State or states making the joint request it may insofar as that concentration affects trade between member states adopt the decision provided for in Art. 8 II 2nd sub-paragraph, III and IV MR1989 and MR1997[1186].

Art. 22 I MR2004 deals with the referral of a case to the Commission. It states that one or more member states may request the Commission to examine any concentration as defined in Art. 3 MR2004 that does not have a community dimension under Art. 1 MR2004 but affects trade between member states and threatens to significantly affect competition within the territory of the member state making the request[1187]. Such a request is due within 15 working days of the date on which the concentration was notified.

Art 22 II MR2004 obliges the Commission to inform the competent authorities of the member states and the undertakings concerned of any request owing to Art. 22 I MR2004 without delay[1188].

Any other member state has the right to join the initial request within a period of 15 working days of being informed by the Commission of the initial request.

All national time limits shall be suspended until, in accordance with the procedure set out in this article, it has been decided where the concentration shall be examined. As soon as does not wish to join the request, the suspension of is national time limits shall end.

[1184] R. Bechtold/W. Bosch/I. Brinker/S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) FKVO Art. 21 I p 976.

[1185] K. Lange / T. Pries, Einführung in das europäische und deutsche Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2011) CH 4 § 2 I. p 178; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 23 II. 2. p 532.

[1186] V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 14 III 2. p 132; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 23 V. 1. p 541; q.v. § 40 III GWB; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 10 VII 4. p 377.

[1187] R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 21 3. (E) (ii), p. 870. V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 14 III 2. p 132; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. I. 2. c) pp 274-275; R. Bechtold/W. Bosch/I. Brinker/S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) FKVO Art. 22 pp 982-983; K. Lange / T. Pries, Einführung in das europäische und deutsche Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2011) CH 4 § 2 II 3. c) p 186: „Dutch Clause"; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 23 V. p 540; K. Lange, Handbuch zum deutschen und europäischen Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2006) CH 8 § 3 IV. p 652.

[1188] R. Bechtold/W. Bosch/I. Brinker/S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) FKVO Art. 22 II p 983.

Art. 22 III 1st sub-paragraph MR2004 obliges the Commission to take a decision at least 10 working days after the expiry of the period set in Art. 22 II MR2004 on the affection of trade between member states and the threatening to significantly competition within the territory of said member state[1189]. If the Commission does not take a decision within said period, it shall be deemed to have taken such a decision to adopt a decision to examine the concentration in accordance with the request.

Art. 22 III 2nd sub-paragraph deals with the information of all member states and undertakings concerned related to said decision. It may request the submission of a notification owing to Art. 4 MR2004.

Pursuant to Art. 22 III 3rd sub-paragraph MR2004 the member states having made the request shall no longer apply their national legislation on competition to said concentration.

Art. 22 V MR1989 deals with the application of MR1989 and obliges the Commission to take only the measures strictly necessary to maintain or restore effective competition within the territory of the members state or state at the request it intervenes[1190].

Art. 22 V MR2004 deals with the referral of a concentration to the Commission. It may inform one or several member states that it considers a concentration fulfils the criteria in paragraph 1. In such cases the Commission may invite that member states to make a request to Art. 22 I MR2004[1191].

Art. 23 II MR2004 is about the implementing provisions[1192]. The Commission shall be assisted by an advisory committee composed of representatives of the member states. The advisory committee shall be heard by the Commission before the publication of a draft implementing provision and before adopting such provisions (Art. 23 II (a) MR2004)[1193].

Consultation shall take place at a meeting convened at the invitation of and chaired by the Commission. A draft of the implementing provisions to be taken shall be sent with the invitation. Such a meeting shall take place not less than 10 working days after the invitation has been sent (Art. 23 II (b) MR2004).

The advisory committee is obliged to deliver an opinion on the draft implementing provisions, if necessary by taking a vote. The Commission shall take utmost account of the opinion delivered by the committee (Art. 23 II (c) MR2004).

[1189] R. Bechtold/W. Bosch/I. Brinker/S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) FKVO Art. 22 p 985.
[1190] R. Bechtold/W. Bosch/I. Brinker/S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) FKVO Art. 22 p 987.
[1191] V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 14 III 2. p 132.
[1192] K. Lange / T. Pries, Einführung in das europäische und deutsche Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2011) CH 4 § 2 VI. 1. p 208: Regulation (EC) No. 802/2004/EC, as amended by Commission Regulation (EC) No. 1033/2008 and Commission Regulation (EU) No. 1269/2013.
[1193] R. Bechtold/W. Bosch/I. Brinker/S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) FKVO Art. 23 p 988.

Art. 26 I 1st sub-paragraph MR2004 deals with the entry into force and transitional provisions (20th day following that of its publication in the Official Journal of the EU). It shall apply from 01/05/2004 (Art. 26 I 2nd sub-paragraph MR2004)[1194].

According to Art. 26 II MR2004, MR1989/MR1997 shall continue to apply to any concentration which was the subject of an agreement or announcement or where control was acquired within he meaning of Art. 4 I MR1989/MR1997 before the date of application of MR2004 on 01/05/2004 in particular to the provisions governing the applicability set out in Art. 25 II and III of MR1989 and Art. 2 MR1997[1195]. Finally, there is a new jurisdictional notice on merger control of 2008[1196] completed by Commission Guidelines on non-horizontal concentrations[1197].

8.1 Art. 26 III MR2004

As regards concentrations under Art. 26 III MR2004 to which MR2004 applies by virtue of accession, the date of accession shall be substituted for the date of application of this regulation.

8.2 Merger Control Law and the Freedom of Property under Art. 17 I Charter of Fundamental Rights and Art. 14 I, 12 I 1 and 2 I GG

The European and German merger control law is justifiable under the freedom of property of the shareholders pursuant to Art. II-17 Charter of fundamental rights and the freedom of property under Art. 14 I 2 GG (German Basic Law)[1198]. It is a definition of contents and delineation (so called "Inhalts- und Schrankenbestimmung") which defines the liberal market economy in combination with a strong proportionality test. Any measure must not fail to achieve a suitable end, must be the least extensive effective measure and the attainment of the right to property must not harm other ends disproportionaly. The competition law restricts the ownership of private entrepreneurial property with a view to fostering the common good, i.e. the openness of markets to the benefit of actual and potential competitors ("Inhalts- und Schrankenbestimmung zur Förderung des Gemeinwohls durch Offenhaltung der Märkte"). Additionally, the professional freedom under Art. 12 I 1 GG and the general freedom to act owing To Art. 2 I GG is affected[1199].

[1194] R. Bechtold/W. Bosch/I. Brinker/S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) FKVO Art. 26 p 990.
[1195] R. Bechtold/W. Bosch/I. Brinker/S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) FKVO Art. 26 II p 990.
[1196] Commission consolidated jurisdictional notice under Council Regulation (EC) No.139/2004 on the control of concentrations between undertakings, O. J. C 95, 2008, p 1; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.1 (4) p 641.
[1197] Commission Guidelines on the assessment of non-horizontal mergers under the Coucil Regulation on the control of concentrations between undertakings, O. J. 2008 C/265/6; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.1 (4) p 642 and § 7.17 (1) p 719.
[1198] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) A. III. 1. d) p 19.
[1199] I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 2 A. p 68.

8.3 Exempted and Specific Economic Sectors

Art. 42 TFEU exempts the agricultural sector from the application of Art. 101 and 102 TFEU and the merger regulation unless the European Parliament and the Council decide otherwise. In the train, street and inland navigation transport sector, specific rules apply[1200]. The same is true for maritime transport[1201]. The Commission regulated the application of Art. 101 III TFEU to liner conferences and consortiums[1202]. For aviation, it is stated that the competition rules apply to inland aviation and to aviation between a member state and third countries[1203]. A regulation governs the application of Art. 101 III TFEU to agreements, decisions and concerted practices in aviation[1204]. For the insurance sector, it is specified that certain agreements, decisions and concerted practices may be exempted from the cartel prohibition under Art. 101 I TFEU[1205].

8.4 Legal Protection as to the MR2004 owing to the TFEU

The Commission has sole jurisdiction regarding the application of MR2004 subject to review of the courts (Art. 21 II MR2004)[1206]. According to Art. 16 MR2004, the CJEU shall have unlimited jurisdiction concerning the review of decisions of the Commission as to fines and periodic penalty payments under Art. 14 and 15 MR2004[1207]. Art. 9 IX MR2004 states that a member state may initiate proceedings of the CJEU for the purpose of applying its national competition law against a refusal of the Commission under Art. 9 II MR2004[1208]. The CJEU or Tribunal may implement a fast track proceeding for cases related to merger control which takes ten months[1209].

[1200] Regulation (EEC) No. 1017/1968 of the Council of 19/07/1968 applying rules of competition to transport by rail, road and inland waterway, O. J. 1968 L 175, p 1; as codified by Council Regulation (EC) No. 169/2009 of 26/02/2009 applying rules of competition to transport by rail, road and inland waterway, O.J 2009 L 61, p 1; I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 9 III. 4., p 265.

[1201] Council Regulation (EC) No. 1419/2006 of 25 September 2006 repealing Regulation (EEC) No.4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, and amending Regulation (EC) No. 1/2003 as regards the extension of its scope to include cabotage and international tramp services, O. J. L 269, 28/09/2006, p 1; I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 9 III. 4., p 265.

[1202] Council Regulation (EC) No. 246/2009 of 26 February 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), O. J. L 79, 25/03/2009, p 1; I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 9 III. 4., p 265.

[1203] Council Regulation (EEC) No.3975/1987 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector O. J. L 374 , 31/12/1987, p 1; Council Regulation (EEC) No. 3976/1987 of 14 December 1987 on the application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector, O. J. L 374, 31.12.1987, p 9; Council Regulation (EC) No.411/2004 of 26 February 2004 repealing Regulation (EEC) No.3975/87 and amending Regulations (EEC) No.3976/87 and (EC) No.1/2003, in connection with air transport between the Community and third countries, O. J. L 68, 06/03/2004, p 1; I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 9 III. 4., p 265.

[1204] Council Regulation (EC) No. 487/2009 of 25 May 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector, OJ L 148, 11/06/2009, p 1; I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 9 III. 4., p 265.

[1205] Commission Regulation (EU) No.267/2010 of 24 March 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of agreements, decisions and concerted practices in the insurance sector, O. J. L 83, 30/03/2010, p. 1; I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 9 III. 4., p 266.

[1206] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 208, p 729.

[1207] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 208, p 729; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 7., p 1201.

[1208] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 208, p 729.

[1209] It introduces a simple hearing with limited durations pleedings (single statement of claim and answer). Art. 76a proceedings order of the court; Art. 62a proceedings order of the CJEU, q.v. G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 210, pp. 729-730; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.38 p 794.

Against a non-applicability decision under Art. 6 I lit. a MR2004, an action for annulment is feasible within two months after the publication of the contested act (Art. 263 TFEU)[1210]. A clearance under Art. 6 I lit. b MR2004 does not lead to a disadvantage for the parties so that no action of them for annulment is feasible (Art. 263 TFEU) even if a hostile acquisition is applicable for the target company[1211]. However, for competitors, clients or suppliers an action for annulment is feasible against decisions under Art. 6 I lit. b MR2004[1212]. For conditional clearances under Art. 6 I lit. b in combination with Art. 6 II MR2004, an action for annulment is possible in front of the tribunal (Art. 263, 256 TFEU)[1213]. Natural or legal persons suing under Art. 263 TFEU must demonstrate that the contested act is addressed to them (the notifying parties[1214]) or immediately and individually affects them (Art. 263 IV TFEU)[1215]. The latter applies to sellers and the target of a concentration[1216]. Third parties (competitors of the parties and consumers) must demonstrate that they are immediately and individually affected in particular if the were engaged in the merger proceedings and their market position is affected[1217].

Decisions adopted by the Commission in the process of implementation of commitments can also be reviewed under actions for annulment for example when the Commission decides that a purchaser is not a suitable purchaser for the purposes of merger control law[1218]. Decisions under Art. 6 lit. c MR2004 have only a procedural relevance and do not grant legal standing in terms of an action for annulment (Art. 263 TFEU)[1219]. Member states have legal standing against decisions owing to Art. 6 I lit. b and lit. c MR2004 under Art. 263 TFEU[1220].

Against a negative decision so as not to grant an exemption from the prohibition to implement a concentration prior to its approval, an action for annulment by the parties and the member states is feasible (Art. 7 III MR2004, Art. 263 TFEU)[1221].

[1210] Q.v. I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 p 786.
[1211] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 213, p 731.
[1212] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 213, p 731; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.1130, p 789.
[1213] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.1130, p 789.
[1214] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.1144, p 792.
[1215] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal notes 5.1140-5.1142, pp. 791-792.
[1216] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.1145, p 793.
[1217] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.1146, p 793
[1218] I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.34 p 790.
[1219] General Court, Case T-48/03 *Schneider Electric v Commission* [2006] ECR II-111 para 59; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 214, p 731; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.34 p 791; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.1134, p 790; J. P. Terhechte (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal notes 73.224, p 1883.
[1220] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 215, p 731.
[1221] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 217, p 731; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.1132, p 790.

Against a clearance decision under Art. 8 I MR2004 a third person and against conditional clearance decision under Art. 8 II MR2004 a party or a third person and against a blocking decision of the Commission owing to Art. 8 III MR2004 the parties may appeal to the Court and the CJEU (action for annulment owing to Art. 263, 256 TFEU and Art. 230 I ECT) and even if in following of the decision the concentration was withdrawn[1222]. Third persons may also appeal to the Court against the clearance of a concentration (action for annulment owing to Art. 263 TFEU)[1223]. Actions for annulment by member states against decisions to prohibit concentrations under Art. 8 III MR2004 are feasible (Art. 263 TFEU)[1224]. Dissolution decisions under Art. 8 IV MR2004 have been challenged by the parties (actions for annulment under Art. 263 TFEU)[1225]. Interim measures under Art. 8 V MR2004 or revocation decisions under Art. 8 VI MR2004 against compatibility decisions owing to Art. 8 I MR2004 and conditional clearances under Art. 8 II MR2004 may be legally challenged by the parties[1226].

Parties or third persons may challenge deemed decisions under Art. 10 VI MR2004 owing to a lack of a timely decision pursuant to Art. 6 I lit. b, lit. c, 8 I and III MR2004[1227].

Against formal requests for information (Art. 11 MR2004) and inspection decisions of the member states or the Commission (Art. 12[1228]-13 MR2004) an action for annulment is feasible (Art. 263 TFEU)[1229]. Fine (Art. 14 MR2004) and periodic penalty decisions (Art. 15 MR2004) can be challenged with an action for annulment with an unlimited power to examine the discretion of the Commission so that the fine is increased, decreased or cancelled (Art. 263 TFEU in combination with Art. 261 TFEU)[1230]. Refusals to referral decisions under Art. 4 IV and V MR2004, can be challenged in front of the CJEU[1231]. Lastly, an action for failure to act (Art. 265 TFEU) is feasible in case of a concentration with a Community dimension (Art. 1 II-III MR2004) when there is a lack of a Commission decision under MR2004 and the pursuer has unsuccessfully fixed a period to the Commission to act[1232].

[1222] F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1443, p 569; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 218, p 732 and § 17 marginal note 221 p 733. Since 1999 every prohibition decision was challenged in front of the court which lead to frequent annulments; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.1130, p 789.

[1223] F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1443, p 569; A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 397, p 186.

[1224] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 221, p 733.

[1225] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 222, p 733.

[1226] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 223, p 733.

[1227] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 224, p 733.

[1228] I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.30 (2) p 772.

[1229] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 225, p 734.

[1230] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 226, p 734.

[1231] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 229, p 735.

[1232] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 231, p 735.

Actions for damages under Art. 268 and 340 TFEU are feasible if the violated legal norm intends to sustain legal rights to a person, if the violation is sufficiently qualified and if there is a close causal link between the violation and the damage[1233].

Under Art. 264 IV TFEU, the addressee or another person which is immediately and individually affected by a Commission decision has the right to sue[1234] (addressees of requests for information under Art. 11 MR2004, inspection decisions pursuant to Art. 12-13 MR2004, fines and periodic penalty decisions owing to Art. 14-15 MR2004, prohibition decisions under Art. 8 III MR2004, dissolution decisions Art. 8 IV MR2004 and interim measures decisions Art. 8 V MR2004) or clearance decisions with incidental provisions owing to Art. 8 II 2nd sub-paragraph MR2004)[1235]. Third persons like competitors, consumers or suppliers of the parties have the right to sue[1236]. The period for filing an action is two months since the publication of the contested decision[1237]. The action in front of the CJEU has no suspensive effect[1238] so that for example a conditional clearance decision may be implemented regardless of an action[1239]. The Court may however grant provisional legal protection owing to general principles of EU-law[1240] providing that the applicant demonstrates a serious financial loss owing to the implementation of the decision[1241]. The addressee of a decision of the Commission which is overruled by the Court may seek legal protection under the damage claim provision of Art. 340 TFEU[1242]. Actions in front of the courts do not have a suspensive effect (Art. 278 TFEU) but the Court may order the suspension of contested decision (Art. 278 II TFEU) or interim measures (Art. 279 TFEU)[1243]. Any party which was unsuccessful in front of the Tribunal may appeal to the CJEU on grounds of points of law[1244].

9. Interplay between Internal Market Policy, Liberalisation and Concentrations with Commitments

This chapter reflects the relationship between three subjects with close mutual links: At first, the internal market policy intends to create a true common market in Europe by implementing the basic freedoms; i.e. the freedom

[1233] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 232, p 736.
[1234] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 234, p 737.
[1235] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 235, p 737.
[1236] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 236, p 738.
[1237] Art. 263 V TFEU; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 237, p 739.
[1238] Art. 278 TFEU; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 238, p 739.
[1239] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 238, p 739.
[1240] Art. 278 2nd sentence and Art. 279 TFEU; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 240, p 739.
[1241] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 240, p 740.
[1242] I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.39 p 795.
[1243] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.1170, p 800.
[1244] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.1178, p 801.

of goods[1245], free circulation of workers[1246]; freedom of establishment[1247]; freedom of services[1248] and free circulation of capital[1249] as summarised by Art. 3 EUT and Art. 3 – 6 TFEU (Art. 2 and 3 I lit. c ECT). Clearly, this concept involves policies removing distortions to cross-border transactions in electricity and gas generation, transmission, distribution, supply and metering so that a level playing field for competition is provided.

Secondly, the transnational competition policy as introduced by Art. 3 I lit. g ECT will assist in obtaining the internal market. This refers not only to classic antitrust law under Art. 101 - 102 TFEU (Art. 81-82 ECT), but also to merger control law and to the liberalisation of sectors which were formerly controlled by legal or factual monopolies regardless whether the state or a private entity operated as the relevant undertakings. In the era of liberalisation, Art. 106 I and II TFEU (Art. 86 I and II ECT) deserve special attention which usually allows public undertakings in terms of Art. 106 I TFEU (Art. 86 I ECT) to be granted an exemption from EC law as long as such measure is indispensable to attain services in the general economic interest that are imposed on them and provided that such a derogation is not disproportionate compared with antagonistic concerns of cross-border trade which may be of superior importance in the specific situation[1250]. The more restrictive this derogation from EC law is interpreted the more powerful becomes the liberalisation of the energy sectors: Services in the general economic interests, especially public service obligations of energy companies, must not be considered as wild cards to exclude competition. As the energy industries involve significant investments that form severe barriers to market entry of foreign competitors or energy traders, a concentration of minor market players operating on geographic markets within a single member state may be sometimes indispensable to achieve economies of scale that are necessary to enable an entity to challenge foreign markets without having to fear an effective retaliation of incumbent entities.

However, it would be highly detrimental to the liberalisation of electricity and natural gas markets as provided for in the IEMD[1251], the Hydrocarbons Directive and the IGMD[1252], if the energy undertakings solely pursued defensive concentrations so as to create even larger areas of virtually closed supply and to install collective dominance. The threat of collective dominance in the energy sector is facilitated by means of several structural elements:

- the transparency of the market (at least for industrial players),
- the high ratio of exchangeability of the product (power quality, security of supply, environmental standards),

[1245] Art. 23-31. ECT. Art. 28-37 TFEU.
[1246] Art. 39 et seq. ECT; Art. .45 et seq. TFEU.
[1247] Art. 43 et seq. ECT; Art. 49 et seq. TFEU
[1248] Art. 49 et seq. ECT; Art 56 et seq. TFEU.
[1249] Art. 56 et seq. ECT; Art. 63 et seq. TFEU.
[1250] V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 19 I p 163.
[1251] R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 23 10. (A) (i), pp. 1020-1021.

- the focus on the price
- the low amount of cross-elasticity of demand (i.e. captive consumers)
- the maturity of the market (i.e. stable demand trends, expansion only to the detriment of other competitors)
- the already highly concentrated market with few players operating in old closed supply areas

These factors may initially foster severe price competition but the competitors will try to establish a mode of restricting competition as extended price competition will put the turnovers of all players under pressure.

Consequently, it may be persuasive to argue that concentrations are backed if they facilitate cross-border competition unless it is intended to remove a potential foreign company that is likely to invest on the home market owing to geographic proximity[1253].

An important tool to assure proactive effects of a given concentration is to make the undertakings comply with conditions that require a divestiture of assets which provide for capital links to competitors or up- and downstream undertakings and which result from the era of monopolistic supply areas.

Of course, one must pay attention to the question whether the divested entities are able to become profitable an to remain stand alone competitors and whether they are bought from experienced international energy companies or by other local entities as the latter could easily achieve a future dominant position. By clearing concentrations with due effects of market opening, competition on both the regional level and the European level is generally enhanced.

Another tool of a highly ambivalent legal nature is the reciprocity concept pursuant to Art. 19 V IEMD[1254]. A member state or a private entity is entitled to reject TPA if the network owner could not provide electricity to a comparable consumer in the country of the applicant for TPA. One question was whether this concept could be extended by analogy to cross-border concentrations as well:

Could a member state prohibit a take-over of an incumbent firm by a foreign investor unless domestic investors are prevented from comparable transactions in the acquirer's country? These issues will be discussed in the following sub-sections.

Thirdly, the Commission and national authorities can accept incidental provisions suggested by the parties to grant negotiated TPA under conditions that are more favourable than under ordinances that govern the key-commercial terms of negotiated TPA[1255] or than under associations' agreements. This issue is discussed in the analysis of the VEBA/VIAG concentration.

[1252] R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 23 10. (A) (i) pp. 1020-1021.
[1253] This argument could be true to prevent EdF from acquiring EnBW: q.v. FT, *EdF's Plan to Invest in EnBW* (02/10/2000), http://www.ft.com .
[1254] Directive 1996/92/EC.
[1255] Directive 1996/92/EC provided for negotiated or regulated TPA. Germany chose negotiated TPA (Associations' agreements power I of May 1998, II of January 2000, II+ of 2001 and associations' agreements gas I of 04/07/2000 and II from 03/05/2002) before regulated TPA was codified.

The subsequent analysis of recent concentrations in the European energy sector will indicate to which extent the Commission focuses on divestitures that enhance market opening, on restraints-on control commitments[1256], on improved TPA and on reciprocity by means of incidental provisions.

9.1 Structure of European Energy Markets

The liberalised energy market describes the network bound power and natural gas supply market through utilities. The petroleum market is fully liberalised. Free competition is available for most parts of the supply chain except transmission and distribution of electricity and natural gas. The transmission and distribution of electricity and natural gas is a natural monopoly. Access to third parties to the grids is granted by virtue of the essential facilities doctrine[1257] (§ 19 II No. 4 German GWB).

Power trade in Europe has a long tradition. Germany is exporting 62,695 TWh and is importing 40,245 TWh in 2008. The prices for grid access are regulated in Germany by the Bundesnetzagentur (Federal Grid Agency). Roughly 80 % of the power supply and the power traded are generated by E.ON, RWE, EnBW and Vattenfall[1258]. Roughly 75% of power are traded OTC and not via the power exchange. In 2014 Germany exported a peak amount of 34,1 TWh of electricity[1259]. For a functioning competition on liberalised energy markets it is necessary to internalise the external costs of electricity production so as to avoid stranded investments in power generation. A functioning power trade is necessary (CO2 taxation and emissions trading). Security of supply is essential for a functioning power trading market. In 2010 43,8 % of German customers are supplied by the four big utilities.

E.ON sold with consent of the European Commission of 26/11/2008 its German high voltage transmission grid business to the Dutch Tennet group (divestiture and ownership unbundling as an alternative of the formation of an independent system operator or an independent transmission operator as legal unbundling under IEMD 2009[1260] including 4800 MW power station performance; exchange of 1700 MW of power station performance with GdF Suez; sale of hard coal power station Mehrum to Stadtwerke Hannover; sale of 312 MW water power station capacity to the Austrian Verbund undertaking).

E.ON planned to reduce its debts by virtue of a sale of assets (disinvestments):

- share of 3,5 % in Gazprom in December 2010 (revenue 3,4 bn. Euro)
- natural gas grid in Italy in December 2010 (revenue 290 Mio. Euro)

1256 This term is explained by H. Krause, *Article 6 I lit. b EC Merger Regulation: Improving The Reliability of Commitments*, ECLR 214 (1994).
1257 R. Whish, D. Bailey, Competition Law (8th ed.) (Oxford, U.K., OUP, 2015) CH 23 7. (B), p 1032.
1258 I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 1 A. 1. b. p 6; CH 1 A. 1. e. pp 8-9.
1259 AG Energiebilanzen: "Bruttostromerzeugung in Deutschland ab 1990 nach Energieträgern". Stand 11. Dezember 2015.
1260 I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 12 § 12.12 (4) pp. 1411-1412.

- UK undertaking „Central Networks“ (revenue 4,7 bn Euro)
- Shareholding of 20 % in Stadtwerke Duisburg
- „Eon Bulgaria“ (revenue 133 Mio. Euro)
- Shareholding of 40 % in regional supplier HSE (revenue 305 Mio. Euro)
- Transmission grid operator Open Grid Europe (revenue 3,2 bn. Euro)
- Shareholding of 50 % in the JV Horizon Nuclear Power (revenue 433 Mio. Euro)
- Shareholding of 43 % in regional supplier E.ON Thüringer Energie (revenue 946 Mio. Euro)
- Shareholding of 10 % in regional supplier E.ON Thüringer Energie
- Shareholding of 24,5 % in the Slovack energy undertaking Slovensky pylnarensky priemysel (revenue 1,3 bn. Euro)
- Shareholding of 15,1 % in the pipeline Interconnector (revenue 127 Mio. Euro)
- Energy from Waste to a JV in which E.ON has E.ON 49 % and the investment fund EQT has 51 %
- Shareholding of 34% in the Finnish nuclear energy undertaking Fennovoima.
- Sale of E.ON Földgáz Trade und E.ON Földgáz Storage to the Hungarian utility MVM Hungarian Electricity (revenue 870 Mio. Euro)
- Sale of 62,9 % participation in the regional supplier E.ON Westfalen (revenue ca.360 Mio. Euro)
- Sale of 73,3 % in the regional supplier E.ON Mitte (revenue ca. 610 Mio. Euro).

On 08/06/2016, EON decided to divest its conventional energy generation business including water power to Uniper SE (without nuclear assets).

RWE pursued the following acquisitions since 2000:

- 2000 – Vereinigte Elektrizitätswerke Westfalen *(VEW)*
- 2001 – Thames Water, UK
- 2002 – RWE Transgas, Czech Republic
- 2002 – Innogy Holdings, UK
- 2003 – American Water Works Company, USA
- 2009– *Favorit Unternehmens-Verwaltungsgesellschaft* (German district heating business of ExxonMobil)
- 2009 – Essent, Netherlands

RWE pursued the following disinvestments since 2000:

- 2002 – RWE Dea *Downstream-Geschäft* (filling stations, sold to Shell Dea Oil GmbH)
- 2003 – Consol Energy (hard coal), USA
- 2004 – Hochtief (building business)

- 2004 – Heidelberger Druckmaschinen, (printing devices)
- 2010 – Thyssengas *(including the gas transmission grid of 4200 km, 2016 sold to a consortium of the Dutch Fund DIF and EdF; in April 2007, the Commission initiated a procedure owing to the abuse of access to the gas transportation grid so that RWE offered to sell the business to an interested third party in order to settle the procedure)*
- 2011– Amprion (high voltage transmission grid operations in Germany) (74,9 %)
- 2012 – VSE (19 %)
- 2012 – Berliner Wasserbetriebe (24,95 %)
- 2012 – Koblenzer Elektrizitätswerk und Verkehrs-AG (57,5 %)
- 2014 – *RWE DEA (Upstream oil and gas business, still ongoing)*

EdF was founded 1946 and is a SA (plc) since November 2004. It services with 158.000 employees 37 Mio. of customers. It is the 2nd largest electricity provider in the world. Its affiliate RTE operates the high voltage transmission grid. EdF is present on the following global markets: Argentina, Egypt, Belgium, Brazil, China, Ivory Coast, Italy, Netherlands, Mexico, Poland, Sweden, Slovakia, Spain, Hungary, USA, UK and Vietnam. In Germany, EdF held until December 2010 45,01% in EnBW and sold it to Baden-Württemberg. In 2008 EdF acquired British Energy, a nuclear power plant operator for 12,5 bn. GBP and sold 20% of the package to its partner Centrica.

EdF is planning to build a nuclear power station in the UK at Hinkley Point (Areva EPR), which should be operational in 2017. The building costs as specified in 2005 will increase. Therefore, EdF has not taken a decision whether to erect the power station or not. AREVA notified to ASN (French nuclear safety agency) that the EPR reactor in Flamanville due to be constructed has anomalies regarding the pressure vessel. In the end of July 2013, EdF notified that it will terminate its participation in the US nuclear power plant projecting JV CENG by virtue of sale of assets in the JV to its US partner Exelon.

Gaz de France was a French utility since 1946 and was transformed in to a SA (plc) in 2005 (IPO) and merged in 2008 with Suez into GdF Suez. The French state held 80% of the shares of GdF and 35,7% in to GdF Suez. Since 2015 the firm is called Engie.

EnBW is the third largest power producer in Germany. In January 2000, Baden-Württemberg sold its 25,1% shareholding in EnBW to EdF for 2,4 bn. EUR. In September 2001, EnBW acquired 29,9 % of the shares of Stadtwerke Düsseldorf and in December 2005 EnBW acquired a further 25,05% of the shares in Stadtwerke Düsseldorf for 361 Mio. EUR so that EnBW became the majority shareholder. In October 2003, EnBW merged with Neckarwerke Stuttgart. In July 2009, EnBW acquired 26% of EWE in Oldenburg by virtue of purchase of

shares. Owing to the nuclear power station termination pursuant to the nuclear disaster at Fukushima, two EnBW power stations were closed and the EnBW revenue suffered severely. At the end of 2010 Baden-Württemberg re-acquired 45% of the shares in EnBW from EdF for 4,7bn EUR.

Vattenfall AB, Sweden is internationally active since 1996. In 1999 it acquired 25,1% of the shares of HEW AG and in 2001 Vattenfall became majority shareholder in HEW. Vattenfall Europe was the product of the fusion of HEW, VEAG and Laubag in 2002, to be completed by BEWAG in 2003. Vattenfall Europe terminated the minority shareholdings by virtue of a squeeze-out in 2006. Vattenfall Europe left the stock exchange in 2008. Vattenfall Europe sold its transmission grid operator 50Hertz Transmission to the Belgian transmission grid operator Elia and to the Australian infrastructure industry fund management (IFM). On 17/09/2012 Vattenfall Europe AG became Vattenfall GmbH. Vattenfall has a 30% shareholding in GASAG. In December 2010 Vattenfall sold its 24,9% shareholding in Stadtwerke Kassel to Thüga. In May 2009, the termination of concession agreements in 2014 gave rise to a re-sale of 25,1 % of electricity, gas and district heating grids to the Freie und Hansestadt Hamburg (FHH).

Wingas is a leading gas trading company in Germany. Since 2015, it is a 100% affiliate of Gazprom. Wingas was founded in 1993 through the BASF subsidiary Wintershall, the biggest German oil and gas producer, and Gazprom for natural gas trading and supply. Wingas is supplying natural gas to local and regional utilities, industrial companies and power stations in Germany and Europe (Belgium, France, Great Britain, Austria, Czech Republic, Denmark and the Netherlands). The German market share Is 20% in 2014.

Owing to the 3rd liberalisation package of the EU (Directive 2009/73/EC), Wingas unbundled the transmission grid and the gas storage businesses in 2010.

Wingas GmbH & Co KG was transformed into W & G Beteiligungs-GmbH & Co. KG and the whole gas trading and supply business was transferred into Wingas GmbH. The gas storage business is lead by Astora GmbH & Co. KG.

Gascade, the former Wingas Transport is since February 2012 the independent transmission operator for the operation of the gas transmission grid. The shares in Norddeutsche Erdgasleitung (NEL) and Ostsee-Pipeline-Anbindungs-Leitung (OPAL) are held by WIGA Transport Beteiligungs-GmbH & Co. KG.

Since February 2012, Astora is responsible for the gas storage business as direct affiliate of Wingas. In Rehden, Astora is operating the largest European gas storage facility (Volume of 4,4 bn. m^3 working gas). This is the equivalent of 20% of gas storage in Germany. Since 2013, Astora is operating in Jemgum (Lower Saxony) a gas storage facility (until 2018 working gas of 1 bn. m^3 of gas). In May 2007, the gas storage facility Haidach in Salzburg entered into operation (volume of 1,2 bn. m^3 of working gas). It is operated by Astora, RAG and

Gazprom Export. It was until 2011 enhanced to 2,6 bn. m^3 of working gas. Since 2014, it is connected to the Austrian gas grid. In December 2013 the EU-Commission approved the complete takeover of Wingas through Gazprom.

9.2 Incidental Provisions so as to Address Undertakings Offered by the Parties

Incidental provisions or secondary regulations are limitations, conditions, disclaimer reservations, obligations, and obligation reservations and are issued in order to meet the legal requirements for the issuance of an administrative act or subject to discretion (q.v. § 36 I-II German Administrative Proceedings Act (VwVfG)). A collateral clause must not interfere with the intention of the main administrative act (§ 36 III German Administrative Proceedings Act (VwVfG)).

Art. 6 II and Art. 8 II MR2004 explicitly allow the Commission to add conditions or obligations to a clearance decision to meet the commitments that the parties offered in order to make a concentration compatible with the common market[1261]. The Commission Notice on Remedies introduces a new Form RM with a description of commitments, its suitability to remove competition concerns, an explanation of any deviation from the Commission's model texts for divestiture, a summary of commitments and an information on any business to be divested[1262]. Section III of the Commission Notice on Remedies discusses different types of remedies: structural remedies as the divestiture of a business, the removal of links to competitors and behavioural remedies like the termination of exclusive agreements or agreements to grant competitors access to infrastructure or key technology (other remedies)[1263]. The divested business must compete efficiently with the merged entity on a lasting basis[1264]. Links to competitors must be removed[1265]. Phase One commitments must be submitted within 20 working days of the date of receipt of the notification[1266]. Art. 10 I 2nd sub-paragraph MR2004 states that the deadline for the Commission to make a Phase One decision is extended from 25 to 35 working days where

[1261] R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 21 6., p. 907; Commission Notice on Remedies O. J. (2008) C 267/1; C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 45 p 443; q.v. § 40 III GWB; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 10 VII 4. p 377; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 5. G. (i), p 1195.

[1262] Commission Regulation (EC) 1033/2008, O. J. 2008 L 279, p 3 Form RM; Commission Notice on Remedies Acceptable under MR2004, O. J. (2008) C 267, p 1; R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 21 6. (B) (i), p 908; C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 45 p 443; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.178, p 684.

[1263] Commission Notice on Remedies, O. J. (2008) C 267/1 Section III; C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 45 p 443; R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 21 6. (B) (ii), p 909; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.32 (2) p 779.

[1264] R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 21 6. (B) (iii), p 911; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.32 (1) p 778.

[1265] R. Whish, D. Bailey, Competition Law (8th ed.) (London, U.K., Butterworths, 2015) CH 21, 6 (B) (ii) (b) p 934. Commission Notice on Remedies, O. J. (2008) C 267/1 Section III paragraphs 58-60; C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 45 p 443.

[1266] R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 21 6. (B) (ii) (c) p 911. Commission Notice on Remedies, O. J. (2008) C 267/1 Section IV; C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 45 p 443; C. Koenig, K. Schreiber, Europäisches Wettbewerbsrecht (1st ed.) (Tübingen, Germany, Mohr, 2010) CH 7 V. 2. a), pp. 215-216.

commitments are offered[1267]. Art. 19 II of the implementing regulation requires that Phase two commitments are submitted within 50 working days of the date on which the Commission decided to conduct a Phase Two investigation[1268]. This deadline can be extended by a further 15 working days where commitments are submitted between day 55 and 65 of a Phase Two investigation[1269]. Special timing issues may arise including special circumstances in which it may be possible to offer commitments after the deadline has expired[1270].

Section V of the Commission Notice on Remedies discusses the divestiture process, the approval of purchasers, the role of monitoring and divestiture trustees and the obligations of the parties following implementation of the divestiture[1271].

The College of Commissioners may revoke a decision under Art. 6 I lit. a and b MR2004 where the decision is based on incorrect information or the undertakings concerned commit a breach of an obligation attached to the decision (Art. 6 III lit. a – b in combination with 6 II MR2004)[1272]. The Commission is then no longer bound by the period under Art. 10 I MR2004 (Art. 6 IV MR2004)[1273].

When a condition is ignored the decision no longer stands, is automatically void, and the parties may be required to dissolve the concentration (Art. 8 IV b MR2004)[1274]. The conditions suspend but do not oblige the addressee. The Commission may then issue a new Art. 8 I-III decision[1275]. The Commission may also add interim measures (Art. 8 V MR2004). If an obligation is broken the commission may revoke the decision or issue fines and periodic penalty payments (Art. 6 III, 8 II, 8 VI lit. b, 14 II lit. d and 15 I lit. c MR2004)[1276]. The obligation does not suspend the administrative act but obliges the addressee to meet the requirements (obligation to specifically do, suffer or to leave a given conduct)[1277].

The EU law issues boundaries as to the decree of incidental provisions, i.e. the principle of selected individual issuance, the obligation of legal form clarity, the institutional balance and the reservation of essence[1278]. No

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1267 R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 21 6. (B) (iii), p 911; I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 2 E V. 2. b. p 177; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 53, p 675.

1268 R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 21, 6 (B) (iii) p 911; C. Koenig, K. Schreiber, Europäisches Wettbewerbsrecht (1st ed.) (Tübingen, Germany, Mohr, 2010) CH 7 V. 2. b), p 216.

1269 R. Whish, D. Bailey, Competition Law (8th ed.) (London, U.K., Butterworths, 2015) CH 21, 6 (B) (iii) (c) p 935; I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 2 E V. 2. b. p 177.

1270 R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 21 6. (B) (iii), p 911; Commission Notice on Remedies, O. J. (2008) C 267/1 paragraphs 88-94; C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 45 p 443.

1271 Commission Notice on Remedies, O. J. (2008) C 267/1 Section V; C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 45 p 443.

1272 G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 89, p 687; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.349, p 620, marginal note 5.542, p 664 and marginal note 5.1118, p 787.

1273 G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 89, p 687.

1274 J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.1120, p 787.

1275 J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.1120, p 787.

1276 J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.1123, p 788.

1277 F. Kopp / U. Ramsauer, VwVfG (19th ed.)(Munich, Germany, Beck 2018), § 36 Rz 29 and 34.

1278 Prinzip der begrenzten Einzelermächtigung, Gebot der Rechtsformklarheit, Institutionelles Geichgewicht, Wesentlichkeitsvorbehalt; q.v. J. P. Terhechte, Nebenbestimmungen im europäischen Wirtschaftsverwaltungsrecht – Instrument verdeckter Regulierung.

secondary regulation is available if a modifying obligation is issued which is part of the main regulation of the administrative act (contents assignment[1279]).

A highly complex matter is the question whether a collateral clause can be challenged with a court action annulling simply the clause or if a court action for a new administrative act without the incidental provision is required. The favourable traditional opinion allows only obligations to be contested with an action for annulment of the clause[1280]. A modern school allows every collateral clause to be addressed by virtue of an action for annulment of the clause[1281]. In March 2003, the Commission published a standard model for divestiture commitments and a standard model for trustee mandates supplemented by an explanatory note[1282]. Commitments may be offered in the first or second phase of the investigation[1283]. Commitments in the first phase must be communicated within 20 working days from the date of receipt of the notification[1284] so that the deadline for phase one decisions is prolonged from 25 to 35 days[1285]. During the phase two, commitments must be submitted within 65 working days from the date on which phase two proceedings were initiated[1286]. If the parties commit a breach of an obligation, the Commission may revoke its clearance decision under Art. 6 II or Art. 8 II MR2004 owing to Art. 6 III lit. b MR2004 or Art. 8 VI lit. b MR2004 and may require the parties to pay fines and periodic penalty payments (Art. 14-15 MR2004)[1287]. If a condition is not fulfilled, the clearance decision no longer stands and the Commission may order the dissolution of the concentration (Art. 8 IV lit. b MR2004)[1288].

9.3 SHELL / MONTECATINI CASE IV/M. 269

This case involves Shell Petroleum NV (Shell) and Montedison Nederland NV (Montedison). On 26 January 1994 the Commission decided to continue the suspension of the notified concentration owing to Art. 7 II MR1989 and on 7 February 1994 initiated proceedings in this case pursuant to Art. 6 I lit. c MR1989.

[1279] Inhaltsbestimmung.
[1280] F. Kopp / U. Ramsauer, VwVfG (19th ed.)(Munich, Germany, Beck 2018), § 36 Rz 61-62.
[1281] BVerwG, BVerwGE 60,269 and BVerwGE 112, 221.
[1282] I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.32 (2) (d) pp. 782-783.
[1283] I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.32 (3) p 784.
[1284] Art. 19 I Commission Implementing Regulation (EU) No. 1269/2013 of 5 December 2013 amending Commission Regulation (EC) No.802/2004 implementing Council Regulation (EC) No.139/2004 on the control of concentrations between undertakings. O. J. L 336, 14.12.2013, pp. 1-36; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.32 (3) p 784.
[1285] Art. 10 I MR2004; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.32 (3) p 784.
[1286] I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.32 (3) p 784.
[1287] I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.32 (4) p 785; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.990, p 757.
[1288] I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.32 (4) p 785; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.990, pp. 757-758.

9.3.1 The Parties

Shell is a holding company within the Royal Dutch / Shell group. Montedison belongs to the Ferruzi group of companies. Its polyolefins interests are owned by Montecatini Nederland BV through two subsidiaries Himont Incorporation (polyolefins) and Mopletan Spa (downstream).

Montedison transfers its global polyolefins interests to Sophia, which is to be owned 50% by Shell and Montedison. It includes global production and marketing assets, intellectual property rights and research and development facilities. Montedison retains only minor interests in one of the market of the JV, namely the right to license the Spheripol process for the manufacturing of polypropylene (PP) to third parties in the United States of America.

Shell contributes to the JV the major part of its PP and polyethylene business (PE). Outside the JV the following operations are available:

- PP in the US
- Three JVs one of which is ROW in Europe
- Upstream interests
- Certain downstream activities
- Non-polyolefins polymer interests.

9.3.2 The Concentration as Subsequently Amended

The operation is modified as follows: Montedison`s global PP business would remain outside Sophia by its transfer to a company (Technipol) under the sole ownership and control of Montedison. Montedison/Himont withdraw from Montefina and would sell its shareholding therein to a third party.

Montedison would contribute to Sophia its remaining world-wide polyolefins interests. Shell`s contribution to Sophia would be as originally planned.

Technipol would have all the financial or other resources necessary to enable it to conduct is business on a lasting basis independent of Sophia and Shell.

9.3.3 Community Dimension

The aggregate world-wide turnover of Shell and Montedison exceeds 5.000 Mio. EUR and each party achieves more than EUR 250 Mio. Within the EU. The 2/3 rule is honoured.

9.3.4 Concentration

The operation is a concentration under Art. 3 MR1989 because Sophia will perform on a lasting base as a JV all the function of an independent economic entity. The JV has joint control between Shell and Montedison each

with 50%. Major decisions must be taken by unanimous consent (capital budget; fundamental changes of the business; borrowing specified amounts of money, large investments). Shell has a leading role as it elects the appointment of the CEO of the JV and the Shell nominated directors decide all general matters except for those of fundamental or strategic importance.

Sophia enjoys all the assets and resources necessary to enable in it to perform all the functions of an autonomous economic entity in the polyolefins sector. With regard to the PP production this is true although Montedison`s PP business stays outside of the JV. Sophia will be active in the following sectors:

- Production and sale of PP
- Production and sale of PE
- Production and sale of PE-technology
- Production and sale of ethylene and propylene
- Downstream activities of film and fibres.

According to the amendments of the concentration, Sophia will not remain active on the market for PP technology, because Montedison`s global technology will be transferred to Technipol and Shell´s existing activities on the PP technology market will not be contributed to Sophia. These are based on Shell`s cooperation with UCC.

Montedison will contribute to the JV Sophia all of its global polyolefin interests with the exception of its PP technology business and will thus withdraw from the markets of the JV. Shell will remain active on some of the JV Sophia markets because it retain certain of its polyolefin interests outside the JV Sophia.

In the specific circumstances of this case, it appears that coordination between the parents within the meaning of Art. 3 II MR1989 (Art. 3 IV MR2004) is not likely to occur.

9.3.5 Competitive Assessment of the Concentration as Notified

According to the original concentration plan, the businesses contributed to the JV would relate to the following economic sectors:

production and sale of PP and PP technology production and sale of PE and PE technology production and sale of ethylene and propylene

production and sale of films for consumer goods packaging, flexible films for good packaging, melt spun fibres, fibres and tapes/fibrillated tapes.

9.3.6 Product Market Definition

Regarding the production and sale of PP it has to be stressed that PP belongs to the category of polyolefins that is a family of thermoplastics derived from a particular group of base chemicals knows as olefins which also includes PE and polybutelene (PB). Olefins are typically derived from oil or natural gas.

9.3.7 Geographic Market Definition

According to the Commission´s enquiries, many customers procure PP from several sources in the member states of the EU rather than purchasing PP from a single source[1289]. The market for highly technical products involving significantly R&D and large capital and manufacturing costs is global[1290].

9.3.8 Market Shares

Spheripol and Unipol are two leading technologies in the PP industry.

9.3.9 Modifications to the Original Concentration Plan

Regarding the PP technology undertaking the parties undertake the following: Himont´s existing PP technology will remain outside the Sophia JV and will be under the sole control of Montedison (Technipol Company)[1291]. Shell does not have any investment in Technipol Company. The PP technology business will remain separate from Sophia and Shell.

9.3.10 Assessment of the Incidental Provisions

These incidental provisions have been taken into account by the Commission in its assessment of the effects of the proposed concentration. As explained above, were the operation to be implemented as notified both leading PP technologies would fall within a single entity, Shell. However, the implementation of the parties´ commitment relating to PP technology will change this anti-competitive situation. Montedisons´s global PP technology business will be transferred to a separate company, Technipol[1292]. It is independent from Sophia and Shell. Technipol will be responsible for the licensing, updating and further development of such technology. Technipol will be expected to undertake its own research efforts in the area of PP process and catalyst technology thus securing its future as an active licensor[1293].

The first quarterly report on the implementation of the PP technology shall be submitted 4 months of the date of this decision. The second quarterly report shall be submitted after the inauguration of Technipol and within 7

[1289] q.v. J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. III. 1. c) (1) p 375.
[1290] A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 5. D. (ii) b., p 1139.
[1291] Commissioin Decision of 8 June 1994, declaring the compatibility of a cocentration with the common market, CASE IV/M.269 Shell / Montecatini, Recital 116.
[1292] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 188, p 643.
[1293] Commissioin Decision of 8 June 1994, declaring the compatibility of a cocentration with the common market, CASE IV/M.269 Shell / Montecatini, Recital 120.

months after the date of this decision. For the next three years, an annual report on Technipol shall be submitted at the end of each financial year and the report shall include:

- copy of annual accounts
- separate identification of licensing
- detail of other income
- R & D expenditure
- Intellectual property rights
- Employee numbers
- Catalyst sales
- Summary of the company`s commercial and scientific activities.

For the reasons above, the Commission considers that the proposed concentration as subsequently amended by the inclusion of the commitments offered by the parties, would not lead to the creation or reinforcement of a dominant position on the market for the PP technology and PP production and sale, as a result of which effective competition would significantly impeded in the common market under Art. 2 I MR1989. The concentration can therefore be declared compatible with the common market subject to full compliance with conditions and obligations within the meaning of Art. 8 II MR1989[1294]. The Commission freed in the proceeding a remedy which meanwhile was introduced by US-cartel authorities[1295]. As the parties offered commitments, a 2nd meeting of the advisory committee on concentration was initiated so as to get feed back from the member states[1296]. The conditional clearance decision owing to Art. 8 II MR1989 was challenged by the competitor Union Carbide Corporation with an action for annulment (Art. 263 TFEU) backed by an application for withholding the implementation (interim measures under Art. 278 2nd sentence and Art. 279 TFEU) which the court refused to grant[1297].

9.4 TRACTEBEL / Distrigaz CASE IV/M. 493

The important aspect of this case is that the Commission concludes that no relevant market for energy products exists but distinct markets for the generation, transmission, distribution and supply of electricity or for production, transmission, distribution, supply and storage of natural gas[1298]. Therefore, the parties' operations

[1294] q.v. § 40 III GWB; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 10 VII 4. p 377.
[1295] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. III. 9. l) p 468.
[1296] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 195, p 725.
[1297] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 240, p 740.
[1298] Commission Decision, Case IV/M. .493, 1994 (*Tractebel/Distrigaz*) paragraph 21-32; P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (3) p 401.

did not overlap and did not provide any scope for dominance apart from the then statutory rights of Distrigaz. Consequently, the concentration was unconditionally cleared pursuant to Art. 6 I lit. b MR1989.

9.5 SIEMENS / ELEKTROWATT CASE IV/M.913

The Commission received on 24/06/1997 owing to Art. 4 MR1989 a proposed concentration whereby Siemens AG (Siemens) intends within the meaning of Art. 3 I lit. b MR1989 to acquire sole control of Elektrowatt AG (Elektrowatt) through the purchase of shares with a value of 44,9 % because the remaining shares were held by diverse minor shareholders[1299].

On 15/07/1997 the Commission informed the parties of its decision to suspend the implementation of the concentration under Art. 7 II and 18 II MR1989 until a final decision has been taken.

After examining the notification, the Commission has established that the project falls within the scope of MR1989 and gives rise to serious doubts about its compatibility with the common market. By decision of 28/07/1997 the Commission initiated proceedings owing to Art. 6 I lit. c MR1989.

9.5.1 The Parties

Siemens is active in the fields of energy production, transmission and distribution, systems engineering, public communications networks, private communications systems, protective engineering, traffic engineering, automotive engineering, medical engineering, semi conductors, passive construction components and pipes and tubes, electromechanical components, information technology and lighting technology.

Elektrowatt is a Swiss holding company which, via its subsidiaries in Switzerland and Germany, is active in electricity generation and supply, building technology, security engineering, telephone installations and general building operations, property management and engineering services in various fields. Siemens inter alia takes over the following activities of Elektrowatt in the Energy sector:

commercial building control (essentially through Landis & Gyr/Landis & Staefa) services, systems, installations and equipment for energy supply companies: Elektrowatt's activities in the field of electricity supply and interconnection will be sold to firms other than Siemens.

9.5.2 Acquisition

Siemens intends to buy the shares of Elektrowatt which were hold by Credit Suisse Group (CSG), Zürich. Elektrowatt's electricity supply and interconnection activities will be split of beforehand and transferred to its subsidiary Watt AG and they will be acquired by a consortium of German and Swiss energy suppliers. CSG

[1299] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 179, p 1254.

currently owns 44,9% of Elektrowatt and the remaining shares are widely dispersed. Before the shares are sold to Siemens, CSG will make the general public shareholders a public offer for all Elektrowatt shares.

The concentration is caught by Art. 3 I lit. b MR1989 as Siemens acquires sole control over Elektrowatt. It is a de facto sole control as even if the public bid of CSG is completely unsuccessful the remaining shares are widely dispersed and are not present on the annual general meeting (less than 70% in recent years).

9.5.3 Community Dimension

The concentration has a community dimension.

9.5.4 Assessment pursuant to Art. 2 MR1989

As to the relevant product markets the activities of Siemens and Elektrowatt overlap inter alia in the following fields:

- energy meters,
- energy management systems,
- ripple control transmitters and receivers.

9.5.5 Overall Assessment

Regarding electricity meters, the merger will not give rise to or strengthen a dominant position, which would impede effective competition in the common market or a substantial part thereof. The same is true for heat meters and ripple control transmitters and receivers and energy management systems.

9.5.6 Conclusion

For the reasons set out above, subject to the condition that the commitment given by the parties is fulfilled, it is to be assumed that the concentration will not give rise to or strengthen a dominant position, which would impede effective competition in the common market or a substantial part thereof. The merger is to be declared compatible with the common market and with the functioning of the EEA-Agreement owing to Art. 2 II MR1989 and Art. 57 EEA-Agreement (SIEC-test and jurisdiction of the Commission if a concentration has both an EU and and EFTA dimension and jurisdiction of the EFTA Surveillance Authority in case of a sole EFTA dimension)[1300].

[1300] EEA countries are the EU member states and the EFTA states Norway, Iceland and Liechtenstein and until 2012 no case with a single EFTA dimension has been notified; q. v. C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.320, p 766; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.310, p 611 and marginal note 5.314, p 612.

9.6 NESTE / IVO CASE IV/M. 931

The Neste/IVO case is broadly similar to the concentration Tractebel/Distrigaz[1301]. The Finnish state decides to merge two public undertakings: IVO is the largest electricity generator and wholesale vendor whereas Neste controls oil, gas and chemicals businesses including Gasum that controls the domestic gas supply[1302]. The Commission reiterates that the relevant markets for electricity and gas are different. However, the Commission communicated a negative assessment as to the fact that a dominant electricity generator acquires the dominant gas supplier on the grounds that the economic relevance of natural gas as a fuel source for electricity generation is deemed to rise sharply in the future for the attainment of energy efficiency and environmental objectives. Fortum acquires 25% of Neste[1303]. Therefore, it would be detrimental if a leading electricity generator could control the gas business so as to preventing the latter from becoming a serious competitor. The geographic scope of the market is deemed to be national as the influence of Nordpool is too insignificant that international suppliers or foreign consumers could be regarded as interchangeable[1304]. The Commission cleared the concentration on the condition that IVO does not acquire GASUM pursuant to Art. 6 I lit b 1-2 MR1997[1305].

9.7 EXXON / SHELL CASE IV/M. 1137

The Commission received on 25/05/1998 a notification of a proposed concentration owing to Art. 4 MR1989, as amended by MR1997 by which the companies Exxon Chemical Company (Exxon) and the Shell Petroleum Company Ltd and Shell Oil Company (Shell) form a full function JV pursuant to Art. 3 I lit b MR1997. The JV will be active in the area of lubricant and fuel additives.

9.7.1 The Parties

Exxon is active globally in oil and gas exploration and the production and sale of chemical products, coal and power generation. Exxon obtains more than 30% of its turnover through business activities in the EEA. Shell is a diversified multi-national company and concerned with activities relating to the exploration and production of oil and gas and the production of chemicals and coal. Shell obtains more than 40% of its global revenue through its business activities in the EEA.

9.7.2 Concentration

The operation consists of the formation of a JV which will combine Exxon's and Shell's respective lubricant additives and fuel additives businesses. The JV will be active in the manufacture and sale of additives for

[1301] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (3) p 401.
[1302] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (3) p 401.
[1303] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 179, p 1254.
[1304] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. III. 1. c) (1) p 375.
[1305] Commission Decision, Case IV/M. . 931, 1998 (*Neste/IVO*); P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 D. (2) (a) p 409.

lubricants. Shell will contribute to the JV its entire world-wide lubricant and fuels additives businesses, currently carried out by Shell Additives.

Exxon will contribute its fuel additives and its detergent inhibitor package lubricant additives business world-wide (currently Paramins). In accordance with an incidental provision that the parties have given to the Commission most of Exxon's viscosity index improvers will be divested to a third party: the Oronite Additives Division of Chevron Chemical Company (Chevron).

Exxon and Shell will each hold 50% of the JV. They will each appoint 3 members of the board. All substantial decisions including those concerning the business plan and the budget, require unanimous decisions. Therefore, joint control is available.

The JV will perform on a lasting base all of the functions normally carried out by other lubricant and fuel additives companies. It will be involved globally in the research and development, manufacture, marketing and sale of additives for lubricants and fuels; raw materials and components for such additives. Therefore, the concentration consists of the formation of a full-function JV under Art. 3 II MR1997.

9.7.3 Community Dimension

A community dimension is available.

9.7.5 The Relevant Markets

The JV will be active in lubricants and fuel additives. The main impact of the operation is in lubricating oil additives.

9.7.6 Assessment

Concerning VI improvers, the combined EEA market share of the parties would amount to more than 50%. With this market share, the JV would become the clear market leader. The main competitors would be Rohmax (less than 20%), Ethyl (less than 20%) and Lubrizol (less than 20%).

9.7.7 Ancillary Agreements

The parties have requested that a number of ancillary restrictions should be assessed in conjunction with the concentration.

9.7.8 Modifications to the Original Concentration

To remove the competitive concerns raised by the concentration in the market for VI improvers, Exxon has submitted incidental provisions to the Commission. Exxon undertakes to divest its global business relating to the research, development, manufacturing, marketing and sale of viscosity index improvers derived from olefin

copolymers (OCP) and used in crankcase lubricating applications of any kind to Chevron Chemical Company LLC (Chevron).

9.7.9 Conclusion

For the above reasons and subject to full compliance with the incidental provisions referred, the Commission has decided not to oppose the notified concentration and to declare it compatible with the common market and with the functioning of the EEA-Agreement (Art. 6 I lit. b MR1997 and Art. 57 EEA-Agreement).

9.7.10 Annex

In the context of the formation of the JV between Exxon and Shell, Exxon hereby undertakes to sell, convey, assign and transfer to Chevron its global business relating to the research, development, manufacturing, marketing and sale of viscosity index improvers (VII) derived from olefin copolymers (OCP) and used in crankcase lubricating applications of any kind.

Exxon hereby undertakes not to close the JV in Europe until such time as it has effectively transferred its Crankcase VII business to Chevron in Europe and in the US.

Exxon will inform the Commission of the completion of the transfer of the Exxon Crankcase VII business to Chevron or an alternative valid purchaser. Such transfer shall have occurred in Europe within twelve months from the date of the Commission's decision authorizing the JV, unless extended by the Commission at Exxon's request. Every three months Exxon shall report in writing to the Commission on developments concerning the transfer of its Crankcase VII business to Chevron or the status of negotiation with potential alternative purchasers.

9.8 HALLIBURTON / DRESSER CASE IV/M. 1140

The Commission received on 23/04/1998 a notification of a proposed concentration owing to Art. 4 MR1989 by which the undertakings Halliburton Company (Halliburton) and Dresser Industries (Dresser) merge pursuant to the meaning of Art. 3 I lit. a MR1989.

9.8.1 The Parties

Halliburton is a diversified engineering and construction and energy services company. Its energy services are mainly focused on oilfield exploration and production of oil and gas.

Dresser is again a diversified company with operation and spread among three industry segments, namely engineering and construction services, petroleum products and services and energy equipment.

9.8.2 The Operation and Concentration

Dresser will be merged into Halliburton and will cease to exist as a legal entity. The proposed operation constitutes a concentration under Art. 3 I lit. a MR1989.

The concentration was also notified to the Antitrust Division of the U.S. department of justice (DO. J.). The DO. J. has identified the market for drilling fluids where the competitive overlap of the parties would lead to high combined market shares. Drilling fluids are special high temperature lubricants used during various drilling activities. In order to allow the closing of the operation, the DO. J. has requested Halliburton to divest its 36% stake in M-I Drilling Fluids LLC (M-I). Halliburton has therefore offered a commitment to the DO. J., whereby it will eliminate the competitive overlap in the market for drilling fluids through the divestiture of its participation in M-I. As a consequence, the market for drilling fluids does not constitute an affected market within the meaning of the MR1989.

9.8.3 Community Dimension

The concentration has a community dimension.

9.8.4 Relevant Markets

The oilfield services industry comprises a variety of products and/or services distained to oil and gas exploration and production companies around the world. In all affected markets the consumers of the parties are oil and gas companies (oil companies and well operators) such as BP, Shell, Mobil, Statoil, Amoco.

9.8.5 Competitive Assessment

Regarding directional drilling services, there are three major providers, namely Schlumberger, Baker-Hughes and Dresser, whereas Halliburton is a weaker fourth player. The combined market share of the merged entity will be of 25%.

9.8.6 Conclusion

For the above reasons, the Commission decides not to oppose the notified concentration with regards to the markets for the provision of directional drilling services, completion products and services and the market for the storage and shipping of cement and for the provision of cementing services on the oil rigs and to declare it compatible with the common market and with the functioning of the EEA-agreement (Art. 6 I lit. b MR1989). Moreover, considering that Halliburton will divest its participation in M-I Drillings, drilling fluids do not constitute an affected market in the present case.

9.9 BP / AMOCO CASE IV/M. 1293

The Commission received on 29/10/1998 a notification owing to Art. 4 MR1989 of a proposed concentration by which the undertakings The British Petroleum Company p.l.c. (BP) and Amoco Corporation (Amoco) enter into a full merger.

9.9.1 The Parties

BP and Amoco are international oil exploration, petroleum and chemical groups[1306]. They each have three core business activities, i.e. oil and gas exploration and production; refining, marketing and supply of oil and gas; manufacturing and marketing of petrochemicals and related products. In addition, both undertakings are involved in the solar energy field.

9.9.2 The Operation and Concentration

The operation consists of a full legal merger between both undertakings. The concentration will be brought about by Amoco merging with a newly formed subsidiary of BP, incorporated under the laws of the US. It will be effected in accordance with the terms of an agreement and plan of merger entered into among BP, Amoco and the newly formed affiliate of BP. On completion of the concentration the current BP shareholders will hold approximately 60% and the Amoco shareholders will hold approximately 40% of the share capital of the combined entity.

9.9.3 Community Dimension

The transaction has a community dimension (Art. 1 MR2004).

9.9.4 Relevant Markets and Competitive Assessment

The operation will create overlaps in the areas of crude oil and natural gas exploration and production and marketing of oil and gas, and petrochemicals. The only affected markets have been identified in the field of petrochemicals.

9.9.5 Modification to the Original Plan of Concentration

In anticipation of serious doubts that could be raised with respect to the effects of the concentration on the industrials consumers market, the notifying parties amended their original merger plan.

The modification consists of the divestiture of Amoco's European PIB business in the industrials markets in the EEA to Pakhoed Distribution Europe B.V. (Pakhoed), a major distributor of chemicals in Europe. Following this amendment, the status quo ex ante is maintained, i.e., the overlap created on the supply of PIB to the industrials market is removed.

The Amoco assets and facilities to be transferred to Pakhoed include:

- Amoco's direct customer business
- Amoco's supply agreements with other PIB chemical distributors
- Amoco's bulk storage, drumming and blending facilities in Antwerp.

The transfer secures to Pakhoed, for a period of 5 years, the supply of PIB for a given volume, reflecting the quantities sold historically by Amoco to industrials consumers. This volume will be sold at a fixed price to be indexed to the daily average quote of naphta. Pakhoed has the ability to purchase PIB in excess of the above volume per year, on a price which will be negotiated in good faith and on commercial terms. This extra volume may guarantee Pakhoed the possibility of growth in this sector. Packhoed has no obligation to purchase from Amoco, but can turn to other suppliers. Both the sale of the business and the supply of PIB to Pakhoed are the subject matter of agreements already entered into by Amoco and Pakhoed on 14/11/1998. These are subject to the Commission's approval of the modification and of the concentration.

9.9.6 Assessment of the Modification

The modification provides for the transfer of Amoco's customer contracts, stock and inventory of PIB and its Antwerp storage, blending and handling facilities. The above modification has a result to remove the competitive overlap created by the concentration on the market for the supply of PIB to industrial consumers. Hence, Amoco's supplies will remain available in the EEA but will be traded via Pakhoed, on whom neither Amoco nor BP may exert any commercial influence.

Pakhoed is a large and established company with sufficient technical and commercial know-how in this product market to make them a strong competitor. Moreover, Pakhoed has secured a competitive price for PIB during the first five years of operation. The price will be determined according to a formula which is mainly based on the prevailing price of naphta, a feedstock for PIB. Pakhoed has its own laboratory to formulate and blend the product in close cooperation with industrial consumers. Pakhoed will be able to consolidated fragmented demand of the industrials market and make additives PIB from other sources available to the industrials market.

The above amendment was tested on the market. In their replies to the Commission's questionnaire, the majority of customers stated that the amendment would be sufficient to preserve effective competitive conditions in their market.

[1306] D. Yergin, The Quest (1st ed.)(New York, US, Penguin, 2011) CH 4, p 92.

9.9.7 Conclusion

For the reasons above, the Commission has decided not to oppose the notified concentration, to the extent that, following the amendment brought about by the undertakings concerned to their original concentration plan, the operation does not give rise to serious doubts. The notified operation is therefore declared compatible with the common market and with the functioning of the EEA Agreement (Art. 6 I lit. b MR1989).

9.10 EDF / LONDON ELECTRICITY CASE IV/M. 1346

The case EdF/London electricity provides interesting insights regarding the application of MR1997 to the energy sector as well[1307]. EdF notified a future concentration with a Community dimension as its subsidiary ELEX (UK) Ltd was interested in bidding for London Electricity Holdings No.1 Ltd that was due to be sold by its then owner Entergy Corporation in an auction[1308]. Owing to the specific circumstances of a private auction, EdF acquired a derogation from the prohibition to implement a concentration under Art. 7 IV MR1997 and bought 100% of the stock capital[1309]. The U.K. authorities tried to obtain jurisdiction over the concentration with a Community dimension by means of Art. 9 II MR1997. Despite of the limited interconnector capacity - which could justify a finding that the results of the concentration are felt unduly on a distinct market, the Commission denied to transfer the jurisdiction[1310]. Another attempt was made so as to preclude the application of MR1997 under Art. 21 III MR1997 on the grounds that national regulation of the electricity sector would form a distinct policy area that was not covered by MR1997. However, the Commission concluded, that MR1997 and domestic electricity regulation were independent legal matters but U.K. regulatory policy was not affected regardless of the ownership of London Electricity as long as the acquirer would meet the statutory requirements of expertise and financial strength. Thereby, the application for national jurisdiction was rejected[1311].

The relevant market definition was differentiated between generation of electricity, access to the transmission grids, to the distribution grids and supply to consumers. Finally, it can be stated that the Commission does not accept any attempt to block cross-border concentrations on the grounds of a reciprocity doctrine in analogy to the IEMD[1312]. Consequently, it is not relevant that British investors cannot acquire a comparable distribution company in France as EdF is a public undertaking. The relevant geographic market was deemed to be local[1313].

[1307] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. p 390.
[1308] Commission Decision, Case IV/M. 1346, 1999 (*EdF/London Electricity*) paragraph 1,5.
[1309] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. VI. 1. c) p 537.
[1310] A decision under Art. 9 III 2 MR1997: Commission Decision, Case IV/M. 1346, 1999 (*EdF/London Electricity*) paragraph 7; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 149, p 706.
[1311] Commission Decision, Case IV/M. 1346, 1999 (*EdF/London Electricity*) paragraph 8; A. Ezrachi, EU Competition Law (5th Ed.) (London, UK, Bloomsbury, 2016) CH 9, p 401.
[1312] R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 23 10. (A) (i), pp. 1020-1021.
[1313] C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.214, p 706.

9.11 EXXON / MOBIL CASE IV/M.1383

Whereas on 03/05/1999 the Commission received a notification of a proposed concentration by which the U.S. undertakings Exxon Corporation (Exxon) and Mobil Corporation (Mobil) were to merger the global activities[1314]. On the 02/06/1999, the UK unsuccessfully notified the Commission in accordance with Art. 9 II lit. b MR1989 that it considered that the concentration affected competition in the north west of Scotland in the retail motor fuel sector[1315]. On the 26/07/1999 the Commission issued a statement of objections identifying inter alia competition concerns in the market for motor fuel retailing in the whole of the UK.

By decision dated 09/06/1999, the Commission found that the notified operation raised serious doubts as to its compatibility with the common market and accordingly initiated proceedings in this case pursuant to Art. 6 I lit. c MR1989.

9.11.1 The Parties and the Operation

Exxon is a diversified undertaking active globally in the exploration, development, production and sale of crude oil and natural gas; the refining and sale of refined petroleum products; the development, production and sale of various chemical products; the production and sale of coal and minerals; and power generation[1316].

Mobil is a diversified undertaking active globally in the exploration, development, production, and sale of crude oil and natural gas; the refining and sale of refined petroleum products; and the development, production and sale of various chemical products. Mobil and BP regrouped all their refining and retailing activities in Europe into a JV BP/Mobil[1317].

This notification concerns a horizontal full merger under Art. 3 I lit. a MR1989[1318]. Both undertakings signed an agreement and plan of merger on 01/12/1998. Owing to this agreement, Mobil will merge with a wholly owned affiliate of Exxon, with Mobil as the surviving corporation. As a result, Exxon will hold 100% of Mobil's issued and outstanding voting securities Exxon shareholder will own approximately 70% of the combined Exxon Mobil entity, while Mobil shareholders will own approximately 30%.

9.11.2 Community Dimension

The transaction has a community dimension (Art. 1 II MR1997).

[1314] I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 2 B II 5. p 75; P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (2) (a) p 397.

[1315] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.34, p 548 and marginal note 5.218, p 593.

[1316] D. Yergin, The Quest (1st ed.)(New York, US, Penguin, 2011) CH 4, p 96.

[1317] Commission Decision BP/Mobil, CASE IV/M. 727: The activities of the JV do not include marine and aviaion lubricants.

[1318] A. Ezrachi, EU Competition Law (5th Ed.) (London, UK, Bloomsbury, 2016) CH 9, p 403.

9.11.3 Competitive Assessment

The oil industry is generally divided into the upstream oil and gas sector, i.e. exploration, development and production of crude oil and natural gas) and the downstream sector (refining and marketing of fuels; distribution of natural gas, manufacture of lubricants) and the various petrochemical activities[1319].

The concentration does not raise competition concerns in the markets for exploration, development and production of crude oil and natural gas and with regard to the various petrochemical activities where the parties' operations overlap. Both parties are active in the exploration, development and production of crude oil and natural gas and the Commission had also expressed serious doubts on the gas to liquid market. However, there are, for the reasons indicated below, no competition concerns on these markets.

For the reasons indicated below, the concentration would have given rise to the creation or strengthening of a dominant position in the following markets:

- Wholesale transmission of natural gas in the Netherlands[1320]
- Long distance wholesale transmission of natural gas in Germany[1321]
- Underground storage facilities for natural gas servicing the south of Germany[1322]
- Group 1 base oils in the EEA
- Motor fuel retailing in Austria, Germany, Luxembourg, Netherlands and the UK
- Motor fuel retailing on toll motorways in France
- Aviation lubricants world-wide
- Aviation fuels at Gatwick Airport. London Gatwick is a relevant part of the common market[1323].

9.11.3.1 Exploration, Development and Production Process

Upstream activities comprise three types of commercial activity: the finding of new reserves, the development and commercial exploitation.

9.11.3.2 Gas to Liquids Technology

The Commission expressed serious doubts in its Art. 6 I lit. c MR1989 decision that the notified transaction creates a dominant position with regard to gas-to-liquids-technology (GTL).

[1319] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 196, p 1259.
[1320] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (2) (a) p 397.
[1321] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (2) (a) p 397.
[1322] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (2) (a) p 397.
[1323] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. VI. 3. a) (2) (b) p 569.

9.11.3.3 Natural Gas

Regarding the introduction and concerning the description of the gas column, the natural gas that streams from the well contains elements that need to be removed before the gas reaches pipeline quality, composed almost entirely of methane and ethane and can be injected into the high-pressure distribution pipeline.

9.11.3.4 Base Oils, Additives and Lubricants

The lubricants industry involves three different products with a vertical relationship: base oils, chemical additives and lubricants. Base oil is blended with chemical additives to produce lubricants.

Concerning nameplate capacity and effective production, the EEA production and capacity is as follows:

Company	Nameplate capacity 1996 (kty)	Nameplate capacity in %
Exxon	1825	23,1%
BP/Mobil	1443	18,3%
Shell	1280	16,2%
Agip	520	6,6%
Cepsa	166	2,1%
DEA	250	3,2%
ELF	174	2,2%
Total	545	6,9%
KPI	230	2,9%
Fortum	92	1,2%
Repsol	300	3,8%
Petrogal	150	1,9%
Nynas	250	3,2%
Iplom	340	4,3%
MOH	160	2%
SRS	170	2,2%
Addinol	0	0%
OMV	0	0%
Grand Total	7895	100%

Regarding market shares based on sales to third parties, merchant market shares have been defined as sales to third parties both inside and outside the EEA including spot market sales.

Undertaking	Share of merchant market
Exxon	30-40%
BP / Mobil	10-20%
Shell	10-20%
Agip	0-10%
Cepsa	0-10%
DEA	0-10%
Elf	0-10%
Total	0-10%
KPI	0-10%
Repsol	0-10%
Petrogal	0-10%
MOH	0-10%
SRS	0-10%
Grand Total	100%

On the basis of 1998 sales figure, the calculations indicate Exxon's significant share of the merchant market (30-40%), with BP/Mobil taking second place with 10-20%. The following table provides a ranking according to base oils plant dimension:

Ranking	Refinery	Owner	Nameplate capacity	Groups
1	Augusta (Italy)	Exxon	860	I
2	Livorno (Italy)	Agip	540	I
3	Gonfreville (France)	Total	500	I/III
4	Port Jérome	Exxon	485	I

	(France)			
5	Fawley (UK)	Exxon	440	I
6	Pernis (Netherlands)	Shell	370	I
7	Gravenchon (France)	BP/Mobil	340	I/III
8	Dunkirk (France)	BP/Mobil (60%); Elf (40%)	340	I/III
9	Petit Couronne (France)	Shell	340	I/III
10	Coryton (UK)	BP/Mobil	330	I
11	Hamburg (Germany)	Shell	330	I/III
12	Heide (Germany)	DEA	250	I/III
13	Nynashamn	Nynas	250	Other
14	Stanlow (UK)	Shell	240	I
15	Europort (Netherlands)	KPI	230	I/III
16	Neuhof (Germany)	BP/Mobil	215	I/III
17	Algericas (Spain)	BP/Mobil (50%); Cepsa (50%)	200	I
18	Porto (Portugal)	Petrogal (75%); Total	180	I

		(25%)		
19	Theodori (Greece)	MOH	170	I
20	Salzbergen (Germany)	SRS	170	I
21	Escomberas (Spain)	Repsol	150	I
22	Puertollano (Spain)	Repsol	150	I
23	Huelva (Spain)	Cepsa (66%), Elf (34%)	100	I
24	Finland	Fortum (Neste)	50	III

9.11.3.5 Refining and Marketing of Fuels (Downstream Oil)

Downstream activities include crude oil refining and the marketing and distribution of refined products to end-users.

Regarding motor fuel retailing, taking the markets at national level, the table below shows the market shares of the parties and their competitors in those countries where the joint market share resulting from the merger is above 15%:

1997	Aus	Ger	Fr Motor-ways	Lux	NL	UK
Exxon	0-10%	10-20%	10-20%	10-20%	10-20%	10-20%
BP/ Mobil	10-20%	0-10%	10-20%	0-10%	20-30%	10-20%
Ex/BP/ Mobil	20-30%	20-30%	20-30%	10-20%	30-40%	30-40%
Shell	10-20%	10-20%	10-20%	20-30%	20-30%	10-20%

Aral	0-10%	10-20%		10-20%		
Others	OMV 20-30%	0-10% DEA	30-40% TotalFina 20-30 Elf	10-20% TotalFina	10-20% Texaco 0-10% TotalFina	
Hypers		0-10%				0-10% Tesco 20-30% aggr.

In their response to the Commission decision to open the 2nd phase, the parties contend that the retail motor fuel business is characterised by intense competition in terms of total offering to the customer.

The table below shows a comparison of motor fuel prices in the countries affected by the transaction:

Retail Motor gasoline – pump price

Region	Average	Price	Per	Metric	Ton	(US $)
	1996	1996	1997	1997	1998	1998
	Tax incl.	Tax excl.	Tax incl.	Tax excl.	Tax incl.	Tax excl.
Austria	1,438	491	1,288	457	1,193	390
Belgium	1,500	398	1,389	370	1,312	313
France	1,524	285	1,384	278	1,391	266
Germany	1,400	354	1,222	334	1,174	279
Luxembourg	1,148	401	1,028	383	936	321
Netherlands	1,579	428	1,447	406	1,405	347

UK	1,271	270	1,397	300	1,487	271

Retail Diesel pump price

Region	Average	Price	Per	Metric	Ton	(US $)
	1996	1996	1997	1997	1998	1998
	Tax incl.	Tax excl.	Tax incl.	Tax excl.	Tax incl.	Tax excl.
Austria	1,014	407	900	369	820	314
France	937	255	856	239	854	220
Germany	955	334	822	294	762	234
Luxembourg	832	333	739	305	659	247
Netherlands	1,003	366	903	329	842	271
UK	1,044	249	1,194	266	1,278	228

Regarding Austria, the general overview over refining, infrastructure, retailing is as follows. In Austria, there is only one refinery, owned and operated by OMV. The two following market players are Esso and Aral, each with more than 0-10% market share:

	1995	1996	1997	1998
OMV	20-30%	20-30%	20-30%	20-30%
BP	0-10%	0-10%	10-20%	10-20%
Shell	10-20%	10-20%	10-20%	10-20%
Esso	0-10%	0-10%	0-10%	0-10%
Aral	0-10%	0-10%	0-10%	0-10%
Other branded	20-30%	20-30%	10-20%	10-20%
Others	0-10%	10-20%	10-20%	0-10%

A number of the smaller branded networks, accounting for around 30-40% of the B-brands, are subject to financial interests from one of the top 3 players in the market. The table below shows the total volume sales of motor fuel on French motorways over the last five years as well as the total volume sales of motor fuel in the French market as a whole:

France	1994	1995	1996	1997	1998
Estimated motorway volume					
Motor gasoline kt	908	852	799	788	781
Auto diesel kt	1449	1519	1509	1587	1684
	2357	2371	2308	2375	2465
France	1994	1995	1996	1997	1998
Industrial retail volume					
Motor gasoline kt	16122	15379	14738	14377	14289
Auto diesel kt	15649	16532	17139	18118	19005
	31771	31911	31877	32495	33294

Regarding the pre-merger environment, unlike off-motorway retailing, the market for fuel retailing on toll motorways in France is already very concentrated. The table below shows an estimate of the market shares in volume of the parties and their competitors over the last five years.

France	1994	1995	1996	1997	1998
Total	30-40%	30-40%	30-40%	30-40%	30-40%
Elf	20-30%	20-30%	20-30%	20-30%	20-30%
Shell	10-20%	10-20%	10-20%	10-20%	10-20%
Esso	10-20%	10-20%	10-20%	10-20%	10-20%
BP/Mobil	10-20%	10-20%	10-20%	10-20%	10-20%
Fina	0-10%	0-10%	0-10%	0-10%	0-10%
Agip	0-10%	0-10%	0-10%	0-10%	0-10%

The market has remained quite stable in terms of trends in market shares over the time. It is also worth measuring the market position of the various players by reference to the number of station sites.

Number of station	1996	1997	1998

sites			
Total	111	113	126
Elf	128	125	124
Shell	48	51	57
Esso	55	56	60
BP/Mobil	22	42	41
Fina	26	34	24
Agip	9	9	7

Regarding entry barriers, expansion and potential competition, it is acknowledged by the industry that a number of factors make entry on the toll motorway motor fuel retailing market more difficult than in the retail service station market as a whole.

According to the parties' 1997 figures, Aral is the market leader with 20-30%, Shell has 10-20%, Exxon 10-20%, DEA 0-10%, BP/Mobil 0-10%, Elf 0-10%, TotalFina 0-10%, Agip 0-10% and KPI 0-10%. The so-called price cutters accounted for 10-20% (with Hypermarkets 0-10%, Jet-Conoco 0-10% and white pumps 0-10%. The smaller B brands (as Avia, Tamoil, …) accounted for 0-10%.

	1994	1995	1996	1997	1998
Aral	20-30%	20-30%	20-30%	20-30%	20-30%
Shell	10—20%	10-20%	10—20%	10—20%	10—20%
Esso	10—20%	10-20%	10—20%	10—20%	10—20%
DEA	0-10%	0-10%	0-10%	0-10%	0-10%
BP	0-10%	0-10%	0-10%	0-10%	0-10%
Conoco	0-10%	0-10%	0-10%	0-10%	0-10%
Elf/Minol	0-10%	0-10%	0-10%	0-10%	0-10%
Agip			0-10%	0-10%	0-10%
Fina			0-10%	0-10%	0-10%
Total			0-10%	0-10%	0-10%
Others	10-20%	10-20%	0-10%	0-10%	0-10%
Hyper and white pumps	10-20%	10-20%	10-20%	10-20%	10-20%

According to the parties, pump prices vary only marginally in Germany. Independent retailers have a very marginal position.

The pre-merger situation is as follows:

Luxembourg	1994	1995	1996	1997	1998	June 1999
Shell	20-30%	20-30%	20-30%	20-30%	20-30%	20-30%
Aral	10-20%	10-20%	10-20%	10-20%	10-20%	10-20%
Exxon	10-20%	10-20%	10-20%	10-20%	10-20%	10-20%
Q8	0-10%	0-10%	10-20%	10-20%	10-20%	10-20%
Texaco	10-20%	10-20%	0-10%	0-10%	0-10%	0-10%
Total	0-10%	0-10%	0-10%	0-10%	10-20%	10-20%
BP/Mobil	0-10%	0-10%	0-10%	0-10%	0-10%	0-10%

It is also worth measuring the market position of the various players by reference to the number of station sites:

Luxembourg	1994	1995	1996	1997	1998
Shell	55	59	58	52	
Aral	51	52	53	50	
Exxon	34	31	30	30	29
Q8	56	52	52	48	
Texaco	29	23	22	22	
Total	15	15	15	16	34
Fina	21	19	19	18	
BP/Mobil	1	3	2	3	
Total industry	293	272	275	261	

It is also striking that the overall number of sites is extremely high given the size of the country. The higher the throughput, the lower are sites' average operating costs:

Average throughput	1994	1995	1996	1997	1998

per site – m^3					
Shell	4394	4318	4041	4849	
Aral	3915	4210	3741	4197	
Exxon	3470	4370	4732	5057	6795
Q8	1929	2174	2150	2542	
Texaco	4976	5695	4895	4988	
Total	2990	4486	5875	6609	
BP/Mobil	10272	30502	27741	14486	

However, in general terms it can be said that the average throughput of the industry is very high in Luxembourg when compared with the average of other countries:

Average throughput comparison	Austria	Germany	UK	Netherlands	Luxembourg
m^3	1422	2932	2577	2502	4372

In order to fully appreciate the competitive environment existing in motor fuel retailing in Luxembourg, it is worth comparing pre-tax price trends in the countries affected by the operation:

Region	Average	Price	Per	Metric	Ton (USD)	Retail motor gasoline – pump price
	1996		1997		1998	
	Tax incl.	Tax excl.	Tax incl.	Tax excl.	Tax incl.	Tax excl.
Austria	1,438	491	1,288	457	1,193	390
Belgium	1,500	398	1,389	370	1,312	313
France	1,524	285	1,384	278	1,391	266
Germany	1,400	354	1,222	334	1,174	279
Luxembourg	1,148	401	1,028	383	936	321
Netherlands	1,579	428	1,447	406	1,405	347
UK	1,271	270	1,397	300	1,487	271

Region	Average	Price	Per	Metric	Ton (USD)	Retail

						Diesel – pump price
	1996		1997		1998	
	Tax incl.	Tax excl.	Tax incl.	Tax excl.	Tax incl.	Tax excl.
Austria	1,014	407	900	369	820	314
Belgium	981	363	860	324	784	264
France	937	255	856	239	854	220
Germany	955	334	822	294	762	234
Luxembourg	832	333	739	305	659	247
Netherlands	1,003	366	903	329	842	271
UK	1,044	249	1,194	266	1,278	228

Regarding specific features of the Luxembourg market – price regulation, a specific feature of the market in Luxembourg is the fact that the government sets a maximum price per grade of motor fuels. More specifically, it is the ministry of economic affairs which operates a system of maximum wholesale and retail pump prices.

Refining capacity in the Netherlands (1997)

Refinery	Owned by	Beneficial ownership	Refining capacity 000s bed
Europoort-Pernis	NL Refining Co	Texaco 35% BP/Mobil 65%	399
Pernis	Shell	Shell 100%	374
Rotterdam	Esso Nederland BV	Exxon 100%	180
Rotterdam	Kuwait Petroleum	Q8 100%	76
Vlissingen	Total Raffinaderij	Total 55% Dow 45%	148

Regarding wholesaling, the Netherlands are a net exporter of refined petroleum products.

Retail market shares 1998

Shell	BP/Mobil	Exxon	Texaco	TotalFina	Q8	Indies
30-40%	10-20%	10-20%	10-20%	0-10%	0-10%	10-20%

Movement of retail market shares

	1994	1995	1996	1997	1998
Shell	20-30%	30-40%	30-40%	30-40%	30-40%

Mobil	0-10%	10-20%	10-20%	0%	0%
BP	0-10%	0-10%	0-10%	10-20%	10-20%
Texaco	10-20%	10-20%	10-20%	10-20%	10-20%
Esso	10-20%	10-20%	10-20%	10-20%	10-20%
Total	0-10%	0-10%	0-10%	0-10%	0-10%
Fina	0-10%	0-10%	0-10%	0-10%	0-10%
Q8	0-10%	0-10%	0-10%	0-10%	0-10%
Independents	10-20%	10-20%	10-20%	10-20%	10-20%

Number of service stations in the Netherlands

	1994	1995	1996	1997
Shell	770	770	750	745
Mobil	375	470	450	0
BP	300	300	300	750
Texaco	555	551	555	557
Esso	395	395	390	390
Total	185	180	190	185
Fina	170	170	172	185
Q8	200	200	190	190
Total Refiners	2950	3036	2997	3002
Avia (independent)	185	185	190	190
Other independents	1010	829	813	788
Total of service stations	4145	4050	4000	3980
Total volume K cubic meters	8846	9097	9443	9957
Industry average volume (Cubic meters)	2949	3237	3373	3078

The following table shows the average throughputs realised by the majors and the independents in the Netherlands.

Average throughput (m^3)	1994	1995	1996	1997
Shell	3395	3629	3884	4218
Mobil	2256	2026	2233	
BP	2574	2519	2595	2426
Texaco	1922	2024	2149	2311
Esso	2424	2348	2463	2776
Total	2262	2582	2546	2728
Fina	2261	2161	2286	2308
Q8	1636	1559	1641	1537
Independents	1221	1389	1401	1433
Industry average	2134	2246	2361	2502

For example, the last five years, pump prices were up to 40% higher than in France:

	Netherlands	France	UK	Germany
Pump prices	1	0,7	0,72	0,75
W/sale prices	1	0,84	0,88	0,9

The evolution of market shares in terms of volumes between 1994 and 1998 can be summarised as follows:

Company	Exxon	BP/Mobil	Shell	TotalFina	Texaco
Market Shares 1994	10-20%	10-20%	10-20%	0-10%	0-10%
Market Shares 1998	10-20 %	10-20%	10-20%	0-10%	0-10%
Company	Exxon	BP/Mobil	Shell	TotalFina	Texaco

Market Shares 1994	10-20%	10-20%	10-20%	0-10%	0-10%
Market Shares 1998	10-20 %	10-20%	10-20%	0-10%	0-10%

Company	Conoco Jet	Hypermarkets
Market Shares 1994	0-10%	10-20%
Market Shares 1998	0-10%	20-30%
Company	Conoco Jet	Hypermarkets
Market Shares 1994	0-10%	10-20%
Market Shares 1998	0-10%	20-30%

Motor fuel is an example of a product considered by the Commission to be homogeneous, as consumers are considered not to differentiate between different motor fuels and price is essentially the only base for competition[1324].

[1324] I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.16 (1) (a) (v) p 710.

9.11.3.6 Aviation Lubricants

Aviation lubricants (ester-based turbine lubricants or aviation synthetic turbine oils) are used in the lubrication of either turbofan engines (commercial and military aircraft) or aero-derivative applications (those which were developed on the basis of aircraft engine technology, such as some marine turbine engines and some turbo lubricated power generators and other industrial accessories).

9.11.3.7 Aviation Fuels

Regarding the product market, aviation (or jet) fuel is a kerosene-type fuel used for the powering of jet aircraft engines. Although similar to domestic kerosene (used for heating purposes, in particular in the UK), it meets strict performance specifications. According to the previous decisions (BP/Mobil, Shell/Gulf oil), aviation fuels constitute a separate product market from other motor fuels (such as motor gasoline, automotive diesel and marine fuels).

9.11.4 Commitments and Assessment

On 03/09/1999, the parties offered certain commitments to remove the competition concerns which the Commission had identified in its statement of objections of 26/07/1999. On 20/09/1999 the parties submitted amended commitments taking into account certain adjustments required by the Commission in view of, in particular, the results of the market test. The commitments will be summarised in the following points, following the order of the relevant markets on which the Commission stated objections as followed above in the assessment part of the decision.

9.11.4.1 Natural Gas

Regarding the Dutch wholesale transmission market, the parties will reach a binding agreement on the sale of Mobil Europe Gas Inc. (MEGAS) to a purchaser approved by the Commission[1325]. MEGAS shall be sold as a viable going concern, including its contracted supply and sale portfolio, and all associated transport and other service agreements. The parties shall also nominate and independent and experienced trustee to oversee the ongoing management of MEGAS pending completion of the sale.

MEGAS is the Mobil entity that sells natural gas in competition with Gasunie on the Dutch market. It can be noted that Mobil's upstream production affiliate in the Netherlands has concluded depletion contracts for all of its concessions with Gasunie, MEGAS or Mobil's German affiliate. The rights and obligations of MEGAS under these contracts will be passed on to the purchaser so that the purchaser will have access to Dutch gas in the same proportion as to which MEGAS would have had access to if it remained into the Mobil group. As the

[1325] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (2) (a) p 397.

purchaser has to be a viable existing or potential competitor with the ability to maintain and develop MEGAS as an active competitive force, the Commission will take into account the possibility for the purchaser to have access to natural gas from other sources than the Netherlands and to bring this gas to the Dutch market. If these conditions are fulfilled, the status quo ante to the transaction will be re-established so that the transaction will, subject to fulfillment of the commitment, not lead to the strengthening of Gasunie's dominant position in the Dutch wholesale transmission market.

Concerning German long-distance wholesale transmission market(s), and the divestiture of Exxon's 25% interest in Thyssengas, the parties will reach a binding agreement on the sale of Exxon's 25% equity interest in Thyssengas GmbH (Thyssengas) to a third party approved by the Commission[1326]. Within 10 days from the effective date, the parties will nominate an independent and experienced trustee to represent Exxon's interest and exercise Exxon's 25% voting rights in Thyssengas.

The Commission considers that, overall, the divestiture of Exxon's equity interest in Thyssengas compensates for the strengthening of the dominant positions that would otherwise have occurred as a consequence of the merger. This strengthening relates to Mobil's activity on the long distance market with a current market share of around 1.5 % and Mobil's equity interest of 7.4% in Ruhrgas. It is noted in this respect that Thyssengas has a market share of around 7.3% on the long distance market and is a member of the defined German oligopoly.

Once the parties are no longer involved in Thyssengas, the Commission considers that this company has more incentives to challenge the other oligopoly members and, in this way, replaces the potential of Mobil. This was contested by a third party, which argued that Exxon's withdrawal from Thyssengas will not move Thyssengas out of the oligopoly group and turn it into a competitor, compensating for the elimination of Mobil. This third party explained that this was due to the remaining equity links between Thyssengas and the other oligopoly members via RWE-DEA (50% shareholding in Thyssengas) and Shell (25% shareholding in Thyssengas).

For the following reasons, the Commission is satisfied that the proposed withdrawal from Thyssengas will restore competition up to its pre-merger level. First of all, Mobil was also linked to Ruhrgas and operated closely together with BEB for its German production[1327]. Secondly, RWE-DEA's shareholding and influence on Thyssengas are clearly more important than its 3.5% shareholding in Ruhrgas (where it is a member of the Bergemann Pool) and its obligation to supply 60% of its German gas production to Ruhrgas (this supply volume accounts for less than 1% of German natural gas consumption). RWE-DEA has therefore all the incentives to develop and strengthen Thyssengas.

[1326] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (2) (a) p 397.
[1327] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (2) (a) p 397.

With regard to Shell, it is noted that as a consequence of Exxon merging with Mobil and Exxon divesting from Thyssengas, the interests between Exxon and Shell will, for the first time in more than 30 years, no longer be parallel on the German natural gas markets. It is difficult to assess the impact thereof on the competitive behaviour of the different ventures (competitive interaction between BEB-Thyssengas; BEB-Ruhrgas; Thyssengas-Ruhrgas and so forth), but it can be concluded that this brings back an element of instability into the operation of the oligopoly.

In assessing the suitability of the purchaser of Exxon's equity interest in Thyssengas the Commission will duly take into account the incentives for the competitive behaviour of Thyssengas attributable to the identity of the purchaser.

Regarding voting rights in Erdgas Münster (EGM), the parties shall use their reasonable best efforts to obtain the agreement of the other shareholders in EGM to reallocating a certain percentage of the voting rights currently held by Mobil to such shareholders (pro rata to heir current voting rights) so that BEB and Mobil (or Exxon Mobil) combined will hold less than 50% of the voting rights in EGM[1328]. The commitment contains a re-allocation for both legal entities within EGM.

Therefore, EGM's incentives to compete will return to their pre-merger level. The Commission considers that EGM maintains the possibility to develop into a potential competitor on the long-distance wholesale transmission marketing in a future liberalised environment.

Concerning underground storage facilities servicing the South of Germany, for a period of ten years following the effective date, the parties will offer to enter into a binding agreement with third parties for the sale of all Mobil's rights to one or more of the depleted reservoirs suitable for conversion into storage facilities servicing the South of Germany until it has sold a combined estimated working gas volume, after conversion, of approximately 600 MCM.

If the parties and a potential purchaser fail to agree on a fair market price within six months from the purchasers written expression of interest in a particular reservoir, the parties will, at the potential purchaser's request, acquire a fair market valuation from three independent experts approved by the Commission. The parties agree that they will be bound by the value assessment of such experts.

The commitment to sell one or more depleted reservoirs in Bavaria with a total estimated working gas volume of 600 MCM would represent the possibility to increase the current relevant storage volume[1329]. It is also clear from the market investigation that such a volume would be sufficient to compete with Ruhrgas in the relevant

[1328] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (2) (a) p 397.
[1329] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (2) (a) p 397.

market. No respondent to the Commission's market test has objected to the proposed remedies as a means to remove the competition concerns. Therefore, the Commission considers that the commitment ensures that the barriers to entry for potential competitors will not be increased as a consequence of the concentration. It can therefore be concluded that in those circumstances, Ruhrgas' dominant position in the market will not be strengthened.

9.11.4.2 Base Oils

Within a specified period from the effective date, the parties have committed themselves to transfer control over one or more base oil businesses together encompassing a specified amount of barrels per day of base oil manufacturing capacity to BP Amoco and / or one or more third parties to be approved by the Commission, in one of the following ways or a combination thereof: transfer or return of ownership or equivalent capacity; or a long-term lease agreement or similar arrangement, renewable at the lessee's option, pursuant to which the operational and strategic management of the base oil capacity concerned is transferred, such that the transferee can unilaterally decide, without informing the parties, on all operational and strategic matters. Such arrangement is to be subject to approval by the Commission and the lease agreement will provide that the lessor will not have any access to competitively sensitive information of the lessee.

In addition to the base oil manufacturing facilities, the base oil businesses will include all necessary personal, supply contracts, customer lists and contracts related solely to the divested facilities, access to technology and the provision of technical support to run a base oil business.

During the transition period, the lubricant leg of the BP/Mobil JV (which includes the base oil activities) will be managed entirely independent from the rest of the Exxon – Mobil group with no passing of information and no reporting to persons outside of the JV. If the base oil business were not purchased by BP/Amoco, the parties have undertaken to keep it separate from their activities by appointing a hold separate trustee.

In addition, the parties have committed to transfer supply contract solely related to the divested business to the purchaser.

The resulting limitation of overlap from the concentration will depend on the outcome of the ongoing negotiations between BP Amoco and Mobil on the dissolution of the lubricant leg of their JV. However, the commitments ensure that, whatever the outcome of the negotiations on the dissolution of the lubricant leg of the BP/Mobil JV, Exxon Mobil's share of the merchant market would stand at no more than around less than 40%. On this basis, the modified transaction would not result in the creation of a dominant position held by Exxon Mobil on the base oils market.

When, instead of a sale of the manufacturing plants, control has to be changed by means of a long-term lease agreement, the Commission also needs to approve such an arrangement. In this respect, the Commission considers that the outline of such an agreement as described in the commitments is a sufficient starting basis for the Commission to assess whether the agreement would lead to a change of control and allow the lessee to operate the business as an active competitive force.

Third parties explained that a lease arrangement would be workable in principle if the term of the lease was sufficiently long. They also explained that any purchaser of the divested businesses should have lubricant blending activities in order to be a viable competitor. The Commission believes that a 15 years period renewable at the option of the purchaser should ensure enough duration for the purchaser to operate the business as a long-term undertaking. As to the importance of having a lubricant activity for the purchaser, the Commission will verify the suitability of the purchaser or lessee at the time the parties will submit a proposal to the Commission and the integration of the base oils business within its other activities shall be taken into account.

9.11.4.3 Motor Fuel Retailing

In response to the Commission's conclusion that the concentration will create or strengthen oligopolistic dominance over Austria, French toll motorways, Germany, Luxembourg, the Netherlands and the UK, the parties have undertaken to dispose of Mobil's share in Aral and to terminate Mobil's participation in the fuels part of the BP/Mobil JV[1330].

Regarding Aral, Mobil's rights in Aral are held by Mobil Marketing und Raffinerie GmbH (MMRG), a wholly owned subsidiary of Mobil. The parties commit to withdraw completely from Aral within from the effective date[1331]. This undertaking entirely removes the incentives for Exxon or BP/Mobil and Aral to co-ordinate their competitive behaviour and therefore eliminate the objections raised by the Commission.

Having regard to the BP/Mobil JV, the parties undertake to withdraw entirely from the JV's fuel activities. This should be achieved through one of the two following alternative remedies: (i) sale ob Mobil's in the JV to BP Amoco (or, should BP Amoco not wish to buy this share and accept a third party, to a suitable third party) or (ii) dissolution of the BP/Mobil JV, with essentially all of the fuel assets being acquired by BP Amoco or a suitable third party.

During the interim period, the parties have undertaken (i) to appoint independent representatives at the JV committee, who will vote in the best interest of the JV and will not exchange any fuels, base oil or lubricants

[1330] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 172, p 639.
[1331] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 172, p 639.

information with Mobil or Exxon Mobil; and (ii) to eliminate access by personnel of the JV lubricants business (operated by Mobil) to information relating to the fuels business.

The Commission considers that this offers the best protection possible during the interim period. The Commission recognises that the implementation of these transitional measures depends to some extent on the other partner in the JV, BP Amoco. However, as an operator of the fuels business, BP Amoco will have an incentive to make sure that no information can be transmitted to Exxon/Mobil. Nevertheless, BP Amoco has objected to the appointment of independent representatives at the JV committee, arguing that this amounts to an assignment of Mobil's rights which is prohibited by contract. However, the parties have committed to unilaterally cut such links if they could not agree with BP Amoco within a short time. The parties have also committed to appoint an independent observer, whose task will be to monitor their compliance with the offered remedies.

BP Amoco has argued that the time period for Mobil's withdrawal from the BP/Mobil JV should not be long[1332]. This is based on two reasons: First, Mobil would not have to look for a buyer since only BP Amoco could purchase their interest in the BP/Mobil JV. Secondly, the interim period would be harmful to competition because of the possibility of Exxon Mobil's benefiting from information relating to BP/Mobil fuel-retailing activities.

Indeed, BP Amoco could be inclined to dictate the terms of the sale should the interim period be too short. This interim period should not be used by the parties to unduly prolong Mobil's participation in the JV. That is why the commitments also provide for (i) an obligation on Mobil to accept an expert resolution of any issues linked to the valuation of Mobil's interest should BP Amoco so desire; and (ii) an obligation on the parties to negotiate in good faith with BP Amoco. The reports of the independent observer will inform the Commission on all these issues, thereby enabling the Commission to order under certain circumstances a shorter time limit for the divestiture of Mobil's stake or the dissolution of the JV.

According to the conclusion, the commitments concerning fuels would eliminate all of the overlap between Exxon and Mobil's future business in all of the markets where the Commission concluded that an oligopolistic dominance might be created or strengthened, and possibly in the whole of the fuels sector in Europe. Consequently, such dominant positions will not be created o strengthened.

[1332] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 172, p 639.

9.11.4.4 Aviation Lubricants

Within a certain time behind the effective date, the parties will divest themselves Exxon's global aviation lubricants business with commercial airlines, to a purchaser approved by the Commission. The business comprised product R&D, marketing and sales, blending and packaging facilities, product quality management and technical support and the associated marketing and sales, product quality management and technical support personnel. A trustee will ensure that, during the interim period, the Exxon and Mobil businesses are kept separate.

The market test conducted by the Commission confirmed that the divestiture of Exxon's aviation lubricant activities would be preferable to that of Mobil's aviation lubricants business (as initially proposed by the parties. Indeed, Mobil's activities are integrated within the Mobil group. Mobil produces its own ester base stock and also produces five proprietary additives. It did not appear to be possible to offer Mobil's blending facility as it was part of a wider complex. Respondents to the Commission's market test therefore indicated their doubt as to the capacity of a purchaser of Mobil's aviation lubricant business to operate as a viable competitive force able to constrain Exxon Mobil's actions. When informed about the Commission's doubts as to the adequacy of the divestiture of Mobil's lubricants business, the parties offered to shed Exxon's business Contrary to Mobil's aviation lubricant business, Exxon's aviation lubricants business is not closely intertwined with other Exxon businesses (supply of raw materials to a large extent from third parties; separate blending facility)

On this base, the Commission considers that no dominant position will be created on this market and that its competition concerns expressed in the statement of objections are eliminated.

9.11.4.5 Aviation Fuels

The parties have undertaken to sell within a certain period from the effective date aviation fuel pipeline capacity from the Coryton refinery to Gatwick airport equivalent to Mobil's 1998 sales volume at Gatwick. This undertaking should remove the bottleneck control that the parties would have gained through their merger on the supply of jet fuels to Gatwick airport. Therefore, no dominant position will be created on the market for the supply of aviation fuels to Gatwick airport.

On condition that the commitments summarised above and laid out in detail in the Annex, are fully complied with, the concentration notified on 03/05/1999 consisting of the merger between Exxon and Mobil is declared compatible with the common market and the functioning of the EEA agreement[1333].

[1333] Art. 1 Commission Decision Exxon / Mobil Case IV/M. 1383.

9.11.5 Annex

Whereas on 03/05/1999 Exxon and Mobil notified their proposed merger to the Commission and whereas on 09/06/1999 the Commission initiated a second phase investigation and, on 26/06/1999 sent the parties a statement of objections and whereas it became apparent that the Commission would not approve the proposed merger unless the parties were prepared to offer certain commitments to remove the objections which the Commission had identified in its statement of objections.

Therefore the parties offer the following commitments to allow the Commission to approve the transaction owing to Art. 8 II of the MR1989[1334]. These commitments concern the following items: (1) the divestiture of Mobil's interest in Aral; (2) the divestiture of Mobil's interest in BP/Mobil JV fuels businesses; (3) the divestiture of one or more base oil businesses together encompassing approximately a specified amount of barrels per day of base oil manufacturing capacity; (4) the divestiture of Mobil's interest in certain pipelines from the Coryton refinery to Gatwick airport; (5) the divestiture of assets associated with Exxon's global commercial aviation lubricants business; (6) the divestiture of Mobil's Dutch gas trading affiliate MEGAS; (7) the divestiture of Exxon's 25% equity interest in Thyssengas; (8) a reduction of Mobil's voting rights in Erdgas Münster; and (9) a commitment to offer to sell Mobil's rights in one or more depleted reservoirs suitable for conversion into natural gas underground storage facilities in Bavaria. The specific terms and conditions of these commitments are set forth in this undertaking.

9.11.5.1 Divestiture of Mobil's Interest in Aral

The parties shall sell, or cause to be sold, to a purchaser to be approved by the Commission, either all of the shares held by Mobil Marketing und Raffinerie GmbH (MMRG) in Aral Ag (Aral), or all of the shares of Mobil Oil AG (MOAG) in Warburg Beteiligungsgesellschaft für Mineralölinteressen KgaA & Co. oHG (Warburg oHG), or all of the shares held by Warburg oHG in MMRG, to the effect that, following the divestiture, the parties will no longer hold any shareholding, either directly or indirectly, in Aral.

To assist the Commission in determining whether any proposed purchaser is suitable, the parties shall submit a fully documented and reasoned proposal enabling the Commission to verify that (i) the parties do not own a material direct or indirect interest in the purchaser; (ii) the sale allows Aral to continue to operate as an active competitive force; and (iii) at the time of completion of the purchase, the purchaser has, or reasonably can be expected to obtain, all necessary approvals for the purchase from the relevant competition authorities in the European Community.

[1334] q.v. § 40 III GWB; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 10 VII 4. p 377.

If the Commission has not approved a potential purchaser, the parties shall appoint an independent and experienced trustee with an irrevocable mandate to carry out the divestiture within the remainder of the divestiture period.

The parties shall reach agreement with M.M. Warburg & Co. (as controlling shareholder of Warburg oHG) to the effect that, within 30 days from the effective date, Warburg oHG shall nominate and appoint, in accordance with section M of this undertaking, an independent and experienced trustee to ensure that the interim arrangements below are implemented:

Until the end of 1999, MMRG and its representatives shall refrain from participating in any meeting of the Aral corporate bodies and committees including the Beirat and the KEK, and MMRG shall not be entitled to receive any confidential Aral information during this period. However, the above undertaking shall not prevent MMRG from receiving information which is necessary for it to perform its supply obligations to Aral.

As of 01/012000, the trustee's mandate shall include the power to oversee the management of MMRG and to monitor the ongoing operations of MMRG pending the completion of the sale of the Aral interest. The trustee shall also have the obligation to represent MMRG in the Aral corporate bodies and committees, including the Beirat and the KEK.

As of the date of its appointment, the trustee's mandate shall include the obligation to ensure that (1) Mobil is no longer involved in the management of MMRG and (2) Mobil, Exxon and Exxon Mobil do not receive any confidential Aral information, except (i) publicly available information; (ii) MMRG's consolidated income from Aral; (iii) such information as is required to comply with contractual and legal requirements; and (iv) information that is necessary to effectuate the divestiture of Mobil's interest in Aral, provided that any disclosure of such information shall in any event be limited to those persons within Exxon, Mobil or Exxon Mobil involved in the divestiture process.

For the avoidance of any doubt, the trustee shall not have the power to instruct the financial investor to sell to a third party its shareholding in Warburg oHG, or all shares of Warburg oHG in MMRG, or all shares held by MMRG in Aral, which power shall remain exclusively with Mobil in order to implement the divestiture in paragraph one of this undertaking. Furthermore, it is understood that, pending completion of the divestiture, MOAG shall be permitted to receive its portion of the Aral income.

9.11.5.2 Mobil's Interest in BP / MOBIL's Fuels Business

From the effective date, the parties shall continue to exercise in good faith all reasonable endeavours to reach a binding agreement with BP Amoco for the sale of Mobil's interest in the BP/Mobil JV fuels businesses or the dissolution of the BP/Mobil JV[1335].

The parties shall reach binding agreement on one of the alternative remedies listed below:

- the sale of Mobil's interest in the BP/Mobil fuels business to BP Amoco or a third party to be approved by the Commission,
- the dissolution of the BP/Mobil JV with substantially all of the fuels assets being acquired by BP Amoco, or by a third party acceptable to the Commission.

Mobil's interest in Aral is to be sold under the separate commitment stipulated in section A of this undertaking. Exxon Mobil shall not retain any assets from the BP/Mobil fuels businesses in the markets of concern to the Commission, as identified in the statement of objections (i.e. retail marketing in Austria, Germany, Luxembourg, the Netherlands, the UK, and on French motorways).

To assist the Commission in determining whether a third party other than BP Amoco is a suitable purchaser for BP/Mobil's fuels businesses, the parties shall submit a fully documented and reasoned proposal enabling the Commission to verify that (i) the parties do not own a material direct or indirect interest in the purchaser; (ii) the purchaser is a viable existing or potential competitor, with the ability to maintain and develop the BP/Mobil fuels businesses or assets as an active competitive force; and (iii) at the time of completion of the purchase, the purchaser has, or reasonably can be expected to obtain, all necessary approvals for the purchase from the relevant competition authorities in the EC.

Regarding the transition period for the fuels remedy and the fuels information, neither Mobil nor Exxon or Exxon Mobil shall receive any fuels information on the Committee.

From the effective date, neither Mobil nor Exxon nor Exxon Mobil shall request any fuels information from BP Amoco, except that which is reasonably necessary to satisfy tax, regulatory or other legal requirements, and that which is necessary for or can reasonably be expected to be requested by a third party in accordance with normal commercial practices to accomplish a sale of assets to such third party. Mobil and Exxon Mobil may, in addition, request from BP Amoco such overall financial data on the fuels businesses as is reasonably necessary to make proposals to or evaluate proposals from BP Amoco or third parties on the sale of Mobil's 30% interest in the fuels businesses, such data to be kept confidential by Mobil and Exxon Mobil, to be used solely for the

[1335] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. VI. 1. c) p 537.

above purposes and to be limited only to those persons within Mobil and Exxon Mobil involved in the discussion or evaluation processes, including its external professional advisors.

The following considerations are relevant in this respect:

BP Amoco's own services group or its outside service providers already handle many of Mobil's tax and regulatory filings in Europe with respect to the BP/Mobil JV;

Mobil shall engage outside firms to handle any such filings not performed by BP Amoco or its contractors.

Mobil shall engage an accounting firm to perform an annual audit to confirm that Mobil has received its share of the cash generated by Fuels, without disclosing any further information to Exxon Mobil.

9.11.5.3 Divestiture of Base Oil Business

Within a certain amount of days from the effective date, the parties shall reach binding agreement on the transfer or return of control (within the meaning of MR1989) over one or more base oil businesses together encompassing approximately a specified amount of barrels per day of base oil manufacturing capacity to BP Amoco and / or one or more third parties to be approved by the Commission in one of the following ways or a combination thereof:

Transfer or return of ownership in given assets, or equivalent capacity

a long term lease agreement or similar arrangement of at least 15 years, renewable at the lessee's option owing to which the operational and strategic management of the base oil capacity concerned is transferred such that the transferee can unilateral decide, without informing the parties on all operational matters (including without limitation investments in capacity expansion, additions and modifications of equipment at the expense of the lessee; and sparing, but not permanent shutdown, of capacity. Such arrangement shall be subject to approval by the Commission.

In addition to the ownership or long-term lease of base oil manufacturing facilities the base oil businesses shall include all personnel currently employed at such facilities including, at the purchaser's request, qualified base oils personnel that are reasonably necessary for the purchaser to continue to operate the base oil businesses as an active market participant, all relevant agreements (including feedstock agreements if any and other supply contracts, etc.) which are necessary to continue the ongoing operation of such facilities; any merchant market customer lists and third party contracts related solely to such facilities for the supply of base oils; non-exclusive access to Mobil technology and licenses currently employed to operate such facilities and reasonable best efforts to transfer third party technology and licenses currently used to operate such facilities; and at the option of the purchasers, the provision of technical support for a period of time to assist the purchaser(s) with the

production of base oils at such facilities and with obtaining certification and qualification for the purchaser's base oil production.

Technology support shall include support in raw material selection, processing condition, and the development of specification sheets for base oil products and relevant databases. If the transfer of permits and agreements with third parties requires the approval from any third party, the parties shall use reasonable best efforts to obtain such consent.

At the purchaser's or lessee's option, Mobil shall make available at cost such supplies as are necessary to meet the purchaser's obligations under the transferred contracts for a specified period of time or until the purchaser or lessee is able to manufacture to the required specifications, whichever is shorter.

Mobil or Exxon Mobil shall further for a given period, offer to off-take from the purchaser(s), at prices based on ICIS-LOR quotations, up to a given percentage of the base oil volume captively supplied to Mobil from the relevant divested facilities during the equivalent period in 1998.

To assist the Commission in determining whether a third party other than BP Amoco is a suitable purchaser, the parties shall submit a fully documented and reasoned proposal enabling the Commission to verify that (i) the parties do not own a material direct or indirect interest in the purchaser; (ii) the purchaser is a viable existing or potential competitor, with the ability to operate the base oil business as an active competitive force; and (iii) at the time of completion of the purchase, the purchaser has, or reasonably can be expected to obtain, all necessary approvals for the purchase from the relevant competition authorities in the EC.

Having regard to the transition period for the base oil remedy and from the effective date, Mobil or Exxon Mobil shall:

- keep the base oils/lubricants businesses within the BP/Mobil JV (BP/Mobil Lubricants businesses) separate from Exxon Mobil's base oils/lubricants businesses in Europe (Exxon group);
- manage the BP/Mobil Lubricants businesses (Mobil Group) in the ordinary course and in the best interest of the BP/Mobil JV, under the overall guidance of the committee.

Sufficient resources shall be made available for the BP/Mobil Lubricants businesses to develop during this interim period in a normal way, based on the approved JV five year strategic plans and annual business plans;

Ensure that Mobil Group employees have no involvement in the Exxon group's base oil/lubricants businesses and vice versa;

Ensure that Mobil group employees do not report to any individual outside the BP/Mobil JV;

Ensure that no confidential information concerning BP/Mobil lubricants businesses is disclosed to employees outside of the BP/Mobil JV and that no confidential information from the Exxon group is disclosed to the

BP/Mobil JV. Mobil and Exxon Mobil may, however, request from the Mobil group such data on the BP/Mobil lubricants businesses as are reasonably necessary to make proposals or to evaluate proposals from BP Amoco on the dissolution of the BP/Mobil JV and the accompanying division of assets. Such data shall be made available only to personnel involved in the negotiation and evaluation process, and shall be used solely for purposes of negotiation and evaluation.

Within 10 working days from the moment Mobil acquires full control of such businesses, the parties shall nominate an independent and experienced trustee to oversee the ongoing management of these businesses and their continued viability, marketability and competitiveness.

9.11.5.4 Opt out Possibility for BP Amoco

If at any time following the effective date, BP Amoco elects to submit all outstanding issues on the termination of the BP/Mobil JV (for both fuels and lubricants) to binding expert resolution, Exxon Mobil shall agree to such binding expert resolution and shall agree that as of the closing of the transaction: BP Amoco and Mobil shall be released from their obligation.

Exxon Mobil shall promptly agree an a reciprocal basis any other changes to the BP/Mobil JV arrangements necessary to allow BP Amoco to act as it desires as of the closing of the transaction. Exxon Mobil's agreement in accordance with the previous paragraph shall apply only if:

BP Amoco's election of binding expert determination is irrevocable, provided that at any time before the decision of the experts Exxon Mobil and BP Amoco may agree upon the terms and conditions for the sale of Mobil's interest or the dissolution of the BP/Mobil JV, consistent within the above-stated remedies.

Within 5 working days of a request by Exxon Mobil, BP Amoco shall provide Exxon Mobil with any overall financial data on the fuels businesses reasonably requested by Exxon Mobil. Such data shall be kept confidential, used solely in the expert proceeding, and be disclosed only to persons within Exxon Mobil involved in that proceeding and its external professional advisors.

Similarly, within 5 working days of a request by BP Amoco, Mobil shall provide BP Amoco with any overall financial data on the lubricants businesses reasonably requested by BP Amoco. Such data shall be kept confidential, used solely in the expert proceeding, and be disclosed only to person within BP Amoco involved in that proceeding and its external professional advisors.

9.11.5.5 Expert Resolution of the BP/Mobil JV

Exxon Mobil's agreement in accordance with the previous paragraphs shall apply only if binding expert resolution shall be conducted as follows: within five working days of receipt of BP Amoco's written election of

binding expert resolution, Exxon Mobil shall notify BP Amoco in writing of its nomination of an independent expert. Within 10 working days thereafter, the two experts shall meet and shall choose a third independent expert.

The experts shall be experienced in the downstream oil industry in Europe and shall be independent of both Exxon Mobil and BP Amoco. The independent experts shall have no past or present relationship with Exxon, Mobil, BP Amoco or Arco;

15 working days after the appointment of the third expert, Exxon Mobil and BP Amoco shall simultaneously exchange and provide the experts with their respective written proposals for the sale by Mobil and purchase by BP Amoco of Mobil's interests in the fuels businesses and the division of the lubricants businesses. 5 working days thereafter, a hearing shall be held in London. At that hearing, Exxon Mobil and BP Amoco may make oral submissions to the experts on their written proposals; after considering the written proposals and oral submissions, the experts shall determine, within two months, by majority vote and through a written decision:

Regarding fuels the total value of Mobil's thirty percent interest in the BP/Mobil JV's fuels businesses, which shall be the price at which BP Amoco shall purchase Mobil's interests in the fuels businesses. The Aral income stream, the sale of which is the subject of a separate commitment to the Commission, shall be excluded from the valuation. (The total value shall be allocated country-by-country by agreement between Exxon Mobil and BP Amoco applying the same country- specific valuation methodology that was used at implementation of the BP/Mobil JV.) The valuation shall take into account the financial performance of the fuels businesses since the BP/Mobil JV's formation.

Any other terms and/or conditions of the dissolution of the BP/Mobil JV fuels businesses on which Exxon Mobil and BP Amoco have been unable to agree.

Regarding lubricants, the division of the BP/Mobil JV lubricants businesses in each country so that Mobil receives 51% and BP Amoco receives 49% of the fair market value in kind and/or cash.

Any other terms and/or conditions of the dissolution of he BP/Mobil JV lubricants businesses on which Exxon Mobil and BP Amoco have been unable to agree.

The decision of the experts shall be final and binding. Unless otherwise agreed Exxon Mobil and BP Amoco shall implement all transfers, and all payments between them shall be made, within 3 months of such decision, but in any event not before the closing of the transaction.

9.11.5.6 Divestiture of Pipeline Capacity for Aviation Fuels

Within a specified duration from the effective date, the parties shall reach binding agreement for the sale of aviation fuel pipeline capacity from the Coryton refinery to Gatwick airport equivalent to Mobil's 1998 sales volume at Gatwick, subject to the appropriate pipeline co-shareholder consents and pre-emptive rights and any government approvals.

Accordingly, the parties shall sell such interest in the West London pipeline company limited as necessary to reduce Mobil's interest in that pipeline to a specified amount and an interest in the Walton Gatwick pipeline company limited to third parties approved by the Commission. The parties' interest in the UK oil pipelines limited (UKOP) shall be sold with the Coryton refinery upon dissolution of the BP/Mobil JV.

If within a specified period of time from the effective date, the Commission has not approved a potential purchaser for Mobil's rights in the West London and Walton Gatwick pipelines, the parties shall appoint an independent and experienced trustee with an irrevocable mandate to carry out such divestiture within the remainder of the divestiture period.

To assist the Commission in determining whether any proposed purchaser is suitable, the parties shall submit a fully documented and reasoned proposal enabling the Commission to verify, that (i) the parties do not own a material direct or indirect interest in the purchaser; (ii) the purchaser is a viable existing or potential competitor with the ability to supply aviation fuels at Gatwick airport as an active competitive force; and (iii) at the time of completion of the purchase, the purchaser has, or reasonably can obtain, all necessary approvals for the purchase from the relevant competition authorities in the EC.

9.11.5.7 Divestiture of Assets Associated with Exxon's World-Wide Commercial Aviation Lubricants Business

Within a specified period of time from the effective date, unless extended by the Commission, the parties shall reach binding agreement on the sale of the assets associated with Exxon's global aviation turbine lubricants business with commercial airlines (the assets, the business being referred to as the jet turbine business) to a purchaser approved by the Commission. The jet turbine business being offered is worldwide in scope and includes product research and development, marketing and sales, blending and packaging facilities, product quality management and technical support. Exxon markets five distinct jet turbine oils.

To assist the Commission in determining whether any proposed purchaser is suitable, the parties shall submit a fully documented and reasoned proposal enabling the Commission to verify that (i) the parties do not own a material direct or indirect interest in the purchaser; (ii) the purchaser is a viable existing or potential competitor, with the ability to maintain and develop the jet turbine business as an active competitive force; and (iii) at the

time of completion of the purchase, the purchaser has, or reasonably can obtain, all necessary approvals for the purchase from the relevant competition authorities in the EC.

The assets shall include all assets and personnel currently used by the jet turbine business that are reasonably necessary for the purchaser to continue the jet turbine business as an active market participant, including: the airline customer list; the right to product names, product formulations and military and original equipment manufacturer approvals for products; access to knowledge and expertise in research, product development, marketing and distribution, including employees and intellectual property rights; third party supply contracts or non-exclusive licensing for Exxon proprietary ester base oils and additives currently used in Exxon jet turbine oils; procurement information for third party additives currently used in Exxon jet turbine oils; research equipment and non exclusive use of research test protocols; and warehousing services at competitive third party rates for a period to be agreed between the purchaser and Exxon Mobil, but at a minimum until the purchaser is able to make other arrangements.

Exxon sells jet turbine oils to more than 350 commercial airline customers around the world, of which less than half are actually under long term contract to Exxon. Reasonable best efforts shall include a written reasoned recommendation, the provision to the purchaser of all information and records available to Exxon relating to such commercial aviation customers, the provision to the purchaser of available customer contact data and information on the customer decision maker(s) and, if the purchaser so requests in accordance with reasonable commercial practice, the organisation of joint visits with the purchaser to such commercial aviation customers.

For a two year period from the completion of the divestiture of the jet turbine business and subject to terms and conditions to be mutually agreed upon between the purchaser and Exxon Mobil, Exxon Mobil shall not solicit any customer on the airline customer list for the purpose of selling jet turbine oil for commercial aviation or other applications to that customer. Exxon Mobil may approach such customers for the purpose of selling products other than jet turbine oils.

Exxon uses 18 different additives in its jet turbine oils. Exxon Mobil shall also use its reasonable best efforts to assist the purchaser in securing contracts for the purchase of third party additives currently used by Exxon in blending jet turbine oils.

The assets will include Exxon's blending facility located at Bayway, New Jersey, subject to the consent of the leaseholder of the land and permit requirements.

The parties shall take reasonable steps from the effective date, including appropriate incentive schemes to cause the current sales, technical plant and research personnel associated with the jet turbine oils business to remain with the business until divestiture and transfer to the purchaser.

Exxon holds certain patents related to the jet turbine oil business offered. Exxon Mobil shall grant the purchaser a non-exclusive license to these patents and to the other know-how required to produce jet turbine oils, and provide the purchaser, subject to mutually agreed terms and conditions, all proprietary operating procedures and protocols reasonably required to operate the jet turbine business. The purchaser shall not be allowed to use these licenses in any other business application nor extend this information to any other company affiliate. The purchaser shall not be entitled to use the Exxon name and/or trademark, except that it will have the right to identify itself for a period of one year from the date of completion of he divestiture of the jet turbine oil business as the purchaser of Exxon's jet turbine business.

The jet turbine business includes the test equipment.

For one year following the date of completion of the divestiture of the jet turbine business, Exxon Mobil shall promptly upon the purchaser's request offer to the purchaser technical assistance in transferring and gaining engine approvals.

If within a period of time from the effective date, the Commission has not approved a potential purchaser, the parties shall appoint an independent and experienced trustee with an irrevocable mandate to carry out such divestiture within the remainder of the divestiture period.

From the effective date, Exxon and Exxon Mobil shall ensure that Exxon's and Mobil's aviation businesses are held separate and managed as distinct businesses and operated in the ordinary course of business, consistent with past practice. During the same period, the Exxon Airliner customer lists shall not be provided to or used for the Mobil jet turbine business and Exxon shall do nothing that would cause customers on the airline customer list to contract with Mobil or Exxon Mobil for the supply of jet turbine oils. The parties shall within ten working days from the effective date nominate an independent and experienced trustee to monitor their obligations hereunder, who shall report to the Commission as needed.

9.11.5.8 Divestiture of MEGAS

The parties shall reach binding agreement on the sale of Mobil Europe Gas Inc. (MEGAS) to a purchaser approved by the Commission.

To assist the Commission in determining whether any proposed purchaser is suitable, the parties shall submit a fully documented and reasoned proposal enabling the Commission to verify that (i) the parties do not own a material direct or indirect interest in the purchaser; (ii) the purchaser is a viable existing or potential competitor, with the ability to maintain and develop MEGAS as an active competitive force; and (iii) at the time of

completion of the purchase, the purchaser has, or reasonably can be expected to obtain, all necessary approvals for the purchase from the relevant competition authorities in the EC.

MEGAS shall be sold as a viable going concern, including its contracted supply and sales portfolio, and all associated transport and other service agreements:

MEGAS has entered into supply agreements and has entered into transportation and service contracts with Gasunie, Distrigaz, and for transport through the UK interconnector to support its Dutch sales contracts.

Should the purchaser cause MEGAS to request termination of the sublease to Mobil Erdgas Erdöl GmbH (MEEG) of transport capacity from Oude Staenzijl to Bacton, the parties shall cause MEEG to accept such termination

The sale shall not, however, include the right for the purchaser to use the Mobil name and trademark, except that the purchaser shall have the right to identify itself for a period of one year from the completion of the divestiture of MEGAS as the purchaser of a business that formerly belonged to Mobil. Accordingly, the purchaser shall, upon completion of the sale, have to modify the name of the acquired company.

From the effective date, the parties shall take reasonable steps, including appropriate incentive schemes to cause all MEGAS personnel as of the effective date to remain with the business to be divested. Exxon Mobil undertakes not to hire or solicit the personnel transferred with MEGAS for a period of two years. Exxon Mobil shall further ensure that any of its personnel that has been employed or seconded to MEGAS within the last two years shall not be seconded to Gasunie and shall not be assigned to any Exxon Mobil business unit that directly or indirectly competes with MEGAS for a period of at least one year from the date of completion of the sale.

The parties shall submit to the Commission for prior approval a copy of the draft prospectus prepared for the sale of MEGAS to allow the Commission to verify the prospectus's consistency with the terms of this undertaking.

From the effective date, the parties shall ensure that MEGAS is (i) held separate (in particular from their other gas interests) and managed as a distinct business and operated in the ordinary course of business, consistent with past practice; and (ii) has sufficient experienced personnel and working capital to function properly consistent with past practice.

Within 10 working days from the effective date, the parties shall nominate an independent and experienced trustee to oversee the ongoing management of MEGAS and to monitor the continued viability, marketability and competitiveness of MEGAS pending the completion of the sale of MEGAS.

9.11.5.9 Divestiture of Exxon's 25% Interest in Thyssengas

Within a specified period from the effective date, the parties shall reach binding agreement on the sale of Exxon's 25% equity stake in Thyssengas GmbH to a third party approved by the Commission[1336].

To assist the Commission in determining whether any proposed purchaser is suitable, the parties shall submit a fully documented and reasoned proposal enabling the Commission to verify that (i) the parties do not own a material direct or indirect interest in the purchaser; (ii) the sale allows Thyssengas to operate as an active competitive force; and (iii) at the time of completion of the purchase, the purchaser has, or reasonably can be expected to obtain, all necessary approvals for the purchase from the relevant competition authorities in the EC.

Within ten working days from the effective date, the parties shall nominate an independent and experienced trustee to represent Exxon's interest and exercise Exxon's 25% voting interest in Thyssengas. The trustee shall independently exercise Exxon's voting rights in the best interest of Thyssengas. The trustee's mandate shall include the obligation for the trustee to take into consideration the protection of the financial interests of Exxon Mobil (i.e. in matters relating to major sales of assets, dividend distribution, dissolution of the company, and issuance of new shares) and to consult with the parties on such matters, without transmitting any confidential information, provided that this does not prejudice the trustee's primary obligation to ensure that Thyssengas is maintained as a viable business.

9.11.5.10 Redistribution of Mobil's Voting Rights in Erdgas Münster

Exxon, Mobil and Exxon Mobil shall use their reasonable best efforts to obtain the agreement of the other shareholders in Erdgas Münster to reallocate a certain percentage of voting rights associated with Mobil's current equity interest in Erdgas Münster to such shareholders (pro rata to their current voting rights) so that Exxon Mobil and Elwerath (BEB) combined shall hold less than 50% of the voting rights in Erdgas Münster[1337].

The agreement with the Erdgas Münster shareholders shall be subject to Commission approval and shall provide that any and all reallocated voting rights associated with Mobil's current equity interest in Erdgas Münster shall be returned should Exxon Mobil ever sell its equity interest in Erdgas Münster to a company in which Exxon Mobil holds no material direct or indirect ownership.

9.11.5.11 Offer to sell Mobil's Rights to one or more Depleted Reservoirs Suitable for Conversion into Natural Gas Storage Facilities

For a certain period following the effective date or until the expiration of Mobil's rights to the depleted reservoirs, whichever is earlier, Mobil or Exxon Mobil shall offer to enter into a binding agreement with third

[1336] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (2) (a) p 397.
[1337] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (2) (a) p 397.

parties to be approved by the Commission for the sale of any and all of its rights to one or more of the depleted reservoirs suitable to conversion into storage facilities servicing the Munich area, until it has sold a combined estimated working gas volume, after conversion[1338].

Following the effective date, the parties shall publish their offer to sell the depleted reservoirs in a prominent trade publication to be approved by the Commission.

If Mobil or Exxon Mobil and a potential purchaser fail to agree on a fair market price within six months from that purchaser's written expression of interest in a particular reservoir, Mobil or Exxon Mobil shall at the potential purchaser's request acquire a fair market evaluation from the three independent experts approved by the Commission. The parties agree that they shall be bound by the value assessment of such experts.

To assist the Commission in determining whether any proposed purchaser is suitable, the parties shall submit a fully documented and reasoned proposal to enable the Commission to verify that (i) the parties do not own a material direct or indirect interest in the purchaser; (ii) the purchaser is a viable existing o potential competitor with the ability to convert and operate the depleted reservoir as a storage facility; and (iii) at the time of completion of the purchase, the purchaser has, or reasonably can be expected to obtain, all necessary approvals for the purchase from the relevant competition authorities in the EC.

9.11.5.12 Trustees

If the parties have agreed to appoint a trustee, they shall propose the name of an independent and experienced institution that they consider appropriate to be appointed as trustee[1339]. The Commission shall have the discretion to approve or reject the proposed institution. If the proposed institution is rejected, the parties shall submit the names of at least two further institutions, within five working days of being informed of the rejection. If more than one name is approved by the Commission, the parties shall be free to choose the trustee to be appointed from among the names approved. If all further names are rejected by the Commission, the Commission shall nominate a trustee to be appointed by the parties.

The trustee's mandate shall include the following responsibilities:

to monitor the satisfactory discharge by the parties of the obligations entered into in this undertaking;

- to provide written reports to the Commission on the progress of the discharge of its mandate, identifying any respects in which the trustee has been unable to discharge its mandate. Such reports shall be provided in English within 10 working days from the end of every two months period following the trustee's appointment. The parties shall receive simultaneously a non confidential copy of such trustee reports; and

[1338] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (2) (a) p 397.
[1339] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. III. 9. m) (1) p 470.

- at any time, to provide the Commission, at its request a written or oral report on matters falling within the trustee's mandate. The parties shall receive simultaneously a non-confidential copy of such additional written reports and shall be informed promptly of the non-confidential content of any oral reports.

If this incidental provision requires the mandate of the trustee to include the responsibility to verify that the assets or businesses to be divested are held separate and to oversee the on-going management of these assets or businesses with a view to ensuring the continued viability and marketability of the relevant assets or businesses, the trustee shall:

- in consultation with the parties, determine the best management structure to ensure the viability and marketability of the assets or businesses to be divested;
- monitor that the parties maintain the viability and marketability of the assets and/or businesses to be divested in accordance with this incidental provision, and the management and operation of the assets or businesses in the normal course of business, in accordance with past practice, until divestiture;
- monitor, where applicable, that no competitively sensitive information concerning the assets or the businesses to be divested is disclosed to the parties.

Propose, and if deemed necessary, impose, all measures which the trustee considers necessary to ensure that any of the commitments are observed by the parties.

If this incidental provision requires the mandate of a trustee to include the responsibility to conduct negotiations with, and propose a purchaser or purchasers, the trustee shall:

- notify the Commission as soon as practically possible concerning the identify of purchasers with whom it has initiated negotiations and advise the Commission why it believes such purchasers are suitable, in view of the criteria specified above;
- end negotiations with any prospective purchaser, if the Commission determines that the negotiations are being conducted with an unsuitable purchaser;
- carry out the negotiation with the view to concluding a binding agreement that takes into account the financial interest of the parties (i.e., to obtain the best price and terms possible within the context of the trustee's mandate).

The parties shall provide the trustee with all such assistance and information, as the trustee may reasonably require in carrying out its mandate, and shall pay reasonable remuneration for its services.

As soon as the specific remedy with which the trustee has been entrusted has been implemented, the trustee shall request the Commission to be discharged. However, the Commission may at any time require the re-

appointment of the trustee if it subsequently appears that the relevant remedies might not have been fully and properly implemented.

9.11.5.13 Commission Approvals

If the Commission has not within ten working days following receipt of a fully documented and reasoned request rejected in writing any proposal submitted to it form approval pursuant to this incidental provision, the proposal shall be deemed to be approved.

Provided that the procedure for approval of potential purchasers has been complied with, Exxon Mobil shall be free to accept any offer or to select the offer it considers best in the event of a plurality of offers to the interests or assets to be divested.

9.11.5.14 General Provisions

The parties shall submit progress reports on the implementation of each of the above remedies to the Commission from the effective date until the incidental provision is fully implemented.

At the parties' or any trustee's request, the Commission may extend the period allowed for the conclusion of a binding agreement on any of the divestitures.

The parties shall be deemed to have complied with their divestiture commitment if within the relevant period for divestiture (including any possible extensions) they have entered into a binding agreement (subject the closing of the transaction) to sell the relevant business or assets to a third party approved by the Commission.

If the approval of the transaction by another antitrust authority is made subject to requirements that are potentially inconsistent with this incidental provision or that would together with the obligations in this incidental provision result in the divestiture of assets or businesses beyond what is necessary to eliminate overlap between the parties in any relevant markets, the parties may request a review and adjustment of this incidental provision in order to avoid such inconsistencies or any obligations beyond the obligation to eliminate such overlap.

The parties shall provide the Commission with such information as the Commission may require in connection with this incidental provision within 10 working days from receipt of the Commission's reasoned request.

Nothing in this incidental provision shall require the parties to take, or refrain from taking, any action, if such action or inaction would violate any applicable laws and regulations, nor shall it be interpreted so as to prevent the parties from gaining access to information which they need to comply with their obligations under financial reporting, tax and securities laws.

In witness whereof, the undersigned have caused this incidental provision to be executed as of 20/09/1999.

9.12 GAZ DE France / BEWAG / GASAG CASE IV/M. 1402

As GASAG could attempt to extend its distribution network so as to compete against BEWAG's more expensive district heat, BEWAG could use its future influence on GASAG to coerce GASAG not to expand its network. However, the Commission negated any reasonable scope for such a conduct as the existing energy mix of final consumers (28% district heating, 30% petroleum, 28% natural gas, 4% electricity, 10% hard coal) is more or less fixed because it is hardly economically viable for private owners to switch the fuel source for private heating once a building is constructed[1340]. Finally, the concentration is declared compatible pursuant to Art. 6 I lit. b MR1997[1341].

9.13 BP AMOCO / ATLANTIC RICHFIELD CASE IV/M. 1532

The Commission received on 04/05/1999 a notification owing to Art. 4 MR1989 by which the undertaking BP Amoco (BPA) acquires control within the meaning of Art. 3 I lit. b MR1989 of Atlantic Richfield Company (ARCO)[1342]. By decision of 10/06/1999 the Commission found that the notified operation raised serious doubts as to its compatibility with the common market and initiated proceedings pursuant to Art. 6 I lit. c MR1989.

9.13.1 The Parties and the Operation

BPA is the holding company of a multinational oil exploration, petroleum and petrochemical group comprising three core businesses, that is BPA Exploration (oil and gas exploration and production), BPA Oil (refining, marketing, supply and transportation); and BPA Chemicals (manufacturing and marketing of petrochemical and related products). The BPA group was formed as a result of the merger between BP Company plc and Amoco Corporation. It has well-established operations in Europe, USA, Australasia and parts of Africa, and is expanding its presence in Asia and South America.

Arco is active in the exploration for, production, transportation and sale of crude oil and natural gas and in the refining of crude oil and the transportation and marketing of petroleum products. Although it has operations in a number of countries such as Venezuela, Algeria, Tunisia, UK and Indonesia, the bulk of its activities take place in the USA (i.e. approximately 86% of its total turnover in 1998).

[1340] Commission Decision, Case IV/M. 1402 (*Gaz de France/BEWAG/GASAG*) paragraph IV.C.2)ii).
[1341] Art. 6 I lit. b MR2004.
[1342] I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 2 B II 5. p 75; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 12, marginal note 12.111, p 1614.

9.13.2 Concentration

The concentration being notified is an acquisition of sole control within the meaning of Art. 3 I lit. b MR1989. It will result in BPA acquiring sole control of Arco. The concentration will be effected by means of a share sale. This will be achieved by Arco being merged into a newly established company incorporated in accordance with the laws of the state Delaware, USA (Newco), which will itself be wholly owned by BPA. Following the merger of Arco with Newco, Arco will be the surviving legal entity and will, at that point, have become a wholly owned subsidiary company of BPA. Thus, as a result of these operations, BPA will have acquired ownership of the entire issued share capital of Arco.

9.13.3 Community Dimension

The concentration has a community dimension (Art. 1 II-III MR1997).

9.13.4 Assessment under Art. 2 MR1989

Both parties are active in the exploration, development, production of crude oil and natural gas and in the decision-initiating proceedings the Commission had expressed serious doubts on these markets. However, for the reasons indicated below, no competition concerns arise on these markets. The market for oil and gas exploration is global[1343] whereas the market for natural gas transmission is the EEA, Algeria and Russia and the market for the transportation of natural gas relates to southern Northsea and northern Northsea[1344].

9.13.5 Commitments Proposed by the Parties

BPA has given a commitment to the Commission to divest the equity interest that Arco currently holds in certain pipelines of SNS gas transportation and processing infrastructure[1345]. These equity interests will be divested to one or more purchasers approved by the Commission. In addition, BPA has given a commitment not to re-acquire any of those assets without the Commission's prior approval.

The divestiture by BPA of the interests held by Arco in those pipelines and processing facilities where BPA has currently no interest means that the competitive situation of BPA will be the same before and after the concentration. That is because, as indicated above, in the SNS pipelines and processing facilities TPA is accorded on the basis of unanimous agreement between the owners. The competitive situation therefore depends on the number of pipelines in which a company has an interest and the total spare capacity of those pipelines. The divestiture of the equity interests in the additional infrastructure therefore eliminates the overlap on the relevant markets between BPA and Arco. The Commission therefore concludes that, as a consequence of

[1343] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 197, p 1260.
[1344] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 197, p 1260.
[1345] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 129, p 616.

the commitments, there will be no creation of a dominant position on the relevant markets. As the national gas transmission companies Gaz de France and Distrigaz have a strong countervailing market position, a dominant position of BPA / Arco as natural gas producers is denied[1346].

9.13.6 Conclusion

Regarding to Art. 10 II MR1989, the Commission concludes that the commitments given by BPA are sufficient to remove its serious doubts, identified in its decision-initiating proceedings and in its subsequent investigation of the operation, in relation to Art. 2 II MR1989.

The operation is therefore subject to the condition of full compliance with the commitments in the Annex, compatible with the common market and the EEA agreement.

9.13.7 Annex

Regarding the divestiture of relevant assets and related matters, BPA hereby undertakes to the Commission to procure that Arco British Limited (ABL) shall no later than a specific time, have transferred legal title to the relevant assets to one or more purchasers approved by the Commission; and not without the Commission's prior approval to re-acquire, and to procure that the BPA affiliates shall not without the Commission's prior approval re-acquire any of the relevant assets provided that if by the 14th day after the date upon which BPA sends a written request to the Commission seeking such approval, the Commission has not given written notice to BPA denying such approval, the Commission shall be deemed to have given such approval.

If at any time after the concentration completion the Commission has reasonable grounds to suspect that BPA is failing to comply with the incidental provision given in the previous paragraph, the Commission shall have the power to appoint a trustee.

If by that date, ABL has not transferred legal title to the relevant assets to one or more purchasers approved by the Commission, BPA shall appoint a trustee.

By a specified date after the approval date, BPA shall submit to the Commission the name of a person, independent of BPA, who BPA considers appropriate to act as BPA's nominee for the purposes of participating after the concentration completion date in any discussions with the owners of equity interests in the relevant assets and exercising ABL's right to vote at meetings of the Operating Committees of the relevant assets in regard in either case to the transportation and/or processing in any of the relevant assets of gas owned by any party which does not own an equity interest in the relevant asset in question.

[1346] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 199, p 1261.

If the Commission rejects the name submitted to it by BPA pursuant to the previous paragraph, BPA shall, within seven days of receiving written notice of such rejection, submit the name of an alternative person to act as nominee, provided that if by the 14th day after that date upon which BPA submits the name of a person to act as nominee owing to the previous paragraph, the Commission has failed to give BPA written notice of rejection of the person so named, that person shall be deemed to have been accepted by the Commission to act as nominee.

In the event that the Commission, upon reasonable grounds, rejects two individuals proposed consecutively by BPA to act as nominee, the Commission shall name an alternative individual having the requisite degree of knowledge and experience to act as nominee and within 7 days of the Commission having done so, BPA shall appoint the person as nominee.

If upon reasonable grounds the Commission considers that the nominee is failing to carry out diligently his mandate, the Commission shall be entitled to give written notice thereof to BPA, in which event a new person shall be appointed to ct as nominee.

Concerning notices and other communications, all notices between the Commission and BPA required by or relating to the incidental provisions contained herein shall be sent by facsimile or by overnight courier to the following number/address.

Regarding reports and approval of purchaser(s) of relevant assets, BPA shall promptly inform the Commission of all material developments that relate to the compliance by BPA with the incidental provisions set out herein; and every two months during the period commencing on the approval date and ending at such time as legal title to the relevant assets has been transferred to one or more purchasers written report describing the current status of the divestment process being followed in relation to the relevant assets.

The Commission shall use its best endeavours to inform BPA within 14 days after receiving any notice sent of the suitability of any proposed purchaser(s) of the relevant assets. The Commission, in determining whether any proposed purchaser is suitable, will take into account whether the prospective purchaser concerned: (i) appears to possess the status and resources necessary to own the relevant asset in question as a viable competitor to BPA; (ii) is independent of BPA; (iii) can be shown not to have significant and relevant commercial connections with BPA which may call into question its independence from BPA; and (iv) has, or reasonably can obtain, all necessary approvals from the relevant competition authorities and other regulatory authorities in the EC and elsewhere (if necessary). If by the end of the 14th day after receiving any notice sent owing to above, the Commission has not given BPA written notice of rejection of any proposed purchaser, the proposed purchaser

named in that notice shall be deemed to have been approved by the Commission as suitable to purchase the relevant assets in question.

The Commission shall have the discretion to approve one or both of the names submitted by BPA owing to this Appendix, save that if by the 14th day after the date upon which BPA submits such names, the Commission has not given BPA written notice that the Commission rejects the institutions so named by BPA, such institutions shall be deemed to have been approved by the Commission. If pursuant to the foregoing, only one name is approved, BPA shall appoint the institution concerned as trustee. If more than one name is approved, BPA shall be free to choose the trustee to be appointed from among the names approved.

If all further names are rejected by the Commission, the Commission shall nominate a trustee to be appointed by BPA.

As soon as the Commission has given approval to one or more names submitted, or nominated a trustee, BPA shall appoint the trustee concerned within seven days thereafter.

The trustee's mandate shall comprise the following functions:

- to monitor BPA's maintenance of the viability and market value of the relevant assets, and that each of the relevant assets is being operated in the normal course of business and consistent with its status;
- to monitor the satisfactory discharge by BPA of its obligations under the incidental provision given in above, in addition to the other duties forming part of his mandate, be required after his appointment to transfer legal title to the relevant assets to one or more purchasers approved by the Commission.

In particular, the trustee shall: (i) monitor and advise the Commission as to the adequacy of the procedure for selecting purchasers to purchase the relevant assets and as to the conduct of the negotiations with each such purchaser; (ii) monitor and advise the Commission as to whether the agreements to be entered into with each purchaser of one or more of the relevant assets will properly provide for the divestiture of the relevant asset(s), as provided for in the incidental provision above; and to provide written reports (trustee reports) to the Commission on progress in the discharge of the trustee's mandate, identifying any respects in which he has been unable to discharge his mandate. Such reports shall be provided at regular monthly intervals.

At any time during the term of the trustee's appointment, the Commission may, if on reasonable grounds, it believes that the incidental provision given above is not been properly complied with, request the trustee to carry out the following additional functions (the request) and the trustee's mandate shall be deemed to be extended accordingly:

to ensure that the relevant assets are not being operated other than in the normal course of business consistent with their status; to ensure the proper divestment of the relevant assets; in the trustee's reports, or in any event

within no later than one month of being notified of the request, to submit to the Commission a proposal for the method and timescale proposed by the trustee for the divestiture in accordance with the incidental provisions above; in the trustee's report as soon as negotiations are entered into with prospective purchasers, to provide to the Commission sufficient information to enable the Commission to decide on the suitability of the purchaser(s) in question; to break of negotiations with any prospective purchasers, or to instruct BPA to break of such negotiations, if it appears to the Commission that the negotiations concerned are being conducted with an unsuitable purchaser; and to submit to the Commission for approval an agreement for sale and purchase of the relevant assets (or any of them); such agreement to be unconditional on both purchaser and seller and irrevocable except for the approvals required from the Commission, and any approvals required from any other authority or person.

BPA undertakes to provide the trustee with all such assistance and information, including copies of all relevant documents, as he may reasonably require in carrying out his mandate and to pay reasonable remuneration for his services.

If BPA should announce that the proposed concentration between BPA and Arco has been irrevocably abandoned, the trustee's mandate shall be deemed to be discharged, and his appointment shall forthwith be terminated.

9.14 EDF / SOUTH WESTERN ELECTRICITY CASE IV/M. 1606

The next case is a genuine successor of the above discussed concentration *EdF/London Electricity*[1347]. London Electricity plc, the regional distribution company and new subsidiary of EdF, intends to acquire control of South Western Electricity plc from its present owner Southern Energy, Inc.[1348]. Being a regional electricity company, South Western Electricity's activities focus on distribution in its former protected supply area in South West England whereas it supplies electricity to consumers throughout England and Wales[1349].

The interesting feature of the case relates to the collision of electricity regulation, company law and competition law.

The valid licenses held by South Western Electricity allowed it to distribute and supply electricity in its original supply area [first tier license] and to supply electricity to eligible consumers outside the supply area [second tier license].

[1347] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. p 390.

[1348] Commission Decision, Case IV/M. 1606, 1999 (*EdF/South Western Electricity*) paragraph 4. South Western, Inc. plays a crucial role in the VEBA/VIAG case with regard to the acquisition of VEAG. The complex issue will be discussed, later.

[1349] Commission Decision, Case IV/M. 1606, 1999 (*EdF/South Western Electricity*).

By means of the transaction, London electricity seeks to obtain South Western's supply business inside and outside its original supply region. However, this would contravene to the licenses granted to South Western. The situation is remedied by means of a three step strategy: Firstly, London electricity acquires the brand name, intellectual property rights and goods of South Western with regard to distribution. Secondly, a management contract is concluded, that South Western gives a mandate to London electricity to manage the former's supply businesses inside and outside the former protected area in accordance with the license requirements[1350].

Thirdly, EdF and London Electricity negotiated amendments of the licences with OFGEM so that South Western would be restricted to its distribution business and supply business in its distribution area. The latter would be licensed to EdF again. Additionally, London Electricity would be vested with a second tier license to serve all consumers in England and Wales. Other important license requirements were re-negotiated, too[1351]. Finally, the management contract would be only necessary as far a London Electricity seeks to manage the supply of South Western's tariff consumers in its distribution area[1352].

The Commission states that these regulatory requirements do not fall within the scope of its jurisdiction. Nevertheless, the Commission regards the acquisition of South-Western's supply businesses by means of a mere management contract or by a legal transfer following the license alterations as a concentration with a Community dimension[1353].

As far as functional aspects of market definition are concerned, the relevant markets are basically defined in accordance with the reported findings the case *EdF/London Electricity*[1354]. In particular, the Commission questions whether it is still appropriate to separate a market for the supply of wholesale consumers beyond 110kV p.a. and small consumers[1355]. However, a proper study of demand and supply side interchangeability indicates that those consumer groups are not identical from the view of average suppliers as to different levels of sophistication and price sensitivity and brand loyalty by means of advertisements. Contrarily, small consumers will regard the incumbent supplier as more favourable owing to established supply traditions. Therefore, the markets remain distinct which is in line with other market definitions in cases related to the energy sector[1356].

[1350] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 36, p 526.

[1351] e.g. London Electricity has to separate its distribution business in London from its future supply activities throughout England and Wales. Moreover, it is secured that no internal power trading takes place between EdF's generation and London Electricity's and South Western's supply business; q.v. Commission Decision, Case IV/M. 1606, 1999 (*EdF/South Western Electricity*) paragraph 6.

[1352] The first tier license covers distribution in a given area and supply to tariff in that area without a possibility of splitting; q.v. Commission Decision, Case IV/M. 1606, 1999 (*EdF/South Western Electricity*) paragraph 47.

[1353] Commission Decision, Case IV/M. 1606, 1999 (*EdF/South Western Electricity*) paragraph 8-9.

[1354] Commission Decision, Case IV/M. 1606, 1999 (*EdF/South Western Electricity*) paragraph 10.

[1355] Commission Decision, Case IV/M. 1606, 1999 (*EdF/South Western Electricity*) paragraph 13-14.

[1356] q.v. Commission decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*). However, it is remarkable that the Commission did not transfer its findings of the London Electricity as to a distinct market for regional supply in the fomer protected area to the *Vattenfall/HEW* case.

As far as the geographical scope[1357] of the relevant markets is concerned, it is considered that the market for the supply of small consumers is still not the market of England and Wales but the former protected supply zone. Therefore, London Electricity and South Western hold a dominant position of approximately 95% respectively. However, the dominance test is of prognostic nature and has to take into account that neither company serves a significant number of small consumers in the antagonistic area. Thereby, it is sustainable that the Commission concludes that the concentration does not measurably strengthens both dominant positions in the incumbent markets. Contrarily, the dominance will fade away in the near future owing to increasing market pressure[1358]. The vertical aspects are dealt with in accordance to the findings in the case *EdF/London Electricity*[1359].

9.15 TOTALFINA / ELF CASE IV/M. 1628

Whereas on 24/08/1999 the European Commission was notified in accordance with Art. 4 MR1989 of a planned merger whereby TotalFina would acquire full control within the meaning of Art. 3 I lit. b MR1989, of Elf Aquitaine (Elf) by way of a public takeover bid announced on 05/07/1999.

9.15.1 The Parties to the Transaction

TotalFina is a public limited company formed under French law, in the business in the production of petroleum and gas, refining and distribution of petroleum products, petrochemicals and speciality chemicals. Its business is global[1360].

Elf is a public limited company formed under French law, in business in the production of petroleum and gas, refining, distribution of petroleum products, petrochemicals, speciality chemicals and healthcare. Its business is global[1361].

9.15.2 The Concentration

The concentration consists of a public take-over bid by TotalFina for all the shares in Elf Aquitaine held by the public. The concentration is accordingly an acquisition of sole control under Art. 3 I lit. b MR1989.

9.15.3 Community Dimension

A community dimension is available (Art. 1 MR1997).

[1357] Q.v. J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. III. 1. c) (1) p 375.
[1358] Commission Decision, Case IV/M. 1606, 1999 (*EdF/South Western Electricity*) paragraph 24-26.
[1359] Commission Decision, Case IV/M. 1606, 1999 (*EdF/South Western Electricity*) paragraph 29-38.
[1360] D. Yergin, The Quest (1st ed.)(New York, US, Penguin, 2011) CH 4, p 99.
[1361] D. Yergin, The Quest (1st ed.)(New York, US, Penguin, 2011) CH 4, p 99.

9.15.4 Procedure

On 15/09/1999, TotalFina filed proposals for commitments during the first stage of the procedure under Art. 6 MR1989. These commitments were found to be neither adequate nor precise enough to allay all the serious doubts raised by the notified transaction.

On the 18/10/1999, TotalFina filed proposals for commitments pursuant to Art. 8 II MR1989[1362]. These commitments were found to be neither precise enough nor of such a nature as to allay all the serious doubts raised by the notified operation.

On 26/11/1999, a statement of objections was sent to TotalFina which replied on 13/12/1999. TotalFina did not request the holding of a hearing.

9.15.5 Definition of the Relevant Markets and Competition Analysis

9.15.5.1 Refining and Sale of Refined Products

Having regard to demand, the French petroleum consumption for 1997 is 48.5 Mm^3 per annum for petrol and diesel and 19.5 Mm^3 per annum for domestic heating oil (DHO) and is rising at the rate of approximately 4.1% for fuels, 3.5% for DHO and 5.8% for LPG products. A national market was established[1363].

9.15.5.2 The wholesale Markets for Petrol, Diesel and Domestic Heating Oil

Regarding the reference markets (product markets), the wholesale market means the market for the supply of fuels to retailers (e.g. supermarkets) who are not integrated upstream and to major final users (transport firms).

The table below gives estimated market shares calculated by the Commission on the basis of information gathered in its market survey:

National market	Total-Fina	Elf	Combined	Refiner A	Refiner B	Refiner C	Other
Wholesale Petrol	30-40%	25-35%	50-60%	10-20%	10-20%	10-20%	< 5%
Wholesale Diesel	35-45%	15-25%	45-55%	10-20%	10-20%	10-20%	< 5%
Wholesale Domestic	25-35%	15-25%	45-55%	10-20%	10-20%	10-20%	< 5%

[1362] q.v. § 40 III GWB; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 10 VII 4. p 377.
[1363] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 52, p 586.

Heating Oil							

Refining capacity in France

TotalFina	Elf	TotalFina Elf	Shell	Esso	BP/Mobil	Aggregate
25-35%	15-25%	45-55%	10-20%	10-20%	10—20%	100%

TotalFina would also control 50-60% of the import depots. The merged entity would also control a large proportion of the inland hub depots (45-55%) and coastal depots (40-50%).

	North	Normandy Paris	West Centre	East	South	Rhone Burgundy
Hub and coastal depots	70-80%	35-45%	45-55%	45-55 %	45-55%	35-45%
Trapil		Control	Control	Control		
ODC				Largest user		
SPMR					Control	Control
DMM		Control	Control	Control		

The calculation of shares in the capacity of hub depots controlled by TotalFina/Elf includes the inland hub depots, the coastal depots and the import depots which are not linked to bulk transport facilities.

The market position of the firms concerned post –merger would be as follows, based on their distribution throughput in the six regions identified above.

Position	Non network	Sales by	Product	and	Region
1998	TotalFina/ Elf	Competitor A	Competitor B	Competitor C	Others
South					
Petrol	30-40%	20-30%	10-15%	20-30%	5-10%
Diesel	25-35%	15-20%	10-15%	30-40%	10-15%
DHO	25-35%	20-30%	5-10%	20-30%	5-10%
West and Centre					

Petrol	75-85%	5-10%	10-15%	<5%	<5%
Diesel	70-80%	10-15%	10-15%	<5%	<5%
DHO	40-50%	20-30%	15-20%	5-10%	<5%
Normandie / Paris Region					
Petrol	40-50%	15-20%	15-20%	20-30%	<5%
Diesel	40-50%	10-15%	15-20%	20-30%	<5%
DHO	30-40%	20-30%	15-20%	20-30%	<5%
North					
Petrol	85-95%	<5%	<5%	<5%	<5%
Diesel	80-90%	<5%	<5%	5-10%	<5%
DHO	70-80%	5-10%	<5%	10-15%	<5%
East Alsace Lorraine					
Petrol	40-50%	<5%	30-40%	10-15%	<5%
Diesel	40-50%	5-10%	30-40%	10-15%	<5%
DHO	50-60%	15-20%	15-20%	5-10%	<5%
Rhone Auvergne Burgundy					
Petrol	70-80%	5-10%	10-15%	<5%	<5%
Diesel	70-80%	15-20%	10-15%	<5%	<5%
DHO	40-50%	30-40%	15-20%	<5%	<5%

Competing refiners would not have the potential to benefit from shifts in demand in response to price rises on the wholesale market initiated by TotalFina/Elf. A national market was established[1364].

9.15.5.3 The Market for the Provision of Storage Capacity in Import Depots linked to Means of Bulk Transport

Having regard to the reference market and the product market, import depots may be defined as those capable of accommodating large-capacity ships (between 30000 and 50000 tonnes. In France there are eight import depots linked to means of bulk transport:

DPC St. Pol	Jointly controlled by TotalFina and other refiners	ODC (but forced to go through the Total Mardyck refinery and currently supplied to 99% by that refinery	North and East
CPA Dunkirk	-	ODC (but forced to go through the Total Mardyck refinery	North and East
CPA Rouen	-	Trapil, then DMM	Normandie-Paris region, centre and east
CIM Le Havre	Jointly controlled by TotalFina/ Compagnie Nationale de Navigation	Trapil, then DMM	Normandie-Paris region, centre and east
Stockbrest	TotalFina/Elf 40%	Train	West
Donges St. Nazaire	Controlled by Elf	DMM	West, southern Paris region, centre and east
DPA Ambes Bassens	TotalFina 27.9 % Elf 22.4 %; sole control after the transaction	Rail link which enables it to send one by the trainload the petroleum products it receives by pipeline from Pauillac and Ambes	West
DP Fos	Acquisition of control by TotalFina/Elf	SPMR and two railway lines, one to Toulouse and one to	South, Rhone-Burgundy region and Toulouse

[1364] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 52, p 586.

	TotalFina 25.7% Elf 25.7%	Dijon	

At the regional level, the merger would bring about the following situation:

	North: North-Normandy Paris region West Centre-Alsace Lorraine	South: South-Rhone Burgundy (minus Frontignan)
Import depots linked to means of bulk transport	65-75%	90-100%

9.15.5.4 The Market for Services Related to the Transport of Refined Products by Pipeline

Regarding the reference market and the product market, pipelines transporting finished petroleum products (petrol, diesel and DHO) are logistical tools used for the collection and distribution of refined products by different petroleum operators, namely refiners, independents and supermarket chains.

The main pipeline systems are as follows:

Zone	Le Havre - Paris	Mediterranean - Rhone	Donges - Melun - Metz	ODC
Pipeline	Trapil	SPMR	DMM	ODC
Operator	Trapil	Trapil	SFDM (before 1993 Trapil)	Trapil
Share-ownership	TotalFina 33%; Elf 27%; Esso 11,67; BP 6,42%; Shell 14,62%; Mobil 5,74%	TotalFina 32,5 %; Elf 14,1%; Trapil 5%; Esso 14,6%; BP 12,16%, Shell 16,16%; Mobil 3%; Petrofrance 1,55%; TD 0,8%; Propetrol 0,55%	Elf 49%; CNN 31%; Port of Nantes St. Nazaire 10%; Bollore 10%	NATO
Average throughput	450-1800 m^3/h	500-1200 m^3/h	360 m^3/h	
Diameter	10/12	10/12	10/12	
Traffic in tonnes 1995	18678	8448	2308	2050
Traffic in tonnes 1998	20967	9020	2949	2692

9.15.5.5 Sale of Fuels on Motorways

Having regard to the reference market and the product market: motorway service stations are in a separate market from that for the sale of fuels off motorways; and introduction, fuel retailing comprises the sale of fuel to motorists by service stations. This argument is accordingly invalid as a means of proving that the two categories of service stations are in competition with one other.

	1994	1995	1996	1997	1998
Volume sold on motorways (kt)					
Petrol	908	852	799	788	781
Diesel	1449	1519	1509	1587	1684
	2357	2371	2308	2375	2465
Retail Sales (kt)					
Petrol	16122	15379	14738	14377	14289
Diesel	15649	16532	17139	18118	19005
	31771	31911	31877	32495	33294

In its reply to the statement of objections, TotalFina provided further series of data which showed, it argued, that sales of fuel on motorways have not matched the rise in the number of kilometers travelled on the motorway network.

The table below contains an estimate of the market shares (by volume and by number of service stations on the totality of the French motorways) of TotalFina, Elf and their competitors for 1998:

	Number of stations	Market share by number of stations	Market share by volume
TotalFina		25-35%	30-40%
Elf		15-25%	10-20%
Shell		10-20%	10-20%
Esso		10-20%	10-20%
BP/Mobil		10-20%	10-20%
Agip		< 5%	< 5%
Others		< 5%	< 5%

Overall, its market share would be as follows:

	Market share by number of stations	Market share by volume	
TotalFina/Elf	50%-60%	50%-60%	
Shell	10%-20%	10%-20%	
Esso	10%-20%	10%-20%	
BP/Mobil	10%-20%	10%-20%	
Agip	< 5%	< 5%	
Others	< 5%	< 5%	

In addition to its dominance on the wholesale fuel markets and the oil logistics chain, TotalFina/Elf would benefit after the merger from unequalled coverage in terms of number of service stations and geographic reach. This is demonstrated in the following table, which shows the number of service stations, by brand, on the same section of motorway which are immediately adjacent to a TotalFina/Elf service station, between two TotalFina/Elf service stations or immediately adjacent to two TotalFina/Elf stations.

	BP	Elf	Esso	Shell
BP	X		8	7
Elf	14		19	20
Esso	7		X	7
Shell	7		8	x
TotalFina				

The fact that there are sometimes two TotalFina/Elf stations adjacent to one another and that some service station are caught between two TotalFina/Elf service stations would allow the latter to target any reprisals without this having an effect on other competitors.

9.15.5.6 Sale of Aviation Fuels

The fuel used for aero (or jet) engines is kerosene. Although similar to domestic kerosene (used as heating fuel in the UK in particular), it is subject to strict performance requirement. In previous decisions (BP/Mobil; Shell Gulf oil, ExxonMobil), the Commission concluded that aviation fuels formed a separate product market from other fuels (such as petrol, diesel or marine fuel). TotalFina agrees with this view.

9.15.5.7 Sale of LPG

Regarding the relevant product market, Liquefied petroleum gases (LPGs) contain butane or propane which are the product of either oil refining or natural gas. LPG used as an energy producing fuel can be distinguished from LPG used as a car fuel (LPG-c). As LPG-s comes under the motor fuel market, only LPG used as a fuel for other purposes will be analysed in this section.

According to figures supplied by TotalFina, the price movements were as follows between December 1982 and December 1998.

Centimes / kWh	December 1982	December 1992	December 1998
LPG	33.8	32.8	39.0
Natural Gas	24.2	24.1	24.4
Electricity	54.5	74.2	71.5

The gap is similar in LPG domestic and industrial sales, as shown by the following table, provided by TotalFina.

Price in centimes per kWh (1999)	Private home	Large industry
Natural gas	24	7
Domestic heating fuel	19	10
LPG	39	24
Electricity	58	26

The market shares of the various players are as follows:

LPG market shares - France

Overall LPG	1998
Elf Antargaz	15%-25%
Totalgaz	15%-25%
Air liquide	< 5%
TotalFina – Elf - Air liquide	40%-50%
Butagaz	20%-30%
Primagaz	10%-20%
Vitogaz	< 5%
Esso	< 5%
Repsol	< 5%
Mobil	< 5%

Conditioned LPG	1998

Elf Antargaz	15%-25%
Totalgaz	15%-25%
TotalFina/Elf	35%-45%
Buntagaz	30%-40%
Primagaz	10%-20%
Others (Vitogaz, Repsol, Air Liquide	< 5%

LPG Small bulk sales	1998
Elf Antargaz	15%-25%
Totalgaz	15%-25%
Air liquide	< 5%
TotalFina – Elf – Air liquide	40%-50%
Butagaz	25%-35%
Primagaz	10%-20%
Vitogaz	< 5%
Others	< 5%

LPG medium and large bulk sales	1998
Elf Antargaz	20%-30%
Totalgaz	15%-25%
Air liquide	5%-15%
TotalFina – Elf – Air liquide	55%-65%
Butagaz	10%-20%
Primagaz	10%-20%
Vitogaz	< 5%
Others	< 5%

The table below indicates the proportion of capital held by each of the businesses present on the LPG market in terms of import depots:

Depots	Capacity (m^3)	TotalFina	Elf	Butagaz	Primagaz	Vitogaz
Norgal (Seine valley)	60.000	26.4%	52.7%			20.9%
Petit Couronne (Seine valley)	53.000			100%		
Brest (West)	9.500				100%	
Donges (Nantes)	85.000		100%			
Cobugal (Gironde)	11.500	45%	15%		40%	
Pouillac (Gironde)	16.700			100%		
Port-la-Nouve Ile (1) (South)	8.100		100%			
Port-la-Nouve Ile (2) (South)	1.800			100%		
Geogaz (South)	300.000	26.2%	16.7%	25.2%		
Lavera (South)	90.000				100%	

The following table shows the respective positions of the various players regarding bottling centres:

Bottling centres:

Region	Elf	TotalFina	Butagaz	Primagaz	Vitogaz
North	Valenciennes	Arleux	Courchelettes	Dainville	
East	Herlisheim	Hauconcourt	Reichstett	Herlisheim	
			Sillery	Pont-a-Moussoin	Pont-a-Moussoin
Lower Seine and Centre	Ris (Orangis)		Petit-Couronne		
			Chalon	Le Hoc	Le Hoc
West	Donges		L'herbergement		
				Brest	
			Arnage		
	Vern		Vire	St. Pierre des Corps	
South West	Bousseens	Fenouillet			
	Nerac		Nerac		
	Niort	Niort	Le Doubet		
	Ambes	Ambes	Paulliac	Ambes	
	Lacq		Lacq		
	Rodez		Rodez		
Rhone Valley	Feyzin	Macon	Lyon	Feyzin	
		Marignane	Bollene		
	Fos		Rognac	Fos	
South	Port-la-Nouvelle		Port-la-Nouvelle		
Corsica	Ajaccio		Bastia		

9.15.5.8 Other Markets

The notified transaction would result in business activities in many other petroleum and chemical markets being amalgamated.

9.15.6 Commitments Proposed by the Notifying Party and Evaluation

On the 19/01/2000, the notifying party has proposed certain commitments in order to eliminate the competition problems as the Commission had identified in its statement of objections issued on the 26/11/1999. On 28/01/2000, the notifying party has proposed a set of modified commitments, taking into account the results of the market test and certain modifications requested by the Commission. On the 31/01/2000, the services of the Commission have expressed their negative reaction regarding the modified commitments on the LPG market. The notifying party has, on the same day, proposed to sell of the LPG activities of the group Elf. This new proposal is the result of a negative market test of the proposals that were considered, prima facie, by the services of the Commission as sufficient. She has intervened at the first working day following the Commission's

receipt of the market results. The proposal clearly puts an end to all competition problems identified for the market in question[1365].

For the same reason, it was possible to consult the member states in the framework of the advisory committee in such short delay. As such, exceptional circumstances are present within the meaning of Art. 18 II Regulation (EC) No. 447/1998 justifying the filing of this new proposal after the end of the foreseen quarterly deadline.

These commitments have been summarised and evaluated in the following paragraphs, in the same order of relevant markets as treated by the Commission in its statement of objections and the competitive evaluation part of the current decision. The text of the commitments is joined to the decision and forms an integral part of said decision.

9.15.6.1 The wholesale Market, Import Terminals and Pipelines

Having regard to the description, TotalFina has committed to divest the following assets or activities concerning import- and inland terminals:

- the combined interest of TotalFina and Elf of 38.72% of the shares in CPA;
- the entire interest held by the Elf group of 49% of the shares in SFDM;
- the entire interest held by the Elf group of 50% in CIM. CIM as such becomes independent from the new entity;
- the entire interest directly held by the Elf group of 25.7%of the shares in DP Fos.

TotalFina looses as such control in DP Fos and conserves a non-controlling participation and the three of the six seats it held previously on the board of directors of DP Fos;

- the entire terminal in Fina Port la Nouvelle (TotalFina, southern region);
- the 51% interest in the share capital of Fina Lorient where the new entity will retain 2 of the 4 seats it held previously on the board of directors (TotalFina, West-centre region);
- the entire terminal Fina Nanterre (TotalFina, Normandie-Paris region);
- the 8.76% interest in the share capital of EPL Lyon held by the Elf group (Rhone Alpes) where the new entity will retain 5 of the 6 seats it held previously on the board of directors;
- the 6.54% interest held by TotalFina in the share capital of SES Strasbourg (Eastern region) access to the ODC pipeline.

TotalFina has undertaken to divest the following assets and/or activities concerning pipelines for refined petroleum products:

[1365] Commission Decision, *TOTALFINA / ELF*, CASE IV/M. 1628 para 345; J. P. Terhechte, (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht (1st ed.) (Bielefeld, Germany, Gieseking, 2008) § 73 marginal note 73.173, p 1868.

- the entire interest of 26.6% held by the Elf group in the share capital of Trapil TotalFina/Elf will retain a non-controlling participation of 34.5% and four of the six seats it held previously on the board of directors of Trapil;
- the entire interest of 49% held by the Elf group in the share capital of SFDM, the DMM pipeline operating company. The pipeline operating company SFDM will become independent further to the merger;
- the entire interest of 14.1% held by the Elf group and of 3.5% held by TotalFina in the share capital of SPMR. TotalFina/Elf will retain a non-controlling participation of 29% and three of the five seats it held previously on the board of directors of SPMR.

Regarding the analysis and concerning the wholesale market, the divestments proposed by TotalFina will shield, completely or partially, import and inland terminals in each of the six identified regions from control exercised by TotalFina/Elf. The storage capacities that as such have been liberated from any possible influence of TotalFina/Elf are sufficient to ensure the pressure of refined product supply as an alternative to the refined products coming from TotalFina/Elf or other refiners. In addition to that, the proposed commitments will allow the elimination of any form of control the new entity would have had on the pipelines, which can be considered as bottlenecks as to the supply of each of the regions taken into account. Thus, the supply of refined petroleum products on the wholesale market, made by TotalFina/Elf and the refiners in general, could face competition through the availability of product supply from imports, no matter whether the markets in question were national or regional.

In the southern region, the divestment of the import terminal of Port-la-Nouvelle will allow the market to open up again for imports from the western part of the French Mediterranean. The loss of control in the DP Fos import terminal is a crucial element as this terminals commands the access of import product in the SPMR pipeline-transporting product in the Rhone area up to Lyon. These two measures should reinstate the possibility for demand to choose import supplies independent from TotalFina/Elf and the other French refiners.

In the region Rhone-Alpes-Auvergne-Bourgogne, TotalFina will free storage capacity in the EP Lyon terminal. The divestiture of the stake in CPA will lead to the loss of all influence on the in land terminal of Saint Priest. The decrease of the new entity's participation in the SPMR pipeline (down to 29%) will exclude all possibility of TotalFina/Elf controlling this pipeline, even when it would seek allies among the shareholders with a small stake in this pipeline. In fact, decisions are taken by a two third majority. Demand will as such be able to have competition being exercised up to the fullest between refiners and between refiners and imports.

In the eastern region, TotalFina loses all control over the DMM pipeline and an inland terminal that is connected to the ODC and offers in the Strasbourg region the possibility of connecting three import terminals to

the ODC. The new entity will, in any case, divest its participation in CPA (38.8%), a company that equally controls the import terminal SES in Strasbourg. Concerning this terminal, the divestiture will automatically reduce its influence. TotalFina has equally proposed to renounce to its direct participation of 6.54% in the capital of SES, which, after having divested its participation in CPA, would have been a residual participation. In doing so, TotalFina/Elf loses over the supply sources and will free storage capacities in the inland terminals that should allow demand to select supply independently of the refiners.

In the northern region, where TotalFina/Elf control the only refinery present, the new entity looses its control on the DMM pipeline and a connected in land terminal. The divestiture of the stake in CPA allows to eliminate the pre-emption rights on storage capacity the new entity has in the Dunkerque import terminal. It also leads to the elimination of all possible influence on the management of CPA in this terminal. The incidental provisions should as such allow demand to select supply independently from TotalFina/Elf and the restoration of an effective competition.

In the region West-centre, TotalFina proposes to divest 51% of the import terminal situated at Lorient in Bretagne, to abandon its control over the import terminal of Donges independent together with the DMM pipeline that is connected. TotalFina/Elf will still control the only refinery in the region (Donges) but will no longer control the alternative import sources. As such, the conditions for an effective competition are reinstated.

In the Normandie-Paris region, TotalFina will abandon all control on the import terminal of CIM Havre and will, by divestment of the stake in CPA eliminate the pre-emption rights on storage capacity the new entity has in the Rouen import terminal. This divestiture also leads to the elimination of all possible influence on the management of CPA in this terminal. In addition, TotalFina/Elf looses control over the Trapil pipeline system. In addition, TotalFina has committed to sell a terminal in the North of the Paris region and the commitments on the divestiture of participations in CIM and SFDM will lead to a loss of control on three inland terminals in the South of the Paris region (CIIM Coigniere; CIM Grigny and SFDM La Ferte Alais). These incidental provisions should allow wholesale clients to obtain supply, without being dependent upon TotalFina/Elf and the other refiners. The incidental provisions will also safeguard the existence of accessible inland terminals not controlled by the new entity.

As to the commitments to give up seats on the board of directors, these will be (with the exception to the seat liberated in EPL) the result of commitments covering the total divestiture of certain participations (as the case in CPA) or the loss of control (as the case for SPMR, Trapil, CIM, SFDM, Lorient and DP Fos) the sale of the EPL stake will not be accompanied by a concurrent storage capacity but rather a loss of control over this terminal. The commitment to abandon a director's seat does not nullify the control of this terminal in the hands of

TotalFina/Elf, as the latter would retain the majority in the general assembly. As such the Commission takes not of TotalFina/Elf's intention to abandon a seat on the board of directors in EPL, without this being a condition for declaring the operation compatible with the common market.

As regards the markets for the provision of services for storage capacity in import terminals connected to means of bulk transport, the undertakings offered by TotalFina will completely eliminate the overlap and should allow competition to be reinstated.

Concerning the markets for the provision of transport services of refined petroleum products by pipeline, the proposed commitments completely eliminate the overlap by selling SFDM and by divesting the participation Elf held in Trapil and SPMR. These remedies should allow competition to be reinstated.

The market test conducted by the Commission has confirmed that the proposed commitments will allow effective and lasting competition to be reinstated on the wholesale market, the markets for the provision of services for storage capacity in import terminals connected to means of bulk transport and the markets for the provision of transport services of refined petroleum products by pipeline. Certain third parties have stressed the importance of the storage capacity rights held by TotalFina and Elf in certain geographically confined areas, such as certain parts of Bretagne for heating oil, and the absence of any commitments on these positions held by the new entity. However, the proposed remedies will free sufficient import- or inland storage capacities to allow demand to find supplies independently from the French refiners (and particularly, the new entity).

9.15.6.2 Sale of Motor Fuels on Highways

Concerning description, TotalFina has committed to divest 70 service stations situated on motorways included in the relevant market as defined in this decision. These stations are name-tagged and comprise 35 Elf stations, 27 Total and 8 of Fina brand. The choice of these stations takes the problems into account.

Should the divestment of certain service stations fail to take place as foreseen, because of refusal of the highway concession holder or a lessee manager to agree, then the notifying party has committed itself either to sell to another buyer, or to replace the station in question with another station. When such substitution is applied, the notifying party will have to propose an equivalent (similar in terms of sales, geographical location and the contractual terms of the concession). In all cases, the Commission has to agree and the notifying party has committed itself to consult the French authorities dealing with competition issues.

Regarding the analysis, further to the operation, Elf would contribute 77 stations to the new entity, which means that the overlap is nearly completely eliminated. This is equally the case when calculated on the basis of volumes sold.

Regarding the possibility to substitute a service station with another one in case of refusal by a third party, the measures proposed by TotalFina should allow the proposed remedies to have their full effect. The Commission has taken note of the parties' intention, to consult the French authorities in such case.

The market test has confirmed that, on condition that the purchaser of the divested service stations can rely on independent supply capacity, competition on the market for the sale of motor fuels on highways will be reinstated. A number of third parties have estimated that the divestment would not be sufficient. One of these companies has based this consideration on a market definition stretched to service stations that have not been concluded in the relevant market definition as adopted by the Commission. As such, these operations cannot be retained. Other third parties have indicated that TotalFina and Elf offer private card access to their network and that as such a considerable part of the customer base of the divested service stations will remain customer to the new entity, resulting in amputating significantly the sales volume of a given retail station and increasing the market power of the new entity. TotalFina has informed the Commission that sales made through private cards is around a specified amount of the total volume. As an answer to competitors' fears that the divested service stations sales volume would be significantly reduced, TotalFina has committed to offer the acquirer the possibility to integrate TFE's private card system for a period of 3 years, in case the acquirer would not have such a private card system or would not belong to a private card network regrouping multiple retailers. The Commission considers that the commitment, proposed by TotalFina, relating to private cards should allow the acquirer to maintain the volume of sales in the divested service stations and should provide sufficient time for the acquirer to initiate proper incentives towards the customer base.

9.15.6.3 Sale of Aviation Fuels

Regarding the description, TotalFina commits to divest the 50% participation held by Elf in the supply group GAT (Toulouse) and the 50% participation held by Elf in GALYS (Lyon).

Concerning the analysis, the incidental provision proposed eliminates as such the overlap between Elf and TotalFina entirely on the two markets concerned. The market test has indicated that the proposed remedies can lead to restore an effective and lasting competitive situation.

9.15.6.4 LPG

Concerning the description, the incidental provisions proposed by TotalFina consisted at first in (i) reinstalling the structural independence of direct competitors, (ii) opening up LPG import terminals Norgal at Le Havre, Geogaz in the South, Cobogal in Bordeaux and other logistic facilities (two bottling facilities respectively in the

South and West of France), and (iii) divest customer base with the associated logistic assets for small volumes bulk in the Southern half of France.

The proposals concerning the LPG were not considered by the market test to be sufficient to warrant an immediate restoration of effective and lasting competition. First, there was uncertainty as to the legal capacity of TotalFina offering to sell capacity in the NORGAL terminal rather than a stake. Secondly, each of the stakes offered for divestiture was not big enough to enable autonomous and economical supplies from large size ships. Thirdly, the sum of the volumes offered was merely enough to supply the needs of the divested customer base and of Air Liquide. Fourthly, as regards the sale of conditioned LPG, the proposal did not provide any customer base whereas the majority of sales are made with supermarkets that, as a condition for retailing the product, demand substantial sums. Finally, it was not sure whether the customer base offered for divestiture could benefit from the same logistics as was previously the case within the Elf group.

In reply to the results of the market test, TotalFina proposed a set of modified incidental provisions, consisting essentially of increased import capacities offered for divestiture. These capacities were substantial but could not address the other issues raised in relation to conditioned LPG. At best, the modified remedies would have achieved less dependency for the actual competitors. However, given the concentrated structure of the markets, competitors would have an incentive to follow a price increase initiated by TotalFina/Elf rather than seeking to increase their market shares. The entry of new competitors in the market being highly unlikely, the modified remedies could not have led to a restoration of competition conditions. The uncertainties related to the effect of the remedies were aggravated by the dispersion of the proposed divestments which could as such not ensure an effect, similar to the one achieved through a global divestment, and would have probably led to creating entities dependent on the incumbents on the market.

Replying to the serious doubts the Commission had expressed on the modified remedies, the notifying party has withdrawn its preceding offer and has offered to divest the whole of Elf's LPG activities in France. These activities are essentially regrouped in the company Elf Antargaz but also include assets owned by other entities within the Elf group. Some of the assets of Elf Antargaz are not linked to LPG activities in France and will remain within the merged company. Finally, the storage facilities of Donges and Lacq being linked either to the Donges refinery or the natural gas field of Lacq, will remain within the combined entity. In parallel to this divestiture, the notifying party undertakes to maintain the supply arrangements at the Norgal and Cobogal import terminals and to supply the divested business, on a non-exclusive basis for several years. Finally, as a minority shareholder in Vitogaz, TotalFina/Elf has committed not to oppose to the latter presenting itself as

acquirer of Elf Antargaz. In case such offer would be retained, TotalFina/Elf commits to sell its participation to Vitogaz.

Having regard to the analysis, because of its late submission, the proposal to divest Elf Antargaz could not be market tested. However, there can be no reasonable doubts given its importance and given the full function nature of Elf Antargaz, that this commitment can lead to the immediate restoration of effective and lasting competition. In addition, Elf Antargaz is an important market player for each of the three uses of LPG: conditioned, small bulk LPG and medium and large bulk LPG. As a whole, even if a combined TotalFina/Elf would surpass Total's initial level thanks to the combination of refining capacity and the Donges and Lacq infrastructure, their new market share level would not be one of dominance whereas the total number of competitors on the market will have been maintained.

9.15.6.5 Modalities for Applying the Proposed Remedies

Regarding deadlines, the time scale proposed by TotalFina to apply the commitments is a specified period. In case TotalFina/Elf has accomplished signing an irrevocable within this deadline, a trustee will be charged with selling of the assets in question during a new timescale of a specified duration. This time scale seems acceptable on the basis of the Commission's practice and the particular characteristics of these commitments, as there are a significant number of assets to be divested and many different configurations that these divestitures can take (certain purchasers could show interest in sets of assets).

Concerning a trustee, the notifying party will appoint, subject to approval from the Commission the trustee who will be in charge of monitoring the compliance with the incidental provisions.

Regarding hold separate, it is common practice that the notifying party commits itself, for the period between the date of the decision taken by the Commission and the actual divestment, to manage the assets, due to be divested, on a hold separate basis. Such commitment has a dual objective on the one hand to ensure that the commercial and competitive value of the assets will be maintained during this period and on the other hand to ensure that a combination, even if limited in time, would not lead to an alteration of the competition conditions on the relevant markets.

The incidental provisions submitted by the notifying party limit information exchange at each level of the assets to be disposed. They provide all necessary measures will be taken to avoid divulgation of confidential information. Personnel seconded to the entities to be divested will have to choose between TotalFina/Elf and the entity being divested. The incidental provisions make a distinction according to the nature of the divestment for the representation of the notifying party on the board of the divested entities.

As to the sale of stakes in companies, TotalFina/Elf will replace the board members with the trustee. Board members originating from TotalFina or Elf and who are present personae at the board will provide the trustee with a power to vote. There will therefore be only very limited possibilities for the merged entity to either influence the businesses to be divested or to benefit from confidential information.

It must be noted that the notifying party will keep its position as chairman in CIM and SFDM as well as its position of executive director in SFDM. However, the trustee will approve in advance all important management decisions and monitor the day—to-day management. The trustee will thus position himself between CIM and SFDM and TotalFina/Elf.

The trustee will take all decision relating to the commercial management of the import terminal Port la Nouvelle and the motorway service stations. The notifying party will ensure the administrative and technical management of these assets. This provision appears proportionate, notably because of the integration of these entities within the TotalFina/Elf groups.

Regarding non-solicitation clauses, the proposed commitments foresee a non-solicitation clause concerning the customer base of the divested terminals and the Elf Antargaz business and for the totality of the personnel. This clause should ensure the purchaser of the necessary conditions to establish the purchased assets in an effective and lasting manner on the markets in question.

The commitments contain a non-repurchase clause for a given period for the whole of the divested assets. Hence, TotalFina/Elf could only marginally adjust the fullness of the commitments by repurchasing certain assets. In fact, the analysis of the effect of the proposed remedies is based on the combined effect of the remedies and could not artificially separate each of the divestiture elements.

Concerning the nature of the purchaser and organisation of the divestment process, the notifying party has stressed, when addressing the proposed commitments that in so far as she has provided to the Commission all elements necessary for verifying that an effective and lasting competition will be immediately restored, she considers herself to be free to (i) sell the totality or a significant part of the assets to be divested in one or multiple operations to one single purchaser and (ii) to initiate exchanges with comparable assets located outside France.

Many of the third parties questioned have expressed reserves on this discretion, as expressed by TotalFina in its proposed commitments. These third parties have notably expressed fears that a new entrant, through exchange deals with TotalFina/Elf, would have only very limited incentives to compete with the combined entity because of common interests or multiple contacts on the distinct markets. Equally so, certain third companies have explained that, regarding the commitments for the wholesale market and logistics, a divestiture of the assets in

one or multiple operations to one single purchaser would not lead to the desired opening of the wholesale market needed for counterbalancing the combined refining capacity of the new entity.

As may be seen from the analysis, TotalFina/Elf and its competitor refiners (Shell, BP Amoco and ExxonMobil) share common interests in the wholesale market, and notably face competition from the non integrated retailers in the market (essentially supermarkets). Under these circumstances, if one or all of these players would be chosen by the notifying party or the trustee to acquire the assets up for divestment in the wholesale market, the markets for the provision of services for storage capacity in import terminals connected to means of bulk transport and the markets for the provision of transport services of refined petroleum products by pipeline, the Commission will take these elements into account when evaluating the proposal. The eventual application of other refiners will notably have to be appreciated in the light of the referred to analysis and, if the case, in the light of the contacts these other refiners could have with TotalFina/Elf on other markets.

Equally the Commission will take into account the already very concentrated nature of the market for the sale of motor fuels on highways, and its oligopolistic market structure based on collective dominance, if BP Amoco, Shell and ExxonMobil would be proposed by the notifying party or the trustee to acquire service stations on motorways. The remarks concerning the application of other refiners in the preceding paragraph also apply to this market.

In general, the notifying party has committed not to sell assets up for divestiture to an entity in which it has a significant influence. This clause has to allow complete independence from the acquirer(s).

9.15.7 Conclusion

The commitments proposed by the notifying party seem to be of such nature that they will lead to the immediate restoration of an effective and lasting competition on the markets in question. The majority of the commitments has to be considered as necessary to this effect. As such, leaving aside the elements which the Commission has merely noted (liberation of a director's seat on the board of EPL (Lyon), modalities for the divestment of the assets foreseen of the commitments; and consultation of the French authorities in the case of substitution of the offer of service stations on the motorways as provided for in a specified paragraph (37 (h)) of the commitments) compliance with the entirety of the commitments submitted to the Commission is a condition for the approval of the concentration project.

On condition that the commitments annexed to the decision are fully complied with, the concentration notified between TotalFina and Elf Aquitaine is declared compatible with the common market and the functioning of the EEA agreement. The Commission applied the HHI-test[1366].

9.15.8 Annex 1

Regarding common procedures for the implementation of commitments and the nature of the transferee, in order to maintain effective competition on the affected markets the notifying party undertakes to divest the assets which are the object of the present commitments (hereinafter the assets) to one or more transferees which fulfill the following conditions:

Neither of the TotalFina or Elf groups shall have a material interest either direct or indirect, in the transferee(s); Nonetheless, this provision shall not prevent those companies in which TotalFina or Elf holds material interests which the notifying party undertakes fully to divest in accordance with the present commitments from acquiring some or all of the assets. In this regard, the notifying party undertakes not to oppose, either directly or indirectly, the candidacy of one or other of such companies or the adoption by them of the measures necessary for implementing such candidacy.

The transferee(s) shall be viable operators, either potentially or currently active on the markets in question, capable of maintaining or developing effective competition;

The transferee(s) shall have obtained or shall be reasonably likely to obtain all the necessary authorisations for the acquisition and exploitation of the assets.

The notifying party shall submit to the Commission as soon as possible:

- the draft information document(s) concerning the divestiture of each category of assets (refined product depots; interests in pipelines;
- motorway service stations;
- assets in the LPG sector), to be transferred to potential purchasers;
- the list of potential purchasers, which the notifying party intends to contact.

If the Commission does not pronounce upon the documents in question within five working days from the date of their submission, such documents shall be deemed to be accepted by the Commission.

Subject to the Commission's approval of the transferees and of the specific procedures set out below for assets related to storage and to transportation of refined products and for motorway service stations, the transferee(s) in relation to all or parts of the assets may be:

[1366] I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.16 (1) (a) (i) p 708.

- operators established outside France using or holding substantial interests in activities in the petrol sector (producing, refining, storage, promotion and sale) or more widely in the energy field, or financial institutions;
- entrepositaires agrees or financial institutions established in France.

The selection of the transferee(s) shall be subject to the approval of the Commission. The request for approval of the transferee(s) shall include the necessary information to permit the Commission to verify that the proposed transferee(s) meet the condition indicated in paragraph 1 above. The Commission shall inform the notifying party of its approval or rejection of the proposed candidates for transferees within 10 days from the date of submission of the request for approval of the proposed transferee(s). The absence of a response from the Commission within 10 days shall be considered as an exceptional circumstance within the meaning of paragraph 6 below.

Regarding the time limit, the notifying party undertakes to conclude irrevocable divestiture agreements related to the assets within a specified period from the date of receipt of this decision authorising the merger owing to Art. 8 II MR1989 (hereinafter the first time limit). The transfer of the assets shall become effective within a maximum of several days following the conclusion of the divestiture agreement (hereinafter the 2nd time limit)

In the event of exceptional circumstances, which prevent the conclusion of the divestiture, agreement or the effective divestiture, the first or second time limit may be extended at the discretion of the Commission and upon the duly justified request of the notifying party.

Any request for extension of he first time limit shall be presented to the Commission by the end of a specified period of the first time limit at the latest. Any request for extension of the 2nd time limit shall be presented by a specified amount of days of the second time limit at the latest. The Commission will issue its decision on the request for an extension within 8 days from the date of its submission, and the absence of reaction from the Commission at the end of the 8 days shall not be considered as tacit acceptance by the Commission of the request for an extension.

Regarding divestiture of the assets, as long as the notifying party has provided to the Commission the means of ensuring that the divestiture is of such a nature as to immediately re-establish effective and long-lasting competition:

The notifying pare shall be free to proceed with the sale of the assets according to the conditions and procedures of its choice.

It may divest all, or a significant part, of the assets in either one or several operations, to a single transferee.

It shall also be entitled to proceed with the divestiture of assets by means of exchange of assets of the same or a different nature outside France.

The notifying party undertakes to regain control of the assets during a given period from the date of divestiture of the assets in question.

Having regard to the subject matter of the divestiture, without prejudice to the supplementary details provided below concerning certain particular assets (motorway service stations) the assets bellow shall be divested as autonomous operational entities. For this purpose, the assets shall include tangible assets (land, buildings and other property, fixtures) and intangible assets (customers, computer databases, contracts, authorisations and permits), which are necessary for the management of the assets in question and to enable the transferee to compete effectively. The personnel employed directly within the assets will be divested with the assets in question in accordance with the French labour code (Art. L . 122-12).

The notifying party undertakes no to solicit the employment of personnel transferred with the assets during a specified period from the date of the divestiture of the assets in question. The notifying party shall make its best efforts to encourage the personnel not to resign from their employment before the date of divestiture.

Concerning the preservation of conditions of competition and of the value of assets until divestiture, the notifying party undertakes to preserve the full economic and competitive value of the assets until the date of divestiture of the assets, in accordance with good commercial practices and to the extent possible with the means at its disposal under the present commitments.

In particular, the notifying party undertakes not to carry out upon its own authority, which may have a significant impact on the economic value, the management or the competitiveness of the assets until the date of divestiture of the assets.

Moreover, the notifying party undertakes to put in place the necessary measures to avoid the disclosure of confidential information concerning the assets within the TotalFina or Elf groups or to third parties, with the exception of information necessary for the divestiture of these assets in the best possible conditions in accordance with the present commitments.

As regards the personnel from the TotalFina and Elf groups which are seconded to the assets, the notifying party undertakes within a specified period of time from the date of receipt of the decision approving the merger, to invite such members of the personnel to choose between the possibility of either resigning from their post within the TotalFina or Elf groups in which case the letter shall make their best efforts for them to be employed within the assets concerned, or being reintegrated within the TotalFina or Elf groups, in which case the latter

shall make their best efforts to replace such personnel with individuals who are independent from the TotalFina and Elf groups.

The notifying party shall provide to the trustee referred to below all the means necessary and all information, which the trustee considers useful for the purpose of enabling the trustee to be informed of the ongoing management of the assets.

Regarding the trustee, within eight days following receipt of the decision approving the merger under Art. 8 II MR1989, the notifying party shall propose the names of three trustees to the Commission and shall provide to it a draft mandate in accordance with the provisions of the present commitments which shall include, in particular, the details of the proposed method of payment of the trustee.

The Commission shall issue its decision on the proposed trustee and on the draft mandate within 8 days of receiving the proposal.

The Commission may, within the time limit specified, approve or reject one, two or all three of the trustees proposed. If only one of the three trustees proposed is approved by the Commission, that trustee shall be appointed by the notifying party. If more than one trustee is approved by the Commission, the notifying party shall appoint one of them as trustee as its own choice. If all the trustees are rejected by the Commission, the Commission shall select a trustee, which shall be appointed by the notifying party.

The notifying party shall amend the draft mandate if the Commission so requests.

In the absence of a response from the Commission to the proposal from the notifying party within 8 days from the date of its receipt, the names of the three trustees and the draft mandate put forward shall be deemed to be accepted by the Commission.

The trustee shall be appointed by the notifying party within five working days following the approval by the Commission. The remuneration of the trustee shall be agreed between the trustee and the notifying party.

When the mandate is signed, the notifying party may make no further modification to the mandate without the approval of the Commission. At the request of the trustee, the Commission may require the amendment of the mandate if it is shown that it does not permit the trustee to full carry out the tasks given to it.

The trustee's assignment shall be to:

- ensure that the notifying party maintains the viability and saleability of the assets and continues the management and operation of the assets, in the ordinary course of trade and in accordance with past practice, until the date of effective divestiture of the assets;
- report on a regular basis to the Commission on the state of implementation of the commitments specified above and on the execution of the trustee's tasks.

For this purpose, the trustee shall draw up a confidential report every four weeks and submit it to the Commission in the five working days following each period, or at request of the Commission.

The report shall cover the following points, in particular: confirm that the assets are managed in a manner such as to preserve their full economic and competitive value; indicate the steps taken with a view to the execution of the commitments, the reaction of third parties contacted (potential transferees, third parties with rights of consent and/or pre-emption rights, labour organisations and administrative authorities) and the state of formalisation of the acts of divestiture; and identify, if necessary, the aspects of the mandate which the trustee has not been able to fulfill and the reasons justifying the non-execution of the mandate in this respect.

A non-confidential version of the report submitted to the Commission by the trustee shall also be sent to the notifying party.

As regards shareholdings in the companies which the notifying party undertakes to divest and the seats on the boards of directors which the notifying party undertakes to vacate: subject to the provision below, exercise the voting rights attached to the shareholdings to be divested and to take the place of the director(s) holding the seats to be vacated or to obtain on their behalf a proxy, it being specified that one SFDM director's seat to be vacated shall not be taken by the trustee or be subject to a proxy issued to the trustee and that, in such a case, the director in question shall give a proxy to the president of SFDM in accordance with the instructions of the trustee; to exercise the powers invested in those people whose board seats he has taken or those who gave him a proxy. In the completion of this task in the areas concerning significant sales of assets, payment of dividends, company dissolution, new share issues and increases or reductions in capital, the trustee shall take into account the protection of the financial interests of the notifying party on such matters without communicating to him any confidential information, on condition that the primary obligation of ensuring that the company in question remains a viable entity is not prejudiced.

Should the trustee consider it useful, request whichever of the TotalFina or Elf groups is owner of the shareholding to be divested and / or the directors whose board seats must be vacated pursuant to the present commitments to be present at the entire or part of the proceedings of the general shareholder meeting on condition that they do not communicate confidential information concerning the company in question to the TotalFina or Elf group.

As regards CIM and SFDM where the notifying party holds the presidency of the board of directors (CIM and SFDM) and the position of managing director (SFDM), give prior approval to acts of general policy and strategic decisions and to supervise the daily management actions carried out by the president of the board and the managing director of the companies in question, with the purpose of ensuring that the assets relevant thereto

are managed in a manner such as to preserve their full economic and competitive value, without communicating any confidential information to the notifying party.

As regards assets other than company shareholdings, take all decisions relating to the commercial activities of the assets to be divested within the currently existing management structures until the date of effective divestiture of the assets in question, it being understood that the notifying party shall ensure the ongoing administrative and technical management of the assets (such as payment of salaries, regular technical inspections, etc.) in accordance with past practice, under the supervision of the trustee;

- ensure that the assets in question are utilised in the ordinary course of trade;
- ensure that measures have been taken in order that no information concerning the assets in question, which is sensitive from a competition standpoint, is communicated to the notifying party, with the exception of information, which is necessary for the divestiture of those assets according to the best possible conditions and in accordance with these commitments;
- in general, ensure that the full economic and competitive value of the assets is preserved and to take all necessary measures for this task;
- and in general, verify the satisfactory completion of the present commitments by the notifying party.

In the case of failure by the notifying party to carry out the commitments in the time-limit specified above, the trustee shall be charged with taking up negotiations with interested third parties, for the purpose of, as a trustee, selling the assets in good faith at the best possible price to a transferee approved by the Commission.

If the notifying party fails to substantially respect its commitments, the Commission may supplement the trustee's task as set out above, in order to provide the trustee within every possibility of ensuring that the commitments are respected.

The notifying party undertakes to provide to the trustee all reasonable assistance as well as all information necessary for the execution of his task, as described above. The notifying party shall make available to the trustee one or several offices on its premises or in the premises of the entities subject to the present commitments. The notifying party shall hold regular meeting with the trustee, either orally or in document form, with all information necessary for the completion of his task. At the request of the trustee, the notifying party shall provide the trustee with access to sites, which are being divested.

As soon as the tasks given to him are completed, the notifying party shall request the Commission to be allowed to discharge the trustee from his assignment. The Commission may, nevertheless, require the re-appointment of the trustee if it later appears that the commitments have not been completely carried out.

Regarding substance and implementation of the commitments concerning the market for the off-network sale of refined products and depot logistics and the substance of commitments, the notifying party undertakes to divest:

- the entire interest of 38.72% held by BTT, a 50/50 jointly controlled subsidiary of TotalFina and Elf groups, in the share capital of CPA, owner of, or holder of an interest in, the following depots:
- CPA Rouen (Normandy and Paris region);
- CPA Dunkerque (northern region);
- Stockbrest (western region);
- CPA Saint Priest (Rhone-Alpes);
- and SES Strasbourg;
- The entire interest of 49% held by the Elf group in the share capital of SFDM, a company operating, in addition to the DMM pipeline, 4 depots: SFDM Donges, SFDM La Ferte Alais, SFDM Vatry la Chaussee sur Marne and SFDM Sain Baussant;
- The entire interest of 50% held by the Elf group, In the share capital of CIM which is the owner of 3 depots: CIM Le Havre, CIM Coignieres and CIM Grigny;

The entire interest of 15.07% directly held by the Elf group in the share capital of DP Fos Import, shareholder with an interest of 10.63% of the share capital in DP Fos;

The companies Fina Port La Nouvelle and Fina Nanterre;

The 51% interest in the share capital of Fina Lorient;

The 8.76% interest held by the Elf group in the share capital of EPL Lyon;

The 6.54 % interest held by TotalFina group in the share capital of SES Strasbourg, in whose depot TotalFina/Elf shall no longer hold an interest.

The notifying party undertakes to relinquish at the latest between the end of the trustee's mandate and the effective divestiture of the assets in question:

- the 3 seats held by TotalFina and Elf groups on the board of directors of CPA;
- the 3 seats held by the Elf group on the board of directors of CIM;
- three of the six seats held by TotalFina and Elf groups on the board of directors of DP Fos;
- the three seats held by TotalFina group on the board of directors of Nanterre;
- the three seats held by TotalFina group on the board of directors Port La Nouvelle;
- two of the 4 seats held by TotalFina on the board of directors Fina Lorient;
- one of the six seats held by the Elf group on the board of directors of EPL.

The notifying party undertakes, for a specified periods from the date of divestiture of the depot in question, not to solicit customers of the depots which are the object of the present commitments in which, following the completion of the above commitments, TotalFina/Elf shall no longer hold any ownership interest in order to propose to such customers lease contracts or rights of passage in depots owned by TotalFina/Elf, or in which TotalFina/Elf holds an interest, and which are located within the customer area of the depots specified in the present commitments.

Concerning the means of implementation and as regards the implementation of the commitments set out above, the notifying party makes reference to the common procedures described above and adds the following points:

As soon as the notifying party receives the decision approving the merger and approval of the information document specified above, it shall consult the various operators both outside and within France that may be interested in the acquisition of all or part of the assets in question and shall provide them with the technical, environmental, contractual, commercial and financial data and specifications enabling them to make an offer.

The name of the proposed acquirers of all or part of the assets in question shall be subject to the approval of the Commission according to the conditions laid down in the common procedures and subject to the rights of consent and of pre-emption provided by the articles of association of CPA, SFDM, CIM, DP Fos and Fos Import, EPL and SES.

It is recalled that as regards SFDM and CIM, the acquirer(s) of the divested assets must also be approved by the relevant government commissioners and the authority granting the exploitation right (the government for SFDM and Le Havre Port authority for CIM).

Having regard the substance and implementation of the commitments concerning the markets for the off-network sale of refined products: pipelines for finished products and the substance of the commitments, the notifying party undertakes to divest:

- the entire interest of 26.6% held by the Elf group in the share capital of Trapil;
- the entire interest of 49% held by the Elf group in the share capital of SFDM, the DMM pipeline operating company;
- the entire interest of 14.1% held by the Elf group and an interest of 3.5% held by TotalFina in the share capital of SPMR.

The notifying party undertakes to make, within a specified period from the date of receipt of the decision approving the merger, a proposal to the GIE Groupement Petrolier de Strasbourg (GPS) to offer access through pipes owned by GPS which link ODC with SPLS to all operators in the area (SES, Bollore, Propetrol) which make such a request, within the capacity limits of the pipes, and to vote in favour of this proposal; it being

specified that any disagreement over the utilisation of capacity of GPS pipes shall be put before an expert jointly appointed by he parties in question and, in the absence thereof, before the commercial court of Strasbourg;

at the same time to make a proposal to SPLS to carry out as soon as possible the necessary works to open-up SPLS's pipes in order to enable the operators identified above within the area to transport their products coming from and going to the ODC without having to make use of SPLS' tanks, and to vote in favour of this proposal; and to carry out the collective treatment of all contaminated products on the site of the GPS resulting from the traffic of all operators, immediately after completion of the above work.

The notifying party undertakes to vacate, at the latest between the end of the trustee's mandate and the date of effective divestiture of the asset in question:

- two out of six seats on the board of directors of Trapil which comprises ten in total;
- two out of five seats on the board of directors of SPMR which comprises ten in total;
- four seats held by Elf on the board of directors of SFDM which comprises eight in total.

The notifying party also undertakes not to increase the level of representation of TotalFina/Elf on the boards of directors of Trapil and SPMR, as it results from the implementation of the above commitments, during a specified period from the date of the board seats specified above are vacated. In case of alteration of the total number of seats on the board of directors of Trapil and/or SPMR, the number of seats held by TotalFina/Elf will be modified in due proportion with the above, the total, if necessary, being rounded down without this figure being less than one.

Concerning the means of implementation, as regards the implementation of the commitments set out above, the notifying party makes reference to the common procedures described above and adds the following details:

As soon as the notifying party receives the decision approving the merger and the approval of the information document specified above, as indicated in the common procedures, it shall consult the various operators both outside and within France that may be interested in the acquisition of all or part of the assets in question and shall provide them with the technical, environmental, commercial and financial data and specifications enabling them to make an offer.

The name of the candidates for the acquisition of all or part of the assets in question shall be subject to the approval of the Commission according to the conditions laid down in the common procedures and subject to the rights of consent and of pre-emption provided by the articles of association of Trapil, SPMR and SFDM, as well as the agreement of the government commissioners.

Regarding substance and implementation of the commitments concerning the market for the sale of petrol on motorways and the substance of the commitments, the notifying party undertakes to divest seventy Elf, Total and Fina service stations on motorways which fall within the market definition as provided by the Commission. They shall comprise 35 Elf, 26 Total and 9 Fina stations.

Concerning the means of implementation, as regards the means of implementation of the commitments set out above, the notifying party refers to the common procedures described above, and adds the following details thereto:

As soon as the notifying party receives the decision approving the merger and the approval of the information document, it shall consult the various operators as specified in the common procedures, both outside and within France, that may be interested in the acquisition of the assets being divested. The notifying party shall supply to operators that may be interested in purchasing the assets being divested, the contractual, environmental, commercial, technical and financial data and specifications relating to the service stations in question in order that they may draw up such offers.

The divestiture of the service stations shall be completed through the assignment for valuable consideration of the exploitation licence granted by the motorway operators as well as installations, fixtures, equipment, machinery and tools which are essential for their operation. The personnel employed directly at the points of sale shall be transferred with the service stations. The notifying party specified that the only tangible and intangible assets located on or used at the service stations in question which shall not be transferred, are those assets related to intellectual property rights and know-how and, in particular, the notifying party's branded assets and software management systems.

In order to ensure the immediate re-establishment of effective and long-lasting competition, the notifying party undertakes to propose to purchasers of all or some of the divested service stations, to transfer to them a sufficient number of administrative, commercial and accounting management personnel. The number, functions and conditions of transfer of these employees shall be determined on a case-by-case basis in accordance with, in particular, the wishes of the purchasers, the number of stations being acquired and the means of management that they intend to use (direct management or location-gerance agreement). In addition, the notifying party undertakes to notify the purchasers of stations of the possibility of concluding with them, on a temporary base, administrative management contracts with regard to the points of sale in question until such time as they have set up their own management infrastructure. The notifying party undertakes to conclude such contracts with those purchasers that request it. Until the date of effective transfer of the service stations in question, the notifying party undertakes to supply such stations at internal transfer prices. During the same

period, the sale price of petrol in the stations in question shall be fixed by the trustee on the basis of Platt's quotations and profit targets which he will determine with a view to maintaining the viability, competitiveness and saleability of the said stations.

The notifying party undertakes to inform the transferee of the possibility of allowing holders of the TotalFina GR and Eurotrafic cards and Elf credit and pan cards to use their cards for a maximum period from the date of effective transfer of the service station in question in those divested stations where such cards are accepted at the date of notification of the decision approving the merger, on condition that the transferee does not already operate a card system for the sale of petrol which competes directly with the TotalFina and Elf cards indicated above and that he complies with the management principles in relation to the cards in question such as established by contract with a subsidiary of TRDSA SA (definition of products and services provided by the card, technological, financial, administrative and commercial specifications concerning the card system, responsibilities and complaints, invoicing and payment of suppliers, debt collection, processing costs and administration, commercial and financial procedures, duration and clause providing for allocation of competence). Should the transferee so request, the notifying party undertakes to conclude with him an agreement for the purpose of allowing holders of the cards in question to use them in stations divested during a maximum period from the date of effective transfer of the service station in question, to the extent that and for as long as the conditions specified in the above indent remain fulfilled. The notifying party specifies that it shall not influence the terms or conditions of sale of petrol and other products in the transferred stations by means of the card system in use at such stations and that, in any event, this condition takes precedence over the consequences resulting from membership of the transferee(s) in the card management system. As regards other than those of the TotalFina and Elf groups, such as the DKV and UTA cards, used in the divested stations, the notifying party undertakes to carry out the steps specified above.

Any potential purchaser of all or some of the service stations shall be capable of meeting the requirements of the terms and conditions and the consultation regulations imposed by the motorway operator companies. As a result, those operators intending to make a purchase offer, in addition to the conditions set out in the common procedures above, must be capable of showing their direct or indirect experience in the operation of a service station network of any type.

Offers made by potential purchaser may target either a single station, a group of stations or all the stations subject to the present commitment. The offers may include, either in whole or in part, proposals for exchange of assets, either of the same nature or not, outside France. In the event of receiving equivalent offers, the notifying

party reserves the right to give priority to those offers covering the entire network or a significant number of stations, as well as to those offers including proposals to exchange assets.

In order to facilitate completion of this commitment, any offer to acquire five or more service stations shall include a proportionate number of stations whose exploitation licence comes to an end in or before 2005. The notifying party may also give priority to offers of five or more stations over offers for four or less stations which do not include the obligation set out in the preceding sentence.

The notifying party shall present the purchase offer or offers which it has retained for the approval, on the one hand, of the motorway operator companies in question and, on the other hand, of the lessee holder managers which may be concerned. In case of refusal by the motorway operator company and/or he lease-holder manager, the notifying party may either propose or swap the service station in question with another service station or put forward the approval the potential purchaser which had made the second best offer. For this purpose, the notifying party shall present a duly documented and supported request to the Commission. The notifying party shall also make contact with the French competition authorities. If the Commission does not reject this request in writing within ten working days after receiving it, the proposal of the notifying party shall be considered as accepted. In the event that service stations are to be swapped, the notifying party confirms that the new station that will be proposed shall have the same characteristics as the first station and, In particular, an equivalent volume of sales of petrol, an equivalent turnover in other products and a similar date of expiry of its exploitation permit and shall be located in the same area. Moreover, the swapping of service stations shall not affect the overall economic and competitive value of the initial proposal.

It will be for the transferees, in agreement with the motorway operators in question, to carry out the works required for the transfer of the exploitation licence.

Regarding the substance and implementation of the commitments concerning the market for the sale of aviation fuels at Toulouse-Blagnac and Lyon-Satolas and the substance of the commitments, the notifying party undertakes to divest

- the 50% interest held by Elf in GAT (Toulouse-Blagnac); and
- the 50% interest held by Elf in Galys (Lyon Satolas).

As regards the means of implementation of the commitments set out above, the notifying party refers to the common procedures described above and adds the following details thereto:

As soon as the notifying party receives the decision approving the merger, it shall consult the various operators referred to in the common procedures, both outside and within France, that may be interested in the acquisition of all or part of the assets in question. The notifying party shall supply to operators that may be interested in

purchasing the assets being divested, the contractual, environmental, commercial, technical and financial data and specification relating to membership on GAT and GALYS in order that they may draw up such offers.

The transferee shall fulfill the objective conditions for admission as provided for in the articles of association of GAT and GALYS.

Regarding the substance and implementation of the commitments concerning the LPG market and the substance of the commitments, the notifying party undertakes:

To divest 100% of the shareholding held by Elf in Elf Antargaz, a company having as its object the marketing of LPG, with respect to its LPG operation in the metropolitan areas of France.

The following shall be excluded from the present divestiture: the shareholding held by Elf Antargaz in those subsidiaries operating in the LPG sector outside metropolitan France; the shareholdings held by Elf Antargaz on behalf of Elf Antar France in companies in France or abroad which are not active in the LPG sector. Before the transfer of shares in Elf Antargaz takes effect, the notifying party shall transfer the exempted shareholdings, as indicated above, to Elf Antar France. This transfer shall be subject to the prior approval of the trustee who shall consult the Commission.

The divestiture of the Elf Antargaz shares, in addition to the assets and companies directly and entirely owned by Elf Antargaz, also includes the shareholdings held by Elf Antargaz in the following companies in France: GIE Norgal: 52.67%. The notifying party, prior to the divestiture, shall put forward and vote in favour of an amendment of the articles of association of NORGAL for the purpose of setting out in the articles the rules on the current allocation of capacity of NORGAL, as described in Annex II to the present commitments. The notifying party undertakes to continue the pooling contract, established for the purpose of procurement with the other current shareholder in NORGAL for a given period from the date of effective transfer of the depot, and if the transferee so requests and if the other NORGAL shareholder is in agreement, to admit the transferee to the pool. Rhone Gaz SA: 50.62%; Sigap-Ouest SARL: 66.67%; Wogegal SA: 100%; Gaz Est distribution SA: 100%; Nord GPL SA: 100%; GIE Floregaz: 90%; Midi Pyrenees Gaz SA: 75%; Cobogal SA: 15%. The notifying party undertakes to carry out for a given period from the date of the effective transfer of shares the common procurement contract with the other current shareholder in Cobogal. The notifying party undertakes also to propose to the purchaser of the share to become a party to the common procurement contract, if the so requests and if the other current shareholder in Cobogal agrees. The notifying party undertakes, if necessary, to propose to the purchaser of the shares, if the letter so requests, a supply contract for a given term on the conditions of the TotalFina group. SP de Queven: 50%; SP Bus Paris: 50%; GIE GPL Bus: 25%; GIE groupement technique Citerne: 20%.

In addition to the divestiture of the Elf Antargaz shares, Elf's shareholdings in the following companies, with respect to their LPG operation in the metropolitan areas of France, will be divested: Sobegal SA (the refilling centres of Lacq, Nerac, Rodez and the bulk depot of Domene): 78% held by the Elf group; Geogaz SA: 16.67% held by the Elf group; Geovexin SA: 44.9% held by the Elf group.

In addition, the notifying party undertakes to vacate the directors' seats held by the Elf group on the boards of the companies included in the scope of the present divestiture within the time-limits foreseen for the effective transfer of the assets and in accordance with the conditions specified in the common procedures for the implementation of the commitments.

The notifying party undertakes not to solicit the customers of Elf Antargaz during a period starting from the date of receipt of the decision approving the merger and expiring after the date of the divestiture of the Elf group's shareholding in Elf Antargaz becomes effective.

Regarding the means of implementation, concerning the implementation of the present commitment, the notifying party refers to the common procedures identified above and adds the following details:

The name of the potential purchaser of all or part of the assets shall be subject to the approval of the Commission in accordance with the conditions set out in the common procedures.

As soon as the notifying party receives the decision approving the merger, it shall consult the various operators referred to in the common procedures, both outside and within France, that may be interested in the acquisition of all or part of the assets in question. The notifying party shall supply to operators that may be interested in purchasing the assets being divested, the commercial, technical and financial data and specifications necessary in order that they may draw up such offers.

In the event that Vitogaz intends to acquire shares in Elf Antargaz, the notifying party undertakes not to oppose such acquisition. If Vitogaz is the transferee in respect of the shares in Elf Antargaz, the notifying party undertakes to divest its shareholding (34%) in Vitogaz according to the conditions with respect to form and time limits set out in the agreements between the notifying party and the other shareholder in Vitogaz.

The notifying party points out that those assets related to intellectual and/or industrial property rights or know-how belonging to the notifying party shall be transferred with the shareholdings in question to the extent that they are used within the framework of the LPG activity of Elf Antargaz in metropolitan areas of France, with the exception of trade marks owned and/or utilised by the Elf group as well as proprietary management software belonging to it.

The notifying party shall grant to the transferee a licence to use the trademarks employed by the Elf group in the LPG sector in metropolitan areas of France for a maximum period from the date the divestiture becomes effective.

The notifying party shall ensure that for as long as the shareholdings in question have not been transferred to a purchaser, Elf Antargaz will be managed as a separate and saleable entity, with its own set of management accounts, and shall notify the management of Elf Antargaz that the company will be managed on an independent base and under the supervision of the trustee, in order to guarantee the preservation of its profitability and of its market value.

The notifying party undertakes, after the divestiture of the shares in Elf Antargaz becomes effective, to inform the purchaser of the possibility of concluding with it, for a transitional period with a given maximum, a non-exclusive supply agreement for the purpose of ensuring for the purchaser the necessary supplies during the period required for the establishment of alternative solutions.

9.15.9 Annex 2

Regarding the structure of Norgal the following table applies:

	Participation
TotalFina	26.40%
Elf	52.66%
Vitogaz	20,94%

9.16 AIR LIQUIDE / BOC CASE IV/M. 1630

On 16/08/1999, the Commission received a notification owing to Art. 4 MR1989 of a proposed concentration whereby the undertaking Air Liquide S.A. (Air Liquide) acquires control within the meaning of Art. 3 I lit. b MR1989 of parts of the undertaking of the BOC Group plc (BOC) by way of a public bid to be implemented jointly with the undertaking Air Products and Chemicals Inc. (Air Products) and the subsequent division of the businesses and assets of BOC. On 16/09/1999 the Commission decided in accordance with Art 6 I lit. c MR1989 and Art. 57 EEA Agreement to initiate proceedings in this case.

9.16.1 The Parties

Air Liquide is an international group active in the field of industrial gases and related businesses, cogeneration of electricity and steam, engineering, welding and cutting equipment and consumables, diving and medical equipment and services related to those product. The company supplies industrial gases to various industries including iron, steel, refining, chemicals, glass, electronics, paper pulp, metallurgy, food processing, health care and aerospace industries. Air Liquide is the world's largest producer and distributor of industrial gases in terms of turnover.

BOC is involved in the production and distribution of industrial gases and related equipment, distribution services and vacuum technology. The company produces and markets the main atmospheric gases (nitrogen, oxygen and argon), hydrogen, carbon dioxide, helium, acetylene, LPG and speciality gases. In terms of turnover, BOC is the world's second largest producer and distributor of industrial gases.

9.16.2 The Operation and Concentration

Regarding the notified acquisition of parts of BOC, on 13/07/1999 Air Liquide and Air products announced a joint pre-conditional recommended cash offer under Rule 2.5 of the UK takeover code for all shares in BOC through Bidco, a corporate vehicle established for the purpose of the acquisition.

Air Liquide and Air Products have agreed to divide the businesses and assets of BOC after completion of the bid. In accordance of the agreed plan for that division, Air Liquide will acquire BOC's operations within the EEA as well as certain operations outside the EEA. Air Products will acquire the remaining BOC operations. With respect to BOC's intellectual property consisting of patented and non-patented technology including software, Air Liquide and Air Products intend to make arrangements to give both undertakings equal access to the intellectual property.

The present notification concerns only those businesses and assets of BOC that Air Liquide proposes to acquire, in particular the assets located in the UK and Ireland.

Concerning previous acquisitions, in January 1999, Air Liquide acquired the industrial gases businesses of BOC in France, Belgium, the Netherlands and Germany. Those acquisitions were notified to the Federal Cartel Office in Germany and the Conseil de la concurrence (Belgium Competition authority). Those competition authorities cleared the acquisition. The acquisition was also notified to the Dutch cartel office, which issued a no jurisdiction decision.

Given that the transactions all took place within a two year period between the same undertakings they will be treated as one and the same concentration under the present procedure owing to Art. 5 II MR1989/MR2004[1367].

9.16.3 Community Dimension

The transaction has a community dimension (Art. 1 MR1997).

9.16.4 Assessment under Art. 2 MR1997

Regarding the relevant product markets and in the area of industrial gases, the businesses of Air Liquide and BOC mainly overlap in the production and distribution of industrial gases. Industrial gases are all gases used in

[1367] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.34, p 548 and marginal note 5.149, p 576.

manufacturing processes, research, healthcare and related applications. The parties produce and distribute atmospheric gases (air gases) and non-atmospheric gases (gases produced from sources other than air).

The principal uses of industrial gases are set out in the following table:

Description of primary industrial gases and their use:

Nitrogen Purging of all types Oil and gas operations Heat treatment Glass making Insert packaging Silo atmospheres Food transports Steel making Electronic components Tissue freezing Artificial insemination Food freezing Shrink fitting Molding deflashing Scrap reclamation Die cooling Steelwork equipment cooling Solvent recovery Air pollution abatement Chemical manufacture Blow mold cooling Mine safety	Oxygen Steel making Non-ferrous melting Water waste treatment Gas welding, cutting Breathing gases Rocket fuel oxidant Brick making Odor control Tea fermentation Glass making Pulp and paper Ozone Coal gasification Electronic components	Argon Welding Steel making Light tubes Metals Electronics components
	Carbon Dioxide Food freezing Beverages Oil wells Plant growth Fire extinguishers Waste treatment Mold setting Metals fabrication Tobacco expansion	Helium Welding Ballons Leak detection MRI Cyrogenic cooling Breathing gases
		Hydrogen Furnace atmospheres Glass making Chemicals manufacture Power station equipment cooling Rocket fuel Margarine manufacture Electronic components

Concerning the competitive assessment and the tonnage market for air gases and the market structure, Air Liquide/BOC would have by far the highest market shares in the European tonnage markets for air gases:

Gas	Air Liquide	BOC	Air Products	AGA	Linde	Messer	Praxair	Others
Oxygen			5-10%	5-10%	15-20%	10-15%	< 5%	< 5%
Nitrogen			10-15%	< 5%	15-20%	5-10%	5-10%	5-10%

On site contracts (last five years)

	Percentage
Air Liquide	
BOC	
Combined	
AGA	< 20%
Air Products	< 20%
Linde	< 20%
Messer	< 20%
Praxair	< 20%
Total	100%

Pipelines (km)

		Air Liquide	BOC	Combined	AGA	Air Products	Linde
Local distribution pipelines	Oxygen				0	< 200	< 200
	Nitrogen						
Interconnecting Pipelines	Oxygen						
	Nitrogen						
Total					0	< 200	< 200

		Messer	Praxair
Local distribution pipelines	Oxygen	< 550	< 50
	Nitrogen		
Interconnecting Pipelines	Oxygen		
	Nitrogen		
Total		< 550	< 50

In continental Europe, Air Liquide controls an extensive network of local distribution pipelines in important industrial basins: the Antwerp region, the Liege region, the Mons-Charleroi region (all in Belgium/the Netherlands), the Dunkerque region, the Fos-sur-mere region, the Metz region, the Le Havre region (all in France), the Limito region and the Padova region (all in Italy). No other industrial gases company has access to pipelines in more than one or two confined regions (Air Products - Gent/Terneuzen; Messer – Ruhrgebiet; Linde – Leuna/Buna and Ruhrgebiet; Praxair – Spain).

Regarding the dominant position of BOC in the UK and Ireland, BOC has, for most gases, by far the highest markets shares in the bulk and cylinder markets in the UK and Ireland.

UK

	BOC	Air Products	Messer	Linde	Others
Bulk					
Oxygen		25-30%	< 5%	< 5%	
Nitrogen		35-40%	< 5%	< 5%	
Argon		15-20%	< 5%	< 5%	
CO2		< 5%	50-55%		35-40% Hydrogas
Hydrogen		55-60%	< 5%		

Cylinders					
Oxygen		10-15%	< 5%	< 5%	
Nitrogen		25-30%	5-10%	5-10%	< 5%
Argon		20-25%	< 5%	5-10%	
Acetylene		15-20%	< 5%	< 5%	< 5% AGA
CO2		5-10%	35-40%	< 5%	
Hydrogen		30-35%	< 5%	5-10%	

Ireland

	BOC	Air Products
Bulk		
Oxygen		< 5%
Nitrogen		< 5%
Argon		40-45%
CO2		
Hydrogen		25-30%
Cylinders		
Oxygen		15-20%
Nitrogen		25—30%
Argon		25-30%
Acetylene		10-15%
CO2		< 5%
Hydrogen		15-20%

France

	Air Liquide	AGA	Air Products	Praxair	Messer	Linde	Others
Bulk							
Oxygen	…	15-20%	10-15%	5-10%	< 5%	< 5%	
Nitrogen	…	5-10%	10-15%	< 5%	5-10%	< 5%	10-15%
Argon	…	10-15%	5-10%	5-10%	5-10%	5-10%	
Carbon dioxide	…	< 5%			25-30%		
Hydrogen	…		15-20%		< 5%		
Cylinders							
Oxygen	…	20-25%	< 5%		< 5%	< 5%	
Nitrogen	…	15-20%	5-10%		5-10%	< 5%	
Argon	…	15-20%	5-10%		5-10%	< 5%	
Acetylene	…	10-15%		< 5%	< 5%	< 5%	10-15%
Carbon dioxide	…	10-15%	< 5%		10-15%	< 5%	
Hydrogen	…	10-15%	< 5%			5-10%	

The table shows that Air Liquide holds by far the highest shares in all markets.

Helium

	Air Liquide	BOC	Air Products	Praxair	Messer	Linde	Other
EEA	…	…	25-30%	15-20%	< 5%	-	-
World	…	…	15-20%	25-30%	< 1%	-	-

The proposed concentration would reduce the number of vertically integrated helium suppliers with a full distribution infrastructure to three.

9.16.5 Commitments Submitted by the Notifying Party and Modifications to the Operation

On 21/12/1999 the notifying party submitted commitments in order to remove the competition concerns identified by the Commission. In summary, the commitments comprise the following elements:

Divestiture of tonnage assets and businesses including on-site plant facilities, pipelines, all related tonnage customer contracts and the operating, maintenance and support personnel related to such facilities. The following tonnage plants will be divested: Runcorn, Sherness, Cardiff, Brinsworth, Fawley (all UK), Pardies, Tarnos (both France), Mons (Belgium), and Terneuzen (Netherlands).

Divestiture of bulk facilities and businesses associated with certain of the tonnage facilities (Brinsworth, Fawley, Pardies, Mons and Terneuzen). The assets and businesses to be divested include the bulk production and storage facilities, the associated bulk distribution equipment (road tankers), the bulk tanks located on the customers' premises as well as the personnel for sales, technical support, distribution and customer service, in addition to the customer bulk contracts. The UK bulk divestitures represent a specified amount of liquid oxygen, nitrogen and argon and total annual sales of liquid oxygen, nitrogen and argon of EUR … Mio. The continental bulk divestitures represent a certain amount of liquid oxygen and nitrogen sold and total annual sales of liquid oxygen, nitrogen and argon of approximately EUR … Mio. and together with the bulk business of Carboxique (a 100% affiliate of Air Liquide) of approximately EUR …Mio.

Divestiture of cylinder assets and businesses including certain cylinder fill plant facilities, associated cylinders, distribution equipment (trucks) as well as production and distribution personnel, in addition to contracts with customers. In particular the following cylinder fill plants will be divested: Brinsworth, Bristol (including an acetylene production plant) and Ipswich (all UK), Bobigny and Hauconcourt (both France)

Divestiture of the contracts for liquid helium supply that BOC currently has in Russia and Poland, together with appropriate distribution infrastructure (transport containers). For liquid helium hat Air Liquide/BOC purchase in the USA access will be granted to other industrial gases companies under resale agreements which in all material conditions, including price and duration, are identical to the purchasing agreements to which Air Liquide/BOC are parties (back to back agreements). For the helium sourced from Algeria, Air Liquide will appoint an independent third party to manage Air Liquide's 50% holding in the JV with Air Products, in order to ensure that there are no ongoing links with Air Products. Air Products has undertaken to use its rights in the JV to formalise Air Liquide's compliance with this commitment.

Divestiture of the transfill facility for electronic speciality gases owned and operated by Air Liquide in France together with a license of the technology necessary to operate the transfill plant, all relevant customer information and current purchase orders. Air Liquide undertakes to ensure, within the scope of its existing

sourcing agreements, continuity of sourcing electronic speciality gases from existing manufactures to that transfill facility for a period of two years following the divestment.

Licensing of all of BOC's patented technology (process and applications technology) to third parties who request such licensed rights under reasonable and non-discriminatory conditions.

The divestiture of tonnage oxygen and nitrogen businesses will reduce Air Liquide/BOC's market share in the EEA. The business to be divested in the UK comprises 5 tonnage plants, two of with associated bulk businesses. The business to be divested in France, Belgium and The Netherlands comprises four tonnage plants three with associated bulk businesses. Given that substantial pipelines will be divested together with one of the plants, the combined entity's position as a pipeline operator will be less strong than before the transaction. Air Liquide will acquire a less strong regional position in the UK that is less liable to be used as leverage against competitors, not only because of the tonnage divestments but also because of the bulk divestments which will weaken its position in the UK bulk markets. The commitment to license patented BOT technology to third parties will lessen the concerns arising from the combination of technologies. Moreover, the Commission considers that an acquirer will be able to present additional competition in the EEA tonnage market. The divestment of bulk, cylinder and distribution facilities will give the acquirer(s) access to a related bulk and cylinder infrastructure and will create the possibility of operating the divested tonnage assets as part of an integrated gases business.

In view of these elements the Commission considers that the proposed commitments remove the fear that a dominant position in the EEA tonnage market will be created. The divestiture package for the bulk gases oxygen, nitrogen and argon in the UK represents a specified amount of the markets for these three gases. The liquefiers in Brinsworth and Fawley can supply customers in most regions in Southern and Northern England. The Commission considers that these facilities, together with related customer contracts, personnel and equipment, will enable a new entrant or a smaller existing competitor to present effective competition in the UK bulk market.

The divestiture package for the cylinder gases in the UK represents a specified amount of the relevant markets for oxygen, argon and acetylene and covers other cylinder gases. Besides the reduction of actual market share, the divestment of three production facilities will give the acquirer the flexibility to fill those or other gases depending on demand. The three cylinder–filling centres are located so as to allow a significant coverage of the UK market. The divestiture of the bulk gases production facilities in Brinsworth and Fawley is also necessary to supply those filling centres. Acetylene is produced at a plant in Bristol, which will also be divested. The distribution infrastructure to be divested comprises personnel, collect centres, agents' contracts and equipment.

It is reasonable to suppose that these divestments will enable a new entrant to compete effectively in the UK cylinder markets.

The Commission considers that the proposed commitments will remove the operation's anti-competitive effects in the UK bulk and cylinder markets concerned, by substantially reducing the acquired market position and allowing the entry of a significant competitor. It is likely that the new competitor's market position will be more significant than that which Air Liquide could have acquired had it entered the UK market. The Commission also considers that the presence of one or several new competitors in the UK will enhance the chances of those competitors also becoming active in Ireland. This outweighs the effect of the removal of Air Liquide as a potential competitor in Ireland.

The size of divestments relating to the bulk and cylinder markets in France exceeds the BOC businesses which Air Liquide acquired prior to the notified operation. The Commission considers that the divestments will remove the concentration's anti competitive effects in the French bulk and cylinder markets concerned.

The divestiture package relating to the helium wholesale market ensures that Air Liquide will not acquire access to the supply of refined helium from Russia and Poland. In order to enable a new wholesale supplier to replace BOC's competitive potential to a comparable extent, it is also necessary for that entrant to obtain access to refined helium supplied from a further source, namely in the USA. The ability to spread supply risks over different, unrelated sources ensures competitivity in the wholesale market. This commitment is thus intended to re-establish the competitive potential that existed before the operation. Furthermore, the link between Air Liquide and Air Products that currently exists through their JV in Algeria will be removed.

With respect to the market for electronic speciality gases, the divestiture will cover on of Air Liquide/BOC's two transfill facilities in the EEA. Together with the personnel and technology relating to electronic speciality gases transfilling, continued product supplies and on-going customer orders, the divestiture will enable another industrial gases company to compete effectively in the EEA-market for electronic speciality gases.

The Commission therefore considers that the proposed commitments will remove the fear that collective dominant positions would be created on the markets for wholesale helium and electronic speciality gases. Furthermore, Air Liquide's commitments of 21/12/1999 comprise five elements.

The Commission considers that the commitments of 21/12/1999 as amended on 07/01/2000 will, if acted upon their entirety, eliminate the risk that ongoing links between Air Liquide and Air Products will contribute to the creation or strengthening of dominant position by Air Liquide/BOC and Air Products in the markets for wholesale helium and electronic speciality gases.

9.16.6 Final Conclusion

In view of the foregoing, the notified concentration should be declared compatible with the common market owing to Art. 8 II MR1989 and with the functioning with the EEA-agreement pursuant to Art. 57 thereof, subject to the condition of full compliance with the commitments given by Air Liquide to the Commission on 21/12/1999 (as amended on 07/01/2000)[1368].

9.17 LINDE / AGA CASE IV/M.1641

On 01/09/1999 the Commission received a notification of a proposed concentration under Art. 4 MR1989. By this transaction Linde AG (Linde) was to purchase shares in AGA AB (AGA), thereby acquiring control of the whole of AGA within the meaning of Art. 3 I lit. b MR1989. On 30/09/1999 the Commission decided to initiate proceedings in the case under Art. 6 I lit. c MR1989 and Art. 57 EEA-agreement.

9.17.1 The Parties and the Proposed Transaction

Linde's areas of business are process engineering, materials handling, refrigeration and the production and distribution of industrial gases. AGA also produces and distributes industrial gases. Linde already holds shares in AGA which accounts for 21.76% of the capital and 14.45% of the voting rights. On 15/08/1999 Linde concluded conditional contracts with six large AGA shareholders under which Linde was to buy a total of 66891874 "A" shares and 41974157 "B" shares in AGA. This would bring Linde's stake in AGA to over 66% altogether.

9.17.2 Concentration

The proposed transaction constitutes a concentration under Art. 3 I lit. b MR1997 because Linde would acquire sole control of AGA.

9.17.3 Community Dimension

The concentration has a community dimension (Art. 1 II MR1997).

9.17.4 Appraisal under Art. 2 MR1997

Regarding the relevant product market, both Linde and AGA produce and distribute industrial gases, medical gases and high-purity gases. The most commonly used industrial gases are oxygen, nitrogen, argon, carbon dioxide, acetylene and hydrogen. Industrial gases can be obtained from the air, from synthetic processes or from natural sources. The following table summarises the main uses of oxygen, nitrogen, argon, hydrogen, carbon dioxide, acetylene and helium:

Gas	Main industries when used

[1368] q.v. § 40 III GWB; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 10 VII 4. p 377.

Oxygen	Metallurgy, chemicals, metalworking, paper (bleaching), glass, electronics, waste water purification, fish farming
Nitrogen	Electronics, chemicals, food, metalworking, building
Argon	Metallurgy, metalworking, electronics, inflation of air bags
Hydrogen	Chemicals, food, glass
Carbon dioxide	Metalworking, steel production, chemicals, drinks manufacturing, food, dry ice, waste water purification
Acetylene	Metalworking, glass
Helium	Aerospace, lifting gas for balloons, health care

According to the investigations carried out by the Commission, market shares for liquefied gases in Germany break down as follows:

Liquefied gases	Oxygen		Nitrogen		Argon		Hydrogen		CO_2
	Vol (%)	Value (%)	Vol (%)	Value (%)	Vol (%)	Value (%)	Vol (%)	Value (%)	Vol (%)
Linde	20-25%	30-35%	25-30%	25-305	20-25%	30-35%	20-25%	20-25%	10-15%
Messer	25-30%	35-40%	30-35%	35-40%	45-50%	40-45%	40-45%	45-50%	15-20%
AGA	10-15%	5-10%	5-10%	5-10%	< 5%	5-10%	< 5%	< 5%	25-30%
Air Liquide	10-15%	5-10%	10-15%	5-10%	< 5%	< 5%	< 5%	5-10%	25-30%
Air Products	10-15%	5-10%	5-10%	5-10%	5-10%	5-10%	25-30%	20-25%	< 5%
Praxair	< 5%	< 5%	< 5%	< 5%	< 5%	< 5%	< 5%	< 5%	< 5%
Other	5-10%	< 5%	5-10%	5-10%	5-10%	5-10%	< 5%	< 5%	10-15%

Liquefied gases	
	Value (%)
Linde	10-15%
Messer	20-25%
AGA	30-35%
Air Liquide	25-30%
Air Products	< 5%
Praxair	< 5%
Other	10-15%

According to the investigation carried out by the Commission, market shares for cylinder gases in Germany break down as follows:

Cylinders	Oxygen		Nitrogen		Argon		CO_2	
	Vol. (%)	Value (%)	Vol. (%)	Value (%)	Vol. (%)	Value (%)	Vol. (%)	Value (%)
Linde	25-30%	25-35%	20-25%	25-30%	25-30%	25-30%	10-15%	10-15%

Messere	30-35%	30-35%	20-25%	20-25%	30-35%	30-35%	15-20%	15-20%
AGA	10-15%	10-15%	5-10%	10-15%	10-15%	10-15%	25-30%	15-30%
Air Liquide	10-15%	10-15%	5-10%	5-10%	5-10%	5-10%	25-30%	25-30%
Air Products	< 5%	< 5%	< 5%	< 5%	< 5%	< 5%	< 5%	< 5%
Praxair	< 5%	< 5%	< 5%	< 5%	< 5%	< 5%	< 5%	< 5%
Other	< 5%	5-10%	30-35%	30-35%	10-15%	10-15%	15-20%	10-15%

Cylinders	Hydrogen		Acetylene	
	Vol. (%)	Value (%)	Vol. (%)	Value (%)
Linde	5-10%	15-20%	40-45%	40-45%
Messere	15-20%	25-30%	25-30%	25-30%
AGA	45-50%	25-30%	15-20%	15-20%
Air Liquide	5-10%	5-10%	10-15%	10-15%
Air Proeducts	< 5%	< 5%	< 5%	< 5%
Praxair	< 5%	< 5%	< 5%	< 5%
Other	10-15%	15-20%	< 5%	< 5%

Production and filling plants are distributed between the German regions as follows:

Air separation plant, or air separation plant and pipeline	North	East	South	West	All Germany
Linde	3	3	1	4	11
Messer	0	0	1	8	9
AGA	1	1	1	1	4
Air Liquide	1	1	0	1	3
Air Products	1	0	0	1	2
Other	0	0	1	2	3
Total	6	5	4	17	32

Filling plant or acetylene works	North	East	South	West	All Germany
Linde	7	5	11	8	31
Messer	1	9	3	8	21
AGA	2	3	2	3	10
Air Liquide	2	6	3	6	17
Air Products	1	0	0	1	2
Other	0	2	10	5	17
Total	13	25	29	31	98

Linde and Messer also have the densest network of distributors:

Outlets and distributors	North	East	South	West	All Germany
Linde	107	251	254	186	798
Messer	226	258	163	202	849
AGA	143	155	151	141	590
Air Liquide	36	244	57	102	439
Air Products	47	41	0	73	161

Total	576	949	625	704	2837

According to the investigations carried out by the Commission, market shares for cylinder gases in the Netherlands break down as follows:

Cylinders	Oxygen		Nitrogen		Argon		CO_2	
	Vol. (%)	Value (%)	Vol. (%)	Value (%)	Vol. (%)	Value (%)	Vol. (%)	Value (%)
Linde	40-45	45-50	45-50	50-55	25-30	25-30	25-30	30-35
AGA	25-30	25-30	15-20	15-20	35-40	35-40	50-55	45-50
Linde/AGA	65-75	70-80	60-70	65-75	60-70	60-70	75-85	75-85
Air Liquide	5-10	5-10	5-10	5-10	10-15	10-15	5-10	5-10
Air Products	5-10	5-10	10-15	10-15	5-10	5-10	< 5	5-10
Messer	5-10	< 5	< 5	< 5	5-10	10-15	< 5	5-10
Other	5-10	5-10	10-15	5-10	5-10	10-15	5-10	5-10

Cylinders	Hydrogen		Acetylene	
	Vol. (%)	Value (%)	Vol. (%)	Value (%)
Linde	55-60	55-60	30-35	35-40
AGA	< 5	< 5	45-50	40-45
Linde/AGA	55-65	55-65	75-85	75-85
Air Liquide	15-20	15-20	5-10	5-10
Air Products	< 5	5-10	< 5	< 5
Messer	< 5	< 5	5-10	5-10
Other	15-20	15-20	5-10	5-10

According to the investigations carried out by the Commission, market shares for liquefied gases in the Netherlands break down as follows:

Liquefied gases	Oxygen		Nitrogen		Argon		Hydrogen
	Vol (%)	Value (%)	Vol (%)	Value (%)	Vol (%)	Value (%)	Vol (%)
Linde	15-20	30-35	20-25	25-30	15-20	15-20	35-40
AGA	10-15	10-15	15-20	15-20	20-25	25-30	
Linde/AGA	25-35	40-50	35-45	40-50	35-45	40-50	40-50
Air Liquide	45-50	20-25	30-35	25-30	35-45	40-50	35-40
Air Products	10-15	10-15	10-15	10-15	10-15	10-15	15-20
Praxair	5-10	5-10	5-10	5-10	5-10	5-10	
Messer	< 5	< 5	< 5	< 5	5-10	< 5	
Other	< 5	10-15	< 5	5-10	< 5	< 5	< 5

Liquefied gases	Hydrogen		CO_2	
	Vol (%)	Value (%)	Vol (%)	Value (%)
Linde	35-40	35-40	5-10	5-10

AGA			15-20	20-25
Linde/AGA	40-50	35-45	20-30	25-35
Air Liquide	35-40	35-40	15-20	20-25
Air Products	15-20	25-30	< 5	< 5
Praxair			< 5	< 5
Messer			5-10	5-10
Other	< 5	< 5	50-55	35-40

Production and filling plants in Austria break down as follows:

	Linde	AGA	Messer	SIAD[1369]
Air separation plants	2	2	2	0
Filling plants, all gases	3	5	5	1
CO_2	4	0	1	0
Acetylene works	2	3	1	0
Hydrogen plants	2	1	1	0

According to the investigations carried out by the Commission, market shares for liquefied gases in Austria break down as follows:

Liquefied gases	Oxygen		Nitrogen		Argon		Hydrogen
	Vol (%)	Value (%)	Vol (%)	Value (%)	Vol (%)	Value (%)	Vol (%)
Linde	45-50	40-45	45-50	40-45	70-75	55-60	85-90
AGA	25-30	35-40	20-25	20-25	15-20	25-30	< 5
Linde/AGA	70-80	75-85	65-75	60-70	85-95	80-90	85-95
Messer	10-15	10-15	20-25	25-30	5-10	5-10	< 5
Other	5-10	5-10	5-10	5-10	< 5	< 5	10-15

Liquefied gases		CO_2	
	Value (%)	Vol (%)	Value (%)
Linde	80-85	25-30	35-40
AGA	< 5	20-25	20-25
Linde/AGA	80-90	45-55	55-65
Messer	< %	45-50	35-40
Other	15-20	< 5	< 5

On a number of markets AGA's market share is well over 50%. According to the investigations carried out by the Commission, market shares for liquefied and cylinder gases in Finland break down as follows:

	AGA		Air Liquide		Other	
	Volume (%)	Value (%)	Volume (%)	Value (%)	Volume (%)	Value (%)
Liquefied gases						

[1369] SIAD Vertrieb technischer Gase GmbH, a subsidiary of SIAD SpA.

Oxygen	50-55	50-55	45-50	45-50		
Nitrogen	70-75	65-70	25-30	30-35		
Argon	25-30	30-35	70-75	65-70		
Hydrogen	45-50	45-50	< 5	< 5	50-55	50-55
CO_2	65-70	65-70	30-35	30-35		
Cylinder gases						
Oxygen	80-85	75-80			15-20	20-25
Nitrogen	65-70	75-80			30-35	20-25
Argon	75-80	75-80			20-25	20-25
CO_2	80-85	80-85			15-20	15-20
Hydrogen	75-80	65-70			20-25	30-35
Acetylene	65-70	60-65			30-35	35-40

According to the investigations carried out by the Commission, market shares for liquefied and cylinder gases in Sweden break down as follows:

	AGA		Air Liquide		Other	
	Volume (%)	Value (%)	Volume (%)	Value (%)	Volume (%)	Value (%)
Liquefied gases						
Oxygen	80-85	75-80	15-20	24		
Nitrogen	65-70	65-70	30-35	32		
Argon	65-70	70-75	30-35	28		
Hydrogen	< 5	< 5	95-100	95-100		
CO_2	40-45	60-65	10-15	10-15	45-50	20-25
Cylinder gases						
Oxygen	65-70	75-80	30-35	20-25		
Nitrogen	60-65	60-65	35-40	35-40		
Argon	70-75	70-75	25-30	25-30		
CO_2	60-65	65-70	35-40	30-35		
Hydrogen	85-90	90-95	10-15	5-10		
Acetylene	75-80	80-85	20-25	15-20		

According to the investigations carried out by the Commission, market shares for liquefied and cylinder gases in Norway break down as follows:

	AGA		Hydrogas	
	Volume (%)	Value (%)	Volume (%)	Value (%)
Liquefied gases				
Oxygen	60-65	60-65	35-40	30-35
Nitrogen	65-70	60-65	30-35	30-35
Argon	25-30	30-35	70-75	65-70
Hydrogen	< 5	< 5	< 5	< 5
CO_2	15-20	15-20	80-85	80-85
Cylinder gases				
Oxygen	65-70	85-90	30-35	10-15
Nitrogen	50-55	65-70	45-50	30-35
Argon	95-100	95-100	< 5	< 5
CO_2	50-55	35-40	45-50	60-65
Hydrogen	95-100	95-100	< 5	< 5
Acetylene	65-70	65-70	30-35	30-35

On the markets in liquefied and cylinder gases in Iceland AGA is the only supplier.

9.17.5 Commitments Offered by the Notifying Party

In order to overcome the Commission's objections to the planned transaction, Linde has entered into the following commitments.

In the Netherlands, Linde undertakes to dispose of the industrial cylinder gas business (nitrogen, oxygen, argon, carbon dioxide and acetylene) of AGA Gas BV. The commitment to dispose of the business extends to the

industrial gas filling plant in Amsterdam, the associated staff, the current contracts with customers, suppliers and forwarding agents, the list of customers, and the associated gas cylinders. The commitment to dispose of the business does not apply to special gases including Mison and gases for medicinal purposes.

In Austria, Linde undertakes to dispose of the entire gas business operated in Austria by AGA through its subsidiary AGA GmbH. The commitment to dispose of the business extends to all air separation plants with the existing on-site supply agreements, all related liquefaction, filling and acetylene plants, the associated staff, current contracts with customers and suppliers, the list of customers, the tanks installed on customers' premises, the associated tankers and other transport vehicles, and the associated gas cylinders. Linde will not dispose of the shell of the company, with its name, and AGA GmbH's interests outside Austria.

Regarding the assessment of the commitments offered and the Netherlands, under the commitment proposed, AGA's cylinder gas business in the Netherlands would be offered for sale to competitors. The disposal would ensure that Linde's position on the markets in cylinder gases would not be strengthened. After the commitment had been complied with the purchaser would be in the same position as AGA was beforehand. This would ensure that after the transaction there would still be another large supplier on the market in cylinder gases in the Netherlands. The Commission is therefore satisfied that the proposed commitment would prevent the creation of dominant positions on the markets in cylinder gases in the Netherlands.

Concerning Austria, under the commitment proposed, AGA's entire gas business in Austria would be offered for sale to competitors. This disposal would ensure that Linde's position on the markets in liquefied and cylinder gases would not be strengthened. It would also ensure that there would still be three main suppliers in Austria. The disposal of the two air separation plants and the liquefaction plants is necessary in order to ensure that the purchaser is placed in the same competitive position that AGA occupied previously in both liquefied atmospheric gases and atmospheric gases in cylinder. Linde has not proposed that the commitment should be restricted to cylinder oxygen, nitrogen, argon, carbon dioxide and acetylene thus excluding cylinder hydrogen. A restriction of that kind would in any event be difficult to apply in practice, because all cylinder gases are general bottled together. The Commission is therefore satisfied that the proposed commitment would prevent the creation of dominant positions on the markets in liquefied and cylinder gases in Austria.

9.17.6 Summary

On the grounds, set out above, the Commission is satisfied that the proposed transaction would not create or strengthen any dominant position as a result of which effective competition would be significantly impeded in a substantial part of the common market, provided that the commitments entered into by the notifying party are

complied with. With that proviso, therefore, the transaction should be declared compatible with the common market, in accordance with Art. 8 II MR1989 and Art. 57 of the EEA-agreement. The Commission rejected an oligopolistic market dominance[1370].

9.18 PREUSSEN ELEKTRA / EZH CASE IV/M. 1659

This case deals with the acquisition of the then publicly owned Dutch generator Electriciteitsbedrijf Zuid-Holland (EZH) by VEBA's subsidiary Preussen Elektra[1371]. Traditionally, the Dutch Electricity Generators used to co-operate in SEP so as to operate the transmission grid and to market the electricity to wholesale and retail consumers[1372]. Their attempt to create a single vertically integrated company responsible to generate electricity, feed it in the transmission grid, operate said grid and sell electricity to wholesale consumers was prohibited by the Dutch Competition authority in 1998[1373]. Later the grid operator TenneT - a 100% subsidiary of SEP was formed. Since its operational control is due to shift to the government[1374], TPA will be facilitated so that it becomes more interesting for international investors to acquire Dutch generators especially if one considers the limited interconnector capacities which preclude significant imports of power.

It is again stated that no simple relevant product market for electricity is available. Contrarily, it is found on the basis of the substitutability doctrine, that separated markets exist for generation with a view of feeding in the transmission grid, access to the transmission grid, access to the distribution grid and supply to wholesale or retail consumers[1375], import and export and that Preussen Elektra is active on all these markets whereas EZH is solely a generator. Given the limited interconnector capacity, the Commission considered the affected markets in The Netherlands and Germany as being of national scope[1376]. The acquisition in terms of Art. 3 I lit. b MR1997 was declared compatible with the common market, especially as Preussen Elektra promised not to execute its voting rights in SEP so as to determine the policy of TenneT prior to the latter's convey to the Dutch State.

[1370] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 108, p 609.
[1371] Commission Decision, *Preussen Elektra/EZH* Case IV/M. 1659, 1999: According to paragraph 4, EZH was owned by the province of Zuid-Holland and 5 cities; P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. p 390.
[1372] The pooled sale of electricity from the transmission grid ended on 31/12/2000: q.v. Commission Decision, Case IV/M. 1659, 1999 (*PreussenElektra/EZH*) paragraph 10.
[1373] Dutch Competition Authority, Case 4/45.b01, 29/01/1998 (*SEP/EPON/EPZ/EZH/UNA*).
[1374] Commission Decision, Case IV/M. 1659, 1999 (*PreussenElektra/EZH*) paragraph 12.
[1375] Commission Decision, Case IV/M. 1659, 1999 (*PreussenElektra/EZH*) paragraph 7-8.
[1376] Commission Decision, Case IV/M. 1659, 1999 (*PreussenElektra/EZH*) paragraph 9; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 192, p 1258.

9.19 VEBA / VIAG CASE IV/M. 1673

The next section will discuss the highly complex case *VEBA/VIAG*[1377]. The analysis shall reveal that the Commission is willing to release a compatibility decision even if a concentration involves far reaching effects as to collective dominance provided that the parties submit and promise to comply with severe divestiture undertakings and mandatory obligations as to a system of preferential negotiated TPA in favour of applicants. The significant complexity of the case results from the concentration of RWE/VEW that was due to be assessed by the German Federal Cartel Office in parallel proceedings and conditionally cleared[1378]. The combined outcome of both cases will have a major influence not only on the structure of the market but also to the re-structuring of the VEAG company, which is jointly owned by VEBA and VIAG so that potential competition with VEAG is reduced[1379]. According to the rationale of both proceedings, VEAG shall be enabled to become a new powerful competitor to E.On and RWE. Otherwise, the concentrations shall be blocked. After a long take-over battle, it seems that this concept was fairly successful as HEW AG - backed by the Swedish state owned utility Vattenfall - will purchase VEBA's, VIAG's and RWE's direct stakes and VEW's mediate stake[1380] in VEAG. Additionally, HEW will acquire BEWAG so as to control BEWAG's stake in VEAG, as well.

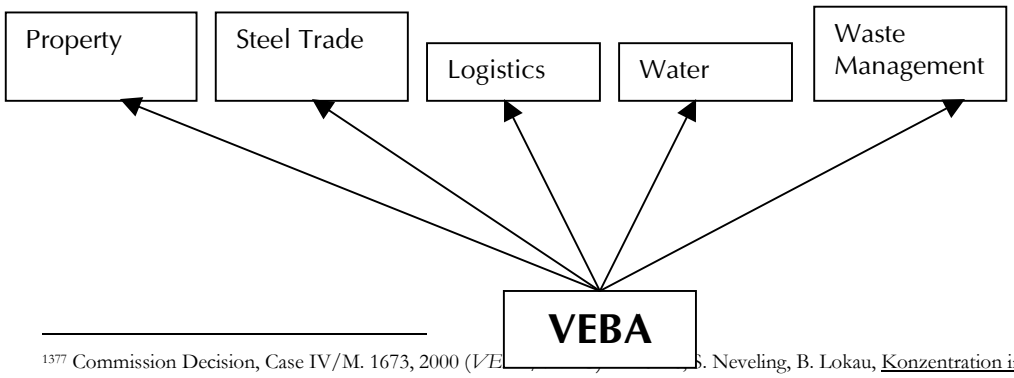
9.19.1 The Parties

VEBA AG and VIAG AG jointly notified on 14 December 1999 pursuant to Art. 4 I; II 1st Variant MR1997[1381] that they intend to merge in terms of Art. 3 I lit. a MR1997[1382].

9.19.2 VEBA AG

VEBA is a group with multiple industrial activities[1383]:

VEBA AG



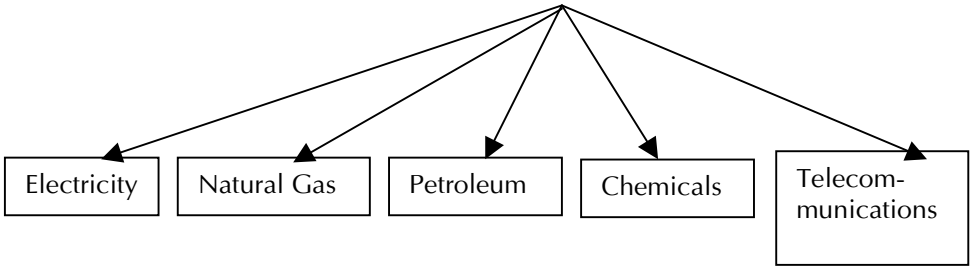
[1377] Commission Decision, Case IV/M. 1673, 2000 (*VE* S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 1 B. II. 3. a. p 38; CH 5 C. pp 329-330.

[1378] Federal Cartel Office, Case B8-40000-U-309/99 (*RWE/VEW*), paragraph I (clearance), paragraph I lit. A-D (conditions); J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. VI. 7. f) p 638; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 16, p 514; § 34 marginal note 177, p 1253.

[1379] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. III. 5. b) (4) (a) p 421; P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (1) (a) p 392; W. Kurzlechner, Fusionen Kartelle Skandale (1st ed.) (Munich, Germany, Redline Wirtschaft, 2008) CH 12, p 248.

[1380] VEAG participates in 25% of the equity of EBH which holds 25% of VEAG; q.v. infra Table 13: Status Quo Ex Post: Joint Daughter Undertakings; P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (1) (a) p 392.

[1381] Art. 4 II MR2004.

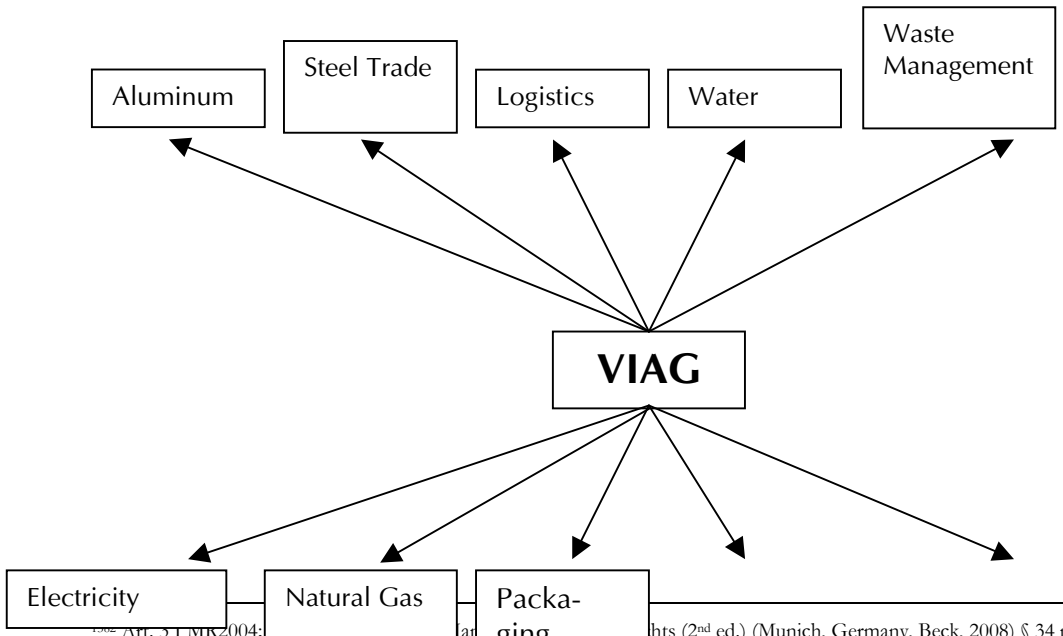


VEBA's power activities extend to generation, transmission, distribution and supply. The operations are concentrated in its subsidiary Preussen Elektra AG. By means of exclusive concession agreements with municipalities and demarcation contracts, either Preussen Elektra in persona or one of its subsidiaries[1384] held in general factual monopoly regarding the generation, transmission, distribution and supply of electricity for the general public in the federal states of Schleswig-Holstein, Lower Saxony and parts of Hesse[1385]. Preussen Elektra jointly controls VEAG AG together with RWE AG and Bayernwerk AG, so that VEAG could be regarded as a JV. VEAG was created in the aftermath of the German Unification so as to generate, transmit and distribute electricity in Eastern Germany[1386]. Finally, Preussen Elektra holds important shareholdings in two regional distribution companies in Eastern Germany: e.dis and Avacon.

9.19.3 VIAG AG

VIAG AG is a group with industrial activities that are similar to VEBA[1387]:

VIAG AG



[1382] Art. 3 § MK2004; [illegible] hts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 178, p 1254; J. Faull & A. Nikpay, The EU L[illegible] ed[illegible] P, 2014) CH 5, marginal note 5.45, p 551.

[1383] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) at 4.

[1384] e.g. Schleswag in Schleswig-Holstein.

[1385] However, municipalities often controlled the supply of electricity.

[1386] q.v. Financial Times, *VEAG Well-Positioned to Assume Powerful Role* (09/10/2000), http://www.ft.com.

Chemicals	Telecom-munications

The power activities are concentrated in the affiliate Bayernwerk AG which is engaged in generation, transmission, distribution and supply of electricity. Bayernwerk enjoyed a factual monopoly in federal state of Bavaria that was similar to the one held by Preussen Elektra. Apart from the joint control of VEAG, Bayernwerk AG jointly controls BEWAG AG together with Southern Energy Beteiligungsgesellschaft[1388]. Finally, VIAG controls the TEAG, a regional distribution company in Eastern Germany.

9.19.4 Concentration

The Commission quickly established that the proposed concentration in terms of Art. 1 I MR1997[1389] is a merger between VEBA and VIAG in terms of Art. 3 I lit. a MR1997[1390]. VIAG will transfer its assets to VEBA and the former will cease to exist[1391].

9.19.5 Community Dimension Art. 1 II; 5 MR1997

The transaction has a community dimension as only VEBA generated more than two thirds of its community wide turnover within Germany whereas VIAG has not a community wide turnover of that kind[1392]. The BKartA unsuccessfully applied for a referral of the case to German authorities (Art. 9 MR1997)[1393].

9.19.6 Dominance Test Concerning Activities of the Parties in the Electricity Sector under Art. 2 MR1997

After having enacted an initiation of formal proceedings decision under Art. 6 I lit. c MR1997[1394], the Commission pursues a thorough analysis in order to examine the compatibility of the concentration pursuant to Art. 2 MR1997[1395]. The examination distinguishes between engagements in the electricity and the chemicals industry. For the purpose of this doctoral paper, it is justifiable not to discuss the impact of the given concentration on the relevant markets for chemicals.

Furthermore, the Commission does not address other business activities of VEBA and VIAG because any reasonable potential of dominance is denied.

[1387] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) at 5.
[1388] A subsidiary of Southern Energy, Inc. (US).
[1389] Art. 1 I MR2004.
[1390] Art.3 I lit.a MR2004.
[1391] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 6.
[1392] I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 2 B II 5. p 75; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. II. 2. a) (1) p 341.
[1393] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 198, p 1261.
[1394] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 2. Art. 6 I lit. c MR2004.
[1395] Art. 2 MR2004.

The thesis will discuss the Commission's dominance test dedicated to the electricity industries by means of a methodology that was introduced above[1396]: Firstly, the Commission's definition of the relevant product market will be evaluated. Then, the urgency of the need to maintain effective competition will be analysed pursuant to Art. 2 I lit. a MR1997[1397] depending on the market structure, actual competition and potential competition. Thirdly, the market position of the undertakings is assessed in combination with their economic and financial powers, alternatives available to consumers, barriers to entry, demand trends, interests of consumers and the ability to intensify technological progress provided that it is to consumers' benefit.

9.19.6.1 Relevant Product Market Analysis for the Electricity Sector

As a prerequisite of a diligent analysis of dominance under Art. 2 MR1997[1398], the Commission has to identify the relevant product markets within the electricity industry[1399]. As discussed above, the Commission will define a relevant product market if products are available that are substitutable without major difficulties from the view of ordinary consumers based on functional, geographic and temporal criteria: demands side interchangeability[1400]. Alternatively, it is relevant if interchangeable groups of consumers are available from the point of view of suppliers: supply side substitutability.

9.19.6.1.1 Functional Criteria

With regard to electricity, the Commission establishes six relevant products: First of all, a market is available for the generation of electricity that is fed in the transmission grids[1401]. Secondly, a distinct market exists for the high voltage transmission of electricity to regional distribution companies, large municipalities, power traders or large industrial consumers[1402]. The limited capacity of interconnectors prevents the Commission from accepting a European market instead of a national scope for electricity transmission[1403]. The next market refers to the medium and low voltage distribution of electricity from regional distributors to small municipalities and large consumers and from municipalities to large consumers[1404]. Then, there is a market for the supply/metering of electricity from distributors to small individual and from municipalities to said consumers[1405]. Moreover, a

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[1396] q.v. 6.5.3 Compatibility Decision under Art. 6 I lit. b MR1989; 6.5.3.1 Definition of The Relevant Market; 6.5.3.2 Assessment of Dominance in Terms of Art. 2 II MR199, especially the sub-sections 6.5.3.2.1 to 6.5.3.2.10 and 6.5.3.2.16 .
[1397] Art. 2 lit. a MR2004.
[1398] Art. 2 MR2004.
[1399] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 B. (1) (e) p 380.
[1400] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 B. (1) (e) p 380.
[1401] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 11; Commission Decision, Case IV/M. 1346, 1999 (*EdF/London Electricity*); Commission Decision, Case IV/M. 1606, 1999 (*EdF/South Western Electricity*); G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 182, p 1255.
[1402] The high voltage grids refers to the German high voltage networks of 380 kV and 220 kV; q.v. q.v. Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 14; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 182, p 1255.
[1403] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. III. 4. e) (1) p 401. Barriers to entry owing to ownership of the transmission grid reduces the scope for potential competitors.
[1404] This refers to the medium voltage networks of 20-110 kV and the low voltage grids below 20 kV in Germany: q.v. Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 16.
[1405] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 16; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 182, p 1255.

market for electricity trading is deemed to exist[1406]. Lastly, the import and export of electricity is considered, too[1407]. The Commission finds that all these markets are relevant to the concentration as Preussen Elektra and Bayernwerk are not only engaged in generation and transmission, import and export of electricity but are also involved in distribution and supply by means of equity stakes in regional distributors and in local undertakings. The latter are usually partly owned by municipalities[1408].

9.19.6.1.2 Brief Evaluation of The Commission's Methodology

The Commission suggests to apply a methodology that concentrates on the assessment of the market for the transmission of electricity: If a concentration on said market leads to additional detrimental effects on downstream markets for distribution and supply, such finding will affect the transmission market analysis[1409]. This approach is backed by its simplicity and its comparatively rapid decision-making. However, it bears a significant risk that no duly diligent assessment of specific downstream markets is conducted. In fact, the Commission only deals with a number of downstream markets that are chosen by discretion.

9.19.6.1.3 A European Internal Electricity Market as the Relevant Geographic Market?

Based on the doctrine substitutability without undue difficulties, the Commission undertakes considerable efforts to define the adequate geographic scope of the market of transmission of electricity[1410]. The parties are of the opinion that the market for transmission of electricity already has a transnational community wide nature[1411]. The arguments relate to the continental grid that is co-ordinated by means of the UCPTE in general and the interconnectors between Germany and its neighbours in particular. Additionally, it is argued that the intention of Art. 3 I lit g ECT and the rationale of the IEMD[1412] require to define a European market.

Contrarily, the Commission argues in favour of a market for transmission that does not exceed the national borders[1413].

Clearly, the parties' allegations are in the interest of the applicants as an increasing size of a relevant market reduces the scope for any finding of dominance. However, the rationale of Art. 3 I lit. g ECT and of the IEMD is only relevant as it describes the desired future structure of an internal market but a due legal interpretation of

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[1406] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 11; Commission Decision, Case IV/M. 1557, 1999 (*EdF/Louis Dreyfus*); G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 182, p 1255 and marginal note 183, p 1256.
[1407] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 19.
[1408] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 15, 16-18 and 19.
[1409] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 19.
[1410] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 20; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. III. 4. c) p 398.
[1411] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 21.
[1412] R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 23 10. (A) (i), pp. 1020-1021.
[1413] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraphs 22-31; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 189, p 1257.

Art. 2 MR1997[1414] - even if it considers the near future - cannot ignore that considerable legal and factual obstacles against an internal electricity market will remain in place for a relevant period.

Moreover, the Commission's view is supported by persuasive evidence. The interconnector capacities are extremely limited compared with the electricity consumed within the national borders[1415]:

Interconnector Capacities in 1998

Company	Capacity (GW)	country of destination
VEBA	**5,0**	Netherlands, Denmark, Sweden
VIAG	**6,6**	Austria, Czech Republic
RWE	**13,9**	Netherlands, France, Luxembourg, Austria, Switzerland
VEAG	**7,0**	Denmark, Poland, Czech Republic
VEW	**3,2**	Netherlands
EnBW	**10,3**	France, Austria, Switzerland
total:	**46,0**	

source: UCPTE, 1998

The import of electricity to Germany was 38,5 TWh in 1998. This reflects a mere 8% of the total consumption[1416]. From October 1998 to September 1998, 28TWh were imported according to an ETSO study[1417] which equals 6% of the then overall consumption of 479 TWh. A further reduction is caused by transit power contracted on a long-term basis so that the required capacities will not be available for German electricity traders. The Commission also underlines, that it is important to consider that the interconnector capacity cannot simply be added up to 46 GW because the so-called loop flows of electricity will limit the capacity to a value between 7 or 15 GW[1418]. Additionally, the Commission points out that the small amount of effective capacity that could be available for liberalised cross-border electricity trade is further reduced owing to those capacities which are reserved for long term electricity sales agreements entered into by the owners of the interconnectors[1419].

This argument is challenged by the parties as synchronised counter-trading would remove the need to transport physical electricity. However, the Commission sticks to its opinion because the practical experience does not indicate significant quantities of counter-trading at present[1420]. Future developments are not considered especially as cross-border trade is impeded by the "cross-border t-component", a specific levy imposed on third party access to interconnectors in accordance with the 2nd associations' agreement[1421]. Consequently, an average consumer of high voltage electricity transmission will not regard electricity of domestic and of foreign

[1414] Art. 2 MR2004; R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 23 10. (A) (i), p 1021.
[1415] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 189, p 1257.
[1416] q.v. Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 22.
[1417] ETSO, Proposal for The Implementation of The Cross-border Tariffs for The Year 2001, 27 March 2000.
[1418] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 25-27; P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (1) (a) p 393.
[1419] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 27.
[1420] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 28.
[1421] This component equals 0.25 Pf per kWh: q.v. BDI, VIK and VDEW, *2nd Associations' Agreement*, (13/12/1999) Annex 5 point 3; Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 30.

origin an interchangeable products. Therefore, it is superior to argue in favour of a geographic market of electricity transmission not exceeding the German market. The T-Component was abandoned[1422].

9.19.6.1.4 National Market as The relevant Geographic Market?

The present finding that no community wide market for the transmission of electricity exists does not clarify whether a genuine German market for electricity transmission exists or if several regional markets for transmission exist of which the scope could be limited to those areas in which the former de facto monopolists, i.e. the large vertically integrated companies, own the transmission grids. In contrast to a former decision, the Commission no longer argues that it is not necessary to define the geographic scope of the market as national or regional[1423]. Now, the Commission applies the doctrine of demand side substitutability in order to address the issue. Said interchangeability will depend crucially on the present and future competition as to transmission of electricity to regional distributors, large municipalities and to large individual consumers[1424].

Clearly, the efficiency of TPA to the transmission grid will be an important factor for this analysis accompanied by the unbundling provisions and a limited relevance of direct lines[1425].

The efficacy of TPA to distribution grids will be equally important as the latter is necessary in order to serve small municipalities or the large number of final consumers. Apart from primary EC law that is generally primarily applicable to the detriment of contravening national laws pursuant to the effet utile doctrine, the specific legal foundations of any domestic TPA regime are Art. 17-18 IEMD[1426]. The German Energy Industry Act of 1998[1427] opted for a negotiated TPA regime[1428]. Fortunately, 100% of consumers are eligible for TPA from its entry into force. This intensifies the market opening and facilitates a finding in favour of a national market in contrast to neighbouring markets like France and Austria. However, regional markets could well be maintained for the foreseeable future if the efficacy of negotiated TPA was extremely limited compared with a hypothetical regime of regulated TPA.

In the past, the efficacy of commercially viable TPA was not secured by the first associations' agreement and it was hardly improved by the second associations' agreement[1429]. Both agreements are not enforceable contracts. Additionally, they protect the interests of vertically integrated entities rather than those of new market entrants[1430]. Additionally, both agreements fail to introduce simple rules for the process of applications for TPA.

[1422] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (1) (a) p 393.
[1423] q.v. Commission Decision, Case IV/M. 1720, 2000 (*Fortum/Elektrizitätswerk Wesertal*) paragraph 13.
[1424] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 33.
[1425] q.v. Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 35.
[1426] Directive 1996/92/EC; R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 23 10. (A) (i), p 1021.
[1427] Section 6 I Energy Industry Act of 24 April 1998 [Gesetz über die Elektrizitäts- und Gasversorgung (Energiewirtschaftsgesetz - EnWG)], Federal Law Gazette 1998 I 730; as lastly Amended on 29 March 2000, Federal Law Gazette 2000 I 305.
[1428] I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 1 A. I. 3. p 14; CH 1 A. II. 3. p 28.
[1429] q.v. Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 39.
[1430] Especially, the cross trading zone t-component is detrimental to competition.

Neither do they clarify the potential for refusals to TPA, which is provided by the Energy Industry Act[1431], nor do they boost transparency to proceedings by means of mandatory publications of key-commercial terms for TPA. Unfortunately, the federal ministry of economics did not take advantage of its power to enact an ordinance to determine the key commercial terms of TPA contracts if the former is deemed to be necessary to facilitate secure, price worthy, environmentally sustainable supply of power to the general public and to foster competition[1432].

A further difficulty relates to the cross-trading zone t-component which will have to be paid by applicants for TPA if the transaction crosses the border between the Northern and Southern trading zone without being offset by counter trading[1433]. This surcharge of 0.25 Pf/kWh is not only unjustifiable in terms of cost-reflection as TPA does not lead to long distance flows of electricity in physical terms but also a disguised discrimination between traditional power companies and new competitors. The former companies are either operating power stations in both trading zones directly or indirectly by means of shareholdings so that they can easily avoid cross-trading-zone transactions so as to unduly evade the levy. In fact, another dis-incentive is provided by the obligation to balancing services as the remuneration exceeds the costs by far[1434].

Finally, a further impediment of competition on a national scale relates to the fact, that neither ownership nor legal unbundling is mandatory but a mere management unbundling with separate accounts[1435] so that vertically integrated entities can maintain commercial interests which provide for incentives as to the discrimination between intra- or extra-group applicants for TPA.

As a result of the arguments presented, it would be superficially sustainable if the Commission argued in favour of a regional market definition. However, such a finding would be premature as the Commission has to take other aspects into account which back a conclusion that equals a national market definition[1436]. First of all, the limitations of the second associations' agreement can be overturned by its revision that is due in January 2002.

Secondly, it is predicted that the defensive practice of "subsidiary sales of electricity" will be terminated, soon[1437]: A new market entrant tries to avoid the uncertainties of lengthy TPA negotiations by a very defensive approach: If the entrant sells electricity to a final consumer who is served via the network of a regional

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[1431] i.e. Section 6 III Energy Industry Act; Art. 4 Act Regarding the Electricity Reform of 1998 (protection of power generated from lignite in Eastern Germany; q.v. Art. 8 III-IV IEMD.

[1432] Section 6 II Energy Industry Act of 24 April 1998 [Gesetz über die Elektrizitäts- und Gasversorgung (Energiewirtschaftsgesetz - EnWG)], Federal Law Gazette 1998 I 730; as lastly Amended on 29 March 2000, Federal Law Gazette 2000 I 305.

[1433] BDI, VIK and VDEW, *2nd Associations' Agreement*, (13/12/1999) p 6 and Annex 5 point 3.

[1434] q.v. Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 40.

[1435] Section 9 I-IV Energy Industry Act of 24 April 1998 [Gesetz über die Elektrizitäts- und Gasversorgung (Energiewirtschaftsgesetz - EnWG)], Federal Law Gazette 1998 I 730; as lastly Amended on 29 March 2000, Federal Law Gazette 2000 I 305.

[1436] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 41.

[1437] q.v. Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 42.

distributor, the vendor avoids TPA by purchasing the power that is needed from the regional distributor. This practice prolongs the period of market opening as the entrant's ability to offer lower prices is extremely limited. Thirdly, the Commission assesses, that it is hardly feasible to invoke the lignite protection clause to outlaw TPA. Finally, the evolution of power exchanges is deemed to overcome the weaknesses of present TPA by means of standardised financial risk management tools so as to facilitate power trading[1438].

If one weighs the facts it is difficult to conclude that a unique German market for electricity transmission exists at present. However, the assessment under Art. 2 MR1997[1439] is an operation essentially based on elements of prognosis. Therefore, it is indeed justifiable to regard the market as a national one for the purposes of an adequate assessment of the concentration VEBA / VIAG.

9.19.6.1.5 Temporal Criteria?

Additionally, it is well worthy to distinguish markets for electricity on the basis of the temporal difference between the time of concluding a supply contract and the future delivery of power. One could separate traditional long term supply agreements, which meet basic needs[1440], from new spot markets for additional needs and from markets for derivatives, i.e. forwards, futures options and swaps. Unfortunately, the Commission does ignore these temporal aspects.

9.19.6.2 Assessment of the Need to Maintain Effective Competition Art. 2 I lit. a MR1997

The second element of the dominance test of Art. 2 MR1997[1441] deals with the correct assessment of the need to maintain effective competition on the relevant market for feeding generated electricity in the transmission grid and the affected markets of transmission, distribution, supply of electricity and metering of its consumption. This need is established by means of sub-criteria of declining importance which relate to

- the present and future market structure[1442],
- actual and potential competition on the affected markets
- additional criteria [arg. ex Art. 2 I lit. a MR1997 "among other things"[1443]]

It will be concluded that the market structure is already highly concentrated so that the Commission will have to give a general priority to the concern that effective competition on the affected markets must be secured.

9.19.6.2.1 Present Structure of the Market for Power Generation and Wholesale via the Transmission Grid pursuant to Art. 2 I lit. a 1st Variant MR1997

[1438] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 45.
[1439] Art. 2 MR2004
[1440] Probably, such long term agreements could contain a subsidiary clause that they are only valid if the consumer has not contracted quantities of priority power from spot markets.
[1441] Art. 2 MR2004; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 25 II. p 596.
[1442] A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 373, p 176.
[1443] Art. 2 I lit. a MR2004.

With regard to the present and future structure of the market for the transmission of electricity in Germany, it must be stated that the market is highly concentrated at present. This is a result of several factors:

First of all, the number of companies who generate power, feed it in the transmission grid and sell it to either regional distributors, large municipalities or large industrial consumers is quite limited. This may be exemplified by the following table:

Status Quo Ante: Electricity Generation and The Market Shares Regarding The Feeding of Power in The Transmission Grid

Com-pany	Generation in TWh in 1998	market share regarding the feeding of power in the transmission grid (%)
VEBA	**77.1**	21.2
VIAG	**44.5**	12.2
BEWAG	**10.3**	2.8
RWE	**120.4**	33.1
VEW	**19.8**	5.44
VEAG	**43.9**	12.1
EnBW	**35.3**	9.7
HEW	**12.6**	3.46
total:	**363.9**	**100**

Source: Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 49.

The market power of the transmission companies that is indicated by high market shares concentrated in eight companies is even extended by three additional elements:

The generation capacity of regional distribution companies and of municipalities is very limited so that these undertakings depend largely on the power transmitted to them on the transmission grid. This finding may be underlined by the following table:

Status Quo Ante: Concentration of The Market Owing to The Concentration of The Capacity of Electricity Generation for The Public

Undertaking producing electricity for the general public (i.e. not Industrial Power Producers and DB Railway)	Installed Generation Capacity of including jointly owned power plants (GW)	Percentage of installed Capacity
VEBA	17.5	17.6%
VIAG	11.0	11.1%
BEWAG	2.9	2.9%
RWE	19.8	19.9%
VEAG	9.4	9.5%
VEW	4.2	4.2%
EnBW	7.7	7.8%
HEW	3.8	3.8%
TOTAL "Verbund Utilities"	*76.3*	*76.8%*
Regional Distribution Companies and Large Municipalities	23.1	23.2%
TOTAL	*99.4*	*100%*

Source: Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 52.

The concentrated nature of the market is not only reflected by generation capacities but also by the actual amount of power that was sold by distributors or suppliers to final consumers and which was originally generated by the transmission companies. For this purpose, it is not relevant whether the power was sold to retail consumers by branches, affiliated regional distribution companies or local supply undertakings co-owned by municipalities:

Status Quo Ante: Concentration of The Market Owing to High Proportion of Retail Electricity Sales Depending on Verbund Utilities' Production

Utilities	**Responsibility for Retail Electricity Sales in Germany (TWh)**	**Equals a Percentage of Retail Sales of:**
VEBA	102.3	21.4%
VIAG	59.5	12.4%
BEWAG	13.3	2.8%
RWE	151	31.5%
VEAG	attributed to its shareholders	attributed to its shareholders
VEW	43.6	9.1%
EnBW	44.3	9.3%
HEW	15.4	3.2%
TOTAL "Verbund Utilities"	*429.4*	*89.7%*
Regional Distribution Companies and Large Municipalities	49.6	10.3%
TOTAL	*479*	*100%*

Source: Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 53.

Moreover, the number of regional distributors and especially that of municipalities is immense so that the market power of the vendors is expanded by an atomistic demand pattern[1444], at least in general.

Lastly, the vendors who sell power via the transmission grid are frequently influential (im)mediate shareholders in the (im)mediate buyers so that the former have access to confidential economic data.

The second element of concentration of the market relates to the commercial link, that the generators concluded contracts providing for emergency electricity supply to the transmission grid in case of unforeseeable difficulties[1445].

Thirdly, even the few influential vendors of electricity via the transmission grid are linked by direct or indirect cross-shareholdings[1446]. Clearly, these links reduce the potential of fierce competition between the transmission companies.

In fact, the Commission considered these factors when it assessed the proposed concentration but is remains questionable whether these factors were taken into due account. The answer will be provided later as a

[1444] The scope for energy demand cartels of SME's which are exempted from the German Antitrust Act is to insignificant to remedy this situation: q.v. Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 51, 57, 86.
[1445] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 48.
[1446] e.g. VEAG was created as a generator and transmission company after the German unification. Its shareholders are the other transmission companies and it is jointly dominated by VEBA (Preussen Elektra 26.25%), VIAG (Badenwerk 22.5%) and RWE (26.225%); q.v. Annexes 10.7.2 Capital Links among German utilities. BEWAG was jointly dominated by VEBA and Southern Company, U.S. q.v. Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 55.

consequence of a critical analysis of the incidental provisions attached to the decision. A negative assessment will be probable unless the parties invent options that severely limit the room for additional impediments of competition. Even this may be insufficient so that it could be better to use the concentration as a vehicle of facilitation of future competition. Incidental Provisions could try to define a strategy that facilitates a rapid breakdown of traditional vertical integration in the former areas of exclusive transmission and distribution operations.

Furthermore, these conditions and obligations could provide for an incentive to allow VEAG to become an entity independent from its Western counterparts VEBA/VIAG, RWE/VEW and EnBW so that it may be a true competitor, soon[1447]. It will be beneficial that it is issued with modern power stations[1448].

9.19.6.2.2 Actual and Potential Competition on the Affected Markets: Art.2 I lit. a 2nd Variant MR1997

The tendency towards a negative assessment of the concentration owing to an extremely great need not only to maintain but also to develop effective competition on the affected markets that was indicated by the already highly concentrated market structure is even broadened by the Commission's arguments relating to actual and potential competition. The scope for actual and potential competition from external sources is seriously weakened by the limited capacity of interconnectors which was mentioned above with respect to the domestic market definition[1449]. The same idea is true because of the barriers to entry as a result of the natural monopolies regarding the transmission and distribution networks, that are not adequately addressed by the second associations' agreement[1450], and of the serious financial and judicial burden to get an approval for a new power station.

9.19.6.2.3 Additional Criteria Art. 2 I lit. a 3rd Variant MR1997

Based on the wording "among other things" in Art. 2 I lit. a MR1997[1451] the aspects that were discussed above, are not of an exhaustive nature. The Commission rightfully points out that several subsidiary criteria need to be reviewed to assess the present structure of the energy sector[1452].

The homogeneity of the product provides for transparency of commercial operations that alleviates joint dominance of powerful undertakings rather that fierce price competition in the long run as all competitors might equally suffer from lower margins. Secondly, the stable demand trend is also a factor that limits the

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[1447] A new 4th force is created VEAG (HEW, BEWAG, VEAG, LAUBAG, without ENVIA) called Vattenfall Europe AG and later GmbH: I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 1 B. II. 3. c. p 42.
[1448] Financial Times, *VEAG Well-Positioned to Assume Powerful Role* (09/10/2000), http://www.ft.com.
[1449] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 50.
[1450] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 58; q.v. BDI, VIK and VDEW, *2nd Associations' Agreement*, (13/12/1999).
[1451] Art. 2 I lit. a MR2004.
[1452] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 58.

incentive to compete fiercely against each other. The tendency towards a limitation of competition is highlighted by the over-capacities concerning base load generation that were admitted recently. Therefore, VEBA/VIAG and RWE plan to close down several old power stations[1453].

9.19.6.3 Market Position of the Undertakings Art. 2 I lit. b 1st Variant MR1997

If one considers the market position of the undertakings that are active on the affected markets, it is important to reiterate that the ownership of the transmission networks provide for a formidable means of preventing or slowing down the process of liberalisation. The transmission network offers the crucial ability to transmit power over long distances at minimum loss so that TPA to this network is one of the bases of liberalisation. The following table indicates, how concentrated the ownership of transmission networks is:

Status Quo Ante: Transmission Network Ownership

Undertaking	Ownership Concerning Transmission Networks 380/220 kV in km	Percentage of total network
VEBA	6,569	16%
VIAG	5,500	14%
BEWAG	136	ca. 1%
RWE	9,000	22%
VEAG	11,500	29%
VEW	2,000	5%
EnBW	2,100	5%
HEW	360	1%
Regional Distribution Companies and Municipalities	3,121	7%
TOTAL	40,150	100%

Source: VDEW, 1997.

The relevance of this argument is proved by the slow and lengthy negotiations which lead to the first associations' agreement in 1998. The former contained an ill designed distance related tariff although power transport does generally not involve distance related costs. Moreover, time consuming negotiations preceded the adoption of the second associations' agreement which will last until December 2001. Although a more cost-

[1453] q.v. E.on announces a closure of power stations owing to over-capacities of allegedly 10,000 MW: Financial Times Deutschland, *E.on Energie: Chef kündigt Schließung von Kraftwerken an* (04/10/2000), http//www.ftd.de; Later it is specified that the nuclear power station Stade will be closed in 2003 although the "atomic industry consensus" would have allowed E.on to continue to operate Stade until 2004 due to overcapacities of allegedly 4800 MW: Financial Times Deutschland, *E.on Energie: Kernkraftwerk Stade geht 2003 vom Netz* (09/10/2000), http://www.ftd.de. Similarly in terms of time and scope, RWE announces a closure of 5,000 MW of installed capacities including a nuclear power station and fossil fuel plants that are no longer competitive: Financial Times Deutschland, *RWE: Energieversorger nimmt Kraftwerke vom Netz* (10/10/2000), http://www.ftd.de ; Financial Times, RWE Announces Closures (10/10/2000), http://www.ft.com .

reflecting network access tariff was chosen[1454], several features are inconsistent with a fair TPA regime. In fact, the negotiations are not based on objective, transparent and non-discriminatory criteria alone. For instance, it is still disputed whether the consumer is entitled to conclude a single sales contract for power with the chosen supplier so that it is up to the supplier to agree on TPA with the network operators or if it is mandatory that the consumer concludes a TPA contract at least with the owner of the low voltage distribution grid[1455].

9.19.6.4 Economic and Financial Strength Art. 2 I lit. b 2nd Variant MR1997

The exorbitant economic and financial strength of the vertically integrated undertakings which operate on the affected markets is beyond serious doubt. The share capital[1456], the guaranteed income as a result of former exclusive concession agreements and demarcations contracts in combination with a cost-plus pricing and the various expansions[1457] may be the predominant indicators.

9.19.6.5 Alternatives Available to Consumers Art. 2 I lit. b 3rd Variant MR1997

The need to develop effective competition on the relevant market of distribution of electricity via the transmission grid is and affected markets is underlined by the lack of alternatives to ordinary consumers as the networks are a natural monopoly and by the fact that even interconnectors are owned by the Verbund utilities. Finally, fuel-switching capabilities are considered to be too expensive to be realised by average consumers[1458].

9.19.6.6 Barriers to Entry Art. 2 I lit. b 4th Variant MR1997

Similarly to the previous chapter, the transmission networks do not only restrict consumers' choices but provide also for natural monopolies, i.e. essential facilities of which the duplication is hardly economically feasible and hardly environmentally desirable[1459]. As long as interconnector capacities are insignificant and are controlled by the Verbund utilities, other barriers to entry relate to the necessary investment in modern base-load, medium-load and peak-load power stations. Therefore, the protection of competition on the current market is even more important.

9.19.6.7 Demand Trends, Interests of Consumers and Technological Development: Art. 2 I lit. b 5th-7th Variant MR1997

As the demand trends are relatively stable, the problem arises that new competitors are facing the difficulty that expansion is only feasible to the detriment of other energy companies, which provides for an important barrier

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[1454] q.v. BDI, VIK and VDEW, *2nd Associations' Agreement*, (13/12/1999) p 6.
[1455] If one insists on a contract for TPA between the consumer and the local grid owner, the grid owner will be in an advantageous position in order to slow down the process in every single case or to make individual competing offers; q.v. Financial Times Deutschland, *RWE Plus macht Druck, um eine grundsätzliche Frage des Stromwettbewerbs in Deutschland zu klären* (02/01/01), http://www.ftd.de.
[1456] q.v. Annexes 10.7.2 Capital Links among German utilities.
[1457] e.g. VIAG founded a successful telecomunications division called VIAG Interkom. RWE recently acquired Thames Water so as to implement a multi utility strategy.
[1458] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 83-84.

to entry. However, this situation does not foster competition between the existing market players in the long run, as other factors of the market may facilitate joint dominance instead of fierce competition.

Furthermore, the post-liberalisation scenario is still in its initial stage so that it is not prudent to conclude that price reductions for consumers within the last 12-15 months are sufficient to meet consumers' interests in the long run because oil price developments, the likelihood to close down base load nuclear power stations due to the phasing out talks regarding the nuclear industry and the option to consolidate generation activities by merging of entities will provide for opportunities to cut supply quickly so that stable prices or even price increases are foreseeable in the long run. Finally, technological developments are not boosted by the merger.

9.19.6.8 Prognostic Evaluation

The addition of the factors defining the present structure of the market, the actual and potential competition, the market position of the parties, their powers, the lack of alternatives to consumers, demand trends, consumer interests and technological progress highlight the seriousness of the concern to develop competition on the affected markets. Consequently, factors which impede competition on the newly liberalised market of electricity generation and wholesale via the transmission net must neither be ignored nor left unaddressed but they must be limited by pro-active competition policies. Therefore, it is justifiable to block the concentration unless the parties propose restrictions which will limit the explicit threat to the competitive structure in a manner that efficiently remedies the anti-competitive aspects. Such incidental provisions may require a divestiture of assets in order to create new powerful competitors or at least provide international energy investors with promising options for investments in order to initiate power projects with a reasonable chance of success.

In brief, the promotion of competition by undertakings must at least outweigh the potential of the parties to create even higher barriers of entry by means of consolidation and pooling of operations.

In order to evaluate the impact of the concentration on the affected markets, the Commission intends to predict the future consequences of the notified concentration provided that it was hypothetically cleared without any incidental provisions.

This prediction is further complicated as the Commission has to take the likely outcome of parallel German merger control proceedings between RWE/VEW into account in order to come to a valid conclusion. In pursuing this prognosis, the Commission evaluates the probable effects of both concentrations on the affected markets.

[1459] R. Whish, D. Bailey, Competition Law (8th ed.) (Oxford, U.K., OUP, 2015) CH 23 7. (B), p 1032.

Firstly, the generation of power and its feeding in the transmission grid is considered. The result is exemplified in the subsequent table which should be contrasted to an abovementioned table[1460]:

Predicted Status Quo Ex Post: Electricity Generation and The Market Shares Regarding the Feeding of Power in The Transmission Grid

Company	**Generation in TWh in 1998**	**Market share regarding the feeding of power in the transmission grid (%)**
VEBA+VIAG +BEWAG (the latter was jointly controlled by VIAG and Southern Energy Inc. in 1998)	**131.9**	36.3%
RWE alone	**120.4**	33.1%
RWE+VEW	**140.2**	38.5%
VEAG	**43.9**	12.1%
EnBW	**35.3**	9.7%
HEW	**12.6**	3.46%

Source: Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 65.

Secondly, it is calculated to what extent the sale of electricity via the transmission grid by the vertically integrated utilities will be responsible for later retail sales of power. This is indicated by the subsequent table that should be contrasted to table eight[1461]:

Predicted Status Quo Ex Post: Responsibility for Retail Electricity Sales

Company	**Responsibility for Retail Electricity Sales in Germany in TWh**	**Equal a Percentage of Retail Sales of ... %**
VEBA+VIAG +BEWAG (the latter was jointly controlled by VIAG and Southern Energy Inc. in 1998)	**175.1**	36.6%
RWE alone	**151.4**	31.5%
RWE+VEW	**194.6**	40.6%
VEAG	**Attributed to its shareholders**	Attributed to its shareholders
EnBW	**44.3**	9.3%
HEW	**15.4**	3.2%

Source: Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 67.

After having collected the presented data, the Commission creates an hypothesis that - even if the notified concentration RWE/VEW was not cleared - a collective dominant position of VEBA/VIAG and RWE might arise[1462]. This thesis will be well reasoned if the forthcoming analysis supports the conclusion that the necessary conditions of joint dominance are fulfilled which were - in general - introduced above[1463]. Therefore, it is

[1460] Table 6: Status Quo Ante: Electricity Generation and The Market Shares Regarding the Feeding of Power in The Transmission Grid.
[1461] Table 8: Status Quo Ante: Concentration of The Market Owing to High Proportion of Retail Electricity Sales Depending on Verbund Utilities' Production.
[1462] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 60.
[1463] supra at 6.5.3.2.16 Joint Dominance under Art. 2 II; I MR1989.

necessary to ask whether a small group of powerful competitors with equal strength is available which may co-ordinate their behaviour - without relying on formal allegedly legally binding or mere gentlemen's agreements - simply by a quick adaptation to the present behaviour of its competitor so as to imitate a single economic entity and to remove internal competition.

Firstly, the future VEBA/VIAG group feeds 131.9 TWh in the transmission grid and is responsible for 175.1 TWh of retail electricity sales in Germany[1464]. Whereas RWE alone amounts to 120.4 TWh and 151.0 TWh respectively. Together with VEW 140.2 TWh are fed into the grid and the group will be responsible for 194.6 TWh of retail sales. Consequently, both groups are nearly of equal strength.

The exorbitant market power of the group results from the combined market share of VEBA/VIAG and RWE which would amount to 69.4% as to feeding of electricity in the transmission grid or to 86.8% together with VEW.

Secondly, the electricity fed in by VEBA/VIAG and RWE to the transmission grid would be responsible for 68.1% of the later retail electricity sales from the regional distribution grids or for 77.2% together with VEW.

Thirdly, the next two tables clarify that an enormous difference as to market shares exist between VEBA/VIAG and RWE compared with the largest external competitor[1465].

Moreover, figures relating to installed capacity indicate the strong position of the group VEBA/VIAG and RWE/VEW:

Predicted Status Quo Ex Post: Generation Capacity

Company	**Generation Capacity in GW**	**Percentage**
VEBA+VIAG +BEWAG (the latter was jointly controlled by VIAG and Southern Energy, Inc. in 1998)	**31.4**	31.6%
RWE alone	**19.8**	19.9%
RWE+VEW	**24.0**	24.1%
VEAG	**9.4**	9.5%
EnBW	**7.7**	7.8%
HEW	**3.8**	3.8%
Regional Distribution Companies, Municipalities	**23.1**	23.2%

Source: Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 69.

This market power is enhanced if one considers the market share of base load plants operated by the group:

Status Quo Ex Post: Structure of Power Stations

Company	**Power Station Base load**	**Power Station Medium Load (GW)**	**Power Station Peak Load**	**Total (GW)**

[1464] q.v. tables 9-10. The Commission states that the advantage of RWE/VEW after the likely clearance of the concentration would be insignificant: q.v. Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 63.

[1465] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 64.

	(GW)		(GW)	
VEBA/VIAG/ BEWAG	17.1	5.8	7.8	30.7
RWE	15.3	4.2	1.7	21.2
RWE/VEW	17.8	5.0	3.8	26.6
VEAG	8.0	0.1	2.8	10.9
EnBW	4.7	0.8	1.5	7.0
HEW	2.2	0.2	1.7	4.1

Source: Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 75.

Power supply from reliable sources and grids is a product with nearly identical characteristics so one has to conclude that competition will be reduced to price competition or cross utility competition in general.

Furthermore, the highly concentrated nature of the market prior or after an unconditional clearance will provide for an extremely transparent business environment for the involved management[1466]. Peaceful behaviour is even more interesting owing to the parallel existence of former closed supply areas and network ownership and owing to stable demand predictions[1467].

Additionally, the low cross-product and price elasticity of demand and the high barriers to entry provide for a further incentive to less aggressive competition[1468]. However, even more specific factors are the capital links between the Verbund utilities with regard to either other Verbund utilities like VEAG or BEWAG[1469].

Hence, the members of the potential duopoly participate in regional distribution companies and companies partly owned by municipalities[1470] which provides not only for secure sources of consumer demand and but also gives another incentive not to lose the benefits of co-operation from these daughter undertakings by excessive competition between the parents. This is exemplified by the following table:

Status Quo Ex Post: Joint Daughter Undertakings

Parent Company	**Daughter VEW**	**Daughter VEAG**	**Daughter HEW**	**Daughter LAUBAG**
VEBA/VIAG/ BEWAG (26% Southern Energy, Inc.; 26% VIAG; 23% VEBA)	VIAG is a share-holder of VEW	26.25% + 22.5% =49.75% (+5% of BEWAG via EBH)	15.4 %	30%+15%
RWE		26.25%		
EBH GmbH		25%		
- 25% HEW				
- 25% BEWAG				
- 25% EVS				
- 25% VEW				
BBS				55%
- 18% by Energiebeteiligungsholding [owned by BEWAG, HEW, VEW, EVS]				

[1466] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 72.
[1467] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 58, 80, 81.
[1468] The barriers to entry were already assessed with regard to the present market structure under Art. 2 I lit. a and under Art. 2 I lit. b MR1997; q.v. Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 82; B. Woeckener, Strategischer Wettbewerb (3rd ed.)(Berlin, Germany, Springer, 2014) CH 3.3.2 p 83.
[1469] I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 1 B II. 3. c. p 42.
[1470] An indicative list of majority and minority shareholdings in municipal energy undertakings is provided by paragraph 115 of Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 76.

- 71.8% by Rheinbraun [RWE affiliate] **- 10% RWE Energie** **Thüga** **- VEBA 56.9 %** **Energiebeteiligung GmbH** **- RWE Energie 49.7%** **- VEBA 50%** **RAG AG** **Sydkraft (Sweden)** **- VEBA 17.6%** **Vattenfall (Deutschland) GmbH** **- subsidiary of Vattenfall AB, Sweden** **- pooling of shares with FHH via Vattenfall HGV Holding GbR** **Hamburgische Gesell-schaft für Beteiligungs-verwaltung mbH** **- 25.1% of shares** **- controlled by the federal state FHH** **- pooling with Vattenfall** **Institutional Investors**			15.4 % 25.1% 31% (votes) 7.8%	

Parent Company	**Daughter RHENAG**	**Daughter STEAG**	**Daughter Envia**
VEBA/VIAG/ BEWAG (26% Southern Energy, Inc.; 26% VIAG; 23% VEBA) **RWE** **EBH GmbH** **- 25% HEW** **- 25% BEWAG** **- 25% EVS** **- 25% VEW** **BBS** **- 18% by Energiebeteili-gungsholding [owned by BEWAG, HEW, VEW, EVS]** **- 71.8% by Rheinbraun [RWE affiliate]** **- 10% RWE Energie** **Thüga** **- VEBA 56.9 %** **Energiebeteiligung GmbH** **- RWE Energie 49.7%** **- VEBA 50%** **RAG AG** **Sydkraft (Sweden)** **- VEBA 17.6%** **Vattenfall (Deutschland) GmbH** **- subsidiary of Vattenfall AB, Sweden** **- pooling of shares with FHH via Vattenfall HGV Holding GbR** **Hamburgische Gesell-schaft für Beteiligungs-verwaltung mbH** **- 25.1% of shares** **- controlled by the federal state FHH** **- pooling with Vattenfall** **Institutional Investors**	54.1% 41.3%	 26% 71.5%	100%

Sources: Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 79 and Commission Decision Case IV/M. 1842, 2000 (*Vattenfall/HEW*) paragraph 5; Financial Times Deutschland, Vattenfall: HEW-Übernahme ist erst der Anfang (19/10/2000), http://www.ftd.de.
The undertakings VEBA / VIAG and RWE / VEW also control joint subsidiaries which operate power stations[1471].

These links provide for comparable cost structures and reveal similar marginal costs and define additional mutual interests.

Given the parallel power distribution between the mentioned entities, both groups' turnovers will suffer severely in case of long term rate wars without any chance of market expansion by acquisition of new consumer groups[1472] whereby a peaceful adaptation of competitor's strategies will prevent both factions in the group with stable and protected revenues. The Commission points out that this finding is consistent with initial price reductions in the early stages of liberalisation[1473] because it takes due time before the competitors are used to the market environment and are able to define the scope for collective dominance.

Another facilitator of joint dominance is the high proportion of the transmission grid that will be owned by the entities VEBA / VIAG and RWE / VEW according to table:

Predicted Status Quo Ex Post: Transmission Network Ownership

Company	**Transmission Network in km**	**Percentage**
VEBA+VIAG +BEWAG (the latter was jointly controlled by VIAG and Southern Energy, Inc. in 1998)	**12.069**	30%
RWE alone	**9.000**	22%
RWE+VEW	**11.000**	27%
VEAG	**11.500**	29%
EnBW	**2100**	5%
HEW	**360**	1%
Regional Distribution Companies, Municipalities	**3.121**	8%

Source: VDEW, 1997.

The strong position of VEBA/VIAG and RWE/VEW is enhanced by the abovementioned control of the interconnectors so that the even acquisition of HEW by Vattenfall does hardly generate any present opportunities for market opening by means of imports[1474].

The fact that the grid owners will benefit from surcharges for balancing of energy must not be neglected especially as the grid operations were only unbundled in legal or management terms and in terms of separated accounts. However, no ownership unbundling is ordered so that an important incentive is provided to

[1471] e.g. Power Station Grundremmingen. The operating company is owned by RWE (75%) and Bayernwerk (25%) and the power is distributed according to the shareholdings: Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 76.
[1472] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 64.
[1473] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 74.
[1474] The interconnectors to Denmark and Sweden are controlled by VEBA: Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 23 with reference to a study of UCPTE, 1998 and paragraph 109.

maximise the costs of network access and the balancing of energy and to minimise the costs of power in combination with in-transparent tariffs for access[1475]. Additionally, there is an incentive to discriminate between applicants for grid access whether they belong to the group of the grid owner or not. This is especially true in case of congestions and it has to be criticised that the second associations' agreement does not provide for congestion management mechanisms[1476] so that the grid owner can enact more or less discretionary decisions.

This conclusion is backed by the rule within the second associations' agreement which insists on a t-component for a grid access that crosses the border between the Northern and Southern trading zones. On a prima facie basis, it is considered to be beneficial that the surcharge is not due if the applicant can offset the flow of electricity by means of antagonistic flows within the same period. However, this is a discriminatory tool as especially large utilities with commercial operations and plants in both trading zones are able to circumvent the surcharge by reciprocal activities[1477].

The second associations' agreement even increased the costs for balancing services compared with the first version[1478].

If one summarises the transmission grid related aspects of power liberalisation in Germany, it must be concluded that the development of a market for electricity trade is impeded by the utilities VEBA / VIAG and RWE / VEW with regard to

- interconnector control
- control over generation
- network ownership
- provisions in the associations agreement regarding t-component, offsetting and balancing services;
- statutory requirements lacking a mandatory ownership unbundling.

In combination with the factors of transparent product and market structure, former closed supply areas, stable demand trends and various capital links among the transmission utilities and between them and downstream companies, an exorbitant probability of joint dominance exists so that the external competition between VEBA / VIAG and RWE / VEW will be co-ordinated and internal competition will be removed by means of a quick adaptation of the behaviour of competitors without any need to rely on additional concerted practises in terms of Art. 101 TFEU (Art. 81 ECT). Thereby, the Commission concluded that the proposed concentration fulfilled

[1475] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 109 and 122; I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 1 A. I. 3. p 14; CH 1 B. II. 3. c. pp 43-44.
[1476] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 124.
[1477] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 109 and 121.
[1478] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 122; q.v. BDI, VIK and VDEW, *2nd Associations' Agreement*, (13/12/1999) p 7.

the criteria of dominance in terms of Art. 2 I and III MR1997[1479]. In accordance with the arguments presented above, this finding is consistent with the doctrine of collective dominance.

9.19.7 Incidental Provisions Imposed on the Parties by the Commission

Having established that the concentration fulfils the criteria of the dominance test pursuant to Art. 2 MR1997, the Commission is obliged to communicate its concerns to the parties in form of a statement of objections pursuant to Art. 18 I and III MR1997 and to provide them with an opportunity to communicate their comments on the Commission's negative assessment within a hearing[1480]. Furthermore, the announcement to enact a statement of objections will alert the parties to propose alterations of the concentration pursuant to Art. 8 II 2 MR1997 in order to remove any scope for future collective dominance on the relevant market for generation of electricity in order to sell it via the transmission grid and the affected markets for distribution, supply, import, export and trading of electricity[1481]. However, it has to be stressed that Art. 18 II of the implementing regulation[1482] requires the parties to make these commitments within three months after the initiation of phase two proceedings.

As a result of negotiations during the hearings, the parties proposed several incidental provisions, which were accepted by the Commission. The incidental provisions are explained below. Later, the efficiency of the incidental provisions will be critically assessed as well.

9.19.7.1 Divestiture of Equity Stakes in VEAG, LAUBAG and Mining Privileges

The parties VEBA and VIAG propose to divest their equity stakes in VEAG[1483] of 26.25% and 22.5% so as to allow VEAG to become a third powerful and independent competitor on the German market for the generation of electricity and the feeding of electricity in the transmission grid[1484].

Secondly, VEBA / VIAG suggest, to sell their shareholdings in LAUBAG to the acquirer of VEAG. LAUBAG is an East German lignite producer and an important supplier of VEAG[1485]. The ownership structure of LAUBAG is quite complex and is illustrated up to the most relevant levels by the following table[1486]:

[1479] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 130.

[1480] The legal basis for hearings are Art. 18 I; 7 IV;8 II; 8 III-V; 14-15 MR1997; Art. 14 Commission Regulation 447/1998/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 061, 02/03/1998, p 1 Including Annex I (Form CO); q.v. supra at 6.6.1.6 Hearings; C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339.

[1481] q.v. § 40 III GWB; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 10 VII 4. p 377.

[1482] Art. 18 II Commission Regulation 447/1998/EC of 1 March of 1998 on The Notifications, Time Limits and Hearings Provided for in Council Regulation 4064/89/EEC on The Control of Concentrations between Undertakings, O. J. L 061, 02/03/1998, p 1 Including Annex I (Form CO); C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 34, p 339.

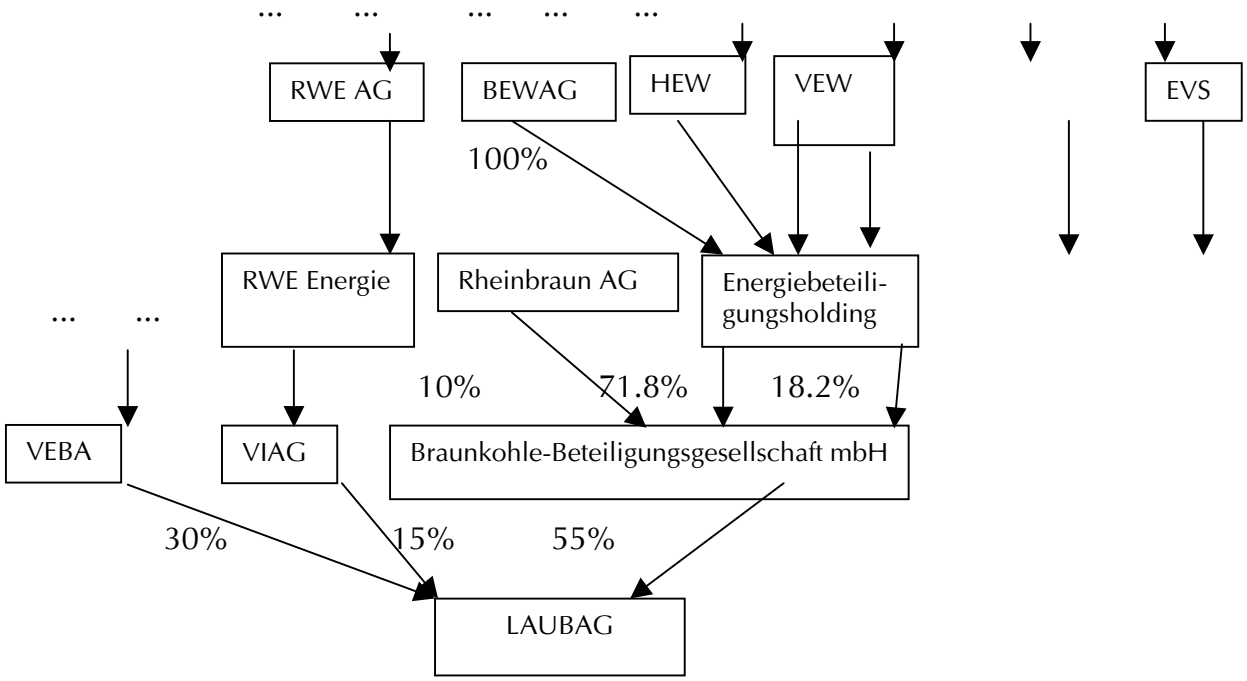
[1483] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 D. (2) (a) p 409; W. Kurzlechner, Fusionen Kartelle Skandale (1st ed.) (Munich, Germany, Redline Wirtschaft, 2008) CH 12, p 251

[1484] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 174, p 640.

[1485] q.v. table 13: Status Quo Ex Post: Joint Daughter Undertakings and Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 79 and 215.

[1486] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) Annex Undertakings, point I.

Ownership Structure of LAUBAG



Finally, VEBA / VIAG will give up their East German mining privileges that are owned by the shareholders of LAUBAG according to their shareholdings and which and leased to the former. The acquirer of VEAG shall become the owner of said privileges[1487].

9.19.7.2 Temporal Guarantee Regarding A Taking of Delivery of VEAG's Power By Downstream Affiliates of VEBA / VIAG

In order to secure the market position of the generation and transmission company VEAG, which was previously prevented from securing its consumer base by means of acquiring downstream companies, VEBA / VIAG promise to take delivery of power generated by VEAG to market conditions: The affiliated regional distribution companies of the parties - i.e. TEAG, e.dis, Avacon-Ost - must purchase 100% of their power needed until 31/12/2003 using ordinary demand patterns. The purchase obligation is generally reduced in 2004 by 10%[1488]. The power price is linked to the price of summer 2000 and consists of the components energy and network access. From 01/01/2002 on, only the energy component will be relevant to the price calculation. Additionally, the parties promise not to invoke specific termination clauses attached to a major loan granted to

[1487] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) Annex Undertakings, Chapeau of point I 1.
[1488] However, if the demand of regional distribution companies increases, the purchase obligation will increase as well. A decrease is not relevant: q.v. Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 216 and Annex I.5 lit a-d .

VEAG in May 1999[1489]. The background is to assure VEAG's credit line as the former is still weak in financial terms owing to major investments in power stations in the 1990s[1490].

9.19.7.3 Divestiture of Equity Stakes in BEWAG

VEBA/VIAG promise to divest their assets of 26% and 28.7% of ordinary shares in BEWAG[1491]. This commitment is accompanied by additional safeguards that are similar to those attached to the separation of VEAG and LAUBAG and which will be discussed infra[1492].

9.19.7.4 Divestiture of Equity Stakes in VEW

VIAG proposes to honour the commitment that it will sell its shareholdings in VEW[1493] so as to remove any direct equity link between the future groups of VEBA/VIAG and RWE/VEW[1494]. The safeguards, which protect the efficacy of the divestiture commitment, are comparable to the mentioned divestiture safeguards[1495].

9.19.7.5 Divestiture of Equity Stakes in HEW

As HEW is one of the entities which might acquire VEAG facilitated by an acquisition of BEWAG so as to form a powerful competitor independent from the two groups VEBA / VIAG and RWE / VEW, it is well received by the Commission, that VEBA suggests to sell its direct equity participation of 15.4% in HEW[1496]. Substantive and Procedural safeguards as to the separation of assets also apply[1497]. However, it does not propose to divest its shareholding in the Swedish Sydkraft which owns 15.4% in HEW. This is justifiable as VEBA's share in Sydkraft is only amounts to 17.6% and Sydkraft's stake is too small to ensure board representation and access to sensitive commercial data[1498]. Finally, the question is of rather academic interest since Sydkraft has already sold its stake in HEW to Vattenfall[1499]. However, should Vattenfall be once privatised, E.ON could implement its participation in Sydkraft to execute control over Vattenfall[1500].

[1489] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) Annex Undertakings I.4. .
[1490] Financial Times, *Veag Well-Positioned to Assume Powerful Role* (09/10/2000), http://www.ft.com.
[1491] VEBA entered into an obligation in front of the Federal Cartel Office not to execute more than 20% of the votes attributed to its ordinary shares on 17/09/1997; q.v. Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 217 and Annex Undertakings, Chapeau of point II; W. Kurzlechner, Fusionen Kartelle Skandale (1st ed.) (Munich, Germany, Redline Wirtschaft, 2008) CH 12, p 251.
[1492] infra at: 7.7.6 Theoretical Efficacy of the Untertakings to Remedy the Situation: i.e. time period for the divestiture, commission of a competent trustee for the sale in case of temporal excession subjet to Commission's approval, financial power and business expertise of the acquirer, approval of the acquirer(s); appointment of a second trustee subject to approval who executes voting rights q.v. Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 217 and Annex Undertakings point II 1-3.
[1493] VIAG did not only hold 11.13% of the shares of VEW but also had a subsidiary Contigas which holds 30% of EVG which again holds 24.7% of VEW: Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 218.
[1494] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 174, p 640.
[1495] q.v. Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) Annex Undertakings point II 1.-3. .
[1496]This reflects 14.2% of voting rights in HEW: Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 219; W. Kurzlechner, Fusionen Kartelle Skandale (1st ed.) (Munich, Germany, Redline Wirtschaft, 2008) CH 12, p 251.
[1497] q.v. safeguards that were discussed above; Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) Annex Undertakings point IV.1.-2..
[1498] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 241.
[1499] In October, Sydkraft sold its stake of 15.4% in HEW to Vattenfall that owned already 26.2% of HEW. E.on sold its stake of 15.4% (14.2% of votes) in HEW to Vattenfall, too. Institutional Investors sold another 7.8% to Vattenfall. The latter holds approximately 71.2% of the votes: Financial Times Deutschland, *Vattenfall: HEW-Übernahme ist erst der Anfang* (19/10/2000), http:///www.ftd.de.
[1500] W. Kurzlechner, Fusionen Kartelle Skandale (1st ed.) (Munich, Germany, Redline Wirtschaft, 2008) CH 12, p 251.

9.19.7.6 Divestiture of Equity Stakes in RHENAG

Moreover, VEBA will terminate its minority engagement in 41.3% of the equity of RHENAG which is controlled by RWE which owns 54.1% of the share capital[1501]. Again, safeguards are attached in order to guarantee the efficacy of the divestiture[1502]. This incidental provision will remove another area of mutual interest between the two future groups.

9.19.7.7 Obligation Not to Impose the T-Component on Applicants for TPA

In order to tackle the drawbacks of the second associations' agreement, VEBA / VIAG promise not to impose the t-component on entities who apply for TPA for transactions that cross the boundary between the Northern and Southern trading zones in Germany[1503]. Clearly, this will remove the opportunity for the two future groups VEBA / VIAG and RWE / VEW to benefit unduly from the ability to avoid the t-component by means of offsetting of transactions owing to their diverse operations - i.e. power stations, subsidiaries and consumers - in both trading zones[1504].

9.19.7.8 Obligation to Transparent Billing Calculation

Another drawback of the associations agreement is addressed by the obligation of VEBA / VIAG to apply a transparent method for the calculation of bills[1505]. Therefore, the wholesale consumer[1506] has to receive detailed information as to the network access fee, power price, metering fee, taxes and levies related to renewable energy, co-generation, concession fees and VAT. Thereby, the transparency of power prices with respect to transaction involving TPA is increased so that electricity trade is facilitated and cross-subsidisation is combated[1507].

9.19.7.9 Obligation Regarding the Billing of Balancing Services

In order to address the potential scope of discrimination against electricity traders by means of excessive fees for power balancing, the parties commit themselves to offer transparent cost reflecting prices[1508]. Therefore, the parties are prevented from offering cheaper power that is cross-subsidised by means of high balancing fees imposed on applicants for TPA[1509].

[1501] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 220.
[1502] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) Annex Undertakings point V1.-2.
[1503] It is interesting that this obligation will be immediately vailid on the condition that RWE/VEW agreed to honour a comparable obligation in the German proceedings: q.v. Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 221 and Annex Undertakings point VI and VIII 4.
[1504] q.v. Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 243.
[1505] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 222.
[1506] A consumer who takes delivery via the 110kV network or higher. Wholesale consumers delivered via the 20 kV network is included from 1 January 2001.
[1507] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 244.
[1508] They must offer balancing services on the base of daily calculated service fees or on the base of labour based prices: q.v . Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 223, 246 and Annex Undertakings point VI 3..
[1509] q.v. supra 7.5.5.8.

9.19.7.10 Obligation to Sell Reserved Interconnector Capacity to ELTRA

Hence, VEBA commits itself to give up its reserved capacity of 400 MW regarding the interconnector to Denmark that has a total transmission capacity 1200 MW[1510]. VEBA acquired a transportation right of 400 MW from ELTRA in order to take delivery of electricity from Statkraft. VEBA promises to re-sell its transportation right to the Danish utility ELTRA basically on the original conditions[1511]. Statkraft will receive financial payments which equal the profits that were made if the power sales agreement was honoured in reality[1512]. Thereby, new competitors may import electricity to Germany by means of bidding for the freed capacities of the interconnector. The intention is that additional capacity will be available so that inter alia Vattenfall will be able to sell cheap electricity to its German subsidiary HEW so as to intensify price competition in Germany[1513].

9.19.7.11 Condition Precedent linked to the Outcome of the German RWE / VEW Proceedings

Finally, the parties agree on the fact that certain obligations are not deemed to be fulfilled unless the entities RWE / VEW entered into the obligations not only to sell their stakes in VEAG and LAUBAG, but also to sell mining privileges. Moreover, said obligations must be legally valid[1514].

Similarly, it is regulated that VEBA / VIAG will not have fulfilled their obligations as to the application of the second associations' agreement unless the RWE / VEW group subscribes to honour comparable undertakings with respect to the clearance of their concentration under German law (a duopoly and oligopolistic market as to power supply owing to transmission is applicable of 80% in Germany)[1515]. The rationale of this condition precedent is that the incidental provisions imposed on VEBA / VIAG will be sufficient to avoid a duopoly of both groups if a powerful third competitor is formed by VEAG and if small competitors can benefit from efficient TPA to the large proportions of the transmission grid owned by both groups.

9.19.8 Theoretical Efficacy of the Incidental Provisions to Remedy the Situation?

Although the Commission conditionally cleared the concentration, it is not beyond reasonable doubt whether the quoted commitments are indeed sufficient to remedy the threat that the groups VEBA / VIAG and RWE / VEW will jointly dominant the affected markets.

First of all, it is highly beneficial that the Commission insisted on various safeguards which are designed to assure the efficacy of the divestiture of VIAG's participation in VEW and of both groups' equity stakes in VEAG,

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[1510] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 224; P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 D. (2) (c) p 412.
[1511] the re-sale price is lower reflecting the period of usage by Preussen Elektra.
[1512] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) Annex Undertakings VII.
[1513] This is especially relevant as power prices in Scandinavia are lower: q.v. Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 247.
[1514] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 225 and Annex Undertakings point VIII 4. .
[1515] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 225; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. III. 9. k) (4) p 465.

LAUBAG, BEWAG, HEW and RHENAG: The divestiture obligation is accompanied by the provision that the acquirer must not only be either an existing competitor or a potential competitor on the relevant market but also that the acquirer must be backed by adequate long term financial resources and that he must have sufficient expertise in the power sector[1516]. Clearly, the purchaser must be independent from both groups in terms of capital links. Prior to the transactions, the parties VEBA / VIAG must obtain a prior approval of the Commission as to the identity of the acquirer(s). Moreover, the prior consent of the successor of the Treuhandanstalt, the privatisation agency regarding formerly state owned companies, is required as far as VEAG is concerned[1517]. The urgency of the restructuring is underlined by the fact, that the parties need to comply with a strict time limit of 13/12/2000[1518].

As a measure of last resort, the parties have to commission a competent trustee for the sale - subject to the approval of the Commission if the fail to meet the time limit[1519]. The trustee will carry out the restructuring under close supervision by the Commission if the parties did not divest the assets mentioned above on time[1520]. The parties also have to commission a second trustee who will be responsible to execute the voting rights attributed to the shares of VEBA / VIAG in VEAG and LAUBAG[1521].

However, the Commission's competition policy behind these divestitures is not well reasoned: It is stated that the threat of a duopoly of VEBA / VIAG and RWE / VEW should be removed by the creation of a new independent and powerful competitor on the relevant market for generation of electricity for the feeding of power in the transmission grid in Germany[1522] rather than by an outright prohibition of both concentrations. This conclusion is justifiable only if a conditional clearance under Art. 8 II 1-2 MR1997 is a suitable, necessary and proportionate means[1523]. Necessity means that the tool is either the solely effective solution or - if more options are available - a solution that is far less detrimental to the addressees' interests while it will be either equally effective or insignificantly less effective.

It is alleged that the presented divestitures, the alterations regarding the application of the associations' agreement and the creation of moderate spare capacity regarding the interconnector to Denmark are suitable, necessary and proportionate means to prevent a future duopoly[1524].

[1516] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) Annex Undertakings point I.1. lit. a .
[1517] This requirement is valid until 2013; q.v. Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) Annex Undertakings point I.1. lit. a; II 1 lit. a.; III 1 lit. a; IV 1 lit. a; V 1.; Die Zeit, *Das elektrische Monopoly*, 33 (14/12/2000).
[1518] The deadline is quoted in the articles: Financial Times, *VEAG Well-Positioned to Assume Powerful Role* (09/10/2000), http://www.ft.com; Financial Times, *Court to Unlock VEAG's Future* (03/12/2000), http://www.ft.com; Die Zeit, *Das elektrische Monopoly*, 33 (14/12/2000).
[1519] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) Annex Undertakings point I.1. lit. b; II 1. lit. b; III 1.lit. b; IV 1.lit. b.
[1520] If the parties do not engage in reasonable divestiture efforts, the Commission may even inaugurate the mandate of the trustee in an earlier stage.
[1521] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) Annex Undertakings point I 3.; II 2.; IV 2.; V 2. The trustee will be independent in general. Parties' consent is needed if decisions are required affecting the financial value of the investments.
[1522] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 226.
[1523] q.v. § 40 III GWB; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 10 VII 4. p 377.
[1524] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 238.

In fact, this thesis is extremely doubtful. Firstly, one must question the suitability of the propositions accepted by the Commission to prevent a duopoly.

Clearly, it would be more suitable to block the concentrations and to use the Commission's and Federal Cartel Office's powers under the collective dominance doctrine under Art. 102 TFEU (Art. 82 ECT) and Section 19 GWB1998[1525] respectively in order to coerce the most influential vertically integrated utilities, i.e. VEBA, VIAG, RWE and VEW,

- to sell their stakes in VEAG, LAUBAG, BEWAG, RHENAG to a qualified independent investor
- to sell divest their transmission and distribution operations (ownership unbundling) rather than applying the associations' agreement in a way sustained by the present incidental provisions as it is sustainable to conclude that the whole agreement interferes with Art. 101 TFEU (Art. 81 ECT) or at least Section 1; 22 GWB1998
- to free interconnector capacity at every border by means of the essential facilities doctrine pursuant to Art. 102 TFEU (Art. 82 ECT) or Section 19 GWB1998[1526].

As the presented alternative is far more detrimental to the parties' objectives, it is indispensable to assess whether this solution would far more effectively remove any scope for collective dominance in combination with a finding that the commitments accepted by the Commission are not sufficiently efficient.

First of all, this solution would be far more effective as neither VEBA nor VIAG, RWE and VEW can any longer rely on equity links and commercial links as to VEAG and jointly owned downstream companies.

Secondly, a larger number of competitors would provide international investors with greater opportunities to invest and to enhance competition so as to create a truly de-concentrated market. This finding is backed by the thesis that it is extremely likely that the new structure of E.ON, RWE and HEW/BEWAG/ VEAG/Vattenfall produces another collective dominance with even greater detrimental effects.

The same arguments, put forward to develop the threat of a collective dominance of VEBA / VIAG and RWE / VEW as a result of an hypothetical unmodified clearance can be used to defend the alternative solution: As a consequence of the incidental provisions imposed on VEBA / VIAG and RWE / VEW it is extremely likely that a joint dominance of four groups will occur: E.ON, RWE, EnBW/EdF and the new north eastern company HEW/Vattenfall/VEAG/BEWAG (4th power[1527]). The Commission fails to indicate why the latter structure would be significantly less powerful than the unmodified structure.

[1525]Section 22 outlaws suggestions of commercial conduct which contravene statutory or administrative prohibitions: Antitrust Act of 26 August 1998, Federal Law Gazette 1998 I 2521, as Amended on 22 December 1999, Federal Law Gazette 1999 I 2626. Alternatively, the agreement could be regarded as a cartel under Section 1 GWB1998.

[1526] R. Whish, D. Bailey, Competition Law (8th ed.) (Oxford, U.K., OUP, 2015) CH 23 7. (B) p 1032.

[1527] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 198, p 1261.

However, the Commission goes on to argue that - as a result of the presented incidental provisions - the utility VEAG will become an independent powerful competitor after the groups sold their stakes and provided that a powerful independent purchaser is selected who is able to bear VEAG's debts resulting from major investments in modern lignite fuelled power stations in the 1990s resulting from the upgrade of the power sector in Eastern Germany. VEAG may play an important role in the future power market owing to its modern power stations, its transmission grid and its interconnectors[1528].

Obviously, HEW - assisted by Vattenfall - is the candidate that is preferred by the Commission and it is suggested that HEW uses an acquisition of BEWAG as a multiplier of power and as a tool to secure its take-over of VEAG. This is backed the fact that VEBA is asked to sell its equity stakes in HEW and VIAG to divest its stake in BEWAG[1529].

9.19.9 Factual Efficacy of Implementation of Incidental Provisions?

The efficacy of the implementation of the incidental provisions that were accepted by the Commission as sufficient to remedy the threat of a duopoly between VEBA / VIAG and RWE / VEW is questioned by several incidents which reveal the weakness of the present regime of formulation and implementation of incidental provisions.

As the drawbacks resulting from the text of Art. 8 MR1989/1997 were discussed above[1530], it is preferable to focus on factual deficiencies of the incidental provisions.

Firstly, it is questionable in terms of competence and expertise if the Commission and the Federal Cartel Office design future market structures on an incidental basis, depending on an eventual application for a merger. It would be more efficient to apply given competences ex officio in order to define long lasting amendments of competitive structures.

Secondly, the parties applying for a concentration have a strong commercial incentive not to propose more than the absolute minimum of restructuring. Despite the threat of fines, periodic penalty payments and revocations, they may submit false or at least not complete information or even interpret vague data in a way that would not be upheld after the merger was implemented.

For example, VEBA / VIAG denied the availability of excess capacity regarding the generation of base load electricity in Germany as to the feeding in the transmission grid[1531]. The Commission criticises this allegation

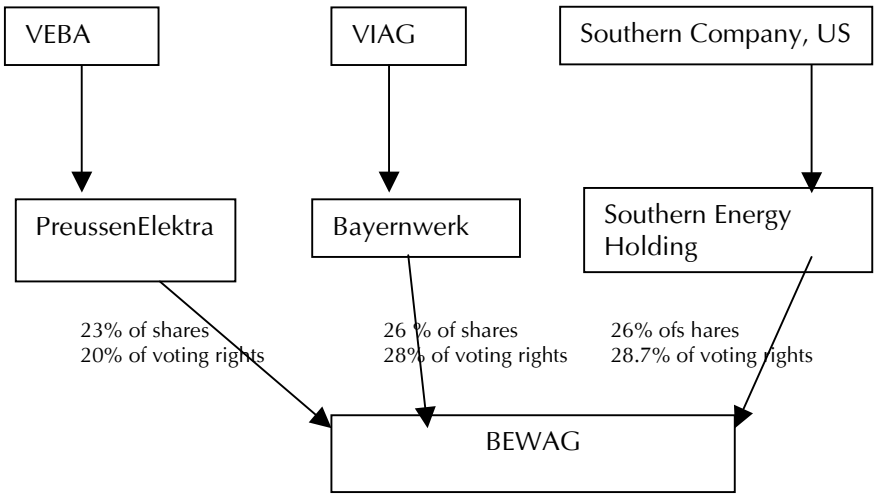
[1528] Die Zeit, *Das elektrische Monopoly*, 33 (14/12/2000); Financial Times, *VEAG Well-Positioned to Assume Powerful Role* (09/10/2000), http://www.ft.com.
[1529] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 240-241.
[1530] supra at 6.6.3.2.4 Implementation of Undertakings and Evaluation .
[1531] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 101.

due to a lack of evidence and states that over-capacities are necessary to establish liquidity for third party power trading[1532].

Moreover, the parties said that they did not intend to shut down base load capacity with a view to reducing supply, facilitating trade and increasing prices[1533]. However, the Commission failed to insist on any commitment of the parties, not to close down base load electricity for the near future. It may be contrary to good faith, that E.ON, the successor of VEBA / VIAG announced within four months after the clearance of the merger in June 2000 that it was planning to close down plant generating base load electricity[1534]. It is even less surprising, that the new RWE utility announced a similar closure plan only four days later[1535]. This incident is a clear indicator of joint dominance because both groups adopt a "new interpretation" of old economic facts at the same time although plans of closure were denied during the merger proceedings[1536]. The closure of base load capacities does not only impede electricity trade - given the limited import facilities - but also threatens the consumers as the regional distribution companies and the municipal companies are either depending on the groups or lack financial resources to build new power plants on their own.

Thirdly, the effective and speedy implementation of the incidental provisions relating to VEBA's and VIAG's stakes in VEAG is countered by the long take-over battle over BEWAG which should have been used so as to facilitate the take-over of VEAG as BEWAG has a mediate equity participation in VEAG. BEWAG's ownership structure is exemplified by the following table:

Ownership Structure of BEWAG



[1532] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 104 and 128.
[1533] Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 103.
[1534] q.v. E.on announces a closure of power stations owing to over-capacities of allegedly 10,000 MW: Financial Times Deutschland, *E.on Energie: Chef kündigt Schließung von Kraftwerken an* (04/10/2000), http//www.ftd.de; Later it is specified that the nuclear power station Stade will be closed in 2003 although the "atomic industry consensus" would have allowed E.on to continue to operate Stade until 2004 due to overcapacities of allegedly 4800 MW: Financial Times Deutschland, *E.on Energie: Kernkraftwerk Stade geht 2003 vom Netz* (09/10/2000), http://www.ftd.de.
[1535] Similarly in terms of time and scope, RWE announces a closure of 5,000 MW of installed capacities including a nuclear power station and fossil fuel plants that are no longer competitive: Financial Times Deutschland, *RWE: Energieversorger nimmt Kraftwerke vom Netz* (10/10/2000), http://www.ftd.de ; Financial Times, RWE Announces Closures (10/10/2000), http://www.ft.com.
[1536] q.v. Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 103-104.

HEW sought to acquire VEBA's and VIAG's stake in BEWAG but Southern Energy, Inc. wanted to take unilateral control of BEWAG as well in order to obtain a majority stake in VEAG. Therefore, Southern Energy applied for a temporary court injunction which should prevent VEBA / VIAG from selling its stakes in BEWAG to HEW. A similar application was made by the Senate of Berlin. Both applications were based on the 1997 privatisation agreement of BEWAG and the 1997 consortium agreement which allegedly vested Southern Energy with pre-emption rights[1537]. The injunctions were granted by the court. In September, Southern Energy claimed to have offered a partnership agreement regarding the control of BEWAG on the condition that Southern Energy would be the majority shareholder[1538]. Vattenfall denied to have received an offer and formally refused to co-operate on 1 October 2000[1539]. In the meantime, a potential acquisition of VEAG by EnBW - supported by EdF - was considered but the Cartel authorities refused to accept EnBW as a bidder because they preferred four independent powerful competitors in the future market for electricity generation and transmission rather than three groups[1540]. However, due to mounting political criticisms[1541], the Senate later withdrew from its injunction after an agreement was concluded with HEW. The agreements states that BEWAG would bit together with HEW / Vattenfall for VEAG and that HEW would not shift BEWAG's management from Berlin to Hamburg in case of a successful acquisition of BEWAG[1542].

The period to place a bid for E.ON's stake of 48.75% and for RWE's stake of 32.5%[1543] in VEAG ended on 15/11/2000[1544]. Vattenfall AB acquired sole control in HEW in October[1545] and HEW continued to insist that its bid for VEAG will depend on a successful acquisition of BEWAG[1546]. In the meantime, Vattenfall offered Southern Energy to sell its stake in BEWAG to HEW on the condition that Southern Energy will be granted a 25% + one share participation in the North Eastern energy group that is due to be created. This offer was rejected[1547]. On 4 December 2000, the Court prevented a take-over of BEWAG by HEW on the grounds that an

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1537 Financial Times Deutschland, *BEWAG: Vorschlag Southern Energys findet kein Gehör* (26/09/2000), http://www.ftd.de.
1538 Financial Times Deutschland, *BEWAG: Vorschlag Southern Energys findet kein Gehör* (26/09/2000), http://www.ftd.de.
1539 Financial Times Deutschland, *BEWAG: Vorschlag Southern Energys findet kein Gehör* (26/09/2000), http://www.ftd.de; Financial Times Deutschland, *Vattenfall: Verwunderung über Southern-Vorschlag zu BEWAG* (01/10/2000), http://www.ftd.de.
1540 i.e. E.on, RWE, EnBW, VATTENFALL/HEW/BEWAG/VEAG; q.v. Financial Times, *VEAG: Übernahme durch EnBW praktisch ausgeschlossen* (06/10/00), http://www.ftd.de.
1541 Financial Times Deutschland, *HEW/Southern Energie: Keine Annäherung im Streit um BEWAG-Beteiligung* (01/11/2000), http://www.ftd.de.
1542 Financial Times, *Vattenfall Wins a Victory in The Battle for VEAG* (05/11/2000), http://www.ft.com; Financial Times, Court to Unlock VEAG's Future (03/12/2000), http://www.ft.com.
1543 RWE holds its old immediate stake of 26.25%. Then, it acquired the former VEW's stake of 25% in EBH GmbH which holds 25% of VEAG which leads to additional 5%; q.v. Table 13: Status Quo Ex Post: Joint Daughter Undertakings; Financial Times Deutschland, *HEW/Southern Energie: Keine Annäherung im Streit um BEWAG Beteiligung* (01/11/2000), http://www.ftd.de.
1544 Other bids were placed by BEWAG (potentially pooled bid with HEW), HEW/Vattenfall, EnBW/EdF, NRG Energy, American Electric Power, ENEL: Financial Times, Court to Unlock VEAG's Future (03/12/2000), http://www.ft.com.
1545 Financial Times Deutschland, *Vattenfall: HEW-Übernahme ist erst der Anfang* (19/10/2000), http://www.ftd.de. The former and current ownership structure of HEW is assess below.
1546 Financial Times, *Vattenfall Wins a Victory in The Battle for VEAG* (05/11/2000), http://www.ft.com.
1547 FAZ, *BEWAG-Streit wird am Montag entschieden*, 16 (01/12/2000).

arbitration between E.ON and Southern Energy is necessary to settle the dispute[1548]. The court held that the consortium agreements between VEBA, VIAG, Southern Energy and the Senate regarding the privatisation of BEWAG were no longer valid due to the doctrine of clausula rebus sic stantibus, i.e. the agreements are deemed not to be valid any longer as the implied legal basis of the obligations to grant a pre-emption right to Southern Energy is eroded owing to VEBA's and VIAG's divestiture commitments as a result of their merger. The Commission announced not to grant any extension as to the sale of VEAG so that no time is left for a prior settlement of the dispute regarding BEWAG through arbitration[1549].

In the meantime, E.ON communicated its interest to acquire businesses from Endesa and Iberdrola in Spain who are required to divest owing to a recent concentration so that observers speculated in public whether the Spanish Utilities would bid for VEAG as well[1550]. It was reported that the bids of Endesa / Iberdrola for VEAG and LAUBAG exceeded DM 3bn, as did ENEL's of DM 3.1bn[1551]. However, it was believed that HEW would bid up to DM 3bn and was granted an informal right of a last offer by E.ON[1552].

These rumours did not last for a long time. They might have been inspired by the vendor's wish to persuade HEW / Vattenfall to submit a higher bid even though they could secure control of BEWAG. Nevertheless, BEWAG and HEW official were keen on bidding together even though BEWAG wants to be treated like an equal partner whereas Vattenfall insists on sole control over VEAG[1553]. As early as on 11 December, it was reported that HEW / Vattenfall would win the contest after having bid close to DM 3bn for VEAG and LAUBAG[1554]. It is reported that the pressure of politicians, unions, the Federal Cartel Office and the Commission, and the threat of the VEAG's mediate minority shareholders HEW and BEWAG could challenge the Eon's and RWE's decisions were sufficient to secure the acceptance of HEW's bid.

The deadlock as to the acquisition of BEWAG by HEW is still unresolved even though Vattenfall continued to offer that Southern Energy could obtain an equity stake of 25% plus one share in the new North-Eastern-Energy group that is due to be created[1555]. Thereby, Southern Energy could block certain strategic decisions according to company law.

[1548] Financial Times Deutschland, *BEWAG: Übernahme durch HEW vorerst gestoppt* (04/12/2000), http://www.ftd.de; Financial Times, Court puts BEWAG Sale on Ice (04/12/2000), http://www.ft.com.

[1549] Financial Times Deutschland, *BEWAG will im Ausland expandieren* (05/12/2000), http://www.ftd.de.

[1550] Financial Times Deutschland, *RWE und E.on wollen VEAG an Spanier verkaufen* (07/12/2000), http://www.ftd.de; Financial Times Deutschland, *E.on: Konzern plant Einkaufstour durch Europa* (07/12/2000), http://www.ftd.de; FAZ, *Hochspannung*, 24 (08/12/2000); FAZ, *Das Poker um den ostdeutschen Strommarkt geht in die letzte Runde*, 16 (08/12/2000). The rumours were rejected by RWE but upheld by VEAG officials.

[1551] FAZ, *Das Poker um den ostdeutschen Strommarkt geht in die letzte Runde*, 16 (08/12/2000); FAZ, *Die HEW ist bei der VEAG fast am Ziel*, 21 (13/12/2000).

[1552] FAZ, *Das Poker um den ostdeutschen Strommarkt geht in die letzte Runde*, 16 (08/12/2000).

[1553] FAZ, *Das Poker um den ostdeutschen Strommarkt geht in die letzte Runde*, 16 (08/12/2000).

[1554] Financial Times, *Vattenfall Poised to Win VEAG* (11/12/2000), http://www.ft.com; Financial Times Deutschland, *VEAG: HEW und Vattenfall übernehmen Mehrheit* (11/12/2000), http://www.ftd.de: between DM 2.5 bn and DM 3bn. FAZ, *Die HEW ist bei der VEAG fast am Ziel*, 21 (13/12/2000): close to DM 3bn

[1555] Financial Times Deutschland, *HEW:Zwei Jahre Aufbauzeit für Nord-Ost-Stromkonzern* (27/12/2000), http://www.ftd.de.

Clearly, this highly dramatic take-over battle reveals a structural weakness of the Commission's ability to enforce incidental provisions and that it is highly probable to rely on the trustee to sell assets. The larger the values and the political interests at stake, the less probable is a clear-cut micro-economic reasoning as two the acceptance of bidding. It is questionable from the rationale of competition law whether politicised decision-making should define the outcome. From the point of development of European markets it would have been better if a company, entirely privately owned, had acquired VEAG and LAUBAG rather than a public undertaking like Vattenfall.

Moreover, it is questioned whether Vattenfall is as independent from the large German utilities as it is alleged by the Commission and Federal Cartel office in their clearance decisions. E.ON seems to favour a sale of its VEAG assets to Vattenfall as it has a shareholding in Sydkraft[1556]. This shareholding could lead to intense price competition between E.ON and Vattenfall but it is more probable that it will facilitate a future collective dominance not only in the Swedish but also in the German market as intense price competition either in Germany or in Sweden would harm both undertakings. Another speculation states that Vattenfall is due to be privatised, soon. Thereby, E.ON could attempt to acquire Vattenfall so as to re-acquire HEW, LAUBAG and VEAG as well[1557].

9.19.10 Reasons behind the Theoretical and Factual Deficiencies of the Present System of Merger Control with Respect to Incidental Provisions in the Energy Sector

Obviously, the VEBA/VIAG case provides for the most relevant example of powerful tendencies towards concentration in the electricity sector so far. However, an interesting question has not been addressed so far: What are the reasons behind the relatively benevolent definition and implementation of incidental provisions in the VEBA / VIAG case?

First of all, it is the weakness of the present IEMD and the IGMD which effectuates the outcome of merger control proceedings[1558]. If the European energy legislator fails to implement a tight transnational legal framework concerning regulated TPA and ownership unbundling, it will be hardly feasible that competition authorities - usually lacking specific expertise in the energy sector - can overcome deficiencies of the relevant directives. Clearly, it is in general not the task of the Commission as a transnational executive unit to ignore sector specific legislation by the Council. The only exception available could be the implied powers doctrine. However, this exceptional doctrine has to be interpreted extremely narrowly in order to protect the legislator's

[1556]Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 79; Die Zeit, *Das elektrische Monopoly*, 33 (14/12/2000); W. Kurzlechner, Fusionen Kartelle Skandale (1st ed.) (Munich, Germany, Redline Wirtschaft, 2008) CH 12, p 251.

[1557] Die Zeit, *Das elektrische Monopoly*, 33 (14/12/2000); W. Kurzlechner, Fusionen Kartelle Skandale (1st ed.) (Munich, Germany, Redline Wirtschaft, 2008) CH 12, p 251.

[1558] R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 23 10. (A) (i), p 1021.

role according to the principle of constitutional state. Consequently, the Commission lacks the power to impose regulated TPA and ownership unbundling in general on entities seeking clearance of a given concentration.

Secondly, the Commission probably lacks the political power to formulate and implement more effective incidental provisions[1559].

Thirdly, a subsidiary regulatory attempt by means of incidental provisions would be inconsistent with the principle of non-discrimination as it is not justifiable to punish the incidental provisions concerned with regulatory tools that are not applied in general to a business sector.

Fourthly, it is even more relevant from the perspective of the principles of constitutional state and democracy that undertakings must not only be able to foresee the future regulatory framework for an adequate period of time with sufficient precision but the must also be able to affect future policies by means of lobby groups which target the legislator. It is a great difference in terms of fair participation whether the Commission is lobbied by major and minor NGOs in its role as an initiator of proposals for primary legislation or whether an administrative organ is lobbied while the decision of a present case is pending. Such a lobbying solely based on hearings requires more rapid lobbying based on considerable funds and managerial resources and is by its nature more dangerous for independent decision making because individual casehandlers have greater responsibilities and are easier manipulated if they are targeted with in-transparent means.

Moreover, it is worth while questioning why the underlying energy legislation, i.e. the IEMD and the IGMD[1560] are too weak to facilitate more stringent rules as to the liberalisation of the energy sector and what the policy options are in order to remedy the situation.

Although the energy sector is not a special sector that is characterised by its specific nature as a natural monopoly as it was alleged in the past decades, the general public still reacts extremely sensitive to price shifts even though the dependence on scarce resources per unit of output in industrialised countries is far less than during the first and second oil supply crises. Unfortunately, there is still no transnational European response to relative supply shortages and price increases that occurred in the mid of 2000. Instead of Community wide energy conservation policies, public turmoil easily persuaded several national governments - who feared to lose future elections - to grant unsustainable short-term gifts to the fuel consuming society. For instance, the current German Ecology taxes do - apart from their title - not target the consumption of resources in general as otherwise major consumers would not be exempted. Moreover, it is against the very nature of a tax to indicate that the revenues will be spent for public pension funds. It is even less persuasive that future tax increases are

[1559] For instance, the German federal minister for economics, Mr. Müller, was cited that he did not share the concerns that the Federal Cartel Office and the Commission communicated with regard to the concentrations of VEBA/VIAG and RWE/VEW.

offset by means of additional future income tax allowances for people who use private or public transport to go to work. The public sensitivity as to energy prices is another factor which limits the ability of the Commission to define more stringent standards as to the organisation of national energy sectors in stringent accordance with competition law.

The fifth argument relates to constitutional laws which provide for another impediment of the re-organisation of the electricity and gas supply industries. Even if consensus was reached in the Council as to ownership unbundling and mandatory regulatory TPA in the Member States, it would be difficult to adopt such a directive as both mandatory ownership unbundling and regulated TPA interfere with private property that may be well protected by national constitutions whereas Art. 345 TFEU (Art. 295 ECT) restricts the competence of the EC so that it is not allowed to release primary legislation, which expropriates present property or re-defines the scope of future property with respect to energy networks.

If the EC was enabled to release primary law that restricts property rights, additional provisions would have to be added to the primary law which govern the liability of the EC in case of justified or unjustifiable interference with certain property rights so that the addressee of said measures receives either

- damages, i.e. monetary damages or natural restitution which intend to mirror the hypothetical situation in which the addressee would be today in economic terms if the factual interference with property rights had not occurred in the past
- a mere restitution of the status quo ex ante
- proportionate compensation.

As these principles are not laid down at present, it is exclusively up to the Member States to decide on expropriations or re-definitions of property rights based on the wide discretion attributed to national parliaments. Therefore, this remedy is not effective at present, so that the Commission has to restrict itself when it tries to negotiate more far reaching incidental provisions with the parties of a given concentration.

Another element relates to the different stages, in which the national energy markets are. This difference impedes a proper definition of a single European competition policy in the energy sector. This is valid in particular in the gas sector where mature markets and infant market are available depending on the number of consumers, the size of the grid and the proportion of amortisation of the network and equipment.

Luckily, the Commission did not simply give in. Contrarily, new regulatory options were invented so as to increase the efficiency of the liberalisation of the energy sector. To this end, the Florence and Madrid Process were formed with respect to electricity and gas. By means of consensual decision making involving

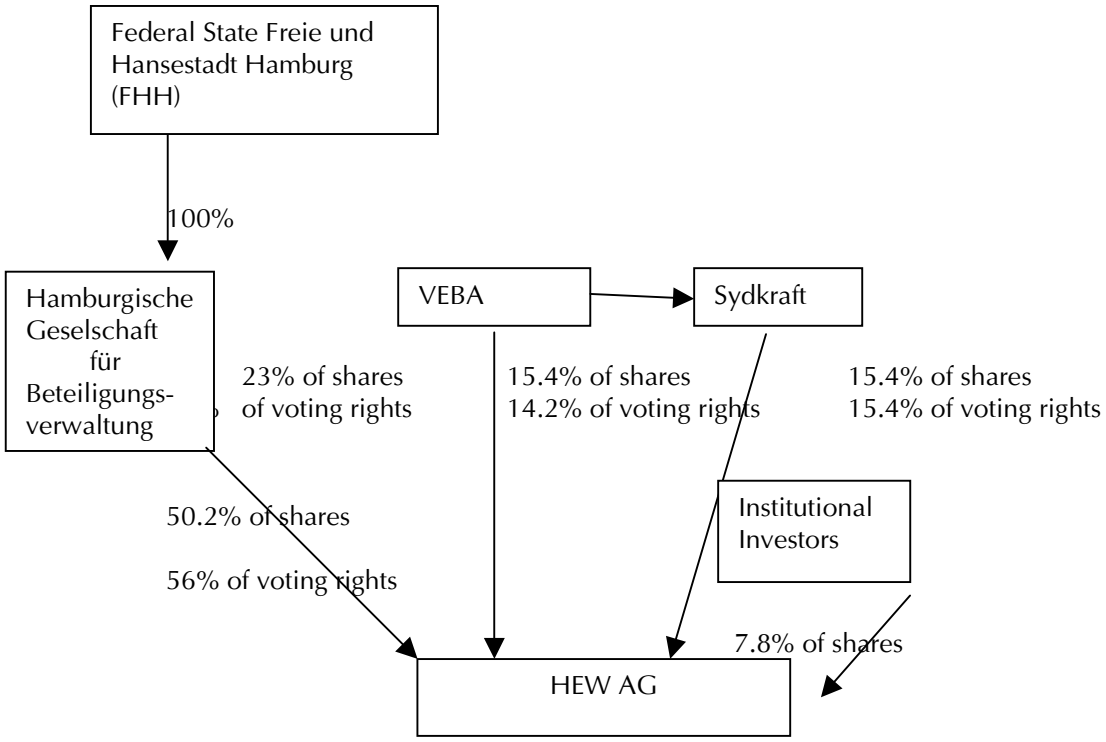
[1560] R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 23 10. (A) (i) p 1021.

independent groups including newly created NGOs like ETSO, the scope for a more transparent EC wide system of network access is discussed. Especially, a system of cross border tariffs for international transactions is due to be developed, soon. This shall include sophisticated systems of interconnector congestion management. Effective Access to interconnectors is a crucial feature for the attainment of future relevant product markets of European scope regarding the generation, transmission, distribution, supply and metering of electricity. Similar difficulties and discussions occur in the gas sector. However, objective, transparent, non-discriminatory access to gas storage facilities is an additional problem of the liberalisation of the gas industries. Consequently, the incidental provisions accepted by the Commission should be classified as a regulatory tool of limited value. It may nevertheless help to overcome some urgent deficiencies owing to the incomplete liberalisation of energy markets in Germany as a result of insufficient primary legislation. Incidental provisions imposed on the parties of a concentration have subsidiary relevance owing to the above discussed considerations and incorporate various structural pitfalls. However, as merger decisions are less likely to be challenged in courts, incidental provisions are nevertheless a speedy tool to overcome the worst deficiencies in a given situation. Thereby, the Commission's approach is justifiable unless better legal instruments of liberalisation and regulation are in place.

9.20 HEW / VATTENFALL CASE IV/M. 1842

On 17 February 2000, the parties FHH and Vattenfall AB notified a transaction pursuant to Art. 4 II 2nd Variant MR1997 regarding the vertically integrated company HEW AG that generates electricity in order to sell it to wholesale consumers via the transmission grid and to the general public via the distribution network. The then ownership structure of HEW AG is exemplified by the following table:

Status Quo Ex Ante: Ownership Structure of HEW



Sources: Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 79 and Commission Decision Case IV/M. 1842, 2000 (*Vattenfall/HEW*) paragraph 5; Financial Times Deutschland, Vattenfall: HEW-Übernahme ist erst der Anfang (19/10/2000), http://www.ftd.de.

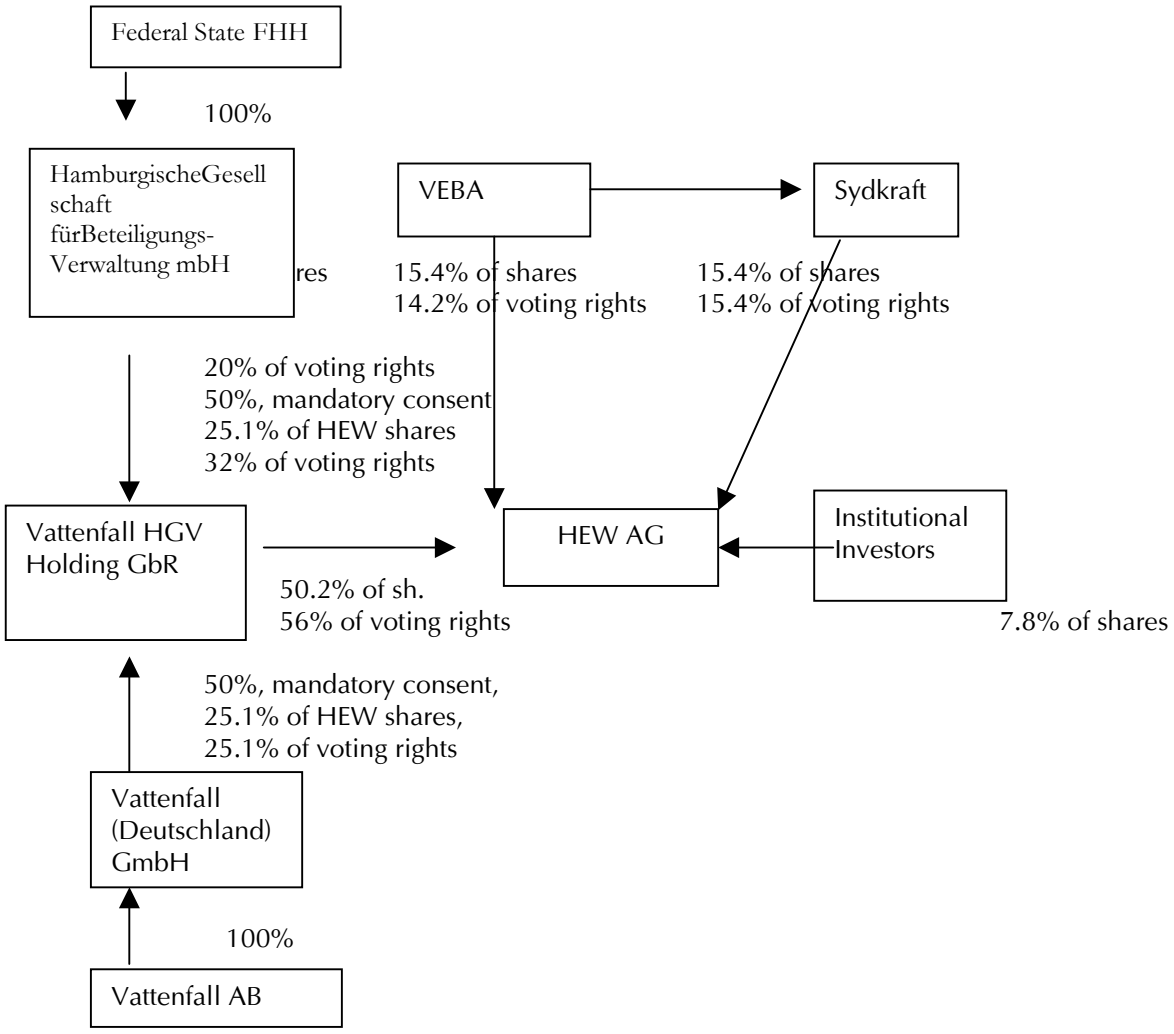
The FHH will sell 25.1% of its shares - equalling 25.1% of its voting rights to Vattenfall (Deutschland) GmbH, a subsidiary of Vattenfall AB. The voting rights of FHH will be executed by Hamburgische Gesellschaft für Beteiligungsverwaltung mbH (HGV) in general. However, HGV and Vattenfall (Deutschland) set up a partnership called Vattenfall HGV Holding GbR which shall execute the voting rights of both partners on a lasting basis.

According to the agreement, FHH gives up sole control over HEW. As a result of the agreement establishing a 50:50 partnership between HGV and Vattenfall (Deutschland), the voting rights of both notifying entities will be pooled. Thereby, a joint control is established by the parent undertakings FHH and Vattenfall AB which are relevant as HGV and Vattenfall (Deutschland) are intentionally set up for the purposes of administering equity participation. The operation is a concentration as HEW will become a full function joint venture in terms of Art. 3 II MR1997[1561]. The transaction has a Community dimension[1562]. It is declared compatible with the common market pursuant to Art. 6 I lit. b MR1997[1563]. The Commission does not regard HEW's position in Hamburg as a dominant one as the relevant market is of national defined pursuant to the findings of the VEBA/VIAG case.

[1561] The term was discussed earlier: q.v. 6.3.1.3 Concentrative JVs under MR1989 and 7.1.1 The New Assessment of JVs under Art. 1 I; 3 I-V MR1997 and Commission Decision Case IV/M. 1842, 2000 (*Vattenfall/HEW*) paragraph 9-10.
[1562] Commission Decision Case IV/M. 1842, 2000 (*Vattenfall/HEW*) paragraph 11.
[1563] Commission Decision Case IV/M. 1842, 2000 (*Vattenfall/HEW*) paragraph 17.

However, this national market definition seems to contradict the Commission's geographic market definitions in the cases *EdF/London Electricity* and *EdF/South Western Electricity* as HEW is insofar similar to London Electricity and South Western as HEW's small consumer supply activities still focus on its former protected region. Moreover, the former tariff consumers focus on HEW as a supplier. If one considers a distinct market, HEW will still hold a dominant position in its former protected region, too. This dispute does not need to be solved as the then minor activities of Vattenfall would by no means significantly strengthen HEW's position on such a distinct market and is bound to decrease gradually. Finally, HEW's ownership structure is as follows:

Status Quo Ex Post: Ownership Structure of HEW



Sources: Commission Decision, Case IV/M. 1673, 2000 (*VEBA/VIAG*) paragraph 79; Commission Decision Case IV/M. 1842, 2000 (*Vattenfall/HEW*) paragraph 5; Financial Times Deutschland, Vattenfall: HEW-Übernahme ist erst der Anfang (19/10/2000), http://www.ftd.de.

It has to be stressed that this structure was altered again in October 2000 when Vattenfall AB acquired sole control by means of purchasing the Eon's, Sydkraft's and the institutional investor's stakes in HEW facilitated by the incidental provisions imposed on VEBA/VIAG in the abovementioned case[1564].

9.21 EDF / ENBW CASE IV/M. 1853

The Commission received on 31/08/2000 a notification under Art. 4 MR1989 of a proposed concentration whereby Electricite de France (EdF), France, alongside Zweckverband Oberschwäbische Elektrizitätswerke (OEW) acquires within the meaning of Art. 3 I lit. b MR1989 joint control of Energie Baden-Württemberg AG (EnBW)[1565].

9.21.1 The Parties and the Operation

EdF is a wholly state owned company which is active in all fields of supply and transport of electricity in France. It operates the national transmission grid. Through its subsidiary EdF International (EdFI), a holding company, EdF has shareholdings in electricity companies in many European countries, including Austria, Belgium, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, Switzerland and the UK. EdF is also active in electricity trading through EdF Trading Ltd (EdFT). Furthermore, EdF is active in the construction, operation and maintenance of electrical plants and power networks and provides waste recycling and street lightening services.

OEW is an association of nine public districts in the Southwest of Germany. Through its wholly owned subsidiary OEW Beteiligungsgesellschaft mbH, OEW holds 34.5% of the shares in EnBW.

EnBW is a vertically integrated electricity utility active in all fields of supply and transport of electricity mainly in the Southwest of Germany. Furthermore, EnBW has activities in electricity trading. Other business activities comprise the supply of gas and district heating, telecommunications, waste recycling and financial services.

Prior to the concentration, Landesstiftung Baden-Württemberg GmbH, a wholly owned subsidiary of the Land Baden-Württemberg held 25.005% in EnBW. The remaining shareholders of EnBW were and are OEW with a stake of 34.5%, Landeselektrizitätverband Württemberg (12.04%), Gemeindeelektrizitätsverband Schwarzwald Donau (8.82%), Technische Werke der Stadt Stuttgart GmbH (9%) and Badischer Elektrizitätsverband (5.4%).

In 1999, the Land Baden-Württemberg organised a tender for the purpose of the sale of its shares in EnBW. EdFI won the tender and acquired 25.005% of the shares in EnBW. EdFI has since increased its shares in EnBW to

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[1564] q.v. In October, Sydkraft sold its stake of 15.4% in HEW to Vattenfall that owned already 26.2% of HEW. E.on sold its stake of 15.4% (14.2% of votes) in HEW to Vattenfall, too. Institutional Investors sold another 7.8% to Vattenfall. The latter holds approximately 71.2% of the votes: Financial Times Deutschland, *Vattenfall: HEW-Übernahme ist erst der Anfang* (19/10/2000), http://www.ftd.de.

[1565] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (1) (c) p 394.

34.5% and has thus reached parity with OEW under the shareholder agreement. EnBW is a potential competitor to serve eligible customers in France[1566].

9.21.2 The Concentration

As a result of the proposed concentration, EnBW will become a JV jointly controlled by EdFI and OEW. EdFI and OEW together will hold the majority of voting rights in EnBW. The proposed operation, therefore, constitutes a concentration under Art. 3 I lit. b MR1997.

9.21.3 Community Dimension

The transaction has a community dimension (Art. 1 II MR1997). In France, a national market for energy supplies is applicable[1567].

9.21.4 Competitive Assessment

Regarding the relevant geographic market, in its decision EdF/Louis Dreyfus the Commission considered the French supply market to be clearly national in scope due to regulatory restrictions and technical constraints. The Commission's investigations in the present case have shown that the market for the supply of eligible customers of electricity is not larger than national.

The Commission asked EdF to provide the number of bids launched by eligible customers where EdF was competing with foreign suppliers in the period from May 2000:

	Number of bids	Rate
Ongoing	42	30%
Won by EdF	65	47%
Lost by EdF	33	23%
Total	140	100%

Outcome of bids based on replies by foreign electricity suppliers:

	Number of bids	Rate
Ongoing	52	10%
Won by foreign companies	48	9%
Lost by foreign companies	437	81%
Total	537	100%

Interconnectors between Switzerland and its neighbouring countries:

Company	Number of interconnectors	Percentage	Transmission capacity (MW)	Percentage
EGL	16	44%	13765	51.8%
Atel	5	14%	4854	18.3%
EOS	6	10%	3854	14.4%
NOK	3	8%	2001	7.5%
BKW	2	5%	1435	5.4%
KWB	2	5%	396	1.5%
RHOW	1	4%	240	0.9%
AWAG	1	4%	53	0.2%

The table shows that EdF is already active in a number of member states:

[1566] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (1) (c) p 394.

Country	Company	Participation of EdFI
Austria	Estag	25% held via SIA, a JV between EdFI (80%) and Gaz de France (20%)
Italy	Ise	75% held via Finel a JV between EdFI (40%) and Edison (60%)
Portugal	Tejo Energia, Pegop, Carbopego	Tejo Energia; Pegop 10% Carbopego 1/3 as part of a consortium with National power and Endesa
Spain	Elcogas	29.13%, main remaining shareholders are Endesa (30.53%) and Iberdrola (11.1%)
Sweden	Graninge	34.2% together with its subsidiary Skandrenkraft
UK	London Electricity-Sweb	100%

EdF's market share in France is 90% an EnBW was the potential competitor in France due to its proximity to the French market. Due to the concentration, the market entry was unlikely[1568].

9.21.5 Commitments Submitted by the Notifying Parties and Modifications to the Operation

The notifying parties submitted commitments in order to remove the competition concerns identified by the commission. In summary, the commitments comprise the following details:

Regarding the relations with CNR, CNR will, as from 01/04/2001, be put in a position so as to ensure on its own both the operation of its power plants and the commercialisation of the new power so generated. EdF and CNR have signed common declarations setting out the contractual framework to render CNR a fully independent electricity producer. EdF undertakes to purchase, between 01/04/2001 and 01/04/2001, upon request of CNR, part of its production. The quantities to be so purchased as well as the purchase price will be subject of a contract to be concluded between EdF and CNR prior o 31/03/2001 in accordance with the joint declaration of 15/01/2001.

EdF undertakes to renounce the exercise of its voting rights in CNR and to withdraw its representative from the CNR board of directors[1569]. A trustee will act as a caretaker of EdF's shares in CNR.

Regarding access to generation capacity in France, EdF undertakes to make available to competitors access to in total 6000 MW generation capacity located in France, 5000 MW in the form of virtual power plants (VPP) and 1000 MW in the form of back-to-back agreements to existing co-generation power purchase agreements[1570].

[1567] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. III. 1. c) (2) (c) p 381; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 192, p 1258.

[1568] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. III. 5. a) (4) p 412; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 200, p 1261.

[1569] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (1) (c) p 394.

[1570] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. III. 9. j) (1) (c) pp 459-460; P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (1) (c) p 394; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 25 VII. 3. p 651; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 173, p 640; § 34 marginal note 200, p 1261.

Concerning VPPs, the VPP will comprise 4000 MW of base load and 1000 MW of peak load capacity. Both base load and peak load VPP will be offered simultaneously, but separately. The VPP contracts will have the duration of three months, six months, one year, two years and three years.

VPP contracts will be awarded through an open, non-discriminatory public auction[1571]. The auction will be open to energy utilities and energy traders. Entrants will bid for an integer number of MW capacity, the smallest bid being 1 MW.

Successful bidders will buy x MW of generation capacity from EdF for EUR y MW/year (capacity price). Over the duration of the contract, the buyer has the right to call upon EdF at any time in order to request delivery of up to x MW. The required load curve has to be notified one day ahead at 12:00 hr.

The buyer will pay EdF EUR z/MWh for the electricity consumed (energy price). Energy prices are fixed by EdF after having given the trustee the occasion to verify their level.

EdF will operate auctions every three months offering base load and peak load plants. The first auction involving the sale of 1000 MW will be conducted in four rounds of 250 MW. The principles of the first virtual power plant auction will be announced in May 2001. The first round will take place in the beginning of September 2001. The other rounds will follow at ten-day intervals.

Regarding the auction of co-generation power, EdF has signed Power Purchase Agreements with French co-generators promising to buy all their electricity production over a period of 12 years. These contracts still have an average of 10 years to run. EdF undertakes to auction a total of 1000 MW of the generation capacity available to EdF under these contracts. The capacity would be offered in back-to-back contracts grouping a number of existing co-generation contracts. The first back-to-back contracts will be for a duration of 12 months. Contracts over two or three years will be considered if demand for such contracts develops.

Regarding duration, EdF undertakes to grant access to generation capacities for a period of five years from the date of the decision. After the five year period the Commission, on the basis of a reasoned request by EdF, will decide whether or not these conditions are met and respectively terminate or prolong EdF's obligation to grant access to generation capacities.

EdF and/or the trustee may submit at any time, but not before three years have elapsed since the adoption of the decision, a reasoned request to bring this commitment to an end.

Regarding EnBW shareholding in Watt, the parties commit that EnBW will divest, and EnBW agrees to divest its shareholding in Watt.

[1571] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 D. (2) (b) p 410; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 25 VII. 3. p 651.

Having regard to the evaluation, the commitments concerning the relations between EdF and CNR, will ensure that from 01/04/2001 CNR will be in a position to become an active competitive force in the French electricity sector. Since EdF will renounce the exercise of its voting rights in CNR and withdraw its representatives from the CNR board of directors, EdF will no longer be involved in CNR's commercial policy and market conduct. On the basis of the technical operation agreement and the commercialisation agreement to be concluded between EdF and CNR, CNR will be progressively in a position to develop the marketing of its entire production on the market for supply to eligible customers.

The access to 6000 MW generation capacity via auctions corresponds to approximately 39 to 41 TWh. This amounts to 30 or 32% of the market for eligible customers which is currently 130 TWh. The access to generation capacity will enable foreign suppliers to become active on the market for supply to eligible customers to a significant extent. After the envisaged reduction of the threshold for eligible customers to 9 GWh/year, the market for eligible customers in France will amount to around 150 GWh. On the other hand, it can be expected that CNR and SNET will directly contribute to the liquidity of this market with some 10 TWh in the forthcoming years. Thus, together with the around 40 TWh made available by EdF through auctions, around one third of the eligible market can be marketed by competitors with electricity generated in France.

Furthermore, German suppliers will also be able to gain a foothold in France and thus become sufficiently strong in France in order to cope with EdF's potential for retaliation resulting from its presence in Germany.

The divestiture of EnBW's participation in Watt will restore the status quo ante in Switzerland.

Therefore, the commitments offered by EdF are appropriate to eliminate the strengthening of EdF's dominant position on the market for eligible customers in France since the outbalance the loss of EnBW as a potential competitor, the retaliation potential in Germany, the increased foothold in Switzerland and elimination of Watt as potential competitor and the strengthening of EdF's position as a Pan-European supplier.

9.21.6 Summary

It can be concluded from the above that the proposed concentration in its modified form would not lead to the creation or strengthening of dominant positions, as a result of which effective competition would be impeded in a substantial part of the common market, on condition that the commitment set out in the Annex are fully complied with. The operation is therefore to be declared compatible with the common market and with the functioning of the EEA, pursuant to Art. 8 II MR1997.

9.21.7 Annex Incidental Provisions

The parties are prepared to submit commitments owing to Art. 8 II MR1997 in order to take account of concerns raised by the Commission[1572]. Regarding the incidental provisions offered by EdF, are the divestment of CNR from EdF.

Concerning incidental provisions offered by EdF, OEW and EnBW, a divestiture of EnBW shareholdings of 24.5% in Watt AG will take place.

9.22 SHELL / DEA CASE IV/M. 2389

The Commission received on 10/07/2001 a notification by Deutsche Shell GmbH (Deutsche Shell) and RWE Aktiengesellschaft (RWE) in accordance with Art. 4 MR1997 of a proposed concentration by which Deutsche Shell and RWE acquire within the meaning of Art. 3 I lit. b MR1997 joint control of a newly created JV (Shell/DEA) that will combine their respective downstream oil and petrochemicals businesses. After an interim period ending on 01/07/2004 at the latest, Shell will acquire sole control of the combined businesses. The case was treated as a single concentration[1573].

After examination of the notification, the Commission by decision of 23/08/2001 concluded that the notified operation fell within the scope of MR1997 and raised serious doubts as to its compatibility with the common market and the functioning of the EEA agreement. The Commission initiated proceedings in this case under Art. 6 I lit. c MR1997 and Art. 57 EEA agreement.

9.22.1 The Parties and the Operation

The Dutch-British Royal Dutch/Shell group of companies (Shell) is globally active in the exploration, production and sale of oil and natural gas, the production and sale of chemicals, power generation and the production of energy from renewable sources. Shell's wholly owned subsidiary Deutsche Shell GmbH is active mainly in the refining of crude oil and the distribution and sale of refined products in Germany, in the production, distribution and sale of certain chemicals, in the production and distribution of natural gas and crude oil and in the solar energy business.

RWE is the ultimate parent company of a group of companies focusing on a multi-utility strategy with activities in energy, water distribution and treatment, mining and raw materials, environmental services, petroleum and chemicals, industrial systems and construction. The up- and downstream oil and chemicals business of RWE is operated via its subsidiary RWE-DEA. The affected downstream oil and chemicals activities are operated via DEA Mineralöl AG, a 100% subsidiary of RWE-DEA.

[1572] q.v. § 40 III GWB; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 10 VII 4. p 377.
[1573] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 44b, p 531.

The parties will use the existing DEA Mineralöl company as the JV vehicle which will be renamed Shell/DEA. Shell/DEA will include the entire downstream oil business and petrochemicals business of each of Shell and RWE-DEA in Germany. Shell and RWE-DEA signed a JV agreement on 05/07/2001 pursuant to this agreement, shares in Shell/DEA will be held 50/50 by RWE-DEA and Shell for an initial period. RWE-DEA will have two put options to sell its 50% stake in the JV Shell/DEA.

9.22.2 Concentration

Shell and DEA will have joint control over Shell/DEA in the initial period.

9.22.3 Community Dimension

The concentration has a community dimension (Art. 1 II MR1997)

9.22.4 Procedure

On 03/08/2001 the German competition authority, the Bundeskartellamt, informed the Commission that the concentration threatens to create or to strengthen a dominant position as a result of which effective competition would be significantly impeded on a market within Germany, which presents all the characteristics of a distinct market owing to Art. 9 II MR1997, requested the Commission to partly refer the case[1574]. The request related to the markets for downstream mineral oil products in Germany, including in particular the markets for motor gasoline, diesel and light heating oil retailing and wholesaling, aviation fuels, heavy fuel oil, bitumen and lubricants[1575]. The request did not concern the markets for petrochemicals, the markets for upstream oil activities as well as the markets for downstream oil products outside Germany. By decision of 23/08/2001 the Commission partly referred the case to the competent German authorities as requested.

On the 24/10/2001 a statement of objections was sent to Shell and RWE, which sent a combined reply on 05/11/2001.

9.22.5 Assessment under Art. 2 MR1989

Regarding Ethylene, it is one of the most important basic chemical products which belongs to the olefin group consisting of ethylene, propylene and butadiene. In Western Europe, ethylene is produced principally from naphta (itself a product of the process of refining crude oil) in steamcracking equipment.

On the basis of the foregoing, the market shares and capacities of the ethylene sellers on the ARG+ merchant market as well as imports by third parties for the year 2000 are as follows:

Ethylene seller	Share of merchant market (%)	Capacity kt

[1574] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. VI. 3. a) (5) p 576.
[1575] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. VI. 3. a) (5) p 576.

Veba	25-35%	900-1000
DEA	10-20%	400-500
Shell	10-20%	900-1000
BP/Erdölchemie	0	900-1000
BASF	10-20%	1300-1400
Atofina	5-15%	700-800
Exxon	5-15%	400-500
Import 3rd parties	0-10%	

After the proposed mergers, the market shares of the ethylene sellers on the ARG+ would be as follows:

Ethylene seller	Market share in %
BP/Veba	25-35%
Shell/DEA	25-35%
BASF	10-20%
Exxon	5-15%
Atofina	5-15%

The current holding of the share capital in the ARG company is as follows:

Shareholder	Capital share
BP incl. Erdölchemie	33.33%
Veba (E.ON)	16.66%
Degussa (E.ON)	16.66%
Bayer	16.66%
DSM	16.66%

Post Merger, the combined BP/Veba alone will hold 50% of the capital, meaning it will be able to block all decisions requiring a special majority.

9.22.6 Conditions and Obligations

This chapter concerns the commitments offered by the parties as regards ethylene. Owing to Art. 8 II first sentence of the 2nd sup-paragraph MR1989, the Commission may attach to its decision conditions and obligations intended to ensure that the incidental provisions concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.

The achievement of each measure that gives rise to the structural change of the market is a condition, whereas the implementing steps which are necessary to achieve this result are generally obligations on the parties. Where a condition is not fulfilled, the Commission's decision declaring the concentration compatible with the common market no longer stands; where the undertakings concerned commit a breach of an obligation, the Commission may revoke its clearance decision, acting pursuant to Art. 8 V lit. b MR1989, and the parties may also be subject to fines and periodic penalty payments according to Art. 14 II lit. a and 15 II lit. a MR1989[1576].

In view of the foregoing, the decision must be conditional upon full compliance by Shell with the commitment to grant access to its terminal for third parties as provided in §§ 1 and 3 of the commitments in the Annex. These commitments are given in order to remedy the collective dominance of Shell/DEA and BP/E.ON on the

ethylene market on the ARG+ and to provide for competition on this market. The terms of use of the terminal as set out in §§ 2 and 4-7 of the annex as well as in the draft terminalling agreement shall be obligations upon Shell them, as they aim at implementing the structural change of the market.

For the reasons set out above, and subject to full compliance with the commitments given by the parties, it must be concluded that the proposed concentration does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it. The concentration is therefore to be declared compatible with the common market pursuant to Art. 8 II MR1989 and with the EEA agreement owing to Art. 57 thereof, subject to compliance with the commitments set out in the annex.

9.22.7 Annex

Regarding the commitments of the parties, they are given owing to Art. 8 II MR1989[1577] and Shell/DEA commit to make available or procure that a Shell affiliate (Shell) will make available access to the terminal facilities at Moerdijk, Netherlands currently owned by Shell Nederland Chemie B.V. and to Ethyleen Pijpleiding Maatschappij BV (EPM)'s pipeline from Moerdijk to Antwerp to one or more users for a total aggregate ethylene volume of up to 250 thousand metric tonnes per annum on the terms of the draft Ethylene Terminalling agreement attached, subject to any amendments proposed by a user and agreed by Shell. The access referred to will be made available for a period of 10 years from 01/01/2003. Shell will invite third parties wishing to enter into an ethylene terminalling agreement to make an application, specifying the volume required no later than 3 months prior to the start of the calendar year in question.

Shell will submit a report in writing to the Commission each 6 months during 2003-2005 inclusive in respect of the operation of these commitments and in particular giving details of all third party requests to enter into an ethylene terminalling agreement.

If the Commission has reasonable cause to believe that Shell is not complying in a reasonable manner with the commitments contained above, the Commission may request the appointment of an independent expert experienced in the ethylene industry to oversee the operation and performance of theses commitments.

9.23 GRUPO VILLAR MIR / ENBW / HIDROELECTRICA DEL CANTABRICO CASE IV/M. 2434

The Commission received on 04/04/2001 a notification under Art. 4 MR1997 of a proposed merger in which the firms Grupo Villar Mir and EnBW, the latter jointly controlled by EdF and Zweckverband Oberschwäbische

[1576] I. Zenke, S. Neveling, B. Lokau, Konzentration in der Energiewirtschaft (1st ed.)(Munich, Germany, Beck, 2005) CH 2 E VI. 2. p 179.
[1577] q.v. § 40 III GWB; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 10 VII 4. p 377.

Elektrizitätswerke (OEW), were to acquire joint control of the Spanish firm Hidroelectrica del Cantabrico (Hidrocantabrico), by means of a public bid takeover bid by Ferratlantica SL (Ferroatlantica)[1578]. Ferroatlantica belongs to Grupo Villar Mir and, after completion of the operation, is to be jointly controlled by Grupo Villar Mir and EnBW.

By letter dated 14/05/2001, the Spanish authorities informed the Commission in accordance with Art. 9 MR1989 that the proposed merger would create or strengthen a collective dominant position as a result of which effective competition would be significantly impeded in the electricity generation market in Spain[1579]. They stated that the merger would also affect the market in distributing and trading in electricity in the autonomous community of Asturias, which presented all the characteristics of a distinct market and was not a substantial part of the common market. The Spanish authorities therefore requested that the proposed merger be referred back to them under Art. 9 MR1989. Thus, the Commission decided to initiate proceedings under Art. 6 I lit. c MR1989.

9.23.1 The Parties and the Operation

Grupo Villar Mir, whose parent company is Immobilaria Espacio SA, is a business group with various interests in the following areas: real estate, fertilisers, construction, operation of infrastructure and service concessions and management of financial investments. EnBW, which is jointly controlled by EdF and OEW, is a vertically integrated electricity company whose main activity is the generation, transmission, distribution, trading and supply of electricity, principally in south-west Germany.

EdF is a state-owned company whose main activities are the generation, transmission, distribution and trading of electricity in France. Through EdF/RTE, a division of EdF, it operates the national electricity grid and interconnectors with neighbouring countries. Through its affiliate EdF International (EdFI), a holding company, EdF owns shares in electricity companies in various European countries including Austria, Italy, Sweden, UK. It is also involved in the construction sector, the maintenance of electricity generating plants and transmission grids, recycling and city lighting.

Ferroatlantica produces, distributes and markets various types of metal and electric furnace-produced ferrous alloys, both for the home and export markets, and also produces hydro-electric power. It is owned outright by Grupo Villar Mir and will, on completion of the proposed operation, be jointly controlled by Grupo Villar Mir and EnBW, which will acquire 50% of its capital.

[1578] C. Koenig, K. Schreiber, Europäisches Wettbewerbsrecht (1st ed.) (Tübingen, Germany, Mohr, 2010) CH 7 IV. 2. c), pp. 207-208; P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (1) (d) p 395.

[1579] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (1) (d) p 395..

Hidrocantabrico is involved in the generation, distribution and marketing of electricity and is currently the fourth biggest Spanish electricity company. Outside the electricity sector, its main activities are essentially the distribution and marketing of natural gas and its involvement in the telecommunications sector in the autonomous community of Asturias.

The proposed operation is the acquisition of joint control of Hidrocantabrico by Grupo Villar Mir and EnBW by means of EnBW's purchase of 50% of Ferroatlantica's shares. After the bidding process was completed, the group formed by Cajastur, EDP and Caser owned 35% and Ferroatlantica 59.66% of Hidrocantabrico's shares.

9.23.2 Concentration

According to the agreements concluded by Grupo Villar Mir and EnBW, each of the companies will own a 50% share of Ferroatlantica and as a result Grupo Villar Mir and EnBW will jointly control Hidrocantabrico. In the light of the above, the notified operation constitutes a concentration under Art. 3 I lit. b MR1989.

9.23.3 Community Dimension

A community dimension is available (Art. 1 II MR1997).

9.23.4 Relevant Markets

Eligible customers in the Spanish market are those consumers regardless of their level of consumption, who are supplied at a nominal voltage of more than 1000 Volts. From 01/01/2003, all consumers of electricity will have the status of eligible customers. Eligible customers have three options (a) the pool, (b) by means of bilateral contracts, (c) through contracts with traders. The market definition is national in scope[1580] (generation and wholesale supply and supply to eligible consumers as opposed to supply to non eligible consumers)[1581].

9.23.5 Compatibility with the Common Market

The Commission takes the view that the operation can strengthen the collective dominant position currently existing in the wholesale electricity market in Spain. As regards the total installed electricity generating capacity of generating companies based in Spain, the table shows how Endesa and Iberdrola control around 83%, far ahead of the other operators with 12% (Union Fenosa) and 5% (Hidrocantabrico).

	May 2001
Endesa	40-50%
Iberdrola	35-40%
Union Fenosa	10-15%
Hidrocantabrico	< 10%
Other	< 5%

The next table shows the market shares in respect of sales on the daily market during the years 1999-2001

[1580] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 11 C. (1) (b) p 291; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 192, p 1258.

	1999	2000	2001 Jan.-May
Endesa	45-50%	45-50%	40-45%
Iberdrola	25-30%	25-30%	30-35%
Union Fenosa	10-15%	10-15%	10-15%
Hidrocantabrico	5-10%	5-10%	5-10%
Others	< 5%	< 5%	< 5%
Imports (EdF/RTE)	5-10%	< 5%	< 5%

Despite the existing collective dominance, the price level on the Spanish market has been affected by increases in the amount of cheap energy supplied in the pool.

9.23.6 Commitments made by EdF and EdF/RTE

EdF/RTE and EdF have offered to make commitments to resolve the problems of competition identified by the Commission:

EdF/RTE commits itself to adopting the measures and carrying out the work necessary to increase the commercial interconnection capacity between France and Spain in the following stages[1582]:

They add an additional 300 MW through technical improvements to existing power lines by the end of 2002; an additional 1200 MW through the construction of a new line; an additional 1200 MW through the construction of an alternative line, the doubling of an existing line or the reinforcement of the French lines in the medium term, provided that technical economic feasibility studies to be drawn up by the end of 2002 justify such construction work[1583].

The increase in commercial capacity must result in an available capacity equivalent to 75% of the additional increase for 85% of the hours of the year.

One or more third parties will be appointed to check compliance with the commitments, and must be approved by the Commission.

In order to resolve the problems of competition arising from its acquisition of control over Hidrocantabrico, EdF undertakes to support an increase in interconnection between France and Spain and, in particular, fulfillment of the abovementioned commitments by EdF/RTE in the stages described.

The commitments described above will reduce the isolation of the Spanish electricity market in the future significantly increasing the chances that operators base outside the Iberian peninsula can compete on the Spanish market. The increase in interconnection levels will make it possible to step up electricity exports of the Spanish market, which will have a positive effect on the level of pool prices and the capacity of the members of the existing duopoly to fix prices. The commitments offered by EdF/RTE and EdF are therefore sufficient to avoid strengthening the dominant position of Endesa and Iberdrola.

[1581] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 186, p 1256.
[1582] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 200, p 1261.

9.23.7 Conclusion

Having regard to the above and provided that the commitments are observed in full, the proposed merger will neither create nor strengthen a dominant position as a result of which effective competition would be impeded in a substantial part of the common market. The operation is therefore declared compatible with the common market and with the functioning of the EEA according to Art. 8 II MR1989, provided the parties honour the following commitments:

to increase interconnection capacity, to comply with any measures required by the Commission as recommended by the official charged with monitoring the implementation of the commitments to ensure that the parties abide by them.

9.24 BP / E.ON CASE IV/M. 2533

The Commission received on 27/07/2001 a notification of a proposed concentration by which BP Plc. (BP) and E.ON under Art. 4 MR1989 acquire within the meaning of Art. 3 I lit. b MR1989 joint control of Veba Oel AG which is currently under sole control of E.ON. After examination of the notification the Commission concluded that the concentration fell within the scope of MR1989 and raised serious doubts as to its compatibility with the common market and the functioning of the EEA agreement and initiated proceedings owing to Art. 6 I lit. c MR1989[1584].

9.24.1 The Parties and the Operation

BP is the holding company of a world-wide active exploration, petroleum and petrochemicals group of companies comprising four core businesses: (1) the exploration and production of crude oil and natural gas; (2) oil refining, marketing, supply and transport of refined products; (3) manufacturing and marketing of petrochemicals and related products; and (4) solar energy. The German downstream oil activities are operated by the wholly owned subsidiary Deutsche BP GmbH (Deutsche BP).

E.ON is the ultimate parent of a vertically integrated energy group, primarily active in Germany and, since its recent acquisition of Sydkraft AB, in Sweden, Its main activities are the production and/or supply of electricity, gas, water, chemical products and oil, as well as the provision of telecommunications services and real estate. The up- and downstream oil and petrochemicals business of E.ON (besides the chemical activities operated by its subsidiary Degussa, which will remain outside the JV) is operated via its 100% subsidiary Veba Oel AG (Veba Oel or JV). Veba Oel, as a holding company, comprises three divisions, each operated by a wholly owned subsidiary: (1) upstream exploration and production, operated by Veba Oel & Gas GmbH (VOG), (2) oil

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[1583] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (1) (c) p 394; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 173, p 640.

refining and petrochemicals, operated by Veba Oil Refining & Petrochemicals GmbH (VORP), as well as (3) downstream oil products marketing operated by Aral AG & Co. KG (Aral). Beside Veba Oel's German activities, it Is also active in Austria, Luxembourg and some Eastern European countries in the marketing of downstream oil products and, with respect to upstream activities, it operates one field in the UK and in the Netherlands, respectively, and holds minority shares in several fields operated by other companies.

BP and E.ON signed a participation agreement on 15/07/2001. Owing to this agreement, Deutsche BP will acquire 51% of the share capital of Veba Oel by capital increase. E.ON will retain 49% of the share capital. E.ON will have a put option at any time after a specified date for a fixed price.

9.24.2 Concentration

In the light of the above veto rights conferred on E.ON by the participation agreement safeguarding its decisive influence in Veba Oel, it can be concluded that BP and E.ON will have joint control over Veba Oel and the transaction constitutes a concentration under Art. 3 I lit. b MR1989.

9.24.3 Community Dimension

The transaction has a community dimension (Art. 1 II MR1997).

9.24.4 Procedure

On 20/08/2001, the German competition authority (Bundeskartellamt) informed the Commission that the concentration threatens to create or strengthen a dominant position as a result of which effective competition would be significantly impeded on a market within Germany, which presents all the characteristics of a distinct market under Art. 9 II MR1989, requested the Commission to partly refer the case[1585]. The request related to the markets for downstream mineral oil products in Germany, including in particular the markets for motor gasoline, diesel, and light heating oil retailing and wholesaling, aviation fuels, heavy fuel oil, bitumen and lubricants. The request did not concern the markets for petrochemicals, the markets for upstream oil activities as well as the markets for downstream oil products outside Germany. By decision of 06/09/2001, the Commission partly referred the case to the competent German authorities as requested[1586].

On 24/10/2001 a statement of objections was sent to BP and E.ON, which sent a combined reply on 05/10/2001.

[1584] E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 25 IV. 3. c) p 637.

[1585] V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 14 III 2. p 132; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. VI. 3. a) (5) p 576.

[1586] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. VI. 3. a) (5) p 576.

9.24.5 Assessment owing to Art. 2 MR1989

Regarding the relevant product market, ethylene is one of the most important basic chemical products, which belongs to the olefin group consisting of ethylene, propylene, and butadiene.

On the basis of the foregoing, the market shares and capacities of the ethylene sellers on the ARG+ merchant market as well as imports by third parties for the year 2000 areas follows:

Ethylene Seller	Share of merchant market %	Capacity kt
Veba	25-35	900-1000
DEA	10-20	400-500
Shell	10-20	900-1000
BP/Erdölchemie	0	900-1000
BASF	10-20	1300-1400
Atofina	5-15	700-800
Exxon	5-15	400-500
Imports 3rd parties	0-10	

After the proposed mergers, the market shares of the ethylene sellers on the ARG+ would be as follows:

Ethylene Seller	Market share in %
BP/Veba	25-35
Shell/Dea	25-35
BASF	10-20
Exxon	5-15
Atofina	5-15

Shell and BP would have arithmetically a combined market share of 55-65%. The increase in market share also corresponds to an increase in market power of Shell/Dea and BP/Veba as a result of the two transactions.

The current holding of the share capital in the ARG company is as follows:

Shareholder	Capital share
BP (incl. Erdölchemie)	33.33%
Veba (E.ON)	16.66%
Degussa (E.ON)	16.66%
Bayer	16.66%
DSM	16.66%

9.24.6 Conditions and Obligations

Owing to Art. 8 II MR1989, the Commission may attach to it decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered with-a-vis the Commission with a view to rendering the concentration compatible with the common market[1587]. Where a condition is not fulfilled the Commission's decision declaring the concentration compatible with the common market no longer stands, where the undertakings concerned commit a breach of on obligation, the Commission may revoke its clearance decision, acting pursuant to Art. 8 V lit. b MR1989, and the parties may also be subject to fines and periodic penalty payments in accordance with Art. 14 II lit. a and 15 II lit. a MR1989.

In view of the foregoing, the decision must be conditional upon full compliance with the incidental provision involving divestiture of the shareholdings in the ARG mbH & Co. KG and the interim incidental provision to exercise the votes of any two of the three shareholdings in the same way as other shareholders as set out in connection with the Annex 1, as these bring about three structural changes of the market. The same applies to the commitment relating to access to the pipeline in the Rhine/Ruhr area as set out in Annex 2.

9.24.7 Conclusion

For the reasons set out above, and subject to full compliance with the commitments given by the parties, it must be concluded that the proposed concentration does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or a substantial part of it. The concentration is therefore to be declared compatible with the common market pursuant to Art. 8 II MR1989 and with the EEA agreement pursuant to Art. 57 thereof subject to compliance with the commitments set out in the Annexes.

9.24.8 Annex

Regarding commitments in relation to ARG, pursuant to Art. 8 II MR1989, BP and E.ON (the parties) hereby give the following commitments in order to enable the Commission to declare the proposed acquisition by BP and E.ON of joint control of Veba Oel AG, which is currently under the sole control of EON, compatible with the common market and the EEA agreement owing to Art. 8 II MR1989[1588].

Concerning divesting any two of the BP/Veba Oel shareholdings, BP and E.ON undertake to divest any two at their own discretion of the three BP/Veba Oel shareholdings in ARG.

For each of the divestiture shareholdings, a purchase, together with a copy of a sale and purchase agreement signed subject to approval by the Commission and a reasoned paper setting out sufficient information on the purchaser for the Commission to decide whether the purchaser meets the requirement below, shall be proposed by the parties for approval by the Commission.

The parties recognise that for a proposed purchaser to meet with the Commission's approval, it shall be independent of and unconnected to the parties.

Having regard to the voting undertaking not to block decisions requiring a special majority (the voting undertaking), it is the intention of the parties that BP and E.ON will not be able to block decisions of the ARG requiring a special majority. The parties shall appoint one or more monitoring trustees, such as an investment bank or consultant or auditor, subject to approval by the Commission.

[1587] q.v. § 40 III GWB; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 10 VII 4. p 377.

The monitoring trustee shall monitor that the parties are using their best endeavours to comply with the divestment incidental provision.

BP and E.ON shall provide the monitoring trustee with all such assistance and information, including copies of all relevant documents, as the monitoring trustee may reasonably require to monitor compliance with the conditions and obligations under these commitment.

If the parties are not able to enter into a final binding agreement for the sale of he divestiture shareholdings within the divestment period, BP and E.ON shall appoint a divestment trustee (an investment bank or consultant or auditor), subject to approval by the Commission.

The divestment trustee shall be independent from BP and E.ON, possess the necessary qualifications to carry out the task and shall not be or become exposed to a conflict of interest.

Regarding the review clause, the Commission may upon request of BP and/or E.ON showing good cause and, if appropriate, after the hearing of the monitoring trustee, and where relevant allow for:

an extension of the voting incidental provision period and/or the divestment period and/or the extended divestment period; or waiver or variation of one or more of the conditions and obligations in these commitments; or discharge the voting incidental provision and/or the divestment incidental provision in its entirety BP and/or E.ON shall address any request for an extension of time periods no later than one month prior to the expiring of such time period, showing good cause. Only in exceptional circumstances will BP and E.ON be entitled to request an extension within the last month of any period.

Regarding appendix 1 to annex 1, upon completion of the acquisition, BP and Veba Oel directly and indirectly control three shareholdings of 16.67 % each in ARG.

For such time that E.ON continues to have a controlling interest under Art. 3 III MR1989 in both Veba Oel and Degussa, and for so long as BP and/or Veba Oel has a shareholding in ARG whereby, if acting together with Degussa, they would be able to block decisions of the shareholders' meetings of ARG requiring a special majority of votes cast or votes existing, the above incidental provision will be amended so that for all decisions which require a special majority of votes, BP and E.ON will exercise the voting rights in accordance with the unanimous decisions of all other shareholders.

This incidental provision shall automatically terminate in relation to E.ON upon the end of the calendar day on which E.ON ceases to have a controlling interest under Art. 3 III MR1989 in Veba Oel AG, and in relation to BP and Veba Oel at the end of the calendar day on which (i) BP and/or Veba Oel cease directly or indirectly to

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[1588] q.v. § 40 III GWB; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 10 VII 4. p 377.

own a shareholding in ARG whereby they can block decisions requiring a special majority and (ii) E.ON no longer continues to have a controlling in both Veba Oel and Degussa.

Regarding Annex II and the undertaking of BP and E.ON, as no direct link exists between the ARG pipeline in Gelsenkirchen and the pipeline between Gelsenkirchen and the Rhine/Ruhr area, BP and E.ON (for as long as it have a controlling interest in Veba Oel) hereby undertake to the European Commission that they will guarantee to an ethylene customer that ethylene delivered via the ARG pipeline to Gelsenkirchen will be made available at that customer's plant on reasonable terms and conditions agreed with that customer (and in the absence of such agreement, on such terms and conditions as may be determined by an independent third party arbitrator appointed by agreement with that customer. This guarantee is made regardless of the source from which that customer may decide to purchase ethylene.

9.25 AKER MARITIME / KVAERNER (II) CASE IV/M. 2683

The Commission received on 14/12/2001 a notification of a proposed concentration by which Aker Maritime ASA (AMA, Norway) acquires sole control of Kvaerner (Norway) by way of purchase of shares. On 14/12/2001, the Norwegian government requested, owing to Art. 9 MR1989 and Art. 6 Protocol 24 EEA-agreement that the case, insofar as it relates to the parties oil and gas activities should be referred to the competent Norwegian competition authority. The request does not concern the parties' ship building activities.

Regarding the parties, AMA which is controlled by Aker RGI Holding ASA, is a provider of products and services for offshore exploration, development and production of oil and gas and is also active in shipbuilding. Kvaerner is an Anglo-Norwegian engineering and construction group with significant activities in the same areas as AMA. Additionally, its activities encompass other engineering and construction activities as well as services to the pulping industry. In these latter areas there is, however, no overlap with any activity of Aker AGI Holding ASA. The proposed concentration is the acquisition of sole control under Art. 3 I lit. b MR1989 whereby AMA acquires sole control of Kvaerner by way of purchase of shares.

Regarding the relevant product markets, AMA and Kvaerner are active in design, development and production of ships for commercial use. Concerning the relevant geographic market, AMA maintains that the market for commercial shipbuilding is global due to the fact that the parties face competition from several shipyards around the world (South Korea, China and Singapore). It was however found that even on a narrower geographic market the operation would not give rise to competition concerns and the geographic market definition could be left open.

According to the current notification, the commercial ship building industry is global and the supply structure is quite fragmented with the three largest suppliers (Hyundai, Samsung and Mitsubishi) having market shares between 7-12%. If a narrower product market were to be considered the parties' combined market shares would only exceed 15% for cruise ships where they would have approximately 19% for deliveries in 1998-2000.

For the above reasons, the Commission has decided not to oppose the operation and to declare it compatible with the common market and with the EEA agreement (Art. 6 I lit. b MR1989).

Regarding Art. 9 MR1989, by a letter from the Norwegian government on 14/12/2001, the government requested a referral of the part of the operation that concerns the parties' oil and gas activities (Art. 9 MR1989; Art. 6 of Protocol 24 EEA agreement). Concerning the relevant product markets, the request for a partial referral of the case to the Norwegian competition authority relates to the parties' oil and gas activities: product markets for new oil and gas installations (EPC contracts) and the market for maintenance and modification of platforms (MMO) respectively. The markets for EPC and MMO contracts on the Norwegian continental shelf is national in scope.

From the above it follows that the conditions to request a partial referral under Art. 9 II lit. a MR1989 are met and that it is therefore appropriate for the Commission to exercise its discretion under Art. 9 III lit. b MR1989 so as to grant the partial referral request.

The notified concentration resulting in the acquisition of sole control by AMA of Kvaerner is as far as it relates to the markets for EPC contracts and MMO services referred to the Norwegian competition authorities owing to Art. 6 of protocol 24 of the EEA agreement and Art. 9 III MR1989.

9.26 ENBW / EDP / CAJASTUR / HIDROCANTABRICO CASE IV/M. 2684

The Commission received on 04/02/2002 a notified merger under Art. 4 MR1989 in which the undertakings Electricidade de Portugal (EDP), EnBW and Caja de Ahorros de Asturias (Cajastur) would acquire joint control of the Spanish undertaking Hidrocantabrico by means of purchase of shares[1589].

EDP is mainly active in the production and distribution of electricity in Portugal. EDP operates as well in he sectors of gas and telecommunications in Portugal. EnBW is active in electricity generation, transmission, distribution, trading and supply of electricity mainly in Southwest of Germany. Other business activities comprise the supply of gas and district heating, telecommunications, waste recycling and financial services.

[1589] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (1) (d) p 395.

EnBW is jointly controlled by EdF and OEW, an association of nine public districts in the Southwest of Germany.

EdF is a state-owned company whose main activities are the generation, transmission and distribution and trading of electricity in France. Through EdF/RTE is operates the national grid and interconnectors with neighbouring countries. Through its subsidiary EdFI, a holding company, EdF owns shares in electricity companies in various European countries. It is also involved in the construction sector, the maintenance of electricity generating plants and transmission grids, recycling and city lighting.

Cajastur is a savings bank. Hidrocantabrico is mainly active as a generator, distributor and supplier of electricity in Spain and as a distributor and supplier of gas and telecommunications in the Spanish region Asturias.

Regarding the operation, the proposed transaction is the acquisition of joint control over Hidrocantabrico by EDP, EnBW and Cajastur, through the acquisition vehicle Adygesinval S.L. (Adygesinval). On 04/12/2001, EnBW, EDP, Cajastur and Caser entered into a shareholders' agreement which shall govern the relations among the notifying parties as jointly controlling shareholders of Hidrocantabrico and of Caser as minority non controlling shareholder. The objective of the parties to the said agreement is to control 100% of the share capital of Hidrocantabrico preliminarily through the acquisition vehicle Adygesinval.

Concerning concentration, further to the aforementioned Shareholders' agreement, after the completion of the operation EDP will hold a specified amount of Hidrocantabrico's shares and EnBW and Cajastur will hold a specified amount of shares. Hidrocantabrico will be jointly controlled by EDP, EnBW and Cajastur (Art. 3 I lit. b MR1989).

The concentration has a community dimension (Art. 1 MR1989).

Eligible customers in the Spanish market are those consumers, regardless of their level of consumption, who are supplied at a nominal voltage of more than 1000 volts. From 01/01/2003 all consumers of electricity will have the status of eligible customers. Eligible customers in Spain who wish to buy electricity under the liberalised system have currently three options: (a) through the pool, (b) by means of bilateral contracts with generators or foreign operators or (c) through contracts with retailers. The market for eligible customers potentially represents 54% of the consumption in Spain.

In view of the above, it is possible to conclude that the relevant product markets for the purposes of the assessment of the case comprise respectively[1590]:

- the electricity offered through the wholesale market: the pool and bilateral contracts between eligible customers and generators; and

- the retail market: the electricity offered subsequently by retailers to eligible customers

Regarding the relevant geographic market for the supply of electricity on the liberalised market, the Commission considered that the market is not larger than national[1591].

In particular, imports to the Spanish market are constrained by the limited interconnection capacity (1900-2100 MW: 1000-1100 MW to France; 600-650 MW to Portugal; 300-350 MW to Morocco)[1592]. This represents 6.6% of the capacity needed at peak demand times. Regarding the assessment of the Spanish market, Hidrocantabrico has generation activities in Spain representing 5% of the market in 2001.

With regard to the wholesale market, Hidrocantabrico's share in terms of sales traditionally not offered electricity to the Spanish pool and EnBW's sales have been negligible. EdF's exports accounted for less than 5% of total demand (long term contract with Red Electrica Espanola). On the other hand and as far as the retail market for electricity is concerned, Hidrocantabrico's share in terms of supply to eligible customers was around 5-10% in 2001, while the combined market share of EDP, EnBW and EdF was below 1%. In conclusion, the proposed operation would result in relatively limited horizontal overlaps in the Spanish wholesale and retail electricity markets.

In particular, the Commission concluded in the referral case that the Spanish electricity market is characterised by the existence of a duopolistic dominant position by Endesa and Iberdrola, on the basis of (1) their shares of total installed generating capacity (Endesa 46% and Iberdrola 37% in 2001); (2) their shares of sales to the wholesale market (Endesa 47% and Iberdrola 27% in 2000); and their ability to set prices in the wholesale electricity market (60-80% of cases in the daily market). This duopolistic scenario has not been altered since by the recent divestiture by Endesa of Viesgo (which accounts for 5% of the total installed capacity in Spain which brought the entry of a new operator, Enel.

Regarding the Portuguese and French market, the transaction is not likely to have any substantial effects in the markets for electricity where EDP and EdF have respectively very strong positions as the incumbent electricity utilities.

In order to remove the competition concerns resulting from the proposed transaction, EdF/RTE and EdF have re-submitted the undertakings that had been accepted by the Commission in relation to the case[1593].

Regarding incidental provisions offered by EdF/RTE, it undertakes to adopt the measures and implement the works necessary to increase the commercial interconnection capacity France-Spain according to the following

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[1590] Q.v. Commmission Decision Grupo Villar Mir/EnBW/Hidrocantabrico, CASE IV/M. 2434.
[1591] Commission Decision Preussen Elektkra/EZH Case IV/M. 1659; EdF/Dreyfus, Case IV/M. 1557; Veba/VIAG, Case IV/M. 1673; Elektrabel/E.ON Case IV/M. 1803; EdF/EnBW Case IV/M1853.
[1592] Q. v. P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 D. (2) (c) p 412.
[1593] Commission Decision, Grupo Villar Mir/EnBW Case IV/M. 2434.

phases[1594]: 300 additional MW through the technical improvement of existing lines before the end of 2002 and 1200 additional MW through the construction of a new line. This additional capacity could be increased up to a specified amount after verification of the technical and economic feasibility 1200 additional MW through the construction of an alternative line, the doubling of an existing line or the reinforcement of the French lines, at mid term, inasmuch as studies of technical and economic feasibility, to be carried away before the end of 2002, will justify such works.

The increase of commercial capacity shall bring about an available capacity equivalent to 75% of the additional increase during 85% of the hours of a year.

Regarding the incidental provisions offered by EdF and in order to solve the competition problems raised by its acquisition of joint control over Hidrocantabrico, EdF undertakes to support the increase in interconnection between France and Spain and particularly the commitments of EdF/RTE mentioned above.

The increase in interconnector capacity will make possible an increase in the export of electricity into the Spanish market, which will positively affect both the level of prices in the pool and the ability of the members of the existing duopoly to determine them. Therefore, the incidental provisions offered by EdF/RTE and EdF are adequate to prevent the reinforcement of the dominant position of Endesa and Iberdrola that would result, after the merger, from the foreseeable maintenance in the future of the current electrical interconnection capacity between France and Spain.

In sum, having regard to the abovementioned considerations, the proposed operation, provided that the incidental provisions contained in the Annexes incorporated to the decision are fully respected, will neither create nor strengthen a dominant position as a result of which effective competition would be significantly impeded in a substantial part of the common market. Therefore, the operation is declared compatible with the common market and the EEA owing to Art. 6 I lit. b MR1989 on condition that the parties comply with the following commitments:

- the increase in the interconnection capacity (Chapter 2 of Annex 1) the compliance with any measure imposed by the Commission upon recommendation to make the parties comply with their commitment as indicated in § 8 of Chapter 3 of Annex I.

The Commission concludes that the incidental provisions submitted by EdF/RTE and EdF during the course of the proceedings are sufficient to address the competition concerns raised by this concentration. Accordingly, subject to full compliance with the incidental provisions, the Commission has decided not to oppose the

[1594] I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.32 (2) (b) p 781.

notified operation and to declare it compatible with the common market and with the functioning of the EEA agreement (Art. 6 II MR1997)[1595].

9.27 ENBW / ENI / GVS CASE IV/M. 2822

The Commission received on 14/08/2002 a notification of a proposed concentration owing to Art. 4 MR1989 by which the undertakings EnBW, Germany, and ENI S.p.A. (ENI), Italy acquire joint control of the German undertaking Gasversorgung Süddeutschland (GVS) by way of purchase of shares[1596].

9.27.1 The Parties and the Operation

EnBW is active in the fields of electricity as well as gas generation, transmission, distribution, supply and trading and district heating supply. Other business activities comprise telecommunications and waste recycling. Prior to the liberalisation of the German electricity market, EnBW's business activities were focused on south west Germany (Baden-Württemberg). After the liberalisation, however, EnBW extended some of its electricity activities nation-wide (Yello electricity to mainly household consumers). As far as gas is concerned, EnBW distributes through subsidiaries, gas at local level to final consumers as well as secondary distributors.

EnBW is jointly controlled by EdF and OEW. EdF is a wholly state owned company which is active in all fields of supply and transport of electricity in France and is the operator of the national grid, but is not active in the sectors of gas generation or supply. EdF indirectly holds 34.5% of the shares of EnBW. OEW is an association of nine public districts in Southwest Germany. Its main purpose is to hold shares in companies active in the energy sectors. OEW holds 34.5% of the shares in EnBW.

ENI is active in the exploration and production of oil and natural gas world-wide. ENI is a gas producer in Italy, the North Sea, Egypt, Nigeria, Kazakhstan and Libya. Furthermore, ENI purchases gas volumes from Sonatrach, Gasunie, Gazprom/Gazexport, Nigeria LNG and some Norwegian gas producers. ENI is also active in the supply, transmission, storage, distribution and trade of natural gas. ENI holds shares in companies with transportation capacities which are active in the operation of the transnational pipelines for transmission of natural gas in Germany, Austria, Switzerland, Tunisia, and sea pipelines in the Mediterranean from Tunisia to Italy, in the Black Sea from Russia to Turkey and in the North Sea from the UK to Belgium.

ENI is currently controlled by the Italian Ministry of Finance through a controlling 30.33% participation in ENI's share capital.

[1595] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (1) (d) p 395; q.v. § 40 III GWB; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 10 VII 4. p 377.

[1596] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (2) (b) pp 397-398.

GVS' business activities are regional gas distribution and transportation using and operating a gas transport system in Baden-Württemberg. GVS mainly supplies gas to local distribution companies. In addition to this, GVS supplies two industrial plants, Rodia Rhone-Poulenc AG, Freiburg, and Badische Stahlwerke AG, Kehl. The latter activity constitutes approximately 1% of GVS' turnover.

Presently, 26.25% of the shares in GVS are held by MVV RHE AG (MVV), 25% by the state of Baden-Württemberg, 15.35% by individual local authorities and 33.4 % by Neckarwerke Stuttgart AG (NWS), which is controlled by EnBW. MVV, state of Baden-Württemberg, NWS and some of the individual local authorities, which taken together represent 95.62% of the shares in GVS, have decided to sell their shares. Two local authorities will remain shareholders of GVS together accounting for 4.38% of the shares in GVS. EnBW and ENI intended to acquire 95.62% of the shares in GVS.

9.27.2 Concentration

As a result of the notified operation EnBW and ENI will jointly control GVS. Via NewCo, a jointly controlled 50:50 JV, EnBW and ENI intend to acquire all the shares in GVS and thereby gain control of GVS.

9.27.3 Community Dimension

The concentration has a community dimension (Art. 1 II MR1997). A national market is applicable[1597].

9.27.4 The Relevant Markets

In Germany, as a result of historical developments, there are two levels of gas wholesale companies: wholesale companies which purchase gas from community and non community gas producers and transport this gas over long distances through high pressure pipelines, and regional supply companies which use short distance medium and low pressure transmission pipelines. In previous decisions the Commission concluded for Germany that long-distance and short-distance wholesale companies operate on a different wholesale market[1598].

9.27.5 Compatibility with the Common Market

Concerning the dominant position of GVS, GVS has high market shares in the regional wholesale gas market and is the main gas supplier in Baden-Württemberg.

EnBW's participation in Stadtwerke in Baden-Württemberg:

EnBW's participation in Stadtwerke in Baden-Württemberg with gas supply	Share in capital in %
EVS-Gasversorgung Nord GmbH,	100

[1597] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. III. 1. c) (2) (c) p 381.
[1598] Commission Decision Exxon / Mobile, Case IV/M.1383; Veba/Viag, Case IV/M. 1673.

Stuttgart	
EnBW Gas GmbH, Karlsruhe	100
EnBW Ost-Württemberg Donauries AG, Ellwangen	99.48
Neckarwerke Stuttgart AG, Stuttgart	86.27
Badenwerk Gas GmbH, Karlsruhe	72
EVS Gasversorgung Süd GmbH, Stuttgart	51

Total supply more than 30.000 GWh.

9.27.6 Incidental Provisons or Undertakings

The decision to initiate proceedings adopted by the Commission owing to Art. 6 I lit. c MR1989 already raised the competition concerns outlined in the decision.

Regarding incidental provisions offered by the notifying parties, in order to address the issue on the foreclosure effect of the proposed operation, the notifying parties undertake to grant a special right whereby each local distribution company, customer of GVS in Baden-Württemberg, irrespective of whether EnBW holds a participation in it or not, can early terminate its supply contract that it concluded with GVS[1599]. The special right of early termination can be exercised at two different points in time. Long-term contracts ending in 2008 can be terminated either in October 2004 or October 2006, those ending in 2015 can be terminated either in October 2005 or October 2007. Customers will have to notify their early termination 6 months in advance. These special termination provisions also extend to contracts concluded between local distribution companies and Neckarwerke Stuttgart AG or EnBW Gas GmbH, in both of which EnBW is a controlling shareholder.

Moreover, the incidental provisions proposed contain provisions on reporting as well as the obligation of the notifying parties to inform all local distribution companies concerned of these special termination rights.

Regarding the assessment of the incidental provisions, the undertakings proposed of the notifying parties addresses the foreclosure effect by providing the possibility to bring substantially volumes of gas demand on to the market much earlier than currently possible under the long-term supply agreements. Even under the assumption that all local distribution companies in which EnBW holds participation would remain with GVS as their supplier of gas, a potential volume of at least about 60% of GVS' present sales could come gradually on the market in Baden-Württemberg over the next years.

Moreover, by expending the early termination rights to the customers of NWS and EnBW Gas those customers will have the possibility of early termination of their supply contracts with NWS and EnBW Gas. The current supply contracts can be terminated for the first time in 2004, for those contracts ending in 2008, and in 2005

[1599] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (2) (b) pp 397-398; CH 14 D. (2) (d) p 412; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 201, p 1262; I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.32 (2) (b) p 781; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.1093, p 781.

for those ending 2015. In this respect, it can be expected that conditions in the regional wholesale gas market may have changed by that time because of the completion of the Südal pipeline and efficient TPA rules allowing for some degree of competition to take place.

In the current situation customers accounting for 40-50% of GVS' sales of gas are contractually bound until 2008 and customers accounting for 50-60% of the sales are even bound until 2015. As a result of the early termination rights in the incidental provisions proposed by the parties at least about 60% of the gas volumes sold by GVS will be opened up to competition in the near future.

Through the commitment proposed by the parties, however, at least about 60% of GVS of GVS total supply (60% direct customer and 5% indirect customer supplied by NWS and EnBW Gas) will legally be able to change supplier for 100% of the respective supplies. This extensive market opening-taking place in the coming years future will mean that GVS' market position becomes subject to competition and that the market may benefit from the legal liberalisation, as it is gradually expected to evolve.

On the basis of the commitments, however, competitors, such as Wingas in particular, will have the chance to win customers to a significant extent in the coming years. They will have the chance to gradually expand their position in Baden-Württemberg, and to proceed on a considerably better basis in the relevant market once all the contracts currently in force have expired.

Most third party commentators considered these proposals to be an appropriate means to free gas volume from long-term supply agreements and, in consequence, to resolve the competition concerns raised by the proposed concentration.

9.27.7 Conditions and Obligations

Owing to the first sentence of the 2nd subparagraph of Art. 8 II MR1989, the Commission may attach to its decision conditions and obligation intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market[1600].

9.27.8 Conclusion

It can be concluded from the foregoing that the incidental provisions proposed by the notifying parties will remove the competition concerns and thus, if implemented, renders the proposed operation compatible with

[1600] q.v. § 40 III GWB; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 10 VII 4. p 377.

the common market. The operation should therefore be declared compatible with the common market pursuant to Art. 8 II MR1989 and with the EEA agreement pursuant to Art. 57 thereof[1601].

9.28 VERBUND / ENERGIEALLIANZ CASE IV/M. 2947

The Commission received on 20/12/2002 a notification of a proposed concentration under Art. 4 MR1989 by which the Austrian undertakings Österreichische Elektrizitätswirtschafts-Aktiengesellschaft (Verbund), EVN AG (EVN), Wien Energie GmbH (Wien Energie), Energie AG Oberösterreich (Energie OÖ), Burgenländische Elektrizitätswirtschafts-Aktiengesellschaft (Bewag) and Linz AG für Energie, Telekommunikation, Verkehr und kommunale Dienste (Linz AG) planned to acquire within the meaning of Art. 3 I lit. b MR1989 joint control of E&S GmbH (E&S) and Verbund Austrian Power Trading AG (APT)[1602]. EVN, Wien Energie, Energie OÖ, Bewag and Linz AG were to manage their interests jointly under the name EnergieAllianz Austria (EnergieAllianz).

On 04/02/2003, therefore, the Commission decided to initiate proceedings in the case under Art. 6 I lit. c MR1989 and Art. 57 EEA agreement.

After a thorough investigation of the case the Commission has come to the conclusion that in itself the notified concentration would indeed strengthen a dominant position as a result of which effective competition would be significantly impeded in a substantial part of the common market[1603]. But the competition concerns to which the transaction gave rise have been overcome by the commitments entered into by the notifying parties.

9.28.1 The Business of the Parties

Verbund generates and transmits electricity and supplies it to industrial consumers and to electricity distributors; it also trades in electricity. Verbund is the biggest electricity generator in Austria, and operates the high voltage grid throughout the country with the exception of Vorarlberg and Tyrol. Verbund deals with large customers through a 55% subsidiary, Verbund-Austrian Power Vertriebs GmbH (APC), the bulk of the other shares in APC, which do not carry controlling rights, are held by Energie Steiermark Holding (Estag), a company which is itself controlled jointly by the Land of Styria and EdF.

Verbund and Estag also jointly own Steweag-Steg GmbH (Steweag-Steg) which is a regional distributor in Styria, Verbund holding 34% of the capital and Estag 66%; Steweag-Steg differs from APC in that here Verbund and Estag exercise joint control.

Verbund has a minority 35.12% holding in Kärtner Elektrizitäts-Aktiengesellschaft (Kelag), which is controlled by an intermediate holding company owned jointly by the land of Carinthia and the German company RWE

[1601] q.v. § 40 III GWB; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 10 VII 4. p 377.
[1602] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 180, p 1254.
[1603] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (1) (e) p 396.

AG (RWE). Verbund has also interests in companies that supply electricity to households on the liberalised Austrian electricity market; these interests currently include 20% stakes in Unsere Wasserkraft GmbH & Co. KG (Unsere Wasserkraft), which is a JV with Estag, and MyElectric Stromvertriebs GmbH (My Electric) which is controlled by Salzburg AG für Energie, Verkehr und Telekommunikation (Salzburg AG). Verbund is itself controlled by the Republic of Austria, which holds 51% of the shares.

The members of EnergieAllianz distribute electricity regionally, in Lower Austria (EVN), the Vienna area (Wien Energie), Upper Austria (Energie OÖ), the Linz area (Linz AG) and Burgenland (Bewag); this includes supplying to final consumers. Energie OÖ has a 26.13% stake in Salzburg AG, the regional supplier in the Land of Salzburg. With the exception of Bewag, the members of EnergieAllianz all generate electricity. The members also distribute gas and heat regionally, and provide services relating to transport, the environment, waste management, waste disposal, telecommunications and cable television. Majority holdings in all members of EnergieAllianz are held by regional authorities.

9.28.2 The Transaction

The planned transaction would consolidate the electricity business of Verbund and EnergieAllianz in two JVs, E&S and APT. The electricity generation capacity of Verbund and the Land corporations that are members of EnergieAllianz would continue to be in separate ownership. But generation would be directed by the trading company APT, which would be owned by 67% by Verbund and 33% by EnergieAllianz. The electricity generated in Verbund's and EnergieAllianz's power stations would be supplied exclusively to APT. APT would handle electricity trading. APT would also supply electricity to E&S, which would be owned 67% by EnergieAllianz and 33% by Verbund. E&S would deal with all the large customers formerly with EnergieAllianz or Verbund, which have an annual consumption of more than 4 GWh, and would supply them with electricity. APT would supply electricity to the Land corporations which are members of EnergieAllianz, and those corporations would supply commercial customers with a consumption of 0.1-4.0 GWh and household customers up to 0.1 GWh. APT would also supply electricity to the remaining Land corporations that are not party to the transaction and the city corporations outside the areas supplied by EnergieAllianz.

9.28.3 Concentration

APT and E&S are to be subject to the joint control of Verbund and EnergieAllianz. Strategic decisions would require the agreement of both sides at a consortium meeting (Syndikatsversammlung). APT and E&S are to be linked together by this consortium meeting which would be common to the two of them and on which they would be equally represented. APT would handle procurement for E&S.

APT and E&S would be performing on a lasting basis all the functions of autonomous economic entities. The transaction therefore constitutes a concentration under Art. 3 I lit. b MR1989.

9.28.4 Procedure

The Commission examined the notification and found that the notified concentration fell within the scope of MR1989 and raised serious doubts as to its compatibility with the common market and with the functioning of the EEA agreement. On 04/02/2003, the Commission decided to initiate proceedings in the case under Art. 6 I lit. c MR1989 and Art. 57 EEA agreement.

On 10/04/2003, the Commission in accordance with Art. 18 MR1989, sent the notifying parties a statement of objections to which they replied by letter of 25/04/2003.

On 12/05/2003 the notifying parties submitted commitments which they proposed to entered into. The Commission carried out a market test in the course of which it consulted third parties; it concluded that the commitments proposed were not sufficient to resolve the competition concerns raised by the transaction, and informed the parties accordingly.

9.28.5 Community Dimension

The concentration has a community dimension. A national market is applicable[1604]. The market for balancing energy is restricted to the balancing zone[1605].

9.28.6 Appraisal owing to Art. 2 MR1989

Regarding the structure of the Austrian electricity industry and the legal framework, until 1999 the electricity industry in Austria was governed by the 2nd Nationalisation Act of 1947, which provided for a strict division of tasks and far-reaching territorial protection for the undertakings operating in the industry. Verbund was responsible for generating energy in large power stations, building and operating transmission grids, and trading in electricity with foreign countries. The nine Land corporations, Bewag (Burgenland), Kelag (Carinthia), EVN (Lower Austria), Energie OÖ (Upper Austria), Salzburg AG (Salzburg), Steweag (Styria), Tiwag (Tyrol), VKW (Vorarlberg) and Wienstrom (Vienna) and the five city corporations in the Land capitals Graz, Innsbruck, Klagenfurt, Linz and Salzburg distributed electricity to all categories of customer in their own areas. What the Land corporations did not generate themselves they generally obtained from Verbund.

The IEMD was initially transposed into Austrian law by the Electricity Industry and Organisation Act. From 19/02/1999 all final consumers with an annual electricity consumption of at least 40 GWh, or from 01/02/2000

[1604] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. III. 1. c) (2) (c) p 381.
[1605] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 194, p 1259.

20 GWh became entitled to access to the grid, and could freely choose their electricity supplier. Thermal stations generated 20416 GWh, 32.8% of the total:

Electricity generation in Austria in 2001:

Producer	Output (GWh)	Share of total output
Verbund	20000-250000	30-40%
Steweag-Steg	1000-6000	0-10%
Energie OÖ	1000-6000	0-10%
Wienstrom	1000-6000	0-10%
EVN	1000-6000	0-10%
Linz AG	0-4000	0-10%
Bewag	0	0
Kelag	1000-6000	0-10%
Salzburg AG	0-4000	0-10%
Tiwag	1000-6000	0-10%
VKW incl. VIW	1000-6000	0-10%
Other electricity suppliers and industry	10000-15000	15-25%
Total output	62.250	100%

Austria is divided into three control areas. Each of the two western Länder, Vorarlberg and Tyrol, is a control area by itself, and forms part of the German control block. The structure of the market in supply to large customers is shown in the following table:

Electricity sales to special customers 2001

Supplier	Supply (GWh)	Market share
Verbund	1500-3500	5-15%
Bewag	0-2000	0-10%
Energie AG OÖ	1500-3500	5-15%
EVN	1500-3500	5-15%
Linz Strom AG	0-2000	0-10%
Wienstrom	3500-7000	15-25%
Total EnergieAllianz	10500-13000	45-55%
Steweag-Steg	1500-3500	5-15%
Kelag	0-2000	0-10%
Salzburg AG	0-2000	0-10%
Tiwag	0-2000	0-10%
VIW/VKW	0-2000	0-10%
Total		100%

The direct combined market share of the parties to the merger was therefore 55-65%.

Electricity sales to small distributors:

	2000	2001	2002
Verbund	0-5%	0-5%	5-10%
EnergieAllianz	40-50%	30-40%	30-40%
Parties combined	40-55%	30-40%	30-40%
Steweag-Steg	30-40%	30-40%	20-30%
Salzburg AG	0-5%	0-5%	0-5%
Kelag	0-5%	0-5%	0-5%
Atel	0%	0-5%	0-5%
Tiwag	10-15%	15-20%	15-20%

The merged entity including Steweag-Steg (jointly controlled by Verbund) would therefore have a market share of 70-80%. Its remaining competitors with one exception have market shares of less than 5%.

Electricity supply to Austrian tariff customers in 2001

Supplier	Supply (GWh)	Market share
Verbund	0	0%
Bewag	0-2000	0-10%
Energie AG OÖ	1000-3000	5-15%
EVN	2000-4000	10-20%
Linz Strom AG	0-2000	0-10%
Wienstrom	3000-5500	15-25%
Total EnergieAllianz	10000-12500	45-55%
Steweag-Steg	0-2000	0-10%
Kelag	0-2000	0-10%
Salzburg AG	0-2000	0-10%
Tiwag	0-2000	0-10%
VIW/VKW	0-2000	0-10%
Others	3000-5500	15-25%
Total direct supply	22992	100%

So, EnergieAllianz alone already has a market share of 45-55% which is sufficient reason to suspect the existence of a dominant position.

9.28.7 Commitments Entered into by the Notifying Parties

In order to overcome the competition concerns identified by the Commission as to the dominant position on the markets for wholesale supply, small distributors supply and retail residential supply[1606], the notifying parties have submitted the commitments described below:

Verbund undertakes to sell its 55% holding in APC to an independent third party, to be approved by the Commission, before the notified merger takes place[1607];

- to transfer existing contracts with final consumers, and any such contracts concluded prior to the transfer, held by APC in the name and for the account of Verbund, before the sale of its holding in APC[1608];
- to sell its 20% holdings in MyElectric and Unsere Wasserkraft[1609];
- to refrain from exercising the voting rights deriving from its holding in Steweag-Steg until a specified date wherever its vote could influence the competitive behaviour of the undertaking, particularly with regard to pricing and products, distribution and procurement, and to withdraw its members indefinitely from the Steering Committee that develops distribution policy for Verbund/APC and Steweag-Steg;

[1606] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 201, p 1262.
[1607] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (1) (e) p 396; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 171, p 639; § 34 marginal note 201 p 1262.
[1608] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (1) (e) p 396; CH 14 D. (2) (a) p 409; CH 14 D. (2) (d) p 412.
[1609] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (1) (e) p 396.

- to remedy all the problems regarding the Austrian domestic grid (380-kV Styria line and if necessary the Salzburg line) and to develop interconnectors to Italy and Slovenia as soon as the authorities have given the necessary authorisation and approval.

Energie OÖ undertakes to transfer to an independent trustee to be approved by the Commission the rights deriving from its holding in Salzburg AG and the rights deriving from the shareholder agreement concluded with the Land and City of Salzburg by a specified date.

Verbund and EnergieAllianz undertake:

- to ensure that APT offers APC an electric supply contract with a duration of at least 4 years in the first place, under the terms of which APC will be able to take 3 TWh of electricity per year in the form of more precisely described structured supplies, at the prices that which Verbund supplies the new E&S[1610]; the contract may be terminated after four years if requested and if the Commission concludes that at that time there are enough other sources;
- to make available through APT 450 GWh of electricity per year, of which at least 50% will derive from hydroelectric plants, satisfying the characteristics of the standard load profile, for auctions in lots of 20-40 GWh, to be supplied to Austria's high voltage grid until 30 June 2008 under more precisely specified conditions for the supply of final consumers[1611];
- to implement measures described in greater detail regarding the provision of balancing energy[1612]; these primarily concern efforts to

  open up the eastern control area towards the Tyrol and Germany, an offer to Kelag to dissolve the storage partnership between Kelag and Verbund at no additional cost, and for a transitional period balancing energy provided by Verbund/EnergieAllianz as the market maker; to allow customers who now find themselves with the new E&S a unilateral right to terminate their electricity supply contracts early at a date six months following the conclusion of the merger, as long as they give three months notice, and to ensure that in the first two years after is has started operating the new E&S offers its customers one-year electricity supply contracts;
- to implement as quickly and comprehensively as possible the

  provisions regarding unbundling that will be enacted within the framework of Austria's implementation of the revised IEMD.

[1610] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 179, p 641.
[1611] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (1) (e) p 396; CH 14 D. (2) (b) p 410; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 179, p 641.
[1612] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 201, p 1262.

9.27.8 Appraisal of the Notified Operation under Art. 2 MR1989 in the Light of the Commitments Entered into

The commitments will overcome the competition concerns regarding the Austrian markets for the supply of electricity to small distributors and large and small customers.

Regarding APC, the commitment to divest Verbund's controlling majority share in APC prevents the accumulation of the Verbund and EnergieAllianz shares of the market for supply to large customers that would have resulted from the merger. APC is responsible for all of Verbund's distribution activities in this field. The undertaking has all the necessary human and material resources, including know-how, a target group list, an e-commerce platform, back office and systems management to enable the purchaser to enter the market for large customers immediately. All of APC's existing customer relations will be transferred to the purchaser, this represents a market share of over 5-15% in terms of large customers. The purchaser must be an independent third party that can guarantee that APC will grow and continue to compete actively with the parties and other competitors in the large customer and distributor market.

The commitment to conclude a long-term contract with APC providing for the structured supply of 3 TWh/year on specified conditions will place APC in the same position with respect to that amount as the parties' own big-customer company E&S. The commitment is therefore likely in the short term either to facilitate the entry of a buyer into the Austrian market, or to make it possible for a buyer substantially to expand its Austrian business. The buyer would be enabled to offer effective competition to the parties after the concentration, and effectively to restrict their market power. This commitment will last for four years in the first place. It may be extended if there are not enough alternative sources of supply available to buyers at the end of that time.

Concerning Steweag-Steg, Verbund's commitment to refrain from exercising its controlling rights in Steweag-Steg with regard to decisions concerning competition until a specified date neutralises existing structural links between Verbund and Steweag-Steg for a transitional period.

Regarding Unsere Wasserkraft and MyElectric, Verbund's commitment to divest its minority holding in Unsere Wasserkraft and MyElectric will means that these undertakings will be unaffected by any influence and financial interest on behalf of the merged entity and will be able to compete with it on the market to supply power to small customers. Unsere Wasserkraft and MyElectric have majority shareholdings in Estag and Salzburg AG respectively, which will be two of the most important remaining Austrian competitors for the merged undertaking Verbund/EnergieAllianz. These have been the two companies most successful at attracting small customers since liberalisation and through them Verbund has ventured beyond Steweag-Steg's traditional supply market to operate on the small customer market. The Commission takes note of this commitment,

without making it a condition or an obligation. The consortium agreement between Verbund and EnergieAllianz requires Verbund to divest these holdings in their entirety.

Regarding Salzburg AG, obliging Energie OÖ to transfer the rights deriving from its minority holding in Salzburg AG to a trustee by the end of December 2007 will ensure that at least for the foreseeable future there will be no danger that Energie OÖ current rights to exert influence and obtain information might reduce the capacity of Salzburg AG to compete actively with the new merged undertaking. During a transitional period this commitment will help to ensure that the parties do not influence the competitive behaviour of Salzburg AG in its dealings with large customers.

Concerning liquidity, the commitments to make available to third parties through auctions an annual supply of 450 GWh, of which at least 50% derives from hydroelectric plants, thereby satisfying the characteristics of the standard load profile, in quantities suitable for the supply of small customers ensures that new competitors entering the market for the supply of small customers now and in the future will have access to additional capacity for power generated in Austria. Moreover, they will be able to supply any customers requesting hydroelectric power. This commitment will increase the liquidity available to facilitate new entries and the expansion of existing market shares by undertakings competing with the parties to the merger. Unsere Wasserkraft and MyElectric who are already competing with the parties in the small customers market, will likewise be enabled to expand their market shares and to safeguard their supplies of power.

Concerning balancing energy, which is a separate product market[1613], the commitments to make balancing energy available will ease access to balancing energy for third party suppliers on electricity markets, particularly for new entrants, Kelag's position as an alternative supplier of balancing energy in the eastern control area is strengthened by the possibility of being able to end the current storage cooperation arrangements with Verbund economically. At the same time the price cap imposed on the balancing energy supplied by Verbund/EnergieAllianz during the period of transition until there is full competition on Austrian power supply markets will limit the cost risk to potential customers for balancing energy. Furthermore, the opening up of the eastern control area towards the Tyrol and Germany, which the notifying parties have undertaken to help bring about, will ensure more competition regarding the supply of balancing energy in the medium and long term.

The commitments relating to balancing energy were agreed between the notifying parties and the Austrian Regulator E-Control. The plan is for E-Control to monitor fulfilment of the commitments as the Commission's

[1613] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 187, p 1257; Commission Decision Sydkraft / Graninge CASE IV/M. 3268; Commission Decision E.ON / MOL CASE IV/M. 3696.

trustee[1614]. E-Control has told the Commission that these commitments will suffice to solve the competition problems detected relating to balancing energy.

Improved access to balancing energy in the eastern control area, particularly for new entrants onto the market, will overcome or reduce what the Commission investigations revealed to be a key obstacle to entry onto the market. This will enable potential competitors in- and outside Austria to enter Austria's electricity markets and compete with Verbund/EnergieAllianz.

Regarding further commitments, the other commitments entered into by the notifying parties concerning the improvements to the Austrian domestic grid, the interconnectors to Italy and Slovenia, special rights to terminate contracts granted to Verbund's large customers who now find themselves with the new E&S and quicker implementation of the unbundling provisions contained in the amended IEMD do not in themselves alter the structure of the competitive conditions brought about by the merger. Moreover the implementation of some of them does not depend solely on the wishes of the parties, as it may require the involvement of third parties or simply relate to the fulfilment of future legal obligations. However, they contribute to the gradual removal of current obstacles preventing entry onto the market and integrating Austrian electricity markets in relevant geographical markets stretching beyond national borders in the medium to long term. In this way, these commitments entered into regarding behaviour may help to ensure that the other obligations set out above, particularly those of a structural nature, succeed in fully restoring effective competition. Although they will not be made conditions attached to the exemption decision, they will help to ensure that the remedy package contributes to the real removal of the competition concerns noted.

Concerning the summary appraisal of the commitments, the divestiture of Verbund's holdings in APC goes most of he way towards removing the market-share overlaps between Verbund and EnergieAllianz on the market for the supply of large final consumers. Selling APC to an independent third party creates the opportunity for a newcomer, e.g. a major power supply company currently operating outside Austria, to enter and compete actively on the Austrian market for large customers. The parties have undertaken not to implement the merger before a Commission approved disposal of APC has taken place, so that full implementation of this commitment is guaranteed. During the period from the opening up of the market, and until full liberalisation the positions of Steweag-Steg and Salzburg AG as competitors will be strengthened by the temporary freezing of their involvement with Verbund and Energie OÖ respectively. The vertical impact of the combination of Verbund's dominant power generating capacity and EnergieAllianz's position as the leading electricity supplier in Austria will be offset at least in part by the fact that sufficient liquidity will be made available on competitive terms to

[1614] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 133, p 701.

APC and the suppliers competing on the market for small customers. The measures to improve access to balancing energy and the opening of Austrian markets to outside competition in the medium term will also help to overcome obstacles to access to the markets and to increase competition in the markets concerned. Were any competition concerns to arise relating to a conceivable market to the supply of regional distributors, they would be overcome by the remedies.

The overall package of remedies submitted by the notifying parties and other commitments will therefore ensure that the notified merger does not create a dominant positions on the markets for the supply of electricity to small distributors and large final consumers, nor will it strengthen the dominant position of EnergieAllianz on the market for the supply of electricity to small customers in Austria.

9.28.9 Conditions and Obligations

Art. 8 II first sentence of the second sub-paragraph MR1989 states that the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market[1615].

Measures that effect a structural change to the market are to be imposed in the form of conditions; implementing steps necessary to achieve this result are to take the form of obligations. If a condition is not fulfilled, the Commission decision declaring compatible with the common market is null and void. Where the undertakings concerned commit a breach of an obligation, Art. 8 V lit. b MR1989 empowers the Commission to revoke a clearance decision; Art. 14 II lit. a MR1989 and Art. 15 II lit. a MR1989 empower it to impose fines or periodic penalty payments on the parties.

In line with this fundamental distinction, the Commission should make it a condition of its decision that the parties comply in full with the commitments by which they undertake to sell their shares[1616] in APC to a third party approved by the Commission, to ensure that APT offers APC an electricity supply contract entitling APC to take 3 TWh a year, and to refrain from implementing the notified transaction until the sale of the shares in APD is effective; to make available through APT 450 GWh of electricity for auction each year until 30/06/2008[1617], to be supplied to the Austrian high voltage grid; not to implement the concentration before the necessary authorisations have been obtained.

These commitments are intended to effect a structural change to the market. Of the other commitments, the details of the continued operation of APC, the terms of APC's electricity supply contract, the non-exercise of

[1615] q.v. § 40 III GWB; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 10 VII 4. p 377.
[1616] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 D. (2) (a) p 409.

voting rights in Steweag-Steg, the transfer to a trustee of the shareholder's rights in Salzburg AG, the terms of the auction of electricity the measures to ensure competition on the market in balancing energy and the grant of an unilateral right to early termination of the electricity supply contracts of large customers who now find themselves with the new E&S should be made the subject of obligations. Essentially they serve to ensure that the conditions already mentioned have the desired effect on competition, or that they are put into effect as planned.

9.28.10 Conclusion

For these reasons, provided the commitments entered into by the notifying parties are fully complied with, it can be accepted that the concentration does neither create nor strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it. Subject to full compliance with the commitments, therefore, the concentration should be declared compatible with the common market and with the EEA agreement (Art. 2 II, 8 II MR1989; Art. 57 EEA-agreement).

The notified concentration by which Österreichische Elektrizitätswirtschafts-AG, EVN AG, Wien Energie GmbH, Energie AG OÖ, Bewag and Linz AG acquire joint control, within the meaning of Art. 3 I lit. b MR1989, of the undertakings E&S GmbH and Verbund Austrian Power Trading AG is hereby declared compatible with the common market and the EEA agreement.

9.29 ELECTRABEL / ENERGIA ITALIANA / INTERPOWER CASE IV/M. 3003

On 26/11/2002, the Commission received a notification of a proposed concentration owing to Art. 4 MR1989 by which the Belgian undertaking Electrabel S.A. (Electrabel), belonging to the Suez group (Suez, France) and the Italian undertaking Energia S.p.A. (Energia) controlled by the Italian undertaking CIR acquire within the meaning of Art. 3 I lit. b MR1989 joint control of the Italian company Interpower S.p.A. (Interpower), presently controlled by the Italian company Enel S.p.A. (Enel), by way of purchase of shares.

After examination of the notification the Commission has concluded that the notified operation does not fall within the scope of MR1989.

9.29.1 The Parties and the Operation

Electrabel is mostly active in production, trade and transmission of electricity and natural gas, mainly in Belgium. In Italy, directly or through JVs, Electrabel is active in power generation and trade of electricity.

Energia is active in supply of gas and electricity in Italy as well as in the supply of services such as energy management and maintenance of energy plants. It is not directly engaged in power generation, but through its subsidiary Energia Plassier S.p.A..

[1617] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 201, p 1262.

Interpower is active in electricity generation in Italy. It operates 3 thermal plants and 1 hydro bundle, with a total net installed capacity of 2611 MW. Interpower is currently wholly-owned by Enel, which purchases most of Interpower's production under a power purchase agreement (PPA). The remaining output about 27 MW is sold to the national grid operator (GRTN).

Interpower is one of the three companies (with Elettrogen and Eurogen) incorporated by Enel owing to the so-called Bersani Decree of 01/04/1999, implementing the IEMD in Italy, and to the Italian Prime Minister's decree of 04/08/1999 pursuant to which Enel is required to sell at least 15 GW of its generation capacity by 01/03/2003. The proposed operation consists in the joint purchase of Interpower by a consortium composed of EblAcea, a special-purpose vehicle solely controlled by Electrabel, and Energia (through its subsidiary Energia Italiana).

9.29.2 Community Dimension

The operation has a community dimension (Art. 1 MR1997).

9.29.3 Concentration

Joint control of Interpower by EblAcea and Energia Italiana is available and there is no full-functionality of the JV available[1618]. Interpower currently sells most of the electricity produced to Enel through a power purchase agreement (PPA) and to a lesser extent, to the national grid operator (GRTN). After the expiration of these contracts, expected in 2003, and based upon the JV agreement, most of the electricity produced by Interpower will be committed to the parties, in proportion of their shareholdings, save for a specified amount required to be sold on the pool market (approximately 5-15%. Furthermore, Interpower will have neither its own customers nor an independent commercial strategy. It will therefore depend for the greatest part of its turnover upon the sales to its parent companies. In the light of the above and in accordance with the Commission notice on the concept of full function JVs, it can be concluded that the proposed JV will not perform on a lasting basis all the functions of an autonomous economic entity within the meaning of Art. 3 II MR1989 (Art. 3 IV MR2004)[1619]. Less than 15% of the electricity generated should be sold to the pool market so that there is a serious lack of an own customer base[1620].

9.29.4 Conclusion

For the above reasons, the Commission has decided that the notified operation is not a concentration within the meaning of Art. 3 I lit. b and 3 II MR1989 (Art. 6 I lit. a MR1989).

[1618] Q.v. Art. 3 IV MR2004 missed; A. Ezrachi, EU Competition Law (5th Ed.) (London, UK, Bloomsbury, 2016) CH 9, p 408 and p 506.
[1619] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 65a, p 543.
[1620] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 65a, p 544.

9.30 AREVA / URENCO / ETC JV CASE IV/M. 3099

9.30.1 Joint Request pursuant to Art. 22 MR1989

The Commission received on 8 and 26/04/2004 a joint referral request from the authorities of France, Sweden and Germany owing to Art. 22 MR1989 to investigate a proposed concentration by which the French undertaking Areva (France) acquires within the meaning of Art. 3 I lit. b MR1989 joint control of the undertaking Enrichment Technology Company (ETC, UK), formerly solely controlled by the undertaking Urenco Ltd (Urenco, UK), by way of purchase of shares[1621].

The Commission has found that the request meets the requirements laid down in Art. 22 III MR1989[1622].

By decision dated 22 June 2004, the Commission found that the notified operation raises serious doubts as to its compatibility with the common market and the functioning of the EEA-agreement. The Commission accordingly initiated proceedings in this case owing to Art. 6 I lit. c MR1989.

On 03/09/2004, commitments were submitted by Areva and Urenco.

The decision is adopted owing to Art. 8 II and 10 II MR1989. Art. 10 II MR1989 requires decisions taken owing to Art. 8 II MR1989 to be taken as soon as it appears that the serious doubts referred to in Art. 6 I lit. c MR1989 have been removed. The commitments offered by the parties remove the serious doubts as to the compatibility of the concentration with the common market, so that a conditional decision pursuant to Art. 8 II and 10 II MR1989 clearing the concentration may be adopted.

9.30.2 The Parties

Areva is controlled by CEA which is controlled by the French state, and is active in three main areas: (a) all stages of the nuclear power business, (b) the connector business, and (c) transportation and distribution of electricity. It is in particular active on the uranium enrichment services market through its subsidiary Eurodif which owns the largest European enrichment plant. The plant is ageing and uses the outdated and expensive gas diffusion technology. Eurodif has a nominal capacity of 10,8 million separative work units (SWU) per year. In 2002, Eurodif made deliveries of around 9 Mio. SWU.

Urenco was established under the umbrella of the treaty of Almelo which was concluded in the early nineteenseventies between Germany, The Netherlands and the UK in order to develop and exploit centrifuge technology for uranium enrichment. The shareholders of Urenco include British Nuclear Fuels (BNFL), Ultra Centrifuge Nederland Ltd, RWE and E.ON. Urenco is the holding company of the Urenco group, which

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[1621] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 152, p 629 and § 17 marginal note 170 p 716; A. Ezrachi, EU Competition Law (5th Ed.) (London, UK, Bloomsbury, 2016) CH 9, p 509.

[1622] V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 14 III 2. p 132; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 170, p 716.

includes two main companies, Uranium Enrichment Company (UEC) and Enrichment Technology Company (ETC). UEC is active on a global level in the provision of uranium enrichments services with the modern and efficient centrifugation technology.

ETC, the subject of the operation is involved in the development, design, and manufacturing of centrifuges for uranium enrichment.

9.30.3 The Operation

The proposed operation consists of the acquisition by Areva of a 50% interest in ETC which will become a JV between Areva and Urenco. ETC's activities will be limited to the upstream research and development, design and manufacture of centrifuge equipment, while Areva and Urenco will continue their activities on the downstream market for uranium enrichment.

Areva currently operates a gas diffusion plant, which it considers to be high-cost compared to centrifuge technology based facilities and to have a finite life-time estimated between 5-20 years. After the CEA had put aside the development of its own configuration and laser enrichment technology, Areva started discussing with centrifuge manufacturers and decided to enter into a JV with Urenco since it was by far the most economic, the least risky and the quickest solution to have a centrifuge plant to replace the existing gaseous diffusion plant. This new plant should start to operate in 2007 and when fully operational is currently planned to have a production capacity of 7.5 Mil. SWU. This will enable Areva to remain an active competitor in the uranium enrichment market in the long term.

The rationale of the operation for Urenco is to receive a return on its past investments directly by selling Areva half of ETC and indirectly by enlarging ETC's customer base.

9.30.4 Concentration

Following the proposed operation, Areva and Urenco will each control 50% of ETC's capital and voting rights and thus will jointly control ETC.

9.30.5 The Relevant Markets and their Competitive Assessment

Regarding the background, the production of fuel comprises a number of steps in transforming natural uranium into fuel for nuclear reactors.

SWU market shares by region 2003

	Western Europe	North America	Asia	Eastern Europe (incl. Russia)
Areva	48	17	19	2
Urenco	25	19	10	2

Tenex	26	-	7	96
USEC	3	64	52	-
JNFL/CNEIC	-	-	12	-

Table market shares in the Community enrichment market 1994-2003

	1994	1995	1996	1997	1998	1999	2000
Areva	50-60%	40-50%	50-60%	50-60%	40-50%	50-60%	50-60%
Urenco	20-30%	20-30%	20-30%	20-30%	20-30%	20-30%	20-30%
Tenex	10-20%	20-30%	10-20%	20-30%	20%	20%	20%
USEC	0-10%	0-10%	0-10%	0-10%	0-10%	0-10%	0-10%
Other	0-10%	0-10%	0-10%	0-10%	0-10%	0-10%	0-10%
	100%	100%	100%	100%	100%	100%	100%

	2001	2002	2003
Areva	50-60%	50-60%	50-60%
Urenco	10-20%	20-30%	20-30%
Tenex	20%	20%	20%
USEC	0-10%	0-10%	0-10%
Other	0-10%	0-10%	0-10%
	100%	100%	100%

9.30.6 Commitments Proposed by the Parties

The parties submitted on 20/08/2004 a package of undertakings in accordance with Art. 8 II MR1989 for the purpose of achieving clearance of the concentration. On 03/09/2004, the parties submitted a revised package of commitments (hereinafter commitments). The commitments are set out in the Annex to the decision. The Commission is of the view that the commitments submitted on 03/09/2004 address and resolve in a satisfactory manner the serious doubts raised by the concentration.

Concerning the summary of the commitments offered by the parties, the commitments consist of the following key-elements: (i) removal of the parties' veto rights over capacity increases; (ii) reinforcement of firewalls to prevent information flows between the parties and the JV and (iii) provision of information to ESA to enable it to monitor prices of enrichment and allowing ESA, if necessary, to take corrective actions by increasing third party imports[1623]. These elements are discussed in turn below.

Regarding the removal of veto rights on capacity expansion, the shareholders' agreement for the JV foresees that the supply of centrifuges to Areva or Urenco, be it as part of the JV's business plan or budget or beyond that, will require the unanimous approval of the ETC board. As both parties will nominate an equal Number of board

[1623] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 181, p 642.

members either of Areva or Urenco would be in a position to prevent capacity increases by the other beyond what is foreseen in the current business plan.

In order to eliminate the Commission's concerns the parties have made a commitment that the Shareholder's agreement will be amended in such a way that, when it is proposed that the JV enters into a new supply agreement for centrifuges with one of the parties, such a decision will not require the approval of the board but will be left to the executives provided that: (i) the commercial terms comply with the shareholder agreement and are therefore not more favourable than other contracts with Areva and Urenco; (ii) the contracts are conditional upon approval of the Joint Committee and the quadripartite Committee, or any other required governmental regulatory approval or, such approvals are granted and (iii) the proposed additional investment into fixed assets does not exceed 20 Mio. EUR. The parties' compliance with these provisions will be monitored by the statutory auditors of the JV.

Regarding firewalls and related undertakings, in order to eliminate the Commission's concerns that that the formation of the JV would lead to co-ordination between Areva and Urenco as a result of increased scope for information exchange through ETC, the parties committed to reinforce firewalls between the parties and ETC and between each of the parties.

The firewall mechanism involves a number of individual points directed at reducing the information flow between ETC and the parent companies and vice versa. The firewall mechanism includes that Areva/Urenco will not have access to commercially sensitive information relating to the ETC group and vice versa, that Areva and Urenco will not be involved in the day to day running of ETC and that the management structure of ETC will be independent of the parties. It also sets out specific duties of the members of the board of ETC who may not hold commercial responsibility in the field of uranium enrichment of either of the parties. This includes that any board member of ETC must not request or receive any commercially sensitive information not connected to reserved board matters, that he must not use commercially sensitive information for any other purpose and that he must not communicate any commercially sensitive information, if received, to the parent companies. Furthermore, no board member is to be involved in the negotiation of any contracts with shareholders or third parties and no information on such individual agreements is to be disclosed to the shareholders. The board of ETC will only receive the information necessary to enable its members to fulfill their fiduciary duties. The parties' compliance with these provisions will be monitored by the auditor of the JV.

Concerning monitoring by the ESA, to enhance the monitoring role of ESA, the parties further committed to supply all essential contractual elements of their current and future enrichment contracts to ESA. In addition the parties undertake to supply all relevant information in relation to enrichment contracts as requested by ESA for

fulfilment of its monitoring role. This information includes prices and payment conditions as well as all other relevant price information for contracts with enrichment customers, whether located inside or outside the community. This information will enable the ESA to closely monitor the development of prices of enriched uranium charged by each of the parties. As the court stated that where decisions concerning economic and commercial policy and nuclear policy are concerned, the agency has a broad discretion when exercising its powers, as it operates under the supervision of the Commission, the Commission is of the view that ESA already has the power to monitor prices of enrichment contracts and that it continues to have, post merger, the power and discretion to adapt its supply policy, ESA's past application of the Corfu Declaration shows that the declaration can be flexibly applied to achieve its objectives. ESA has confirmed that it is prepared to take on such a monitoring role.

Regarding reporting and monitoring, the parties also undertake to submit reports to the Commission on the implementation of the commitments after the completion of the JV. As regards the issues which will be monitored by the auditor of the JV, the parties will submit the resulting compliance reports to the Commission.

Concerning the assessment of the commitments offered by the notifying parties, Art. 10 II MR1989 requires the Commission to adopt a decision owing to Art. 8 II MR1989 as soon as it appears that the serious doubts concerning the operation have been removed. The serious doubts were removed by the incidental provisions given by the parties on 03/09/2004. The Commission will transfer the decision on the supply of machinery to the parties to the ETC executives; the board will only in very exceptional circumstances be competent to decide on such a matter. The executives who are not members of the board and have no contractual arrangements with the shareholders, will fulfill any orders of the parent companies alone on the basis that the order is not contrary to the economic interest of the JV. The assignment of the supply decision to the executives will therefore exclude the parties' veto rights concerning the other party's expansion of capacity.

The Commission therefore considers that the commitment will remove its serious doubts concerning possible co-ordination between the parties on capacity extensions on the basis of the rights of the board.

The Commission further considers that the outlined firewall mechanism will significantly reduce the information flow between the parties and thereby reduce the transparency resulting from the joint ownership of ETC. The members of the board who will not have commercial responsibilities in the parent companies, will only receive commercially sensitive information as far as necessary to fulfill their duties and function on the board. They will not be allowed to share such information with the parent companies. The executives will not be allowed to communicate such information to the parent companies, either. The contractual arrangements with the executives and the members of the boards will include the appropriate provisions to implement the firewall

mechanism and sanctions in case of non-compliance. The firewalls will prevent the parties from sharing information on their future competitive behaviour in the enrichment market via the JV.

Both commitments, the commitment to remove the veto rights of the board and the commitment to establish firewalls, will be monitored by ETC's statutory auditors. Beside monitoring the appropriate confidentially provisions will be included into the contractual arrangement with executives and directors, the auditors will in particular monitor that the executives only take account of the commercial and economic best interests of ETC on a stand-alone basis in deciding in new cascade supply agreements with the parent companies and that the board of ETC acts pursuant to such an interest in its supervision of the JV. The resulting compliance reports, in addition to the reports submitted by the parties on issued not covered by the auditors, will enable the Commission to closely monitor the compliance of the parties with these commitments.

By receiving a comprehensive set of contractual information, ESA will be in a position to monitor the pricing behaviour of the parties and, if pricing information is considered to be inconsistent with the overall development of the enrichment market, ESA will be able to take corrective measures, primarily by increasing the import of enriched uranium from Russia. In addition to the automatic provision of information explicitly mentioned in the text of the commitments, ESA will be able to require additional information if this is necessary for ESA to fulfill the monitoring role. The Commission expects that this will discipline the pricing behaviour of the parties.

The first commitment – the removal of the parties' veto rights over capacity increases of the respective other party – addresses the risk of explicit coordination of the parties on capacity. The second commitment – the firewall mechanism to avoid information sharing between the parties – will further contribute to eliminating the risk that the parties co-ordinate on actual supply into the Community on the basis of the information received from the JV, such as information on the planning of capacity, supply etc. In the same way, this commitment will also contribute to eliminating the risk that the parties will – in the absence of formal veto rights on capacity expansion – tacitly coordinate on capacity on the basis of information received via the JV. Both commitments also address the possible risk of co-ordination of the competitive behaviour of the parties as referred to in Art. 2 IV MR1989. The envisaged monitoring role of the ESA will form a safeguard in order to eliminate any remaining risk of coordination of the parties in the market for enrichment of uranium. The Commission expects that already the threat by ESA to take appropriate action will undermine the possible risk of co-ordination of the parties.

The commitments have to be viewed in the context of the specific circumstances of the transaction. On the one hand, the serious doubts arise out of specific features of the concentration: the likelihood of explicit

coordination of the parties in the market of uranium enrichment, involving the two main players in the community, is based on the veto rights granted by the shareholders' agreement to each of the parties over the respective other party's expansion of capacity; the likelihood of tacit coordination is based on the sharing of information on capacity, output and general planning by the parties via the JV. On the other hand, the creation of the JV as such will lead to a transfer of the centrifuge technology for Areva and will allow Areva to produce enriched uranium much more economically since, according to the information provided by the parties, the centrifuge technology is much more economic in terms of the required initial capital investment, and in terms of operating costs. The transfer of technology as a result of the concentration will therefore make Areva a much more competitive player than if it were if it was to continue to operate with the ageing gas diffusion plant. In these specific circumstances, the Commission submitted by the parties directly address the serious doubts arising from specific features of the concentration and modify the concentration in such a way as to specifically remove those serious doubts. However, the commitments leave the positive effects arising from the concentration as such untouched.

This was also reflected in the results of the market investigation and the market test. In the market investigation, most customers were, by and large, positive about the transaction. It is clear that the market sees the continuing existence of Areva as a supplier of enrichment as being very important for the security of supply, and for the future of the nuclear industry in Europe. However, customers also expressed reservations about the operation as they perceived that the unmodified operation would go beyond the procurement by Areva of a new technology, and constitute a link up between historically strong competitors. In the two market tests of the commitments the customers, overall, confirmed that the commitments are suitable to remove the serious doubts of coordination between the two players while securing Areva's access to the lower cost centrifuge technology.

The Commission therefore considers, given the specificity of the nuclear industry and the regulatory function of ESA under the Euratom treaty the commitments sufficient to remove its serious doubts with regard to the compatibility of the operation with the common market.

9.30.7 Conditions and Obligations

Owing to the 1st sentence of the 2nd sub-paragraph of Art. 8 II MR1989, the Commission may attach to its decision conditions and obligations intended to ensure that the incidental provisions concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market[1624].

[1624] q.v. § 40 III GWB; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 10 VII 4. p 377.

The achievement of the measure that gives rise to the structural change of the market is a condition, whereas the implementing steps which are necessary to achieve this result are generally obligations on the parties. Where a condition is not fulfilled, the Commission's decision declaring the concentration compatible with the common market no longer stands. Where the undertakings concerned commit a breach on an obligation, the Commission may revoke its clearance decision, acting pursuant to Art. 8 V lit. b MR1989, and the parties may also be subject to fines and periodic penalty payments in accordance with Art. 14 II lit. a MR1989 and 15 II lit. a MR1989.

In view of the foregoing, the decision is conditional upon full compliance with the incidental provision that the concentration will not be implemented unless and until the parties have signed the letter agreement as foreseen in section A1, 2nd sentence of the commitments. The other parts of the commitments are obligations.

9.30.8 Conclusion

It must accordingly be concluded that the commitments as set out in the Annex modify the notified concentration to such an extent that the serious doubts of the Commission as to the compatibility of that concentration with the common market are removed. The concentration should, therefore, be declared compatible with the common market owing to Art. 8 II MR1989 and with the EEA agreement owing to Art. 57 thereof, subject to compliance with the commitments set out in the Annex.

9.31 ENI / EDP / GDP CASE IV/M. 3440 (Acquisition blocked)

The Commission received on 09/07/2004 a notification of a proposed concentration owing to Art. 4 MR1989 whereby Energias de Portugal SA (EDP) and ENI Spa, through its fully owned subsidiary ENI Portugal Investment S.p.A (ENI) acquire within the meaning of Art. 3 I lit. b MR1989 joint control over Gas de Portugal SGPS S.A. (GDP)[1625].

9.31.1 The Parties

EDP is the incumbent electricity company in Portugal and holds a dominant position on the electricity markets[1626]. Its main activities consist of generation, distribution and supply of electricity in Portugal[1627]. EDP also controls the Spanish company Hidrocantabrico, which is active in Spain in the sectors of electricity and gas[1628]. The Portuguese state holds directly or indirectly about 30% of the shares.

[1625] R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 23 10. (A) (ii) p 1021; P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (3) (b) p 403.
[1626] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.750, p 709; E. Fox & D. Gerard, EU Competition Law (1st ed.)(Cheltenham, UK, Elgar, 2017) CH 6 C.4., p 269.
[1627] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (3) (b) p 403.
[1628] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (3) (b) p 403.

ENI is active in the exploration and production of oil and natural gas world-wide. ENI is also active in the supply, transmission, storage, distribution and trade of natural gas. Moreover ENI holds shares in companies with transportation capacities which are active in the operation of the trans-national pipelines for transmission of natural gas.

GDP is the incumbent gas company in Portugal. GDP is a wholly owned subsidiary of the Portuguese company Galp Energia, SGPS, SA (GALP), currently jointly controlled by the Portuguese state and ENI, with interests in both the oil and gas sectors and holds a dominant position on the naturalg gas markets[1629]. GDP and its subsidiaries cover all levels of the gas chain in Portugal[1630]. GDP, through its subsidiary Transgas, imports natural gas into Portugal, through a Maghreb-Spain-Portugal pipeline and through the Sines LNG terminal, and is responsible for the transportation, storage, transport and supply through the Portuguese high-pressure gas pipeline network (the network), GDP is also active in the natural gas supply to large industrial consumers and in the development and future operation of the first underground natural gas storage caverns in Portugal. GDP through GDPD also currently controls five of the six local gas distribution companies (LDCs) in Portugal.

Rede Electrica Nacional SA (REN) is not a notifying party for the present concentration but takes part in the overall transaction to which this concentration belongs. REN is a Portuguese company resulting from the 1994 spin-off from EDP of the Portuguese electric grid. REN currently manages the Portuguese electricity grid and acts as single buyer, buying electricity from producers and reselling it to the distributor/supplier for the supply of the non-eligible clients. The Portuguese state controls directly or indirectly 70% of REN while the remainder is held by EDP.

9.31.2 The Operation

The present case concerns a concentration by which EDP and ENI (the parties) plan to acquire joint control over GDP. The operation foresees that the gas transmission network will be transferred to REN, the Portuguese electricity grid operator within a given timeframe. During a transitory period, EDP will have control over the gas network, along with ENI and REN.

According to IGMD 2003/55/EC and the derogation granted to Portugal, 33% of the Portuguese gas market shall be liberalised at the latest by 2007, all non-residential customers at the latest by 2009 and all customers (including residential customers) at the latest by 2010. The Portuguese government may decide to start the liberalisation process earlier.

[1629] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.750, p 709.
[1630] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (3) (b) p 403.

9.31.3 Relevant Market

Regarding the relevant electricity and product market, taking into consideration the specifics of the national Portuguese markets[1631] and the competitive and regulatory framework, the Commission has reached the conclusion that the following markets should indeed be distinguished:

- generation and wholesale supply of electricity[1632]
- provision of balancing power[1633]
- transmission grid[1634]
- distribution grid[1635]
- retail supply of electricity (large consumers and small residential customers)[1636]
- supply of natural gas to power generators[1637]

The electricity required by REN is then sold to the regulated distributor, which is controlled by EDP, under a regulated tariff system. Regulated tariffs are set by the Portuguese energy regulators (ERSE).

Eligible customers are free to choose their electricity supplier and can therefore purchase electricity either from the SEP (Sistema Electrico de Servico Publico) at regulated tariffs or from the SENV (Sistema Electrico Nao Vinculado). The decree law of 17/08/2004 finally provided that all clients are eligible.

Regarding retail supply of electricity, the following electricity retail markets will be considered for the purpose of the present statement: (i) the supply of electricity to large industrial customers (LIC) which are connected to the high (HV) and medium voltage (MV) grid and (ii) the supply of electricity to smaller industrial, commercial and domestic customers which are connected to the low voltage (LV) grid.

Concerning geographical markets in electricity, in past Commission decisions, the relevant geographic market for the wholesale supply of electricity has been considered to be no wider than national borders. In the present case, the investigation has shown that wholesale and retail electricity markets are clearly Portuguese in scope and will remain so in the foreseeable future.

Regarding the relevant natural gas markets and the product markets, the Commission has identified four distinct gas product markets which will be affected by the operation:

- supply of gas to power producers (CCGT)
- supply of gas to local distribution companies (LDC)

[1631] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. III. 1. c) (2) (c) p 381.
[1632] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 12, marginal note 12.28, p 1589.
[1633] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 12, marginal note 12.28, p 1589.
[1634] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 12, marginal note 12.28, p 1589.
[1635] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 12, marginal note 12.28, p 1589.
[1636] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 186, p 1257; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 12, marginal note 12.28, p 1589.
[1637] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 196, p 1260.

- supply of gas to large industrial consumers (LIC)
- supply of gas to small industrial, commercial and domestic customers.

The market of gas supply to power producers will be the first to be opened to competition in Portugal[1638]. The parties claimed that CCGT and LICs should be considered as part of a single, wider wholesale market. The Commission does not agree with the parties. Indeed, power producers have unique demand needs in terms of quantity and flexibility of supply. CCGTs therefore need to combine long-term contracts which are necessary for establishing the basic economic and technical viability and supply security of the CCGT project, with short term contracts for more limited periods.

Regarding the geographical market, on each relevant gas market, the Commission and the parties agree that the supply of natural gas in Portugal is no wider than national[1639]. Both undertakings (EDP and GDP) have strong incentives to enter into each others markets[1640].

9.31.4 Competitive Assessment

Regarding the wholesale electricity market, EDP holds a dominant position in Portugal. In 2003, EDP holds 70% of generation capacity, accounts for 70% of generation and is the largest importer of electricity. The Commission held that the transaction would eliminate GDP as a potential competitor to EDP on the electricity wholesale and retail markets in Portugal, where EDP already held a dominant position[1641]. A similar conclusion is true regarding the Portuguese gas market because the acquisition would strengthen GDP's dominant position on this market[1642].

9.31.5 Commitments Proposed by the Notifying Parties

The parties have submitted commitments on 28/10/2004 and an improved version on 17/11/2004:

EDP.1 Reduction of EDP's shares in REN from 30% to 5%.

EDP.2 Divestment of EDP's shares in Tejo Energia.

EDP.3 Moratorium concerning the construction of new CCGTs subject to a review clause.

EDP.4 Lease of TER production capacity equivalent to one unit subject to a review clause.

EDP.5 Suspension of some of EDP's voting rights in Turbogas and appointment of independent board members in Turbogas.

1638 P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (3) (b) p 403.
1639 P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 11 C. (1) (b) pp 292-293.
1640 J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.750, p 709 and marginal note 5.752, p 709.
1641 I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.15 (7) (e) p 696 and § 7.17 (5) pp. 725-726.
1642 I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.17 (5) p 726.

ENI.II Sale of Senis LNG terminal to REN.

ENI.III Sale of Carrico underground storage to REN.

ENI.IV Anticipated sale of the gas high pressure network to REN.

ENI.V Guarantees for access to the network pending sale of the network to REN.

ENI.VI Release to REN of the capacity at the Campro Major entry point currently booked and unused by Transgas.

ENI.VII Commitment not to book further capacity at the Campo Major entry point.

ENI.VIII Commitment not to book further capacity on the Extremadura pipeline

ENI.IX Commitment to make capacity available on the Extremadura pipeline and/or at the Campo Major entry point under certain conditions.

ENI.X Elimination of GDP's right of first refusal, based on matching the best offer mechanism.

ENI.XI Measures aimed at eliminating concerns related to possible privileged access to price information.

ENI.XII Measures aimed at ensuring scope for the effective liberalisation of the demand represented by LICs.

ENI.XIII Commitment not to engage in dual offers of natural gas and electricity to LICs and retail customers in Portugal until the natural gas supply to such customer groups is liberalised.

ENI.XIV Sale of LDC Setgas.

9.31.6 Assessment of the Commitments Proposed

Regarding commitments on electricity and the wholesale electricity market and the horizontal effects of the operation (removal of GDP as the most likely entrant), the parties proposal consists in a combination of measures at ensuring the entry of competitors while, at the same time, avoiding to divest generation assets. It relies mainly on a moratorium concerning the construction of new CCGTs by EDP and the lease of some production capacity of EDP's power plant TER for a limited period of time.

Respondents to the Commission's market test considered these proposals as clearly insufficient in terms of scale, scope and duration to compensate for the significant loss of GDP as a potential competitor and to effectively ensure the timely entry of potential competitors[1643]. The Commission shares these concerns expressed by third parties.

The moratorium and the lease proposed thus fall short of having a pro-competitive effect similar to a structural remedy.

[1643] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (3) (b) p 404; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 173, p 640.

In addition, the parties propose to divest EDP's 10% share in Tejo Energia, one of EDP's competitor. If this is a positive proposal, it does not all guarantee that Tejo Energia will actually build a CCGT in the future.

The parties have also proposed to suspend EDP's voting rights in Turbogas. This suspension is limited to a three year period and to only two specific areas of decision. EDP has also currently acquired an option to buy 20% more share in Turbogas and manage all of Turbogas' production. It is therefore quite doubtful that the parties' commitments will prevent EDP from exercising influence on Turbogas' gas supply policy and future projects.

Regarding non-horizontal effects (raising rival costs) and EDP's privileged and preferential access to the Portuguese gas infrastructure, the sale of the Sines LNG terminal and Carrico underground storage to the gas high pressure network operator, i.e. an ownership unbundling, is a positive proposal welcomed by the Commission. However, the terms and conditions attached to these transfers do not ensure that a sufficient capacity will be available for third parties. In particular the remedies explicitly allows subsidiaries of the parties active in gas in Spain, Union Fenosa Gas and Naturcorp, to book further capacity even before the transfer, as well as the parties after the transfer.

The parties also proposed to make capacity available in the Spain-Portugal pipeline at Portuguese entry point (Campo Major). According to the market test, this capacity is far too small (less than 10% of this pipeline's capacity, not enough to supply a single 400 MW CCGT unit) and is not ensured in the upstream pipeline (Extremadura pipeline) to bring gas up to the Portuguese border. A mechanism has been included to provide additional capacity but under conditions which make the access to this extra capacity neither timely, economically feasible nor long standing enough for third parties to rely thereon.

The commitments on natural gas infrastructure are therefore likely to have very limited positive effects on the electricity and gas markets in Portugal.

Concerning other vertical impacts of the merger, as regards the other vertical competition concerns raised by the operation, the commitment provide mainly for Chinese Walls to limit flows of information between GDP and EDP. The market test clearly indicated that, in the present case, such measures are not sufficient to address these issues.

Regarding the market for ancillary services, the lease of production capacity, as provided for by commitments, do not allow the lessee to be active in the balancing power market which requires adapting the output of the plant in real-time. As explained above, the commitment do not ensure with a sufficient level of certainty that competitors will build new power generation capacities in Portugal in the foreseeable future. As a result, the proposed remedies do not remedy the strengthening of EDP's dominant position in this market.

Concerning retail supply of electricity, the only remedy which relates directly to the retail supply of power is the commitment not to engage in dual offers of natural gas and electricity to retail customers until the natural gas supply to such customer groups in liberalised. This commitment would only apply for a limited period an in any case, this remedy does not ensure the appearance of competitors to compensate for the loss of GDP.

Other remedies may indirectly positively affect the retail electricity market but do not ensure that new competitors will effectively enter the retail supply of electricity in Portugal in a timely and sufficiently large way so as to compensate for the loss of GDP's future competition[1644].

Having regard to natural gas markets and gas supply to power producers (customer foreclosure), three commitments directly relate to this concern: (i) the elimination of GDP's right of first refusal for the gas supply of TER, (ii) the suspension of some of EDP's voting rights in Turbogas for three years and (iii) the partial lease of TER.

Market participants have underlined that the elimination of GDP's right of first refusal to supply TER does not eliminate EDP's incentives to source gas supply from GDP;

(ii) the mere suspension of some voting rights for a limited period of time does not prevent EDP's influence on Turbogas' supply policy;

(iii) the lease accounts only for one third of TER and the lessee will have to buy most of its gas from GDP. The Commission therefore considers that these commitments fall short from addressing the strengthening of GDP's dominant position in the market for gas supply to power producers.

Regarding gas supply to LDCs (customer foreclosure), the operation forecloses the gas demand of Portgas, the only LDC not controlled by GDP. The gas consumption of the LDC proposed to be divested, Setgas, is four times as small as Portgas'. The commitment therefore does not remove the strengthening of GDP's dominant position in the market for the supply of gas to LDCs.

Concerning gas supply to LICs, the only remedies which directly address the concerns raised in this market are the commitments not to engage in dual offers (gas/electricity) before the gas liberalisation of LICs and to offer LICs the possibility to renew their gas contract on a yearly basis. Both remedies fall short from ensuring that a new competitor will enter the gas market for LICs.

Nevertheless, remedies which may have an indirect impact on this concern also have been analysed: as regards gas import infrastructures, high uncertainties remain as to whether sufficient capacities will be available. Besides, Setgas, which would be divested, accounts for less than 10% of the gas customers in Portugal and

[1644] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (3) (b) p 404.

would be much more limited starting base to enter the LIC market as compared with EDP's electricity and Portgas' gas customer bases.

Regarding gas supply to small customers, the divestiture of Setgas is a structural remedy but does not compensate for the loss of EDP/Portgas future competition in the gas retail market: Setgas sales account for 8% of the overall gas retail sales in Portugal while Portgas holds a 30% market share. The commitment not to offer dual fuels supplies to retail gas customers who are not yet eligible in both gas and electricity is very limited in time and effect. No other remedy has been proposed to directly address the loss of potential competition stemming from EDP's ability to rely on its nationwide electricity customer base, its strong brand and its incentive to provide dual offers (electricity/gas) to customers.

9.31.7 Late Remedies

After the expiration of the deadline set for the submission of remedies, on 26/11/2004, the parties submitted documents proposing to amend the remedies already presented, with a view to addressing the concerns raised by the Commission[1645]. However, these remedies did not fully and unambiguously remove the competition concerns identified by the Commission[1646].

On Friday evening 3/12/2004, the parties submitted a new set of gas commitments aiming to implement the intentions stated by them in the document sent to the Commission on 26/11/2004. Considering the very late stage of the procedure at which these new commitments have been presented (only three working days before the Commission meeting of 09/12/2004 scheduled for the adoption of the final decision, leaving insufficient time for the Commission to assess them in accordance with procedural obligations) and given that this proposal merely aims to implement the intentions expressed in the document sent on 26/11/2004, this latest set of commitments cannot form the basis of an authorisation decision.

9.31.8 Conclusion

For the reasons outlined above, considered individually or together, the Commission issued a decision on 09/12/2004, which declared the proposed concentration incompatible with the common market pursuant to Art. 8 III MR1989 in that it strengthens dominant positions in several gas and electricity wholesale and retail markets in Portugal as a result of which effective competition would be significantly impeded in a substantial

[1645] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. III. 9. i) (1) pp 451-452; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 173, p 640.

[1646] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 173, p 640; § 34 marginal note 202, p 1262.

part of the common market[1647]. The burdon of proof that remedies are sufficient lies upon the Commission and the parties have to provide an explanation[1648]. This decision was challenged by EDP in front of the General Court, which confirmed the decision of the European Commission[1649].

9.32 SIEMENS / VA TECH CASE IV/M. 3653

The Commission received on 10/01/2005 a notification of a proposed concentration owing to Art. 4 MR2004 by which the company Siemens Österreich which is controlled by Siemens AG (Siemens, Germany) is to gain control within the meaning of Art. 3 I lit. b MR2004 of the company VA Tech AG (VA Tech, Austria) by a public takeover bid on 10/12/2004.

The Commission concluded that the notified concentration fell within the scope of MR2004 and took the preliminary view that it raised serious doubts as to its compatibility with the common market and the European Economic Area[1650]. It therefore adopted on 14/02/2005 a decision pursuant to Art. 6 I lit. c MR2004 initiating phase two proceedings for examination of the notified proposal.

On 22/04/2005 the Commission sent a statement of objections to the notifying parties in which it found that, as a preliminary assessment and on the basis of the information so far available to the Commission, the notified proposal was incompatible with the common market.

Siemens replied to the statement of objections in a written statement submitted on 06/05/2005. In a written statement submitted on 25/05/2005, Siemens offered commitments designed to remove any existing competition concerns.

The Commission has now come to the conclusion that, in its notified form, the proposal is liable to significantly impede effective competition in a substantial part of the common market, in particular as a result of the creation of a dominant position. However, the commitments given by the parties allow the competition concerns regarding the concentration to be dispelled. The decision is issued pursuant to Art. 8 II MR2004.

9.32.1 The Parties

Siemens supplies products and services worldwide in various areas of industry and electrical engineering. Its areas of activity include plants for power generation, transmission and distribution, automation and traction

[1647] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (3) (b) p 404; CH 14 F. p 425; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 92, p 603; E. Fox & D. Gerard, EU Competition Law (1st ed.)(Cheltenham, UK, Elgar, 2017) CH 6 C.4., p 269.
[1648] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 D. (2) p 408.
[1649] CFI, Case T-87/05 EDP v Commission[2005] 5 CMLR 23; P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (3) (b) p 404; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 202, p 1262; E. Fox & D. Gerard, EU Competition Law (1st ed.)(Cheltenham, UK, Elgar, 2017) CH 6 C.4., p 269.
[1650] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.558, p 667.

technology, plant engineering and construction, technical services, traffic engineering, building services engineering and information technology.

In the area of equipping hydroelectric power stations, Siemens is working on a JV with the company J. M. Voith AG (Heidenheim, Germany), in which Siemens holds 35% of the shares and has joint control. The Commission's competition assessment rests on the same basis, but it would not change fundamentally if, hypothetically, the concentration were only to lead to Siemens acquiring a majority holding in VA Tech and continuing the JV separately with Voith. Only the extent, but not the existence, of the effects to be expected from the concentration might possibly change as a result.

Through various subsidiaries, VA Tech is active in the areas of power generation (hydroelectric power stations and fossil fuel power stations), power transmission and distribution, metallurgy engineering, infrastructure (in particular building infrastructure), rail traffic technology and electrical plant engineering.

9.32.2 The Proposal

The object of the notification is the proposal by Siemens, through a public bid by its subsidiary Siemens Österreich, to increase an existing holding in VA Tech from 16,45% of the voting rights to at least 50% plus one share and so to acquire sole control.

9.32.3 Concentration

The proposal is a concentration within the meaning of Art. 3 I lit. b MR2004.

9.32.4 Community Dimension

The notified concentration has a community dimension (Art. 1 II MR2004).

9.32.5 Competition Assessment

The proposed concentration leads to numerous horizontal overlaps and vertical links in particular in the following areas: A. Power generation (equipping hydroelectric power stations and gas-and-steam power stations); B. Power transmission; C. Rail; D. Frequency inverters; E. Metallurgy and other industrial plant building; F. Low voltage switchgear; G. Building technology; and H. Infrastructure facilities and cable ropeway electrics; I. Other IT-services.

Equipment for hydro power stations: data provided by Siemens in the notification:

EEA market shares (%) 2000-2004	Equipment total
	Value (EUR)
	1999-2004
Voith Siemens	20-30
VA Tech	20-30
Total	40-50
Alstom	10-15

GE Hydro	10-15
Ansaldo/Franco Tosi	< 2
Andritz	< 2
Others	30-40

VA Tech, by contrast, puts Siemens' and VA Tech's joint share of the market at 40-50% (Voith Siemens 10-15%, VA Tech 30-40%, Alstom 15-20%,GE Hydro 15-20%, Others 20-30%).

On the basis of turnover figures for the competitors listed by Siemens, the Commission has carried out its own market share calculations:

EEA 2000-2004	EUR (Mio.)	Market share (%)
Siemens		10-20
VA Tech		30-40
Combined		40-60
Alstom		20-30
GE Hydro		0-10
Ansaldo		< 1
Andritz		< 1
Others		20-30
Sum		100

The notified concentration would therefore bring together two of the leading suppliers of hydroelectric power plant equipment. On the basis of the data contained in the notification, the market shares are as follows:

EEA-market shares 2003 (%, value)

Product	Siemens	VA Tech	Combined	Main competitors
a. High voltage products	15-20	5-10	20-30	Areva (15-20), ABB (15-20)
(i) Air-insulated switchgear	5-10	5-10	15-20	Areva (10-15), AAB (5-10), Cegelec (5-10), EFACE (5-10)
(ii) gas insulated switchgear	30-40	10-15	40-50	ABB (30-40), Areva (20-30)
(iii) circuit breakers	30-40	5-10	40-50	Areva (30-40), ABB (20-30)
(iv) disconnectors	30-40	20-30	50-60	Areva (20-30), Hapam (10-15)
(v) instrument transformers	10-15	5-10	15-20	Areva (20-25), ABB (10-15), Ritz (10-15), Arteche (10-15), Pfiffner (0-10)
(vi) coils	20-30	10-15	30-40	Areva (20-30), ABB (15-25), Trafomec (5-10)
b. Transformers	10-15	5-10	20-30	ABB (15-25), Areva (15-20), RWE Solutions (5-15), Schneider (0-10), Pauwels (0-10)
(i) power transformers	10-15	10-15	20-30	ABB (20-25), Areva (15-25), RWE Solutions

				(5-15), Pauwels (2-5), EFACEC (2-5)
(ii) distribution transformers	10-15	2-5	10-15	ABB (0-20), Schneider (5-15), RWE Solutions (5-15), Areva (5-15), Pauwels (5-10)
c. energy automation and information systems				
(i) power system management	10-15	10-15	20-30	ABB (10-15), Areva (5-10)
(ii) protective relays	20-30	< 2	20-30	Areva (20-30), ABB (10-20), Schneider (0-10)
d. turnkey projects	20-30	2-5	20-30	ABB (15-20), Areva (10-15), CEGELEC (5-10)
(i) high-voltage projects	50-60	10-15	60-70	ABB (20-30), Areva (5-10)
(ii) medium voltage projects	10-15	< 2	10-15	ABB (15-20), Areva (15-20), CEGELEC (10-15)
e. T&D services	No affected markets on EEA or national basis			

The market investigation confirmed that there are essentially four competitors (Siemens, VA Tech, ABB and Areva) which produce a comparably wide range of TTD components and operate as turnkey suppliers in high-voltage projects.

9.32.6 Commitments

By letter dated 25/05/2005, Siemens submitted commitments under Art. 8 II MR2004 in order to address the Commission's competition concerns. These commitments were slightly amended by letter dated 13/06/2005. The gist of the commitments relating to equipment and services for hydroelectric power stations is as follows: Siemens undertakes to sell VA Tech Hydro GmbH & Co. (VA Tech Hydro), a power generation company forming part of VA Tech to a suitable buyer that is independent of the parties and subject to the Commission's approval[1651]. VA Tech Hydro will be sold as a going concern, i.e. including all tangible and intangible assets existing at the time the commitment was given, and its entire workforce. Siemens promises to keep intact the viability and competitiveness of the business to be divested. It also undertakes to manage the business separately up to the time of the sale.

[1651] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 174, p 640.

To dispel the Commission's competition concerns in the field of metal plant building, Siemens makes commitments which are not relevant to the energy sector.

9.32.7 Competition Assessment of the Proposed Concentration in the Light of these Commitments

Regarding the equipment for hydroelectric power stations, the sale of VA Tech Hydro removes entirely the overlap for competition purposes between Siemens and VA Tech in the market for equipment for hydroelectric power stations. The commitments were presented to customers and competitors as part of a market test. They considered that Siemens' divestment of VA Tech Hydro was an entirely effective measure to remove the competition concerns raised by the proposed merger as originally notified. A number of respondents to the market test pointed out that VA Tech Hydro's activities in fossil fuel power generation (i.e. a field in which there are no competition concerns) would have to remain with the business being divested in order to guarantee its market viability. It was also pointed out that the business divested would have to have access to products relating to network control technology for hydro-electric power stations. Such access is ensured at present by the 50% share in VA Tech SAT GmbH & Co. (SAT). The remaining shares in SAT are held by VA Tech. The wording of the commitment meets both of these concerns.

9.32.8 Conditions and Obligations

In accordance with Art. 8 II MR2004, the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market[1652].

Measures that give rise to a structural change to the market must be made subject to conditions, while the implementing steps necessary to achieve this result constitute obligations on the parties. Where a condition is not fulfilled, the Commission decision declaring the merger to be compatible with the common market is null and void. Where the parties commit a breach of an obligation, the Commission may revoke the clearance decision in accordance with Art. 8 VI lit. b MR2004; fines and penalty payments may also be imposed on the parties under Art. 14 II lit. d MR2004 and Art. 15 I lit. c MR2004.

In accordance with the fundamental distinction described above, the Commission makes its decision subject to the condition of full compliance with the commitment to sell VA Tech Hydro as a going concern, including all of its activities in the field of equipment and services for hydroelectric power plants, by the end of the extended deadline for sale to a purchaser approved by the Commission.

[1652] q.v. § 40 III GWB; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 10 VII 4. p 377.

All remaining parts of the commitments set out in Annex I, in particular the obligation to maintain temporarily and manage separately the business to be divested and the details concerning the trustee to be appointed by the parties, must be made the subject of obligations, since they are meant to only implement the aforementioned conditions.

In view of the incidental provisions in Annex II, the Commission makes the decision conditional on full compliance with the commitments that Siemens will not contest, cancel or revoke its exercise of the put-option as of 31/12/2004 and will not for a specified period, acquire any shares in SMS, unless the Commission finds that the market structure has changed in such a way that this incidental provision is no longer necessary[1653]. The remaining commitments set out in Annex II regarding the rights enjoyed by Siemens as a shareholder of SMS under the shareholders' agreement must also be subject of obligations[1654].

9.32.9 Conclusion

Provided that the commitments entered into by Siemens are complied with in full, it can be accepted that the planned concentration does not lead to a significant impediment to effective competition in the common market or a substantial part of it, and in particular that it does not create or strengthen a dominant position. Subject to full compliance with the commitments set out in the Annex, the concentration can therefore be declared compatible with the common market in accordance with Art. 2 II and 8 II MR2004 and compatible with the functioning of the EEA-agreement in accordance with Art. 57 thereof.

9.33 E.ON / MOL CASE IV/M. 3696

On 02/06/2005, the Commission received a notification owing to Art. 4 MR2004 of a proposed concentration by which the undertaking E.ON Ruhrgas International (ERI) acquires within the meaning of Art. 3 I lit. b MR2004 control of the whole of the undertakings MOL WMT (wholesale, marketing and trading), Hungary and MOL Storage, Hungary, currently solely controlled by MOL, Hungary by way of purchase of shares[1655]. ERI will also acquire MOL's shareholdings in Panrusgaz, Hungary, a JV company between OAO Gazprom (Gazprom, Russia) and MOL[1656].

After examination of the notification the Commission has concluded that the notified operation falls within the scope of MR2004 and raises concerns as to its compatibility with the common market (Art. 6 I lit. c MR2004).

[1653] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.558, p 667.
[1654] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.558, p 667.
[1655] R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 21 10. (C) (iv), p 930; CH 23 10 (A) (ii) p 1045; J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. II. 1. c) (5) (a) p 314; P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (2) (c) p 398; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 130, p 616.
[1656] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (2) (c) p 398.

9.33.1 The Parties

ERI is a solely controlled subsidiary of E.ON Ruhrgas AG which is in turn an indirect subsidiary of E.ON AG (Germany). The three companies are members of the E.ON group of companies which is a privately owned energy company with a focus on the supply of electricity and gas[1657].

MOL is an integrated oil and gas group which is primarily active in Hungary on the markets for natural gas, oils, fuels and chemicals[1658]. It is a public company. The Hungarian state still owns 12% of share capital plus a golden share[1659].

9.33.2 The Operation and the Concentration

Regarding the operation, the companies which are being acquired are the following solely controlled subsidiaries of MOL:

MOL WMT (wholesale, marketing and trading) is a public utility wholesaler and gas trader which supplies natural gas to regional gas distributors, industrial consumers and large power plants in Hungary

MOL Storage operates five natural gas storage facilities located in Hungary and is only active in providing storage services.

E.ON will acquire an interest of 75% minus one share in both MOL WMT and MOL Storage. The agreements provide for a five year put option under which MOL can sell its remaining 25% plus one share interests in MOL WMT and MOL Storage to E.ON.

E.ON is also acquiring MOL's 50% shareholding in Panrusgaz which is a JV between OOO Gazexport (Gazexport), a subsidiary of Gazprom and MOL. 50% of the shares in Panrusgaz are currently held by MOL, whereas 40% of the shares are held by Gazexport and 10% by Interprocom (a company having close ties with Gazprom).

MOL Transmission, another solely controlled subsidiary of MOL, is not acquired by E.ON through the present transaction. MOL is instead granted a put option under which MOL can require E.ON to purchase a 25% plus one share or a 75% minus one share interest in MOL Transmission during the next two years[1660].

Finally, MOL retains control over its gas exploration and production business (the MOL upstream gas exploration and production division (MOL E&P)). However, as part of the transaction, MOL and MOL WMT have entered into a long-term gas supply agreement for the gas produced by MOL E&P (the supply agreement).

[1657] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (2) (c) p 398.
[1658] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (2) (c) p 398; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 130, p 616.
[1659] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (2) (c) p 398.
[1660] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. II. 1. c) (5) (a) p 314.

Regarding the concentration, in view of the structure of the transaction, the acquisition of sole control over MOL WMT and MOL Storage by E.ON constitutes the concentration assessed in the case.

9.33.3 Community Dimension

The transaction has a community dimension (Art. 1 II-III MR2004)[1661]. A national market is applicable for the generation of electricity[1662].

9.33.4 Procedure

On 07/07/2005, the Commission initiated proceedings in accordance with Art. 6 I lit. c MR2004. A statement of objections (SO) was sent to E.ON on 19/09/2005. As agreed between E.ON and MOL, a version of the SO without E.ON's business secrets was transmitted to MOL by E.ON's legal representatives. E.ON and MOL were given the opportunity to comment on the Commission's preliminary findings as set out in the SO by 03/10/2005.

On 20/10/2005, E.ON offered commitments which were amended on 11/11/2005, 15/11/2005 and 08/12/2005 respectively. Further to the market testing of the proposed undertakings, E.ON substantially improved its draft commitments, in particular as regards the duration of the gas release program and the price mechanism of the gas release auctions.

9.33.5 Relevant Markets

The transaction affects the gas and electricity sectors[1663]. Natural gas and electricity activities can be delineated in several distinct product markets: Transmission, distribution, storage of natural gas, supply to power generators, wholesale traders, large power plants, industrial consumers, small businesses, retail consumers[1664]. The market for wholesale supply of natural gas is national[1665].

In bcm	Residential	Industrial	Power plants	Total
2005	5-7	6-8	3-5	14-20
2010	5-7	6-8	3-5	14-20
2015	5-7	6-8	3-5	14-20
2020	5-7	6-8	3-5	14-20

Concerning gas sources, natural gas is either imported from foreign sources or bought from Hungarian gas producers for it to be delivered to customers on the Hungarian market.

Ownership of the gas RDCs:

Kögaz	71.2% E.ON

[1661] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (2) (c) p 398.
[1662] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. III. 1. c) (2) (c) p 381; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 192, p 1258.
[1663] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (2) (c) pp 398-399.
[1664] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 196, p 1260; § 34 marginal note 203 p 1262.
[1665] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 197, p 1260.

	13.3% Julius Bär Holding AG 11.6% Swiss Partners AG 3.9% others
Ddgaz	50.01% E.ON 49.9% RWE 0.1% others
Fögaz	50% + 2 Municipality 32.7% RWE 16.4 % E.ON 0.9% others
Degaz	99.8% GdF 0.2% others
Egaz	99.4% GdF 0.6% others
Tigaz	50% + 1 Eni/Italgas 44.2 % RWE 7.9% others

Regarding the storage of gas, MOL Storage owns and operates the five existing underground gas storage facilities in Hungary. All of these are depleted gas fields.

condition 1: The HEO required the legal and organisational unbundling of the public utility wholesale and the natural gas trade activities of MOL WMT by 31/05/2006[1666];

condition 2: E.ON is required to submit an implementation plan to the HEO regarding certain organisational changes to be undertaken at MOL WMT and MOL Storage;

condition 3: E.ON is required to make the public utility wholesaler submit for approval and execute a programme to ensure the securing of natural gas resources and on the safety of supply in Hungary for a mid-term period;

condition 4: E.ON is required to ensure that the public utility wholesaler does not expand the scope of its customers directly supplied via the transmission network;

condition 5: E.ON and MOL Storage are required to implement a gas storage development scheme for 2005-2009, to be approved by the HEO[1667]:

condition 6: E.ON is required to ensure that MOL Storage will apply regulated access for all system users, i.e. also in the open segment of the market until real competitive market situation between natural gas storages takes place, and to comply with the GGPSSO;

condition 7: E.ON is required to ensure that MOL Storage revises and confirms its qualification granted by the Hungarian Mining Office, unless E.ON can ensure that the acquisition does not affect such qualifications;

[1666] R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 21, 10. (C) (iv), p. 930; P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (2) (c) p 399; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 203, p 1263.

[1667] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 203, p 1263.

condition 8: E.ON is required to initiate the amendment of the HEO's decision in case the decision to be issued by the Commission regarding E.ON's notification of the planned acquisition would affect the HEO's decision within 30 days after the receipt of the Commission 's decision.

Ownership of the electricity RDCs:

Edasz	100% E.ON
Dedasz	100% E.ON
Titasz	100% E.ON
Demasz	61% EdF 20.6% institutional investors 18.4% others
Emasz	54.3% RWE 26.8% EnBW 18.9% others
Elmu	55.3% RWE 27.3% EnBW 10.5% municipality 6.9% others

Regarding electricity generation and the current electricity generation capacities in Hungary, the total generation capacity in Hungary was approximately 8,000 MW in 2004, to be compared with the country's peak load of 6,350 MW.

9.33.6 Competitive Assessment

Respondents to the Commission's market investigation have expressed concerns at all levels of the gas and electricity supply chains, from the upstream level of gas procurement to the downstream level of electricity production and supply[1668].

Quantities in million m^3	MOL E&P production forecast		MOL WMT Contracted quantities	
	total	From existing fields	Normal	Min.
2005/2006	1500-3000	1000-2500	1500-3000	1000-2500
2006/2007	1500-3000	1000-2500	1500-3000	1000-2500
2007/2008	1500-3000	1000-2500	1500-3000	1000-2500
2008/2009	1500-3000	1000-2500		1000-2500
2009/2010	1500-3000	1000-2500		1000-2500
2010/2011	1500-3000			1000-2500
2011/2012	1500-3000			1000-2500
2012/2013	1500-3000			500-1500
2013/2014	500-1000			500-1500
2014/2015	500-1000			500-1500

Gas year	Quantities of MOL E&P production available for third parties (in million m^3)		

[1668] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 177, p 1257.

	Normal	Worst case	Best case
2005/2006	0-500	0-500	0-500
2006/2007	0-500	0-500	0-500
2007/2008	0-500	0-500	0-500
2008/2009		0-500	500-1000
2009/2010		0-500	500-1000
2010/2011		0-500	500-1000
2011/2012		0-500	500-1000
2012/2013		0-500	500-1000
2013/2014		0-500	500-1000
2014/2015		0-500	0-500

The Commission acknowledges that the transaction, by which E.ON acquires MOL's gas wholesaling, marketing and trading business while MOL retains its gas production business (MOL E&P), leads to an ownership unbundling of domestic gas resources by separating the supply and production activities of MOL[1669].

Date in million m^3	Total Hungarian gas demand	Hungarian domestic production	Total import quantities forecasted by E.ON/MOL under long-term contracts	Supply gap
2005-2015	13000-20000	1000-3000	11000-13000	0-4000

EMFESZ is the only new entrant on the Hungarian gas market as of July 2005.

Suppliers	Supply of gas to small industrial and commercial customers in 2004	
	In million m^3	In %
Kögaz	0-500	10-15%
Ddgaz	0-500	5-10%
Total E.ON	0-500	15-20%
Fögaz	500-1000	20-30%
Egaz	0-500	0-10%
Degaz	0-500	10-20%
Tigaz	500-1000	30-40%
MOL WMT	0	0%
Total market	2000-3000	100%

E.ON has sole control of two RDCs (Kögaz and Ddgaz), which together represented nearly 15-25% of the sales on the market for the supply of gas to small industrial and commercial customers. Currently the market positions of the various retailers (RDCs and traders) on the Hungarian market for the supply of gas to residential customers are as follows:

Suppliers	Supply of gas to residential customers in 2004	
	In mio. m^3	In %
Kögaz	0-500	5-10
Ddgaz	0-500	5-10

[1669] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 203, p 1263.

Total E.ON	0-500	15-20
Fögaz	500-1000	20-30
Egaz	0-500	0-10
Degaz	500-1000	10-20
Tigaz	1000-2000	30-40
MOL WMT	0	0
Total market	4000-5000	100

As for the supply of gas to small industrial and commercial customers, the fundamental change brought about by the transaction is that E.ON unlike MOL, is active on the market for the supply of gas to residential customers through its solely controlled affiliates, Kögaz and Ddgaz, and through Fögaz, in which it holds a minority shareholding.

The new entity will acquire a dominant position in the supply of gas to large industrial consumers:

Suppliers	Supply of gas to large industrial customers in 2004	
	In mio. m^3	In %
Kögaz	0-500	5-10
Ddgaz	0-500	5-10
Total E.ON	0-500	10-15
MOL WMT	500-1000	30-35
Fögaz	0-500	10-20
Egaz	0-500	10-20
Degaz	0-500	0-10
Tigaz	500-1000	10-20
EMFESZ	0-500	0-10
New entity	1000-2000	45-50
Total market	3000-4000	100

The table below provides an overview of the main market players' position in electricity generation and retail supply level in Hungary:

	MVM	E.ON	RWE	EdF	Electrabel
Electricity generated in 2004 (GWh)	10000 – 12500	0-2500	5000 - 7500	0-2500	2500 – 5000
2004 %	30-40%	0-5%	10-20%	0-10%	0-10%
Electricity sales to final users in 2004 (GWh)	2500-5000	12.500 – 15.000	12.500 – 15.000	2500 – 5000	2500 – 5000
2004 %	0-10%	40-45%	30-40%	10-20%	0-10%

	Atel	Others	Total
Electricity generated in 2004 (GWh)	0-2500	5000-7500	30.000 – 35.000
2004 %	0-	20-30%	100%

	10%		
Electricity sales to final users in 2004 (GWh)	2500 -5000	0-2500	35.000 - 40.000
2004 %	0-10%	0-10%	100%

As reflected in the table above, E.ON is the main player in the Hungarian electricity retail markets with a market share in excess of 40% due to its strong position both in the public utility segment and as an electricity trader.

Large power plants in Hungary:

Name of power plant	Owner	Fuel	Official production capacity in 2003 (MW)	Official production in 2003 (GWh)
Paksi Atomeromu	MVM	Nuclear	1,866	10,297
Dunamenti	Electrabel	Gas / oil	2,126	5,053
Tisza II	AES	Gas / oil	860	2,426
Matra	RWE	lignite	836	5.032
Csepili GT	ATEL	Gas	389	1,860
Oroszlany	MVM	Coal	240	1,033
Tiszapalkonya	AES	Coal / gas	200	477
Pecs	Pannon power	Oil	190	514
Lörinci	MVM	Oil	170	5
Borsodi	AES	Coal / gas / wood	137	282
Kelenföld GT II	EdF	Gas	136	602
Sajoszöged	MVM	Gas	120	3
Liter	MVM	Gas	120	1
Ujpest	EdF	Gas	110	423
Banhida	MVM	coal	100	462
Debrecen	E.ON	Gas	95	731
Ajka	Transelectro	coal	71	205
Kispest	EdF	Gas		
EMA Power	EPIC Energy Hungary	Gas		
Small power plants			280	4,084
Total			8,046	31,632

Regarding PPAs, the major part of the large power plants' capacity is booked under long-term PPA with MVM.

Name of power plant	Owner	Official capacity in 2003 (MW)	Gas supplier	Gas consumption in 2004 (mio. m^3)
Dunamenti	Electrabel	2126	MOL WMT	1000-1500
Tisza II	AES	860	MOL WMT	0-500
Csepeli GT	Atel	389	MOL WMT	0-500
Kispest	EdF	116	Fögaz	500-1000
Ujpest	EdF	110	Fögaz	500-1000
Kelenföld GT II	EdF	136	Fögaz	500-1000
Sajoszöged	MVM	120	Tigaz	0-500
Liter	MVM	120	Kögaz	0-500
Debrecen	E.ON	95	Tigaz	0-500

Others				500-1000
Total		4072		3000-3500

Suppliers	Supply of gas to power plants in 2004	
	In million m^3	In %
Kögaz	0-500	0-5%
Ddgaz	0-500	0-5%
Total E.ON	0-500	0-5%
MOL WMT	2000-3000	65-70%
New entity	2000-3000	70-75%
Fögaz	500-1000	10-20%
Egaz	0-500	0-10%
Degaz	0-500	0-10%
Tigaz	0-500	10-20%
Emfesz	0-500	0-10%
Total market	3000-4000	100%

The market investigation has also confirmed the current and expected lack of alternative sources of supply for power plants.

Concerning RDCs the table below provides the sales of RDCs in each of the relevant product market for the retail supply of electricity:

Suppliers	Supply of electricity to residential customers in 2004		Supply of electricity to small commercial and industrial customers in 2004		Supply of electricity to medium and large commercial and industrial customers in 2004	
	In GWh	In %	In GWh	In %	In GWh	In %
Edasz	1000-2000	15-20%	1000-2000	15-20%	2000-3000	20-25%
Dedasz	1000-2000	10-15%	0-1000	10-15%	0-1000	5-10%
Titasz	1000-2000	10-15%	1000-2000	15-20%	0-1000	5-10%
Total E.ON	4000-5000	45-50%	3000-4000	50-55%	3000-4000	30-40%
Emasz	1000-2000	10-20%	0-1000	10-20%	1000-2000	10-20%
Elmu	3000-4000	20-30%	1000-2000	20-30%	3000-4000	30-40%
Demasz	1000—200	10-20%	0-1000	0-10%	1000-2000	10-20%
Total market	10000-12500	100 %	5000-7500	100 %	7500-10000	100 %

Regarding electricity traders, electricity customers that have switched to the open segment of the market are supplied by the electricity traders:

Name	Group	2003 (GWh)	2004 (GWh)	%, 2004
Entrade	Atel	0-1000	1000-2000	10-20%
ATEL Energia	Atel	0-1000	1000-2000	10-20%
Total Atel	Atel	1000-2000	3000-4000	20-30%
MVM Partner	MVM	1000-2000	2000-3000	20-30%
E.ON EK	E.ON	1000-2000	2000-3000	20-30%
Masz	RWE	0-1000	1000-2000	0-10%
System consulting		0-1000	0-1000	0-10%
Sempra Energy Europe	Sempra trading	0-500	0-500	0-10%
D- Energia	EdF	0-500	0-500	0-10%
Energy Financing Team	Energy financing team	0-500	0-500	0-10%
Others		0-500	0-500	0-10%
Total		5000-10000	10000-15000	100%

The new entity's strategies in electricity generation and wholesale would significantly impede effective competition in all the markets for the retail supply of electricity.

9.33.7 Assessment of the Remedies Proposed by the Parties

In order to remove the competition concerns described above on the gas and electricity markets, on 20/10/2005 E.ON submitted a package of commitments. On 15/11/2005, following the market test, E.ON submitted revised commitments[1670]. E.ON submitted final commitments on 8/12/2005.

Regarding the description of the remedies and ownership unbundling, under the agreements concluded between E.ON and MOL, MOL would remain a minority shareholder in MOL WMT and MOL Storage (25% + 1 share in each) and enjoy a 5 year put-option under which it can require E.ON to purchase these minority interests.

Pursuant to the incidental provisions, MOL will divest its remaining shareholdings of 25%+ 1 share in MOL Storage and MOL WMT within six months following the transaction. The buyer of the shares will be subject to the Commission's approval. In addition, MOL will not acquire direct or indirect minority stakes in MOL WMT and MOL storage for a period of ten years as long as E.ON is a majority stakeholder of those companies[1671].

The objective of this ownership unbundling remedy is to alleviate the competition concerns raised by the Commission as regards MOL's incentives (in particular through its subsidiary MOL Transmission and its branch MOL E&P) to favour MOL WMT for access to the transmission network and MOL Storage for access to future storage sites.

[1670] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 130, p 616.
[1671] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 180, p 641.

Regarding the put option related to MOL Transmission, under the agreements concluded between MOL and E.ON, MOL would be granted a 2-year put option under which it can require E.ON to purchase a 25%+1 share or a 75%-1 share interest in MOL Transmission.

Pursuant to the incidental provisions, MOL will not exercise the put-option for the 25%+1 share interest in MOL Transmission. In addition, MOL will not sell to E.ON or any of its affiliates, for a period of 10 years as long as E.ON is a majority shareholder of MOL WMT and MOL Storage, a share interest in MOL Transmission that would not result in the acquisition of sole control over MOL Transmission by E.ON or of joint control over MOL Transmission by E.ON and MOL.

Regarding the gas release programme, E.ON undertakes to implement a gas release programme in Hungary by way of business-to-business internet auctions[1672]. This programme will start in 2006 and have a duration of 8 years[1673]. Auctions will be held in 2006-2013[1674]. The necessity of continuing the programme for the last three years can be reassessed upon request by the parties at the end of 2010. 1 bn m^3 of gas will be released at each annual auction[1675]. The annual quantities to be released will be divided in 5 lots of 100 mio. m^3, 5 lots a 50 mio. m^3 and 10 lots of 25 mio. m^3 each. E.ON's affiliates will be excluded from participating, directly or indirectly, in the auctions.

The successful bidders will enter into gas supply contracts with E.ON under the following terms and conditions. The contracted gas will be equally split over two years and delivered at the two Hungarian entry points (80% at the Eastern entry point and 20% at the Western entry point). The gas supply contracts will provide for the same flexibility as MOL WMT's upstream gas supply contracts, namely an annual flexibility of 85% to the effect that the purchaser will have to purchase and pay only 85% of the annually contracted gas quantity ("TOP obligation"). In addition, the daily and quarterly flexibility shall not be lower than the weighted average daily and quarterly flexibility of all purchase contracts of MOL WMT. In any event, the daily flexibility shall be at least 50% of the daily contracted quantity.

The Hungarian Energy Office (HEO) and a Monitoring Trustee will supervise the auctions and the implementation of the gas release programme.

In addition, E.ON undertakes to grant the existing direct customers of MOL WMT and E.ON (KÖGÁZ and DDGÁZ) who participate in the auction or who purchase gas from a trader/wholesaler participating in the auction the right to reduce their obligation to purchase natural gas from MOL WMT and E.ON by the amount of

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[1672] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (2) (c) p 399; CH 14 D. (2) (b) pp 409-410; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 180, p 641; § 34 marginal note 203, p 1263.
[1673] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 D. (2) (b) p 412.
[1674] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (2) (c) p 399.
[1675] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 180, p 641.

gas that they will purchase directly or indirectly from the gas release programme. E.ON also undertakes to grant to those purchasers access to storage at regulated prices and conditions.

The objective of the gas release programme is to ensure sufficient competitive alternatives for access to gas on the Hungarian gas and electricity markets (independently of the parties and at competitive conditions) so as to prevent the new entity from foreclosing the access to gas resources for its downstream competitors in the gas and electricity markets.

Regarding contract release, ERI undertakes to assign to a third party (the "Third Party") half of the contract between MOL WMT and MOL E&P for the supply of domestic gas ("Supply Contract") within 6 months[1676]. Once the contract assignment becomes effective, the Third Party will take over all the rights and obligations of MOL WMT under the Supply Agreement for the part assigned to it. The assignment will become effective at the beginning of the gas year 2007 (July 2007) and will be valid for the whole duration of the Supply Contract, until 2016.

According to the parties, the part of the Supply Contract to be assigned represents approximately 7.6-10 bcm of gas in total, with the volumes to be released in the first year amounting to 1.2 bcm.

As for the gas release programme, the objective of the contract release programme is to ensure sufficient availability of gas on the Hungarian gas and electricity markets (independently of the parties and at competitive conditions) so as to prevent the new entity from foreclosing the access to gas resources for its competitors in the gas and electricity markets[1677].

Concerning access to storage, E.ON undertakes to grant access to storage capacities at regulated price and conditions to end users and wholesalers that purchase gas directly through the gas release programmed or the contract release. In particular, E.ON undertakes to offer access to sufficient storage capacities for those end users and wholesalers even if they purchase gas for the first time or develop an increased demand for storage when buying gas quantities through the gas release programme or the contract release.

The final package of incidental provisions, submitted on 08/12/2005 and described above, incorporates the bulk of the suggestions and comments made by third parties in the context of the market test. The incidental provisions in their final form, substantially improved compared to the parties' initial offer, thus meet the concerns expressed by third parties as regards the need to ensure sufficiently liquidity of gas on the Hungarian wholesale gas market at price and conditions which will allow third parties to compete effectively with the new entity on the downstream Hungarian gas and electricity markets.

[1676] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (2) (c) p 399.

[1677] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 203, p 1263.

As described, the incidental provisions proposed by the parties aim essentially at (i) strengthening the positive unbundling of MOL E&P (gas production) and MOL Transmission (gas transmission) on the one hand and MOL WMT (gas wholesale) and MOL Storage (gas storage) on the other hand and at (ii) releasing volumes of gas on the Hungarian wholesale markets through a gas release and a contract release.

Regarding unbundling, the Commission has found that the 25%+1 minority shareholdings which MOL would retain in MOL WMT an MOL Storage and the existence of the put option for the shareholding of MOL Transmission to E.ON (even though the sale of MOL Transmission is not part of the present transaction) would create structural links between ERI and MOL which would provide the ability and the incentive for MOL to discriminate against the parties' competitors for access to domestic gas, gas transmission services and new gas storage facilities.

Regarding the gas release programme and contract release and the European experience on gas release programmes, to be in a position to assess properly whether the gas release and the contract release commitments submitted by the parties are suitable to remove the competition concerns identified during the procedure, the Commission has carried out an additional investigation focusing on existing similar programmes in various European countries[1678].

Concerning general features, gas release programmes and contract release programmes aim at making gas available to wholesalers and end users at the wholesale level. In this type of programmes, the gas incumbent company undertakes to offer certain quantities of gas for sale to its competitors/customers. The incidental provisions proposed by the parties in the present case comprise both a gas release and a contract release.

In a gas release programme, the gas incumbent offers for sale certain quantities of gas from its overall gas sourcing portfolio. Purchasers enter into supply contracts with the gas incumbent for these quantities. In a contract release programme, the gas incumbent transfers (assigns) part of its gas supply contracts with gas producers. Purchasers enter into a supply contract directly with the gas producers (without the intermediary of the incumbent) and the transferred gas supply contract(s) of the incumbent is terminated, or the gas quantities in the transferred supply contracts are reduced accordingly. Both types of programmes are designed to improve the liquidity of gas markets and enable competing traders and customers to acquire gas for their own use or for resale. The essential difference between contract and gas release is that the incumbent's supply portfolio remains the same in a volume release programme, while it is partly transferred to competitors/customers in a contract release programme.

[1678] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 203, p 1263.

The sale of the gas or the transfer of the gas supply contract may be achieved in two ways: (i) auctions, or (ii) bilateral contracts. The gas quantities may be sold through public auctions where companies with the highest bid are selected. In case of bilateral negotiations, the incumbent negotiates with interested companies and gas sales/contract transfers are concluded based on mutual agreement. The incidental provisions proposed by the parties in the present case comprise both a gas release through auctions and a contract release though bilateral negotiations.

Regarding specific features, gas release programmes have been and are being implemented in several European countries; experience is more limited for contract release programmes. Gas release programmes are either part of a broader action plan required under national law and/or designed by the national energy regulators to open the gas wholesale markets to competition (UK, Spain, Italy) or are implemented as incidental provisions in merger or antitrust procedures (France, Germany, Austria).

Concerning volumes, the quantities of gas to be released depend on the objectives of the gas release programme and of the regulatory framework. More specifically, in a merger case, the volumes should be sufficient to remove the competition concerns and thus depend on the number and the size of markets in which competition concerns arise. The released volumes need to be sufficient to exclude that the incumbent supplier can foresee that all or most of the released volumes will be acquired by certain customer categories. Only if the volumes released are sufficient to allow eligible customers in all affected markets to benefit from the programme (as direct purchasers or indirectly as customers of traders buying gas through the gas release programme) can a gas release programme offset the incumbent's ability and incentives to engage in anticompetitive behavior and thus remove the negative impact on competition.

Regarding the duration of the programme, a gas release programme generally aims at increasing the liquidity on gas wholesale markets and facilitating new entries. In the context of a merger case, a gas release programme may seek to reduce or eliminate the merging parties' ability and incentives to engage in behavior that would significantly impede effective competition. To achieve these objectives, the gas release programme should remain in place for a sufficiently long time as to ensure that the market structure and the competitive conditions have changed significantly, and that the level of competition achieved through the programme is sustainable.

Concerning prices and costs, the price at which gas is available through the gas release programme should enable wholesalers to compete with the supplier of gas under the gas release on the gas wholesale and retail markets. The auction mechanism is a convenient way to allocate efficiently the gas quantities to be released. As the final price results from competitive bids, it is the price that bidders are willing to pay for the gas made available under the programme, given prevailing market conditions.

Regarding flexibility, the daily, quarterly and yearly flexibility provisions for the gas supplied through the gas release programme are essential. Wholesalers and industrial customers should have the ability to structure the gas quantities they purchase according to their own or their customers' consumption profiles. Depending on the conditions of access to storage, the requirements for the flexibility of the gas supplied through a gas release programme differ.

Concerning gas delivery points, the gas should be delivered at a delivery point from which wholesalers can easily transport and store the gas. A gas hub or cross-border entry points are therefore generally appropriate delivery points. A certain degree of flexibility for the choice of the delivery point (as is often the case for the seller) increases the attractiveness of the programme.

Regarding security of supply, the gas supply conditions should include standard provisions on security of supply issues (maintenance, force majeure, off-spec, interruptibility, etc.) following the common practices in the relevant markets. The rights and obligations of the purchasers and the seller should be balanced.

Concerning auction design and guarantees, the "ascending clock auction" has been used in several countries and is apparently an appropriate procedure to allocate the gas quantities. The organization of the auction should also ensure that the seller does not gain information on its competitors.

Regarding the assessment of the gas release programme and on the contract release proposed by the parties, the Commission has concluded that the gas release programme and the contract release as offered by the parties, incorporating the amendments and improvements proposed by third party respondents to the market test, are sufficient to remove all the competition concerns identified by the Commission as resulting from the transaction. In particular, the Commission considers that the combination of the gas release programme and the contract release will ensure that gas end users and wholesalers will have the ability to source their gas needs under competitive and non-discriminatory conditions and, for at least a significant part, independently from the merged entity.

Based on MOL E&P current production forecasts (as included in Annex to the Supply Agreement), the Commission has estimated the quantities of gas that the parties undertake to release on a yearly basis until the gas year 2014/2015.

Quantities of gas released under the proposed commitments:

Gas year	Quantities of gas released (in mio. M^3)		
	Gas release	Contract release	Total
2006/2007	500	700-1300	0-1000
2007/2008	1000	700-1300	2000-2500
2008/2009	1000	700-1300	2000-2500
2009/2010	1000	700-1300	2000-2500

2010/2011	1000	500-1000	1500-2000
2011/2012	1000	500-1000	1500-2000
2012/2013	1000	500-1000	1500-2000
2013/2014	1000	0-500	1000-1500
2014/2015	500	0-500	500-1000
	8000	5000-10000	13000-18000

The table and chart above show that, at least until 2013/2014, substantial quantities of gas (around 2 bcm) will be released and the programmes will last until 2014/2015 (expiry of MOL WMT upstream procurement contracts and of MOL E&P's supply contract). The quantities released by the parties account for up to 14% of the total Hungarian demand and represent 21% of total third parties' gas sales (i.e., excluding sales of E.ON's RDCs and of MOL WMT). This means that third parties will have the ability to purchase a significant share of their gas from the gas release and/or the contract release.

In mio. m^3	Quantities of gas released	Hungarian gas consumption	%
2006/2007	0-1000	15000-20000	0-10%
2007/2008	2000-2500	15000-20000	10-20%
2008/2009	2000-2500	15000-20000	10-20%
2009/2010	2000-2500	15000-20000	10-20%
2010/2011	1500-2000	15000-20000	10-20%
2011/2012	1500-2000	15000-20000	10-20%
2012/2013	1500-2000	15000-20000	5-15%
2013/2014	1500-2000	15000-20000	5-15%
2014/2015	0-1000	15000-20000	0-10%
Total	10000-20000	140000-150000	5-15%

However, the total quantities of gas released over the gas years 2007/2008 to 2013/2014 represent approximately 60% of the size of the market for the supply of gas to power plants and 55% of the size of the market for the supply of gas to large industrial customers. The Commission therefore estimates that the released gas quantities will significantly increase liquidity and hence limit the likelihood of anticompetitive behaviour by the new entity.

Regarding the gas release programme, the Commission believes that the gas release programme offered by the parties is designed, as regards its main features (volumes, duration, price mechanism) and in its more technical features (size of lots, duration of contracts, flexibility rules) largely in line with the criteria described above, which are widely considered to be most relevant for the successful implementation of gas release programmes. The gas release programme was improved to take into account comments and suggestions made by respondents in the market test. The detailed rules for the effective implementation of the auction and the gas supply contracts will be elaborated by the parties under the scrutiny of the HEO, and submitted to the Commission for its approval.

Concerning contract release, the Commission believes that the assignee of the contract release will constitute a sizeable and sustainable competitive force in the Hungarian gas markets. The assignee will purchase significant quantities of gas from MOL E&P starting in July 2007 (expected date of the further liberalization of the Hungarian gas markets) until 2013/2014, independently from the new entity. It will also have to ability to combine the contract release with the purchase of gas quantities through the gas release programme until 2013/2014. The assignee of the contract release will therefore have sufficient long-term gas resources to develop its position on the Hungarian gas markets and introduce liquidity on these markets.

Regarding storage, additionally, the commitments of the parties to grant access to storage for the successful bidders of the gas release programme and the assignee of the contract release at regulated prices are sufficient to grant an effective and non-discriminatory access to the storage capacities for the relevant gas quantities. The Commission believes that this commitment will enable traders and customers to structure the acquired gas according to their own or their customers' needs.

Regards monitoring, finally, the effective monitoring by the HEO, with the assistance of the Commission's Trustee, will help the Commission ensure that the parties will fully comply with their commitments for their full duration[1679].

Concerning conditions and obligations, under the first sentence of the second subparagraph of Article 8 II of the MR2004, the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.

Where a condition is not fulfilled, the Commission decision declaring the merger to be compatible with the common market no longer stands. Where the undertakings concerned commit a breach of an obligation, the Commission may revoke the clearance decision in accordance with Article 8 V lit. b of MR2004. The undertakings concerned may also be subject to fines and periodic penalty payments under Articles 14 II lit. d and 15 II lit. c of MR2004.

9.33.8 Conclusion

It is concluded that the commitments submitted by the notifying party are sufficient to address the competition concerns raised by this concentration. Accordingly, subject to compliance with the commitments submitted by the notifying party, the notified operation should be declared compatible with the common market and the functioning of the EEA Agreement.

[1679] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 199, p 647.

9.34 DONG / ELSAM / ENERGI E2 CASE IV/M. 3868

On 13 September 2005, the Commission received a notification of a proposed concentration pursuant to Article 4 MR2004 by which the undertaking DONG A/S ("DONG", Denmark, notifying party) acquires within the meaning of Article 3 I lit. b of MR2004 sole control of the undertakings Elsam A/S ("Elsam", Denmark), Energi E2 ("E2", Denmark), Københavns Energi Holding A/S ("KE", Denmark) and Frederiksberg Elnet A/S ("FE", Denmark) by way of purchase of shares and assets[1680]. (DONG, Elsam, E2, KE and FE are henceforth collectively referred to as "the parties".)

After examination of the notification, the Commission has concluded that the notified operation falls within the scope of the Merger Regulation and raises concerns as to its compatibility with the common market[1681].

9.34.1 The Parties

DONG is the Danish state-owned gas incumbent active in exploration, production, off-shore transport and sale of oil and natural gas, as well as storage and distribution of natural gas. It also has minor activities related to wind electricity generation and supply of electricity and heat.

Elsam and E2 are the Danish electricity generation incumbents in West Denmark (Elsam) and East Denmark (E2), respectively. They are both active in production and trading of electricity (financial and physical) on the wholesale market and in production of district heating. Elsam, since its acquisition of the (East Danish) electricity retailer NESA in 2004, also has substantial activities in electricity retailing to household and business customers. Elsam and E2 have, on the one hand, a core ownership of local authorities and, on the other hand, substantial shareholdings by DONG and Vattenfall (in Elsam) and by NESA and KE (in E2).

KE and FE supply household and business customers with electricity in the Copenhagen area. They are currently owned by the City of Copenhagen and the City of Frederiksberg, respectively.

9.34.2 The Operation and Concentration

In January 2005, Vattenfall AB ("Vattenfall", Sweden) acquired 35.3% of Elsam's shares. Between 4 and 9 February 2005, DONG, which had previously owned 24.1% of Elsam's shares, entered into option agreements with several local utilities for the acquisition of an additional 40.6% of Elsam's shares. In order to resolve the deadlock situation in Elsam, on 31 May 2005 DONG and Vattenfall entered into an agreement under which Vattenfall would transfer its 35.3% shareholding in Elsam to DONG and receive, as a counterpart, assets (mainly power plants) of Elsam and E2 corresponding to the value of the transferred shareholding. As a result of

[1680] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. p 391; CH 14 C. (3) (a) p 401.
[1681] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (3) p 402.

this agreement, and the preceding transactions, DONG acquires sole control of Elsam and E2, less the assets of these companies that will be attributed to Vattenfall according to that agreement.

The acquisition of altogether 64% of E2's shares by DONG, the remaining 36% being held by Elsam's subsidiary NESA, is therefore a necessary precondition for the completion of the DONG/Vattenfall agreement.

On 7 February 2005, DONG acquired KE from the City of Copenhagen, including KE's 34% share in E2. On 10 February 2005, DONG acquired FE from the City of Frederiksberg, including FE's 2.3% share in E2. In addition, DONG entered into parallel agreements with other E2 shareholders to increase its shareholding in E2 by a further 28% to approximately 64%.

Both the acquisition of FE and the agreements with the other E2 shareholders are legally conditional upon the successful acquisition of KE (and the 34% of E2's shares held by KE) by DONG. The shares transfer agreement between the City of Frederiksberg and DONG contains the explicit condition that the "the main agreement (on purchase of shares in Copenhagen Energy Holding A/S) of 7 February 2005 between the Municipality of Copenhagen and the buyer (DONG) becomes final.

Further, DONG's agreements with the Cities of Helsingør, Roskilde, Hillerød and Slagelse (SK-EL) and with the cooperative NVE-SEAS relating to the transfer of altogether 28% of shares in E2 contain the explicit condition that "the agreement between the Municipality of Copenhagen and DONG concerning DONG's take-over of Copenhagen Energy Holding A/S is finalised".

In view of Elsam's indirect (through NESA) 36% shareholding in E2, the full acquisition of Elsam by DONG is also a legal precondition for the acquisition of full control over E2. Without NESA's shares in E2, DONG would not be in a position to divest important assets of E2 to Vattenfall. In turn, without the divestiture of some of E2's assets to Vattenfall, DONG would not be able to acquire Vattenfall's 35.3% shareholding in Elsam. All these transactions by DONG are thus closely connected with each other as well as with the DONG/Vattenfall agreement. The present concentration within the meaning of Article 3(1) of the EC Merger Regulation thus comprises the acquisition of control by DONG of Elsam, E2, KE and FE.

The asset acquisition by Vattenfall constitutes a separate concentration. Through this concentration Vattenfall acquires electricity generation assets currently owned by Elsam and E2, and predominantly located in Western and Eastern Denmark. These assets have a combined electricity generation capacity of 2452 MW. Most acquired power plants are co-generation plants, producing both electricity and heat, and are fuelled by coal, biomass or natural gas; the remainder is wind power, mainly in West Denmark.

9.34.3 Community Dimension

The concentration has a community dimension (Art. 1 III MR2004[1682]). A national market is applicable[1683].

9.34.4 Procedure

By decision of 18 October 2005, the Commission found that the notified operation raised serious doubts as to its compatibility with the Common Market and the functioning of the EEA Agreement. The Commission accordingly initiated proceedings pursuant to Article 6 I lit. c MR2004.

9.33.4 Legal, Regulatory and Structural Framework for the Natural Gas and Electricity Sectors in Denmark

The notified concentration primarily concerns the natural gas sector and the electricity sector in Denmark.

9.33.5 The Relevant Markets

The transaction affects the gas and electricity sectors. In both sectors various relevant product markets can be delineated.

9.33.6 Competitive Assessment

Regarding a preliminary remark on minority shareholdings, according to DONG's reply to the SO, the following shareholding links existed among the different undertakings concerned existed immediately prior to the notification:

(a) DONG owned 24% of the shares in Elsam and Vattenfall owned 35% of the shares in Elsam (neither of these acquisitions were notified to the Commission or the DCA);

(b) Elsam owned 86% (this acquisition was cleared by the DCA in 2004) and DONG owned 13% of the shares in NESA;

(c) NESA owned 36% of the shares in E2;

(d) local authorities, consumer owned supply companies, or undertakings controlled by them, held the remaining 64% of the shares in E2, including KE (with 34%) and FE (with 2%).

DONG's market share on the market(s) for supplies of gas to industrial customers and decentral CHPs can be seen from the table:

Market shares - supplies to decentralised CHP's and large business

customers (>0.3 mcm) (2004)

Company	Market share
DONG	60-70%
Statoil Gazelle	10-20%

[1682] K. Lange / T. Pries, Einführung in das europäische und deutsche Kartellrecht (2nd ed.) (Frankfurt, Germany, Recht und Wirtschaft, 2011) CH 4 § 2 II. 1. a) pp 179-180.
[1683] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. III. 1. c) (2) (c) p 381.

HNG MN	5-10%
Shell	0-5%
E.ON Sverige	0-5%
Total	100%

The parties point to the fact that DONG has lost considerable market share since the opening of the market. It is true that DONG's market share has gone down from [75-85%] in 2001 to around [60-70%]* in 2004, which is the last full year for which market data is available. However, this drop in market share cannot change the fact that DONG is dominant on the relevant market.

Generation in West Denmark pre- and post merger

2004 West Denmark	Market share (volume)
Dong pre merger	0-5%
Elsam A/S	55-65%
Combined	55-65%
Dong post merger and post Vattenfall divestment	35-45%
Vattenfall AB	20-25%
Competitors	35-45%

Generation in East Denmark pre and post merger

Dong pre merger	0-5%
Nesa A/S (Elsam)	0-5%
Energi E2 A/S	70-80%
Combined pre merger	70-80%
Dong post merger and post Vattenfall divestment	40-50%
Vattenfall AB	30-40%
Competitors	20-25%

Market shares – supplies to metered customers:

Parties combined of which	25-30%
Dong	0-5%
Elsam	20-25%
KE	5-10%
FE	0-5%
E2	0-5%
Energi Denmark	25-30%
SEAS-NVE	0-5%
Scanenergi	0-5%
OK	0-5%
3 regional supply companies: Sydwest Energi, Energi Midt, Energi Nord	0-5%

Regarding retail supply of electricity to small standard load profile customers, the operation will also lead to some market share overlaps in the market for retail supply of electricity to small customers, mainly due to the combination of ElsamNESA's activities with those of KE, whereas the operations of FE and of DONG (who has recently entered the market) are rather small.

Market shares – Supplies to standard load profile customers

Parties combined of which	25-30%
Dong	0-5%
Elsam	15-20%

KE	5-10%
FE	0-5%
E2	0-5%
Energi Denmark	15-20%
SEAS-NVE	10-15%
Sydvest Energi	5-10%
Scanenergi	5-10%
Nordjysk Elhandel	5-10%
Energi Nord	5-10%
Energi Midt	5-10%

The competitive landscape in this market in Denmark is quite fragmented with only a small number of household customers having so far switched from their incumbent local supplier (2% in 2003, 1% in 2004 and 0.5% in the first half of 2005).

9.34.8 Commitments

With a view to addressing the competition concerns set out in the decision, DONG has submitted a set of commitments ("the commitments") to the Commission on 30 January 2006. Those commitments were amended on 1 March 2006 by virtue of a review clause[1684]. They are composed of two parts: a storage divestiture[1685] and a Gas Release Programme[1686].

Regarding the description of the commitments and the storage divestiture*, w*ith a view to addressing the competition concerns on the storage/flexibility market,

DONG has submitted a commitment to divest its gas storage facility in Lille Torup in Jutland. This is the larger of DONG's two storage facilities, and has a working volume of at least 400 million m^3 (mcm) and a total storage gas volume of 710 mcm.

Its daily injection and withdrawal capacity amounts to 3.6 and 7 mcm, respectively. The Divestiture Business encompasses the personnel and all assets related to the LilleTorup storage facility. These assets include all tangible and intangible assets (including intellectual property rights), all licences, permits and authorisations, and all contracts, leases, commitments and customer orders as well as all customer, credit and other records. DONG commits to enter into a final sale and purchase agreement with an appropriate purchaser for the Divestiture Business, within six months from the date of the adoption of this decision. If, by the end of that period, DONG has not entered into such an agreement, the Divestiture Trustee will have an exclusive mandate to sell the Divestiture Business within the following three months[1687]. The purchaser has to be approved by the Commission.

[1684] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.1116, p 787.
[1685] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (3) p 402; CH 14 D. (2) (a) p 409; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 172, p 639; § 34 marginal note 203, p 1263.
[1686] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (3) p 402; CH 14 D. (2) (b) p 409; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 180, p 642; § 34 marginal note 203, p 1263.
[1687] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 199, p 647.

The closing of the sale of the Divestiture Business must take place no later than 1 May 2007. Once a final binding sale and purchase agreement has been concluded, only the purchaser will be entitled to sell storage capacity in the Lille Torup storage facility for the gas storage year 2007/2008 which runs from 1 May 2007 to 30 April 2008. DONG commits not to acquire, for a period of ten years from closing of the sale to the purchaser, direct or indirect influence over whole or part of the Divestiture Business unless the Commission has previously found that the market structure has changed to such an extent that a re-acquisition should no longer be excluded.

Regarding the Gas Release Programme, with a view to addressing the competition concerns raised in this decision, DONG has submitted, as a commitment, a Gas Release Programme in order to make natural gas available to third parties in Denmark. The amount of gas to be released will be 400 mcm per year, (a total of 2,400 mcm) to be auctioned[1688] in the years 2006 through 2011.

According to the amended Commitments, the volumes released will, each year, be divided into ten lots of 40 mcm to be delivered equally over two delivery periods. The delivery period for both primary and secondary auctions to be held in 2006 will be, for practical reasons, the calendar years 2007 and 2008. As for the auctions to be held in 2007 and later, the delivery period will comprise the two following gas years (the first one starting in October of the year of the auction). The volumes correspond to a significant proportion of DONG's sales in Denmark in 2005 and approximately 10% of total Danish consumption. In the event that market conditions change significantly, e.g. DONG's upstream supplies will fall below a certain level during the course of the Gas Release Programme, DONG may, under certain conditions, apply to the Commission to have the Gas Release Programme terminated with respect to the 5 and 6th auctions.

The Gas Release Programme foresees a two-step auction process: "Primary Auctions" to be held no later than April (for 2006: August) and "Secondary Auctions" to be held in June (for 2006: October) of the same year. In the "Primary Auction", DONG will make available gas at the virtual trading point/hub in Denmark (GTF) and, as in a swap, successful bidders will make available the same volume of gas to DONG at one of the specified gas hubs in Germany (Emden), the Netherlands (TTF), Belgium (Zeebrugge) or the United Kingdom (NBP). The "Primary Auction" determines the swap fee at which demand meets the number of auctioned lots. With a view to attracting bidders, DONG pays a separate "compensation" fee of at least 0.33 EUR/MWh to every successful bidder, which may be offset in the swap fee achieved by the auction. The "compensation" fee is intended to "compensate" for any price differences between the GTF and the other hubs. The gas will be divided into ten identical lots of 40 mcm each and auctioned with reference to the swap fee. No single bidder can bid for more

than half of the lots auctioned in one year (Primary and Secondary Auction combined). The Gas Release Programme provides (both for the Primary and Secondary Auction) flexibility to the market with a take-or-pay obligation of 90% of the annual contract quantity and with daily minimum and maximum rates of 50% and 110%, respectively, of the daily contract quantity. It will provide further flexibility to the market by allowing the successful bidders to choose to swap flexibility by providing DONG with the same flexibility terms at the respective re-delivery point as they wish to obtain from DONG at the GTF.

Any quantities not sold in the Primary Auction, will be sold in a Secondary Auction to be held later in the same year. In the Secondary Auction, DONG makes gas available to third parties in Denmark against payment in cash instead of re-delivery of gas. Lots that have not been sold in the Secondary Auction will be carried forward to the Primary Auction of the following year. In the Secondary Auction, a minimum price is to be set as a certain percentage of an indexation reflecting the structure of the indexation of DONG's contracts for purchase of gas from the Danish sector of the North Sea.

In the event that a third party has reason to believe that DONG has not complied with the commitments a mediation procedure will be put in place. The mediation procedure will be overseen by the Monitoring Trustee, who will be entitled, under certain conditions, to appoint additional professionals to assist in the mediation process.

Regarding the assessment of he commitments submitted and the effect of thee proposed commitments on the storage/flexibility market, the main effect of the proposed Commitments on the storage/flexibility market emanates from the divestiture of the storage facility in Lille Torup. In addition, the Gas Release Programme will increase the liquidity of the Danish wholesale market and thereby also provide new sources of flexibility. The divestiture of the larger of the two Danish storage facilities which has a capacity of approximately 400 mcm with no capacity reservations exceeding 1 year, will result in a new entry on the Danish storage/flexibility market. This new constellation will increase competition on this market, whether regarded as a storage market or a wider market for flexibility.

The Danish Transmission System Operator Energinet.dk, however, emphasised that it needs to rely on both Danish storages to physically operate the Danish transmission system. This specific need results from Energinet.dk's statutory obligations regarding pressure, balancing and emergency supply. The necessary access is currently provided under an Interconnection and Operating Balancing Agreement ("IOBA") between Energinet.dk and DONG Storage. As DONG has proposed to conclude an additional IOBA and that the purchaser of the Divestiture Business will also enter into such an agreement, the necessary interconnection and

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[1688] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 D. (2) (b) p 410.

operating balancing between the two Danish storages will be ensured also in the future. Therefore, the storage divestiture will not put at risk the secure operation of the Danish gas transmission system.

A small number of respondents to the market test have indicated that the two Danish storage facilities, Lille Torup and Stenlille, have somewhat different technical characteristics. However, it appears from the market test that Lille Torup is generally perceived as the more flexible and better performing one. The divestiture of the Lille Torup storage facility is generally viewed by market participants as having a positive impact on competition with respect to storage/flexibility in Denmark. In particular the ownership unbundling of the storage infrastructure from DONG's gas sales operations is considered as pro-competitive, including by energy consumer associations. In this context, several respondents suggest that the non-commercial TSO Energinet.dk would be an appropriate purchaser of the Lille Torup storage facility. Some respondents expect that such a divestiture could lead to a regulated third party access regime for storage capacity. It has also been suggested that the ownership by an operator not involved in downstream supply activities would lead to an improvement of the products offered as the new owner would have an increased incentive to be fully responsive to the market's needs. The Commission considers this a strong likelihood.

Although some respondents to the market test advocate a divestiture of both storage facilities, the Commission considers that the ownership unbundling of the larger storage facility is necessary but also sufficient to address the merger-specific competition problems identified in the decision with regard to storage/flexibility.

The storage/flexibility volumes which will be made available to the market by a third party operator following the proposed divestiture, amount to more than 57% of the Danish storage capacity and therefore for a very large part of the overall flexibility available in Denmark. Accordingly, a large number of respondents to the market test considered the divestiture sufficient to compensate for the removal of Elsam's and E2's flexibility from the market. The Commission shares this view. The elimination, as an effect of the proposed concentration, of one flexibility tool independent from DONG (flexible demand) is compensated by the creation, as a result of the storage divestment remedy, of a new, and in general superior, source of flexibility independent from DONG (the Lille Torup storage facility).

A positive impact on flexibility available in Denmark will also emanate from the Gas Release Programme, which thus complements the flexibility offered to the market by the Lille Torup storage facility. It is noted that the degree of flexibility in the auctioned volumes is comparable to the flexibility which current competitors to DONG have access to in Denmark. This available supply contract flexibility has so far clearly reduced these competitors' storage needs. The standard contract terms comprise a considerable flexibility with a take-or-pay obligation of 90% of the annual contracted quantity and a daily minimum quantity of 50% and a daily

maximum quantity of 110%. Competitors wishing to sell the volumes obtained through the Gas Release Programme to end customers in Denmark directly will therefore have much reduced storage needs. The flexibility terms of the Gas Release Programme will allow successful bidders to compete with DONG for all groups of customers with different flexibility requirements. Thereby the customers of these purchasers will also benefit from these additional sources of flexibility. In addition the Gas Release Programme will increase the general liquidity of the Danish wholesale market. The purchasers of the 400 mcm gas released annually will be able to pass on the flexibility terms they receive from DONG not only directly to their end customers but also to intermediate (wholesale) customers of flexibility. As this additional flexibility is provided for 10% of the Danish total market volume, it will have a significant positive effect on the Danish market for storage (or for flexibility).

The divestiture will also have a positive impact on adjacent or downstream markets, in particular the gas wholesale market. The divestiture of one storage facility will enable DONG Trade's competitors to satisfy their flexibility needs without relying on their main competitor. This new ability to acquire storage services which constitute an important and vital input for any gas wholesale (and frequently also retail) operation, independently from DONG will significantly increase the competitiveness of these competitors. The improvement of their competitive situation will be twofold: first, they will no longer need to provide the DONG group with information about their flexibility needs. Companies are usually very uncomfortable about providing such sensitive information to companies linked to their competitors as they are afraid that this information would allow conclusions on their customer profile. Second, and more importantly, DONG's wholesale (and retail) competitors will no longer need to pay for their storage to the DONG group. They will thus no longer have to contribute to the revenues and profits of the DONG group. In this respect, the provision of storage by an operator independent of DONG will contribute to a level playing field between DONG and its competitors.

Both elements of the Commitments, i.e. the storage divestiture and the Gas Release Programme, will also have a positive impact on the Swedish markets. Competition between DONG and the future storage operator of Lille Torup will also benefit Swedish storage customers. The same applies to the effects of the Gas Release Programme.

Regarding the effect of the proposed commitments on the wholesale market for natural gas, the Commission has concluded that the Gas Release Programme offered by DONG, in combination with the storage divestiture, is sufficient to remove all the competition concerns identified by the Commission in relation to the wholesale market. As to the Gas Release Programme, the quantities offered of 400 mcm per year to be swapped or sold via either the primary or the secondary auction make up approximately 10% of Danish demand. These quantities will result in substantial volumes of gas being sold to independent third parties in Denmark. The Gas

Release Programme will be complemented by a customer release clause, which entitles DONG's customers who acquire gas quantities directly in the Gas Release Programme or from suppliers who acquired the corresponding gas quantities in the Gas Release Programme to request a release from their purchase obligations vis-à-vis DONG. The combination of these measures will thereby resolve both competition concerns raised on the gas wholesale market, namely customer foreclosure and removal of potential competition.

An element of specific importance is the customer release provision which provides an incentive for the purchasers of this gas to use it in Denmark, facilitates entry, and addresses the customer foreclosure concern.

Regarding the preference (due to the primary auction) for swaps with players established at other North-Western European hubs, this firstly does not limit the possibility of Danish wholesalers and wholesale customers to gain access to this gas as such international players might well want to ensure Danish "counterparties" to their activities. Secondly it contributes to integrating north-western European hubs with benefits for the development of competition around all of these hubs. A particular advantage for the GTF from a Danish wholesalers' and wholesale customer's perspective is that the results of the auction will make Danish wholesale transactions (also in comparison to other hubs) more transparent.

Regarding the duration of the Gas Release Programme (expiring in 2012) a large number of market participants have qualified this as sufficient for offsetting the harmful effects of the merger on the Danish wholesale market. This can be explained by the fact that there is a certain element of advancing positive "liquidity effects" that in the absence of the merger would likely have taken as long to mature and which, once established might be expected to have some self-regenerating and self propagating effect.

As regards the implementation of the Gas Release Programme, it is important to ensure that all participants are admitted at transparent and non-discriminatory terms and the swap/sale is made under competitive conditions. The provisions governing the auction appear to be sufficiently clear and impartial (and safeguarded by the function of the Monitoring Trustee and the independent third party conducting the auction) as to ensure a successful non-discriminatory conduct of the auction. The market test has confirmed that the annual gas release volume of 400 mcm is considered as sufficient by a large number of respondents. Following the feed-back in the market test, the Commitments have been adapted with respect to the delivery period corresponding to the Gas Year (October-September), except for the lots auctioned in 2006 which, due to technical problems of a timely organisation of the auctions in 2006, are to be delivered in the following two calendar years. The Commitments as amended further take account of a series of well-founded comments made by respondents to the market test.

For these reasons it is concluded that the commitments are sufficient to remedy the competition problems identified on the Danish wholesale market.

Regarding the effect of the proposed commitments on natural gas retail markets and the markets for supplies to industrial customers and decentral CHPs and the raising of entry barriers (vertical problems), the Commission finds that the gas release programme remedies any potential concerns relating to the raising of entry barriers on the market(s) for supplies to industrial customers and decentral CHPs. More specifically, the gas release programme addresses the concern relating to customer foreclosure effect and the attainment of critical size, through the customers release part of the programme, whereby customers representing an annual consumption of up to 400 mcm can be made available for other suppliers. The 400 mcm volume auctioned amounts to 17% of the whole market for supplies to industrial customers and decentral CHPs and is therefore likely to offset any potential negative vertical effects as set out in the competitive assessment.

Any concerns relating to the removal of flexibility of central CHPs as a balancing possibility to the flexibility requirements of suppliers and input foreclosure, are remedied by the flexibility provisions of the gas release programme as well as the divestiture of the Lille Thorup storage facility, which introduces competition between the two Danish storages, eliminates the risk of input foreclosure and thereby facilitates entry.

The Commission therefore concludes that as a result of the Commitments submitted entry barriers will not be higher as compared to the pre-merger situation.

Concerning the elimination of potential competition, the Commission considers that the overall lowering of entry barriers on this market/these markets will have the effect on offsetting the loss of potential competition on this market/these markets.

Regarding the gas release programme this is in particular achieved in two ways. First, the improved access to gas under the gas release programme with the associated flexibility facilitates entry by other potential competitors. Secondly, the customer release mechanism ensures that potential competitors wanting to enter the Danish gas market who have acquired gas through the release programme, will have comparatively easy access to customers.

As regards the market(s) for supplies to small businesses and households and the raising of entry barriers, for the same reason as indicated above regarding the market for supplies to industrial customers and decentral CHPs the Commission finds that the release programme remedies the concerns relating to critical size and liquidity of wholesale gas. The annual volumes of the release programme correspond to 45% of the market(s) for supplies to small businesses and households.

For the same reasons as outlined above for the market(s) for supplies to large business customers and decentral CHPs, the commitments submitted will prevent any raising of entry barriers through the risk of foreclosure of access to storage/flexibility and, potentially, customer foreclosure.

The Commission therefore concludes that as a result of the Commitments submitted entry barriers will even be lowered as compared to the pre-merger situation.

Regarding the elimination of potential competition, the Commission considers that the overall lowering of entry barriers on this market/these markets will have the effect of offsetting the loss of potential competition on this market/these markets.

Regarding the gas release programme this is in particular achieved in two ways.

First, the improved access to gas under the gas release programme with the associated flexibility facilitates entry by other potential competitors. (It is recalled that the competitive assessment identified several other potential entrants whose main problem was access to competitive wholesale gas.) Secondly, the customer release mechanism ensures that potential competitors wanting to enter the Danish gas market who have acquired gas through the release programme will have comparatively easy access to customers.

Thirdly, the remedy submitted on the storage/flexibility market will facilitate entry by introducing competition between the two Danish storages, eliminating the risk of input foreclosure and strengthening overall confidence in non-discriminatory access to storage facilities.

Regarding the overall conclusion on Commitments, for these reasons, the Commission concludes that commitments submitted by DONG on 30 January 2006, and amended on 1 March 2006, are sufficient to remedy the competition problems identified in the assessment of the impact of the notified concentration.

9.34.9 Conclusion

It is concluded that the commitments submitted by the notifying party are sufficient – within the meaning of Art. 8 II of MR2004 – to address the competition concerns raised by the notified operation. Accordingly, subject to compliance with the Commitments submitted by the notifying party, the notified operation should be declared compatible with the common market and the functioning of the EEA Agreement.

The notified operation whereby the undertaking DONG A/S acquires within the meaning of Article 3 I lit. b MR2004, sole control of the undertakings Elsam A/S, Energi E2, Københavns Energi Holding A/S and Frederiksberg Elnet A/S is hereby declared compatible with the common market and the functioning of the EEA Agreement.

9.35 LINDE / BOC CASE IV/M. 4141

On 06/04/2006, the Commission received a notification of a proposed concentration owing to Art. 4 MR2004 by which the undertaking Linde AG (Linde, Germany) acquires within the meaning of Art. 3 I lit. b MR2004 control of the whole of the undertaking The BOC group (BOC, UK) by way of purchase of shares. On 27/04/2006 the Polish office of competition and consumer protection (OCCP) has submitted a request owing to Art. 9 II lit. a MR2004 as a result of which the deadline of the first phase was extended to 06/06/2006. The OCCP took the position that the concentration threatens to significantly affect competition on a number of national markets in Poland, in particular the bulk and cylinder supply of various industrial gases, helium retail supply as well as the supply of calibration mixtures and refrigerants. By letter dated 18/05/2006, the OCCP withdrew its request for referral against the background of remedies which had been submitted by the parties meanwhile and which completely removed the OCCP's concerns.

On 11/05/2006, the parties to the concentration submitted undertakings. The proposed commitments were designed to eliminate the serious doubts identified by the Commission in accordance with Art. 6 II MR2004[1689]. After examination of the notification and in the light of these undertakings, the Commission has concluded that the operation falls within the scope of MR2004 and does not raise serious doubts as to its compatibility with the common market and the EEA Agreement.

9.35.1 The Parties

Both Linde and BOC offer a broad range of gases worldwide to customers in a wide variety of different industries and Linde has recently entered the wholesale market for helium and was competiting aggressively as a maverick[1690]. The relevant gases cover standard industrial gases, such as oxygen, nitrogen and argon; medical gases, such as oxygen for medical use and nitrous oxide; specialty gases, such as various refrigerants and calibration mixtures, and helium. Linde is moreover active in the industrial gases plant construction business and the manufacturing of forklift trucks and warehouse equipment. BOC has furthermore some activities in the logistics sector.

Linde is a publicly-listed company whose shares are traded on all German stock exchanges as well as on the SWX in Zurich. No shareholder has direct or indirect control over Linde.

BOC is a public limited company registered in England. BOC is the parent company of the BOC group of companies and is not controlled by any other company or person.

[1689] q.v. § 40 III GWB; T. Lettl, Kartellrecht (4th ed.) (Munich, Germany, Beck, 2017) § 10 VII 4. p 377.
[1690] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.786, p 717 and marginal note 5.808, p 721.

9.35.2 The Concentration

Linde intends to acquire 100% of BOC's shares. Linde will therefore acquire sole control of BOC. The notified transaction consequently constitutes a concentration within the meaning of Art. 3 I lit. b MR2004.

9.35.3 Community Dimension

The concentration has a community dimension (Art. 1 MR2004).

9.35.4 Competitive Assessment

The businesses of Linde and BOC overlap in the production and distribution of industrial, medical and specialty gases. Linde is moreover active in the engineering and the construction of plants for the production of industrial gases.

The following table summarises the main uses of oxygen, nitrogen, argon, hydrogen, carbon dioxide, acetylene, carbon monoxide and helium:

Gas	**Used in the following industries**
Oxygen	Metallurgy (steel production), chemicals, metalworking cutting and welding), paper (bleaching), glass (melting), electronics, waste water purification, fish farming
Nitrogen	Electronics, chemicals, food (improving shelf life by protecting from oxygen and cryogenic freezing), metalworking (pressing of aluminium parts), building (soil freezing, cooling for the setting of concrete, shielding of prestressing steels against oxidation)
Argon	Metallurgy (steel production), metalworking (shielding of wel d seams against oxidation), electronics (shielding of semicond uctors against impurities), inflation of air bags
Hydrogen	Chemicals (purification), food (edible oil production), glass (grinding)
Carbon Monoxide	Environmental monitoring systems, industrial hygiene gas mix tures, semiconductor fabrication, manufacturing of metal carb onyls, polycarbonate, polyurethane and oxyalcohol.
Carbon Dioxide	Metalworking (shielding of weld seams against oxidation), steel production, chemicals, drinks manufacturing, food (cryogenic freezing), dry ice, waste water purification (neutralisation of alkaline wastes)
Acetylene	Metalworking (cutting and welding), glass (lubrication of mou lds)
Helium	Aerospace, lifting gas for balloons, health care

Regarding medical gases, some gases used for industrial purposes are also used for medical applications.

The following table summarizes the main uses of the five groups of specialty gases:

Gas group	Examples of gases contained in the respective group	Main applications
Noble gases and noble gas mixtures	Krypton, neon, radon, xenon and mixtures	Production of light bulbs (lighting industry), production of excimer lasers (electronics industry)
ESGs	AsH3, BF 3, C2F6, HCl, HBr, SF6, Halocarbon 23, Chlorine, Nitrous Oxide,	used in the semiconductor industry for various specific applications

	Silicone Tetrafluoride	
Refrigerants	Ethylene (C2H4), Ammonia (NH3), Ethylene Calibration gas mixtures (C2H40), Sulfur Hexafluoride (SF6), Carbon Oxide 2 monoxide (CO), Sulphur Dioxide	Cooling agents
Chemicals	Ethylene (C2H4), Ammonia (NH3), Ethylene Calibration gas mixtures (C2H40), Sulfur Hexafluoride (SF6), Carbon Oxide 2 monoxide (CO), Sulphur Dioxide	Various applications in the chemical, biochemical and manufacturing industry
Calibration gas mixtures	Environmental mixtures, special application mixtures, other calibration mixtures	Calibration of instruments and other special applications

Concerning distinct relevant markets per gas, in its previous decisions in the cases M.1641 - Linde/AGA, M.1630 - Air Liquide/BOC and M.3314 Air Liquide/Messer, the Commission took the view that the different individual industrial, medical and specialty gases are generally not interchangeable because of their different chemical and physical properties and therefore each gas constitutes a separate relevant product market.

Concerning the Bulk markets in Poland and the market structure, the table below shows, for 2005, a summary of the market shares of the parties and of the main competitors in Poland for following relevant markets: oxygen, nitrogen, argon (including argon mixtures), hydrogen and carbon dioxide:

Products	Oxygen	Nitrogen	Argon	Hydrogen	CO_2
Linde	30-40%	40-50%	30-40%	10-20%	20-30%
BOC	30-40%	40-50%	10-20%	20-30%	10-20%
Linde + BOC	60-70%	80-90%	40-50%	40-50%	40-50%
Air Liquide	10-20%	0-10%	20-30%	10-20%	0-10%
Air products	< 5%	< 5%	0-10%	0-10%	0-10%
Messer	10-20%	0-10%	20-30%	10-20%	20-30%
Praxair	0%	0%	0%	0%	0%
ZAP	0%	0%	0%	20-30%	10-20%
ACP	0%	0%	0%	0%	10-20%
Others	< 5%	< 5%	< 5%	0%	< 5%

Capacities in Poland 2005:

Gas producer	Oxygen	Nitrogen	Argon
Linde	10-20%	10-20%	0-10%
BOC	50-60%	60-70%	50-60%
Linde + BOC	60-70%	70-80%	60-70%
Air Liquide	30-40%	20-30%	30-40%
Air Products	0%	0%	0%
Messer	0%	0%	0%

Regarding hydrogen and CO2, with respect to CO and hydrogen, the market positions after the transaction will also be fairly high.

Bulk industrial gases: market shares for 2005 in the UK

Products	Oxygen	Nitrogen	Argon	Hydrogen	CO_2
Linde	< 5%	< 5%	< 5%	20—30%	< 5%
BOC	60-70%	60-70%	70-80%	30-40%	20-30%
Linde and BOC	60-70%	60-70%	70-80%	60-70%	20-30%
Air Liquide	0-10%	0-105	< 5%	0-10%	30-40%
Air Products	30-40%	30-40%	20-30%	30-40%	< 5%
Messer	0%	0%	0%	0%	0%
Praxair	0%	0%	0%	0%	0%
Yara	0%	0%	0%	0%	40-50%
Others	0%	0%	0%	0%	< 5%

Regarding production facilities, BOC's strong position in the UK mirrors its position at the level of production facilities. The market position of the parties and of the main competitors are shown below:

Cylinder industrial gases: market shares for 2005 in Poland

Products	Oxygen	Nitrogen	Argon	Hydrogen	CO_2	Acetylene
Linde	40-50%	50-60%	30-40%	20-30%	50-60%	40-50%
BOC	20-30%	10-20%	20-30%	40-50%	20-30%	30-40%
Linde + BOC	60-70%	60-70%	60-70%	60-70%	70-80%	70-80%
Air Liquide	< 5%	< 5%	< 5%	0-10%	< 5%	< 5%
Air Products	0-10%	0-10%	0-10%	0-10%	< 5%	< 5%
Messer	10-20%	10-20%	10-20%	20-30%	10-20%	10-20%
ZA Chorz	0%	0%	0%	0%	0%	0%
Others	0-10%	10-20%	10-205	0-10%	0-10%	0-10%

The high combined market shares that Linde would achieve remain also high if gases for medical applications are assessed separately. The table below indicates the market shares of the various competitors in these markets:

Medical gases in cylinders – Poland 2005

Products	Medical Oxygen	Medical nitrous oxide
Linde	40-50%	40-50%
BOC	30-40%	0-10%
Linde and BOC	70-80%	40-50%
Air Liquide	0-10%	0-10%
Messer	10-20%	10-20%
ZA Chorz	< 5%	40-50%

The table below shows a summary of the market shares of the main players in the UK market:

Cylinder industrial gases: market shares for 2005 in the UK

Products	Oxygen	Nitrogen	Argon	Hydrogen	CO_2	Acetylene
Linde	10-20%	0%	< 5%	0-10%	0-10%	< 5%
BOC	70-80%	50-60%	50-60%	50-60%	40-50%	60-70%
Linde + BOC	80-90%	50-60%	60-70%	60-705	40-50%	70-80%
Air Liquide	0-10%	0-10%	0-10%	0-10%	10-20%	< 5%
Air Products	10-20%	20-30%	20-30%	20-30%	10-20%	20-30%
Energas	0%	0-10%	0%	0%	0-10%	0%
Cyro services	0%	0%	0%	0%	10-20%	0%
Others	< 5%	0-10%	0-10%	0-10%	0-10%	< 5%

Medical gases in cylinders UK - 2005

Products	Medical oxygen	Medical nitrous oxide	Entonox (50% O_2+ 50 % N_20)	Heliox (Helium + O_2 mixtures
Linde	< 5%	10-20%	10-20%	0-10%

BOC	70-80%	60-70%	60-70%	90-100%
Linde + BOC	80—90%	70-80%	80-90%	90-100%
Air products	10-20%	20-30%	10-20%	0%
Others	0-10%	< 5%	< 5%	0%

Regarding filling facilities, BOC's presence is far much stronger and it owns a specified amount of filling plants with a very large geographic coverage. Depending on whether the volumes traded between the wholesalers are included or not, the market participants have slightly different positions:

Worldwide helium wholesale market shares - 2005

	Linde	BOC	combined	Air products	Praxair	Air Liquide
Sales to helium retailers	< 5%	30-40%	30—40%	25-35%	25-35%	0-10%
Sales of helium retailers and to wholesalers	< 5%	40—50%	40-50%	25-35%	20-30%	0-10%

The following capacity shares can be derived:

Worldwide helium capacity shares - 2005

	Linde	BOC	combined	Air Products	Praxair	Air Liquide
Access to helium	< 5%	20-30%	20-30%	30-40%	20—30%	10-20%

Worldwide helium capacity shares (forecast)

	Linde	BOC	combined	Air Products	Praxair	Air Liquide
Access to helium	0-10%	20-30%	30-40%	20-30%	20—30%	10-20%

Regarding non-coordinated effects of the transaction, Linde has recently acquired an own access to helium sources both by long-term agreements and more importantly by its own significant production in the joint venture with Sonatrach.

Regarding Poland and the market shares, on an overall helium retail market (not divided according to cylinder, dewar and tube trailer supply), the parties reach a combined market share of [60-70]% with an overlap of [10-20]% as the following table indicates:

Helium retail market shares – Poland 2005

	Linde	BOC	combined	Air Liquide	Air Products	Messer	Prax air
Poland	10-20%	50-60%	60-70%	0-10%	0-10%	10-20%	0%

The market shares of the different competitors are set out in the following table:

Helium retail market shares – UK 2005

	Linde	BOC	combined	Air Liquide	Air Products	Messer	Praxair
UK	20-30%	50-60%	70-80%	<5%	20-30%	0%	0%

Only Air Products follows with a medium-sized position of [20-30]% market share. Air Liquide has an estimated market share of only [<5]%.

However, BOC is not active on this market. Post-merger, the parties would continue to face effective competition from other strong market players, particularly from Air Liquide, Air Products and Praxair as the following table illustrates:

ESG	Parties' combined market share	Air Liquide	Air products	Praxxair
A5H3	20-30%	20-30%	20-30%	0%
BF3	20-30%	20-30%	30-40%	20-30%
2F6	20-30%	20-30%	20-30%	10-20%
HCl	30-40%	10-20%	20-30%	• • -40%
HBt	30-40%	10-20%	20-30%	30-40%
SF6	30-40%	20-30%	20-30%	20-30%
Halocarbon 23	20-30%	20-30%	30-40%	10-20%
Chlorine	20-30%	20-30%	20-30%	10-20%
Nitrous oxide	30-40%	30-40%	10-20%	20-30%
Silicone Tetrafluoride	30-40%	10-20%	30-40%	30-40%
SDS	70-80%	0%	0%	< 5%

9.35.5 Proposed Remedies

In order to remove the Commission's concerns, the parties have submitted a number of remedies: Linde commits to divest

a. its four helium supply contracts, two with Cryor, Orenburg (Russia) and two with ExxonMobil, Shute Creek (USA) and Linde's shareholdings in two jointly controlled joint ventures with Sonatrach (Helison Joint Ventures), including all contractual rights and obligations of Linde associated with these shareholdings, and the supply contract with one of the Helison Joint Ventures with a combined volume [exceeding 12] million m or, alternatively, as of beginning of 2007 (Alternative A).

b. Linde's two helium supply contracts with Cryor and three of BOC's helium supply contracts, one with Cryor, one with the Polish Oil and Gas company (previously: Krio), Odolanov (Poland) and one with ExxonMobil with a combined volume of [exceeding 12] million m‡ (Alternative B).

According to Linde's proposal, Alternative B would become effective in case that Alternative A fails to be divested within a certain period of time. The reasons for offering this alternative are possible difficulties in receiving Sonatrach's consent to the sale of Linde's shares in the joint-venture.

In addition, Linde later modified this remedy by adding a commitment to divest a sufficient number of cryogenic containers as well as wholesale contracts if required by the purchaser.

Linde commits to divest BOC Gazy Sp z o.o. including its subsidiary Roboproject BOC Sp. z o.o. and, thus, essentially all of BOC's gases business in Poland ("Polish Divested Business"). The Polish Divested Business includes BOC's entire bulk and cylinder supply of standard industrial gases including retail helium. It moreover covers its supply of calibration mixtures and refrigerants in Poland.

In addition, Linde commits to divest Linde Gas UK Limited including its subsidiaries and, thus, essentially all of Linde's gases business in the United Kingdom ("UK Divested Business"). The UK Divested Business includes Linde's entire bulk and cylinder supply of standard industrial gases including retail helium.

Apart from that, Linde commits to divest its customer contracts in the ethylene oxide business of its wholly-owned subsidiary Chemogas N.V. (Belgium) in the UK and in Ireland.

Linde commits to remove structural links between Linde and Air Liquide following from the existing joint ventures between BOC and Air Liquide by severing such joint ventures to the extent that the combined turnover of the severed joint ventures accounts for at least a specified amount of percentages of the combined total turnover of all joint ventures between BOC and Air Liquide. To carry out the commitment, Linde commits to either sell BOC's shareholding or to acquire Air Liquide's shareholding in the respective joint ventures or to dissolve the joint ventures.

Regarding the valuation of the remedies, the remedies remove the serious doubts raised by the transaction. This was largely confirmed by the market test.

Regarding industrial gases, the proposed remedies with respect to the affected national markets in Poland and in the UK eliminate the complete overlap created by the transaction. The serious doubts regarding the various cylinder and bulk markets in these two national market which were raised by the merger will therefore be clearly removed.

Regarding the commitments, moreover, remove the serious doubts resulting from the likelihood of coordinated effects through the division of the industrial gases markets by removing the horizontal overlaps in Poland and in the UK as well as by severing structural links between Linde and Air Liquide. In particular, the divestiture of BOC's complete Polish business will already avoid the creation of a region uniformly dominated by Linde in Eastern Europe and will prevent the increase in geographic symmetry between the leading players Air Liquide and Linde in the EEA.

In addition, the severance of structural links between Air Liquide and Linde removes the additional element, facilitating coordinated effects that would have been brought about by the merger. The market test clearly confirmed that such a remedy would be necessary and effective.

Concerning helium, in the market test, the proposed divestiture of helium supply contracts and shares in the Helison Joint Ventures respectively as described under Alternative A and Alternative B were tested. The market test has shown that the proposed remedies are in principle eligible to remove the serious doubts which are raised by the transaction.

However, two modifications resulted from the market test:

a. Alternative A was overall regarded as too risky. The market was skeptical whether the implementation of this alternative would be feasible against the background of the necessary consent of Sonatrach which was perceived as being difficult to achieve. Moreover, there were some doubts about the investments still necessary to remove the technical problems resulting from the earlier explosion.

Consequently, Alternative B was unanimously considered as being less risky and more effective than Alternative A. In the light of this and in coordination with the US-FTC who had come to the same result in its assessment, the Commission decided that Alternative A should be dropped and the remedy should only contain a commitment as to Alternative B.

b. The market test, moreover, indicated that assets and customer contracts would have to be added to the supply contracts in order to ensure the viability of the remedy. As a consequence, the parties modified the proposed remedy by adding to the divestment a sufficient number of cryogenic containers and wholesale contracts if the purchaser requires.

On the Commission's request, the parties have modified their initial proposal by adding assets and customer contracts if the purchaser requires which are part of the wholesale business in order to ensure the viability of the divestiture. Some market participants had required transfill centres and customer contracts on the retail level in addition. However, the Commission takes the view that assets and contracts originally belonging to the wholesale business completely address the serious doubts raised.

Consequently, the addition of cryogenic tanks and the existing wholesale customer contracts sufficiently ensures the viability of the business. In Europe, all major independent retailers have own transfill centres. An addition of additional assets, such as transfill centres (and the corresponding contracts with end-customers) to the remedy would therefore go beyond the viability of the remedy in the wholesale market.

As described in the competitive assessment, the incentives of a smaller company on the wholesale market largely differ from those of the incumbents. The divestiture to a company which is not one of the large historical players will therefore ensure that the new capacities will remain in the market, that competitive pressure will be exerted with these new quantities and that any additional risk of tacit coordination that was created by the elimination of Linde as a maverick will be removed.

Regarding specialty gases, the proposed remedies eliminate the complete overlap created by the transaction on the affected markets for refrigerants and calibration gas mixtures in Poland. The serious doubts regarding these six markets which were raised by the merger will therefore be clearly removed.

Concerning the UK and Irish markets for ethylene oxide, the parties will divest Linde's customer contracts and will thereby allow a new player to enter into these markets. In view of the response to the market test and in

view of a growing trend towards competitive pressure from geographically neighbouring markets, the serious doubts raised by the merger will be removed by the divestiture of Linde's customer contracts.

As regards the conclusion on the remedies, the Commission considers that the proposed remedies are sufficient to eliminate the serious doubts as to the compatibility of the transaction with the Common Market.

9.35.6 Conclusion

The Commission has concluded that the remedies submitted by the Parties are sufficient to remove the serious doubts raised by the concentration. Accordingly, subject to the full compliance with the commitments submitted by the notifying party, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement. The decision is adopted in application of Article 6 I lit. b and Article 6 II MR2004.

The Commission underlines that the divestment of the UK Divested Business, the Polish Divested Business, the Helium Divested Business, the Ethylene Oxide Divested Business as well as the severance of future structural links between Linde and Air Liquide in Asia as defined in the commitments including the schedules are conditions to the clearance of the proposed transaction. The other incidental provisions constitute obligations as they concern the implementing steps, which are necessary to achieve the sought changes. The detailed text of the commitments is annexed to the decision.

9.36 GAZ DE FRANCE / SUEZ CASE IV/M. 4180

On 10 May 2006, the Commission received prior notification of a concentration, in accordance with Article 4 MR2004, whereby the Gaz de France group ('GdF', France) would merge, within the meaning of Article 3 I lit. a MR2004, with the Suez group ('Suez', France) via an exchange of shares[1691]. After a preliminary examination of the notification, the Commission considered that the transaction as notified fell under MR2004 and raised serious doubts as to its compatibility with the common market and the operation of the EEA Agreement[1692]. National markets for natural gas and power in Belgium and France are applicable[1693].

9.36.1 The Parties

GdF is an energy group present across the gas chain and related energy services and is active in exploration, production, transport, storage, distribution and natural gas sales, mainly in France, but also in Belgium, Germany, the United Kingdom, Luxembourg, Hungary and Spain. In Belgium, Gaz de France, along with

[1691] R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 23 10. (A) (ii) p 1021; P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (3) (c) p 405.
[1692] R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 21 10. (C) (iv) p. 929; P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (3) (c) p 405.
[1693] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. III. 1. c) (2) (c) p 381.

Centrica, exercises joint control over SPE, which is present in the Belgian electricity and natural gas markets and provides energy services.

GdF was transformed from a state-funded industrial and commercial establishment into a public limited liability company by a law adopted on 9 August 2004. Gaz de France S.A. is thus under the exclusive control of the French State.

The Suez group is active in the utility industry and utility services. The group is organised around four operational branches into two spheres of activity, energy and the environment. Suez's main energy subsidiaries are Electrabel (electricity and gas), Distrigaz (gas), Fluxys (transport and storage of gas), Elyo (renamed Suez Energy Services in January 2006), Fabricom, GTI, Axima and Tractebel Engineering in the energy service sector. According to the information provided by the parties, Suez Energie Europe holds a minority stake of 27.5% in Elia, manager of the electricity transmission network in Belgium.

9.36.2 The Operation

By means of the notified merger, GdF will absorb Suez, which will cease to exist as a legal entity. The merger proposal will be submitted for approval by a qualified majority at the two groups' extraordinary general meetings and will not require the launching of a public offer on Suez's shares. The Boards of Directors of both groups have already approved the proposed merger, Suez on 25 February 2006 and GdF on 26 February 2006. The merger will take place by means of a one-for-one exchange of shares.

The merger can only take place once the French Parliament amends the law of 9 August 2004, in order to reduce the State's stake in GdF's capital to less than 50%.

9.36.3 Competition Analysis

Regarding competition concerns raised by the merger, the Commission considers that the merger would significantly impede effective competition in four areas: gas in Belgium, gas in France, electricity in Belgium and district heating in France[1694].

9.36.4 Commitments Offered by the Parties

Commitments offered by the parties In order to remedy the competition concerns identified by the Commission, on 20 September 2006 the parties submitted a package of commitments. Most answers to the market test showed that the vast majority of the commitments offered by the parties were not sufficient to remove the competition concerns raised by the notified operation. After being informed by the Commission on the results of the market test, the parties modified their initial commitments on 13 October 2006. The commitments proposed

on 13 October 2006. The commitments offered by the parties consist of five main elements: — the divestiture of Suez Group's shareholding in Distrigaz[1695]. In this context, the merged entity may request Distrigaz to supply it with gas for the needs of its electricity generating plants and of ECS's customers. However, since the duration of the related contracts is several years (from the date of the divestiture of Distrigaz) for most of the volumes concerned, those supply volumes will be limited and decreasing in time, — the divestiture of Gaz de France's 25,5 % shareholding in SPE[1696], — the relinquishment of any control — de facto or de jure — over Fluxys SA[1697], which will be the transmission operator of all regulated gas infrastructures in Belgium (transport/transit, storage, Zeebrugge LNG terminal) after the reorganisation of its activities[1698]. In this scheme, the management committee of Fluxys SA, which will not be controlled by the parties, will be the exclusive decision maker as regards the global investment programmes concerning the regulated gas infrastructures, a package of complementary measures concerning gas infrastructures in Belgium and in France, — the divestiture of Cofathec Coriance plus Cofathec Service's heating networks, excluding Cofathec Coriance's holding in Climespace and SESAS.

Regarding the assessment of these commitments by the Commission. on the basis of its assessment of the information provided by the investigation and, in particular, of the results of the previous consultation of the market operators, the Commission considers that the modified commitments proposed by the parties on 13 October 2006 are clear-cut and sufficient to remove the competition concerns raised by the notified operation, in Belgium and in France, without the need to run a further market test, for the following reasons[1699]: — the divestitures of Distrigaz, of GdF's shareholding in SPE, of Cofathec Coriance and of Cofathec Service's heating networks remove the overlaps between the parties in all markets previously affected by competition concerns. These divestitures also remove vertical foreclosure problems between gas and electricity markets, — the loss of control by the parties over Fluxys SA and the remedies related to the gas infrastructures in Belgium and in France are sufficient to lower the barriers to entry to a degree that would allow effective competition to develop.

[1694] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (3) (c) p 406; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 93, p 603.
[1695] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (3) (c) p 406; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 177, p 641.
[1696] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (3) (c) p 406; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 177, p 641.
[1697] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (3) (c) p 406; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 177, p 641.
[1698] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 179, p 641.
[1699] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (3) (c) p 406.

9.36.5 Conclusion

The merger as notified would significantly impede competition in a number of markets. The modified commitments offered by the parties on 13 October 2006 are sufficient to remove the competition concerns identified. Therefore, and subject to the parties' full compliance with the commitments made on 13 October 2006 and repeated on 6 November 2006, the Decision concludes that the merger is compatible with the common market. The present Commission Decision therefore declares the notified operation compatible with the common market and the functioning of the EEA Agreement pursuant to Article 8 II MR2004. The French government retains a golden share in GdF[1700].

9.37 STATOILHYDRO / CONOCOPHILLIPS CASE IV/M. 4919

9.37.1 Introduction

On 14 March 2008, the Commission received a notification pursuant to Article 4 MR2004 of a proposed concentration by which the undertaking StatoilHydro ASA ("SH", Norway) acquires within the meaning of Article 3 I lit. b of MR2004 the Scandinavian petroleum businesses of ConocoPhillips Company ("ConocoPhillips", United States of America), namely ConocoPhillips Denmark APS ("JET Denmark"), ConocoPhillips Nordic AB ("JET Sweden") and ConocoPhillips JET AS ("JET Norway"). JET Denmark will be acquired by Statoil A/S (Denmark), JET Sweden by Svenska Statoil AB (Sweden) and JET Norway by Statoil Norway AS (Norway). SH and JET Scandinavia will be referred together as "the Parties" in this Decision. After examination of the notification, the Commission concluded on 13 May 2008 that the notified operation fell within the scope of the Merger Regulation and that it raised serious doubts as to its compatibility with the common market and the EEA Agreement. The Commission therefore initiated proceedings pursuant to Article 6 I lit. c MR2004.

9.37.2 The Parties

SH is an integrated oil and gas company active in the exploration and production of crude oil and natural gas (mainly in Norway) and refining and retail and non-retail sales of fuels and other oil derivatives. SH was created in 2007 when Statoil ASA acquired Norwegian oil and gas company Norsk Hydro ASA.

SH operates retail motor fuel outlets in Denmark, Norway and Sweden under the "Statoil" brand.

In addition, the company operates retail motor fuel outlets in Sweden under the "Hydro" brand. JET Scandinavia operates retail motor fuel outlets in Denmark, Norway and Sweden under the "JET" brand. JET Sweden also

[1700] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (3) (c) p 406.

owns storage facilities for refined petroleum, one of which is dedicated to supplying JET Norway's retail network.

9.37.3 Concentration

Through the proposed transaction, SH will acquire sole control over JET Scandinavia. The proposed transaction therefore constitutes a concentration within the meaning of Article 3 I lit. b of MR2004.

9.37.4 Community Dimension

The concentration has a community dimension (Art. 1 MR2004).

9.37.5 Relevant Markets

Regarding the introduction**,** SH and JET Scandinavia are both active in the markets for retail sales of motor fuel. SH operates fuel station networks mainly under the "Statoil" brand in Scandinavia. JET Scandinavia operates fuel station networks under the "JET" brand in Scandinavia.

9.37.6 Competitive Assessment

As regards the introduction, the Commission has investigated the impact of the proposed concentration on competition in the retail motor fuels markets in Denmark, Sweden and Norway respectively, that is to say the markets in which JET Scandinavia is active. Regarding retail sales of motor fuels in Denmark and the market conditions and the market shares, the respective market shares (by volume) of the main suppliers in the Danish market for retail sales of motor fuels are set out in table below.

Retail sales of motor fuels – Denmark (incl. Petrol and diesel	2005	2006	2007
OK	20-30%	20-30%	20-30%
Shell	20-30%	20-30%	20-30%
StatoilHydro	10-20%	10-20%	10-20%
YX Energi	10-20%	10-20%	10-20%
Q8	10-20%	10-20%	10-20%
Jet	5-10%	5-10%	5-10%
Others	0-5%	0-5%	0-5%
StatoilHydrojet	20-30%	20-30%	20-30%

Since Statoil gained control over Hydro only in October 2007, the market shares of the Statoil and Hydro networks are listed separately.

Retail sales of motor fuels - Sweden (incl. Petrol and diesel)	2005	2006	2007
OK-Q8	20-30%	20-30%	20-30%
Statoil	20-30%	20-30%	20-30%
Shell	10—20%	10—20%	10—20%
Preem	5-10%	5-10%	10-20%

Hydro	5-10%	5-10%	5-10%
Tanka	5-10%	5-10%	5-10%
Jet Sweden	10-20%	10-20%	10-20%
Others	0-5%	0-5%	0-5%
StatoilHydro + Jet	40-50%	40-50%	40-50%
Total	100%	100%	100%

If these closures and divestitures were to be taken into account, the combined market share of Statoil and Hydro would be approximately [20-30]*% and SH estimates that 14 [6,0006,500]* 100.0 [6,000-6,500]* 100.0. As regards unilateral effects, the Commission must investigate the extent to which the removal of JET as an independent player in the Norwegian market for retail sales of motor fuels will significantly impede effective competition in that market.

Retail sales of motor fuels – Norway (incl. Petrol and diesel)	2005	2006	2007
StatoilHydro	20-30%	20-30%	30-40%
Shell	20-30%	20-30%	20-30%
Esso	20-30%	20-30%	20-30%
YX Energi	10-20%	10-20%	10-20%
Jet Norway	0-5%	0-5%	0-5%
Others	0-5%	0-5%	0-5%
StatoilHydro + Jet	30-40%	30-40%	30-40%
Total	100%	100%	100%

9.37.7 Commitments Concerning the Swedish and the Norwegian Markets for Retail Sales of Motor Fuels

On 25 July 2008, SH submitted a proposal for a set of commitments intended to remove the Commission's "serious doubts" about the compatibility of the proposed transaction with the common market.

Regarding the Description of the proposed commitments concerning Sweden and the remedy network, SH proposes to divest a network consisting of 158 unmanned stations, including 118 of the most efficient stations currently operated by Norsk Hydro (under the "Hydro" or the "Uno-X" brands) and 40 fuel stations currently operated by JET Sweden ("the remedy network").

The JET brand is not being acquired by SH and will therefore not form part of the remedy network. However, SH and ConocoPhillips will agree reasonable arrangements in respect of site branding (transitional licence for the "JET" trademark, brand and trade dress) and the use of the JET card for a maximum period of several years from the date of the completion of the proposed transaction.

The 158 sites which SH proposes to divest are either owned by Norsk Hydro or JET Sweden or leased from the dealer or a third party. The fuel equipment on site, such as tanks, pumps, signage and payment units, are all owned by SH or JET Sweden.

After replacement of the JET brand, the Swedish Divestment Business is expected to reach a total volume of [380-410]* million litres and an average throughput of approximately [2.5-3]* million litres per site per year.

Concerning Support functions, all other functions are support functions, which can be outsourced. These support functions include logistics, maintenance, IT, Information Services and Telecommunications and Finance. These services will be provided either through third-party outsourcing arrangements (logistics and maintenance) or through transitional support arrangements with the existing Hydro organisation (with the appropriate ring-fencing mechanisms).

As regards supply and storage, if requested by the purchaser, SH will offer to supply petrol 95, 98 octane petrol ("petrol 98") and diesel to the Swedish Divestment Business on competitive normal commercial terms until 31 December 2013. Supply will be on an "ex rack" basis at SH depots and third party depots at which SH presently has throughput or exchange agreements.

Further, SH will permit the remedy network to use several SH depots for petrol 95, Petrol 98 and diesel on a throughput basis on competitive normal commercial terms until 31 December 2013. SH will also use reasonable commercial endeavours to extend agreements with its own suppliers of E85 to the remedy network.

Provided and to the extent that SH will supply the remedy network with fuel, SH will also offer to provide the remedy network , on competitive normal commercial terms, arrangements to meet the latter's compulsory storage obligations under Swedish law until 31 December 2011, if so required.

Finally, SH will offer the Purchaser of the remedy network the option to buy JET Sweden's 50% shareholding in Norrköping Depå AB, a joint venture between SH and JET Sweden, which owns and operates the storage depots in Gävle and Norrköping.

Regarding transport, the distribution of fuel products from terminals to the stations, including the necessary transport planning, will be fully outsourced to external suppliers. Full outsourcing is made possible by giving the logistics supplier access to the station's automatic tank gauging data, allowing for deliveries as and when required. This, or similar, setups are already in widespread use in the industry.

Regarding the remedy network, SH proposes to divest JET Norway in its entirety ("the remedy network"). SH will acquire, but not exercise control over JET Norway and will resell that company with appropriate transitional arrangements.

The JET brand is not being acquired by SH and will therefore not form part of the remedy network. However, SH and ConocoPhillips will agree reasonable arrangements in respect of site branding (transitional licence for the "JET" trademark, brand and trade dress) and the use of the JET card for a maximum period of two years from the date of the completion of the proposed concentration.

The remedy network consists of 40 automated stations in south east Norway, currently operated under the "JET" brand. All the stations are directly operated by JET Norway. JET Norway's 40 sites are either owned by it or leased from third parties.

JET Norway is managed from JET Scandinavia's Stockholm office, with administrative support provided from both its Copenhagen and Stockholm offices.

Prior to Closing of the Sale of the remedy network to the purchaser, these functions will continue to be provided by JET Scandinavia from its offices in Copenhagen and/or Stockholm. At closing, they will be assumed by the purchaser, subject to possible short-term transitional arrangements.

Concerning supply and storage, SH will offer the remedy network the option to buy petrol 95 and diesel on an "ex-rack" basis from SH on competitive normal commercial terms and conditions until 31 December 2011, including if applicable for supply to replacements of any closed JET stations in the same geographic area. The ex-rack sale and supply will be performed at SH's depot in Oslo (with transfer of ownership there).

In addition, SH will offer the remedy network, including replacements of any closed stations in the same geographic area, an option to buy up to 10,000 m3 per year of petrol 95 on an "ex-rack" basis from SH on competitive normal commercial terms for delivery at the ExxonMobil depots at Tønsberg (Slagen) and Fredrikstad until 31 December 2011.

Finally, SH will offer the purchaser of the remedy network the option to buy the Strömstad depot in Sweden, which is currently used by JET Norway but owned and operated by JET Sweden. Concerning transport, the distribution of fuel products to the JET Norway stations, including the necessary transport planning, is fully outsourced to external trucking companies. JET Norway's contracts with external trucking companies will be transferred to the purchaser of the remedy network.

Concerning the result of the market test and assessment for Sweden, the proportion of respondents considering that the proposed remedy would remove the competition concerns and the proportion of those considering the contrary was balanced.

The main doubts as regards the viability of the remedy network expressed by the competitors refer to the global and the average throughputs of the newly created network. In addition, one competitor considered that Hydro stations to be divested were badly located.

For the following reasons, the Commission does not find those concerns well grounded.

Firstly, the remedy network will have the third highest average throughput, after SH and Tanka, in the Swedish market. Moreover, the remedy network has nationwide coverage and is well represented in the most populated areas.

Secondly, the market test confirms that the remedy network will have the "critical mass" necessary to cover overhead costs and be an efficient competitor.

Thirdly, the remedy network will be present with at least one station in 80 of the 109 clusters in which JET Sweden is present. As regards the remaining 29 clusters, at least 3 competitors will be present within a 5 minute driving time of each Statoil station in all but 5 clusters. The unresolved overlaps at this very local level are regarded as de minimis in relation to the overall size of the remedy network.

Finally, several respondents expressed an interest in acquiring the network in Sweden.

In the light of the above, it is concluded that the proposed remedies will remove the Commission's serious doubts concerning the proposed concentration in Sweden.

Regarding the result of the market test and assessment for Norway, the overwhelming majority of competitors considered that the divestiture of JET Norway would establish a viable competitor and remove the competition concerns expressed by the Commission.

The purchaser of the remedy network will have an incentive to put a competitive constraint on SH and the other three incumbents, since the purchaser must not have had a market share of more than 10% of the Norwegian market for the retail sale of motor fuels in 2007. This provision will prevent any of the other three incumbents from acquiring the Norwegian Divested Business.

Regarding the Conclusion, in the light of the above, it is concluded that the proposed remedies will remove the Commission's serious doubts concerning the proposed concentration in Norway.

9.37.8 Conclusion

The remedies submitted by SH are sufficient to remove the serious doubts raised by the proposed concentration. Accordingly, subject to compliance with the commitments submitted by SH, the notified operation should be declared compatible with the common market and with the EEA Agreement. The decision is adopted in application of Article 8 II of the MR2004.

The decision should be subject to conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission. The conditions should cover commitments relating to the divestiture itself, whereas the obligations should cover commitments related to the divestiture, such as investments in the divestment business before it is divested and the monitoring mechanism.

9.38 GALP ENERGIA / EXXON MOBIL IBERIA CASE IV/M. 5005

On 12 September 2008, the Commission received a notification of a proposed concentration by which the undertaking Galp Energia, SGPS, S.A. ("Galp Energia", Portugal) belonging to the Galp Energia group ("GALP", Portugal) and controlled by ENI S.p.A. ("ENI", Italy), Amorim Energia B.V. ("Amorim", Portugal) and Caixa Geral de Depositos S.A. ("CGD" Portugal), acquires control of the whole of the undertakings Esso Portuguesa Lda. (Portugal), a wholly owned subsidiary of ExxonMobil Portugal ("ExxonMobil Portugal"), Esso Española S.L. ("ESSO Spain") and a part of ExxonMobil Petroleum & Chemical ("EMPC", Belgium), all of them wholly owned subsidiaries of ExxonMobil Corporation ("ExxonMobil", US), by way of purchase of shares.

9.38.1 The Parties and the Operation

The Galp Energia group ("GALP", also referred to as "the notifying party") is a vertically integrated energy company active in the markets for exploration, production and marketing of oil and petroleum products (gasoline, diesel, fuel oil, LPG, jet fuel and bitumen). Furthermore, GALP is present in supply, transport, storage and distribution of natural gas as well as in the market for electricity cogeneration. In 2008, GALP acquired Agip España as well as its 100% subsidiary, Agip Portugal Combustiveis S.A., active in the wholesale and retail sales of refined oil products in Spain and Portugal.

GALP is jointly controlled by ENI, Amorim and CGD. ENI is a vertically integrated energy company. Amorim is indirectly controlled by Mr. Americo Amorim, whose business portfolio does not include any further stakes in the energy sector. CGD is a financial institution, a bank owned by the Portuguese state. CGD is active in retail and corporate banking services, investment banking and asset management.

ExxonMobil Corporation is active in exploration, production and sale of crude oil and natural gas, refining and marketing of petroleum products and power generation.

ExxonMobil Portugal is an affiliate of the Exxon Mobil Corporation and is the sole shareholder of Esso Portuguesa Lda. Esso Portuguesa operates in the supply of petroleum products in Portugal (including retail and non-retail motor fuels, LPG and aviation fuels). Esso Spain is an affiliate of the Exxon Mobil Corporation active in the market of retail fuel sales and aviation fuel. EMPC is an affiliate of the ExxonMobil Group. Its lubricants and specialties' businesses in Spain and Portugal include the marketing and sale of finished lubricants, bitumen, base oils and specialties products.

The envisaged transaction consists of the acquisition by Galp Energia of the entire share capital of ExxonMobil Portugal and Esso Spain. Furthermore, Galp Energia intends to acquire certain assets of lubricants and specialties' business of EMPC in Portugal and Spain. It represents a concentration within the meaning of Article 3 I lit. b of MR2004.

9.38.2 Community Dimension

The concentration has a community dimension (Art. 1 MR2004).

9.38.3 Relevant Markets

Regarding product markets, at the upstream level, motor fuel retailers obtain their supplies from different sources. Integrated companies, such as GALP, get their supplies from their own crude oil refining operations.

As regards non-retail sales of gasoline and diesel, with regard to non-retail sales of motor fuels in Portugal, the parties' and their competitors' estimated sales (in volume) and market shares are set out below.

Non retail sales Diesel 2005-2007	2005	2006	2007
Galp	40-50%	40-50%	30-40%
Exxon	0-5%	0-5%	0-5%
BP	10-20%	10-20%	20-30%
Repsol	20-30%	20-30%	20-30%
Cepsa	5-10%	5-10%	5-10%
Total	0-5%	0-5%	0-5%
Agip	0-5%	0-5%	0-5%
Others	5-10%	5-10%	0-5%
Total	100%	100%	100%

Non retail sales Gasoline 2005-2007	2005	2006	2007
Galp	30-40%	30-40%	20-30%
Exxon	0-5%	0-5%	0-5%
BP	30-40%	20-30%	20-30%
Repsol	10-20%	10-20%	20-30%
Cepsa	5-10%	5-10%	5-10%
Total	0-5%	0-5%	0-5%
Agip	0-5%	0-5%	0-5%
Others	0-5%	5-10%	10-20%
Total	100%	100%	100%

The parties' combined market share for diesel would be [40-50]% (GALP: [30-40]%, Agip: [0-5]%; ExxonMobil: [0-5]%), which is almost twice as high as the market share of the second largest competitor.

Concerning LPG (bulk and bottles) *w*ith regard to LPG in Portugal, the parties' and their competitors' estimated sales (in volume) and market shares are set out below.

Sales LPG 2005-2007	2005	2006	2007
Galp	40-50%	40-50%	40-50%
Exxon	5-10%	5-10%	5-10%
Repsol	10-20%	20-30%	20—30%
BP	20-30%	20-30%	20-30%
Others	10-20%	5-10%	5-10%

Based on the foregoing, the Commission has serious doubts about the proposed transaction's compatibility with the common market with regard to the Portuguese LPG markets.

9.38.4 Proposed Remedies

Regarding the description and in order to remove the Commission's concerns, the notifying party has submitted a number of remedies:

GALP commits to divest all tangible and intangible assets related to Esso Portuguesa's (i) Trafaria site land property; (ii) Trafaria LPG bottling plant (iii) LPG bulk and bottling businesses; (iv) Trafaria lubricants blending plant; (v) Trafaria LPG, gasoline and diesel terminal; (vi) Trafaria LPG, gasoline and diesel storage tanks; (vii) the supply of products and services to the Trafaria site; (viii) the commercial contracts for the supply of fuel from Trafaria.

In addition, GALP commits to divest JV shares ([…]% of Esso Portuguesa's shares in the Lisbon and Faro airport and […]% of Esso Portuguesa's shares in the Porto airport JV, including all rights and obligations therein; (x) into plane activities, including Esso Portuguesa's three airports assets (trucks and others) and jet fuel customers, and, as regards these previously referred airport assets: all operational permits and licenses; all personnel (operational staff and facility managers); product and raw material stocks.

Concerning the evaluation of their remedies, the remedies remove the serious doubts raised by the transaction. This was largely confirmed by the market test.

Regarding LPG, the proposed remedies with respect to the affected national market in Portugal completely eliminate the overlap in LPG bottles and most of the overlap in LPG bulk created by the transaction. As noted above, the notifying party has offered to divest an import and storage facility as well as a bottling plant. However, under the proposed remedy they retain a part of the bulk LPG business, namely the piped LPG operations of ExxonMobil, including the related customer base. In the market test some competitors pointed out that this exclusion could undermine the viability of the LPG business to be divested as the piped LPG business is characterized by far greater profitability and a stable customer base. Furthermore, these competitors contend that GALP would strengthen its already dominant position on the LPG market.

These concerns are however not sustainable. As regards the piped LPG business, the notifying party estimates that GALP and ExxonMobil supply around [20-30]% and [5-10]% respectively of piped LPG in Portugal. They estimate that competitors GASCAN and DIGAL each hold a share of around [20-30]% in this market and several further competitors exist with market shares under 5%. Therefore, even if piped LPG would be treated as a separate market from bulk LPG, there would be no competition concerns.

Furthermore, according to GALP, piped LPG amounts to 5% of total Portuguese LPG volumes sold, [10-20] % of volumes sold from the Trafaria plant and [10-20]% of total Portuguese LPG sales in value. Therefore, if piped

LPG is considered as a part of bulk LPG post-transaction, the combined market shares in LPG bulk would remain below [40-50]% with a very small overlap.

The notifying party has also clarified that the divested activities in LPG, i.e. bottles and bulk, have viable positive margins (both gross and EBIT margins). Therefore, given that piped LPG accounts for at most [10-20]% of the sales of the divested business and that all the divested activities are profitable, the Commission concludes that the divested LPG business is viable without the piped LPG activity and the divestiture removes the serious doubts identified in the Portuguese LPG market.

Concerning. Lubricants, GALP's remedy proposal includes assets relating to a lubricants' blending plant and a storage facility that is situated at the Trafaria Terminal, together with the LPG assets.

The remedy stipulates that GALP would not enter into an asset sale agreement for the sale and purchase of assets referring to the sales of lubricants in Portugal as originally intended with ExxonMobil, where GALP would have become a distributor for ExxonMobil's lubricant products. As a result, the customers and respective contracts for the supply of lubricants would not be transferred to GALP and ExxonMobil would continue executing the contracts still in force. As a consequence, ExxonMobil's customers may be freely approached by any operator in the market and such operators, other than GALP, would have an opportunity to seek a distribution agreement with ExxonMobil. Therefore, the transaction would not result in any accretion of GALP's market share in lubricants and as a result any serious doubts would be clearly removed.

Concerning non-retail sales of diesel, the notifying party's remedy proposal includes assets relating to the import and storage facility for motor fuels in Trafaria.

The notifying party clarified that most of the sales from the Trafaria Terminal are made either on a spot basis or on an internal basis to ExxonMobil retail sites. There exist only two customer supply contracts linked to Trafaria directly and the notifying party undertook further to divest these contracts. In light of this, the Commission concludes that any serious doubts in the Portuguese market for non-retail sales of diesel will be removed.

Regarding aviation fuels, the notifying party proposed to divest Esso Portuguesa's shareholdings in the joint ventures of Lisbon, Faro and Porto airports and all the other tangible and intangible assets belonging to ExxonMobil in these three airports. Excluded from this divestiture are 50% of Esso Portuguesa's share in Porto's joint venture and all the ExxonMobil assets and interests linked to the airports of Ponta Delgada and Santa Maria. Certain respondents contended that the whole Esso Portuguesa's aviation business should be divested as in light of GALP's monopoly at the upstream level of ex-refinery sales of aviation fuel in Portugal, GALP's influence on infrastructure related to the down-stream into-plane operations would raise competitive concerns.

As regards the two other airports, i.e. Ponta Delgada and Santa Maria, it must be noted that for the time being GALP is not the leading or dominant player and that, post-transaction, no dominant position would be created. In the case of these airports, vertical concerns are unlikely to arise as they are far outside the mainland of Portugal and GALP has no refineries close to them. This is well illustrated in the case of Ponta Delgada where the key upstream supplier is actually GALP's competitor.

With respect to the joint venture shareholding in the Porto airport, the remedy includes the necessary operational licences to operate the into-plane business at Porto airport and thus ensures that the divested business is viable. Moreover, it allows for a new entrant to operate competitively and quickly gain customers. The market for into-plane operations is characterised by high flexibility of customers who can easily switch partially or totally to another supplier as the supply agreements are of a limited duration (generally 1-year tenders) and foresee no exclusivity or minimal requirement clauses. Into-plane markets are bidding markets and airlines are sophisticated buyers exerting considerable bargaining power. A divestiture of a specified shareholding in the Porto airport JV is sufficient to resolve all identified competition concerns in this market as there is no connection between volumes supplied to customers and the share in the JV. The notifying party submits that JV agreements can in fact be seen as co-ownership contracts, according to which each co-owner may deliver jet fuel into the common facilities and extract a similar volume in order to supply its own customers (the barter account rule). Thus, a minority shareholder can utilise the storage capacity to a greater extent than its actual shareholding in the JV and therefore could gain a higher market share.

Furthermore, any shareholder can at all times enter into throughput agreements with third parties, who would deliver jet fuel into the common facilities, ensuring that end-consumers' supply requirements are always met. In addition to this, a shareholder cannot be prevented by the remaining shareholders from performing further investments that it considers necessary to operate in the airport. This shareholder would be then the sole beneficiary of such investments. Lastly, the JV agreements remain in force and operational until all shareholders unanimously agree to terminate them. Thus, GALP's minority shareholding in the JV cannot prevent other players from successfully operating in the market or result in weakening or dismantling of the joint venture.

In light of the above, the Commission concludes the aviation business to be divested is viable and that the proposed divestiture removes serious doubts identified in the Portuguese airports.

9.38.5 Conditions and Obligations

The Commitments under section B and the corresponding schedule of the attached Commitment texts constitute conditions of the decision, as only through full compliance therewith (subject to any change pursuant to the

review clause), can the structural change on the relevant markets be achieved. The remaining commitments constitute obligations, as they concern the implementing steps which are necessary to achieve the sought structural change.

9.38.6 Conclusion

The Commission has concluded that the remedies submitted by the notifying party are sufficient to remove the serious doubts raised by the concentration. Accordingly, subject to the full compliance with the commitments submitted by the notifying party, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement. This decision is adopted in application of Article 6 I Iit. b and Article 6 II of MR2004.

9.39 EDF / BRITISH ENERGY CASE IV/M. 5224

On 3 November 2008 the Commission received a notification of a proposed concentration within the meaning of Article 4 MR2004 by which EdF S.A ("EdF") through a 100% owned subsidiary, Lake Acquisitions Ltd ("Lake") proposes to acquire sole control of British Energy ("BE") by way of a public offer to purchase the entire issued share capital, including shares which the UK state is entitled to subscribe, and will subscribe, prior to implementation of the offer[1701].

In a transaction that is legally separate from the notified concentration, EdF has concluded a non-legally binding Memorandum of Understanding with Centrica, one of the other large energy companies in the UK, to sell on 25% of BE, should its bid be successful. Centrica launched a rights issue on 31 October to raise the funds to pay for its part of BE. This potential transaction has not been notified to the European Commission and as such has not been taken into account in this decision.

9.39.1 The Parties and the Operation

Electricité de France (EdF) is a company incorporated under the laws of France.

Previously wholly owned and now majority owned by the French state, since 2005 it has been listed on the Euronext market in Paris. Active globally, EdF and its subsidiaries ("EdF Group") are active in the generation and wholesale trading of electricity and in the transmission, distribution and retail supply of electricity to all groups of customers. It is also active in the provision of other electricity-related services in France and other countries.

BE is a public company limited by shares, incorporated under the laws of Scotland and listed on the London Stock Exchange. Active only within Great Britain, it operates on the UK markets for both generation and wholesale trading of electricity and retail supply of electricity to industrial and commercial customers. BE is

35.6% owned by the UK Government and, following substantial State aid in 2004, it is subject to commitments until 2010.

In relation to the 2004 State Aid decision, the Commission has not identified any State Aid problem with respect to the sale process itself. It has neither identified risks that the 2004 decision may be circumvented or no longer complied with.

The proposed transaction concerns the acquisition of sole control of BE by EdF. EdF have made a public offer, via Lake, to purchase the entire issued share capital of BE. As a consequence, the transaction constitutes a concentration within the meaning of Article 3 I lit. b MR2004.

9.39.2 Community Dimension

The transaction has a community dimension (Art. 1 MR2004).

9.39.3 Competitve Assessment

The proposed transaction as originally notified raises serious doubts as to its compatibility with the common market as regards i) the wholesale electricity market (specifically the potential for the new entity to both withdraw capacity in order to benefit from raised prices and change commercial strategy as regards Industrial and Commercial Customers for the combined entity, leading to a reduction in liquidity),

ii) the high concentration in the ownership of sites most likely to be suitable for a first wave of new nuclear build and iii) the potential for the combined entity's holding of three National Grid connection agreements in relation to Hinkley Point, which it may not use fully, to act as a barrier to entry for other competitors in the relevant region.

9.39.4 Remedies

Regarding the procedure and in order to address the serious doubts as to the compatibility of the transaction, as initially notified, with the common market, identified by the Commission, EdF submitted on 3 December 2008 a remedy package consisting in a) the unconditional divestment of the Eggborough Power Plant and an auction of base load electricity, b) the unconditional divestment of a site at either Heysham or Dungeness and c) the termination of one of the combined entity's grid connections at Hinkley Point[1702]. The Commission carried out an extensive market test among the parties' competitors and customers to assess the effectiveness of the remedy package to remove the competition concerns identified. With a view to incorporating comments and suggestions expressed by market players as regards the first remedy package, EdF submitted on 18 December 2008 a revised remedy package comprising i) the divestment of both the Eggborough and Sutton Bridge power

[1701] R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 23 10. (A) (ii), p 1021.
[1702] C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 12 marginal note 12.119, p 1073.

plants, the latter subject initially to a specified year tolling agreement with a third party, ii) a commitment to trade [25-35] TWh externally over the course of 4 years as either structured trades or on the OTC market, iii) the unconditional divestment of either Heysham or Dungeness, as the purchaser chooses and iv) the termination of one of three National Grid connection agreements it holds in relation to Hinkley Point[1703].

The Commission has assessed the improved remedy package and has concluded that it is sufficient to remove the identified serious doubts. The Commission therefore concludes that the remedy package, as revised on 18 December 2008, is sufficient to remove the competition doubts brought about by the proposed transaction.

Regarding the description of the revised remedy package, and withholding as offered on 3 December 2008, and again in the revised commitments on 18 December, EdF undertakes to divest BE's coal-fired plant at Eggborough**.** This is subject to the Eggborough Banks' option to take ownership of the Eggborough power station. Should the Eggborough Banks decline to take this option, EdF has undertaken to divest the plant to an independent third party within a specified time frame. The Eggborough Banks can also sell on this option to a third party, subject to a pre-emption right in favour of BE, which EdF has undertaken not to exercise.

Respondents to the market test have found that the divestiture of Eggborough would not be sufficient to address competitive concerns in relation to the existence of a significant incentive for the combined entity to withhold capacity. In addition to the divestment of Eggborough, EdF has thus offered to divest the Sutton Bridge power plant fully within the next specified years. A longer period than usual is required for the divestiture of that plant in order to address the specific situation of the plant. Prior to this divestiture and within several months of completion of the transaction, EdF undertakes to enter into a Capacity Tolling Agreement, giving access to the unhedged future output of Sutton Bridge power station to a third party until the plant is divested and thus preventing potential serious doubts in relation to withholding by the combined entity in such a period. Regarding such a tolling agreement, it is foreseen to last several years, a period after which the plant will have been transferred to a third party (divestiture).

As regards the impact on liquidity: effects in the wholesale and supply markets many respondents to the market test for the initial proposal for an auction of [0-5] TWh per year also found that an auction would distort trading. EdF has accordingly proposed an alternative mechanism whereby the amounts would be assigned to a separate trading book under the supervision of a trustee. This would make sure that the corresponding amounts of energy would be handled in a similar way as any other amounts on the market, thereby contributing simply to liquidity. The trustee would also make sure that these amounts are not directly or indirectly traded intentionally with the merger entity thereby circumventing the objective to avoid vertical integration.

[1703] C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 12 marginal note 12.119, p 1073.

Concerning access to nuclear new build sites, as originally proposed, EdF offers a commitment to enter into a sale and purchase agreement by a specified amount for the sale of either the Dungeness Land or the Heysham Land, together with any grid connection rights to an independent operator on terms of sale approved by the Commission.

Grid connections overlap at Hinkley, as originally proposed, EdF offers a commitment to terminate one of the three bilateral connection agreements between National Grid Electricity Transmission plc (NGET) on the one hand and EdF or BE on the other hand, in relation to connections to NGET's transmission network at Hinkley Point. Alternatively EdF has offered to surrender such rights as EdF or BE may have under one such agreement. To this end, EdF shall procure that EdF or BE will notify this termination to NGET in writing no later than a specified date.

Regarding the assessment of the remedy package and the introduction, as set out in the Commission Notice on Remedies, the Commission assesses the compatibility of a notified concentration with the Common Market in line with the terms of the Merger Regulation[1704]. Where a concentration raises serious doubts which could lead to a significant impediment to effective competition, the parties may seek to modify the concentration so as to resolve the serious doubts identified by the Commission with a view to having the merger cleared. In assessing whether or not the remedy will restore effective competition, the Commission considers the type, scale and scope of the remedies by reference to the structure and the particular characteristics of the market in which these serious doubts arise.

As concerns the different types of remedy, the most effective way to maintain effective competition is to create the conditions for the emergence of a new competitive entity or for the strengthening of existing competitors via divestiture by the merging parties.

The divested activities must consist of a viable business, which if operated by a suitable purchaser, can compete effectively with the merged entity on a lasting basis and which is divested as a going concern. Furthermore, in order to maintain the structural effect of a remedy, the commitments have to foresee that the merged entity cannot subsequently acquire influence over the whole or parts of the divested business, unless the Commission subsequently finds that the structure of the market has changed to such an extent that the absence of influence over the divested business is no longer necessary to render the concentration compatible with the Common Market.

[1704] Commission Notice on Remedies, O. J. (2008) C 267/1; C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 45 p 443.

The Commission's assessment has concluded that the proposed remedy package as revised by EdF on 18 December 2008, addresses all serious doubts identified during the course of the procedure and adequately deals with concerns identified by market participants in response to the first remedy package. As such, the Commission has concluded that the proposed remedy package is effective in removing the serious doubts brought about by the transaction in the relevant markets.

Regarding independence, viability and competitiveness, in line with the information at its disposal, the Commission is satisfied that the Eggborough and Sutton Bridge power stations would constitute independent, viable and competitive businesses.

Effectiveness of the remedies in removing the identified serious doubts as to the compatibility of the transaction, as initially notified, with the common market. The revised remedy package addresses the serious doubts identified by the Commission in relation to a) withholding, b) liquidity reduction, c) access to nuclear new build sites and d) potential barriers to entry caused by the holding of grid connections.

The revised remedies reduce the number of flexible plants owned by the merged entity from four to two. Pre-merger, EdF owned two coal plants (Cottam and West Burton) and one gas plant (Sutton Bridge), while BE owned one coal plant (Eggborough) in addition to its nuclear portfolio. Post-merger, the merged entity will own, in addition to BE's nuclear capacity, two coal plants (Cottam and West Burton), which is only one more coal plant than BE owned pre-merger. The divestment of Sutton Bridge is an important addition to the initially proposed remedy package. Indeed, Sutton Bridge is a gas plant with a higher marginal cost than the parties' other flexible plants, which are all coal plants. It would thus have been less costly for the merged entity to withhold Sutton Bridge than other flexible plants in order to increase prices, in particular during peak hours when withholding is more likely. Considering the revised remedy package, there will only be a relatively limited increment (one coal plant) in flexible technology for the merged entity compared to BE's pre-merger portfolio. Furthermore, there is no material change in the marginal cost of the available flexible plants that could be used in a withholding strategy, since both the merged entity and BE's pre-merger only have coal plants to withhold.

Finally, the base load production that would mostly benefit from a price associated with a withholding strategy is unaffected by the merger. On this basis, and on the basis of the calculations carried out by the Commission, it follows that the merger, considered with the revised remedy package, does not bring any significant additional scope for withholding.

In light of the above, it is concluded that the revised remedy package constitutes a clear cut remedy that directly and fully addresses the withholding concern identified by the Commission.

Regarding liquidity reduction, the results of the market test of the first Commitments proposal were in general rather negative. Given that the proposal had a two-fold effect on liquidity (divestiture/commitment not no purchase-back BE's Eggborough plant and the auction of [0-5] TWh per year), both proposals were tested.

With respect to BE's Eggborough plant, negative comments were raised with respect to the limitations of this plant. In particular, it was submitted that the proposed plant has 4 generation units, each with a capacity of 500 MW (2 GW in total), but only 2 of them have Flue Gas Desulphurisation (FGD) equipment to which limits the emissions of SO and NOx. This lack of FGD is likely to limit the output of Eggborough in the future. Moreover, this generation output is likely to decrease over time due to emissions restrictions.

With respect to the auction proposed by the parties, two main areas of concern were identified: (i) the potential negative impact that the proposed auction mechanism may have on the wholesale market, and (ii) insufficient volumes involved in the auction. It has also been raised that, since the merged entity would be long, the volumes of the auction would have been made available to the wholesale market anyway: basically the auction would change the normal route through which these volumes would have been sold. Moreover, the period of 4 years was considered in general as insufficient by many respondents, and that it should last until 2020 or be indefinite. The Commission considers however that the offered period appears to be adequate as it covers the period in which the merged entity would be physically in a position to internalise the additional generation output of BE.

The market test confirmed however that the products to be offered in the auction were adequate (base load for summer and winter), although an even split between summer and winter would be desirable.

With respect to the volumes involved in the auction, the market test considered them as insufficient. The range of volumes proposed ranged from 8 TWh up to 35 TWh.

As regards modified remedies offered by the parties, with the modified Commitments, the parties commit to sell through OTC trades and/or through structured trades agreements, being the two main routes to market in GB and in line with BE's current approach, the following volumes across the period 2012 to 2015:

2012 (TWh)	2013	2014	2015
0-10	5-15	5-15	0-10

The sales will be made directly by the merged entity, therefore eliminating the negative effects identified in the market test that an auction may have on the wholesale market.

With respect to the volumes offered, they represent twice the original proposal ([25-35] TWh versus [10-20] TWh) over the period of 4 years in which the Commission has identified serious doubts. Even if the proposed

volumes are far from some of the proposals made during the market test by market respondents, the Commission considers that they are appropriate for the following reasons.

The remedy has to be seen in conjunction with the divestitures of the power plants of Eggborough and Sutton Bridge. These plants, once divested, will significantly reduce the level of vertical integration of the combined entity and therefore the scope for internalisation.

In the light of the foregoing, the Commission considers that the proposed commitment to market certain volumes in the wholesale market in conjunction with the proposed divestiture of the generation plants in Eggborough and Sutton Bridge are sufficient to remove the serious doubts identified by the Commission with respect to the impact of the transaction on liquidity.

Having regard to access to nuclear new build sites, in order to address the serious doubts established by the Commission regarding access to nuclear sites most likely to be used for a first wave of nuclear new build, EdF has offered a specific commitment in relation to the disposal of the Dungeness Land or the Heysham Land.

In sum, EdF has offered to commit to enter into a sale and purchase agreement for the sale of either the Dungeness Land or the Heysham Land, together with any grid connection rights to an independent operator on terms of sale approved by the Commission. The Land Purchaser must elect which land to acquire within 18 months from the date of the conclusion of the sale and purchase agreement. According to EdF both sites could potentially be suitable for first wave new nuclear build. The commitment offer for the unconditional release of either Heysham or Dungeness, does not affect the obligations of EdF to sell certain sites, subject to certain conditions, following the Sites Undertaking and the Simultaneous Marketing Agreement with the UK Government, which the Commission has taken into account for the purpose of its assessment. Following the satisfaction of the relevant conditions the land of EdF at Wylfa (Lots I & II), BE's land at Bradwell and any land acquired by the merged entity at the NDA land Bradwell auction can also be made available to competitors.

In the course of the market test of the proposed remedy some interested third parties have expressed concerns with the fact that EdF, following its commitment offer, is not committing to release the land it owns at Wylfa and thus they have claimed that the alleged existence of the uncertainty regarding the sale of EdF's land at Wylfa cannot remove the Commission's serious doubts regarding access to nuclear sites. In particular, it was noted that land owned by EdF at Wylfa (at the so called Wylfa I and Wylfa II locations) is being held by EdF only to prevent competitors from developing the NDA Wylfa site which will be tendered in due course. In that respect it was stressed by third parties that EdF cannot develop its land at Wylfa in view of the fact that it is not entitled (following the agreements with the UK Government) to bid for the NDA Wylfa site.

The Commission does not share these views and considers that the commitment offered by EdF for an unconditional divestiture of either Heysham or Dungeness ensures that at least one of the merged entity's sites is to be divested unconditionally.

This commitment can therefore be considered as sufficient in removing the identified serious doubts, despite the existence of the conditions regarding the divestment of EdF's Wylfa land as envisaged in the SMA/Sites Undertaking.

Nevertheless, the Commission notes that the conditions regarding the release of EdF's Wylfa land are likely to be met in early 2010 in light of the above, it is concluded that commitment offered by EdF regarding sites for a first wave of new nuclear build constitutes a clear cut remedy that directly and fully addresses the serious doubts identified by the Commission with regard to potential delays and uncertainty as to the timing, and the actual scope, of the release of sites to competitors of the merged entity.

Concerning the commitments to terminate one grid connection agreement at HinkleyPoint, EdF has also offered a commitment to terminate one of the three bilateral connection agreements between National Grid Electricity Transmission plc (NGET) on the one hand and EdFor BE on the other hand, in relation to connections to NGET's transmission network at Hinkley Point. Alternatively EdF has offered to surrender such rights as EdF or BE may have under one such agreement. EdF shall select which agreement to terminate or otherwise surrender in its absolute discretion, at Hinkley Point. To this end, EdF shall procure that EdF or BE will notify this termination to NGET in writing no later than a specified date.

The Commission considers that this commitment removes any overlaps identified regarding connection agreements in the hands of the merged entity. This commitment was welcomed during the market test. Third parties and NGET have not provided to the Commission information which demonstrates that there exists another location where there would be an overlap in the connections held by BE and EdF respectively.

In light of the above, it is concluded that commitment offered by EdF to terminate one connection agreement at Hinkley point constitutes a clear cut remedy that directly and fully addresses the serious doubts identified by the Commission in this regard.

Regarding the conclusion, the assessment of the proposed remedy package carried out by the Commission shows that the Eggborough and Sutton Bridge facilities to be divested together with related assets constitute stand alone and viable businesses capable of competing with the combined entity on the market for the generation and supply of electricity. The facilities to be divested accounted for [10-20] TWh of electricity in 2007, which substantially reduces the parties' ability and incentive to strategically withdraw electricity in order to game the market and increase market prices. Secondly, the parties' incidental provision to sell [25-35] TWh

through OTC trades or structured agreements between 2012 and 2015 together with the divestiture of the plants at Eggborough and Sutton Bridge address market concerns and the serious doubts in relation to a potential reduction of liquidity. Thirdly, the parties have committed to an unconditional divestment of one of either sites at Heysham or Dungeness. Taking into account all existing arrangements on other sites, which are factual elements taken into account in this process, this is considered to be sufficient to address any issues raised in relation to the dominance of sites most likely to be considered suitable for a first wave of nuclear new build, given that it is also complementary to the existing agreements in place between the parties and the British Government. Finally, the termination of one of three National Grid connection agreements it holds in relation to Hinkley Point constitutes a clear cut remedy that directly and fully addresses the serious doubts identified by the Commission in this regard.

Regarding conditions and obligations, under the first sentence of the second subparagraph of Article 6 II of the MR2004, the Commission may attach to its decision conditions and obligations intended to ensure that the incidental provisions concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.

It is appropriate in this case to qualify as conditions those measures that are intended to achieve a structural change in the market and to qualify as obligations the implementing or accompanying steps which are necessary to achieve this result, as well as behavioural remedies.

9.39.5 Conclusion

For the reasons set out above, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement, subject to full compliance with the commitments submitted by the notifying party. The decision is adopted in application of Article 6 I lit. b and 6 II MR2004.

9.40 IPIC / MAN FERROSTAAL AG Case IV/M. 5406

On 23 January 2009 the Commission received a notification of a proposed transaction pursuant to Article 4 of MR2004 by which the undertaking International Petroleum Investment Company ("IPIC", United Arab Emirates) acquires within the meaning of Article 3 I lit. b MR2004 sole control of the whole of the undertaking MAN Ferrostaal AG ("MAN Ferrostaal", Germany) by way of purchase of shares.

9.40.1 The Parties

IPIC is an investment company with its registered office in Abu Dhabi, United Arab Emirates. IPIC's principle activity is to invest on a long-term basis in energy and energy related companies outside of the United Arab

Emirates concentrating on petroleum refining and related upstream and downstream distribution and service network. The activities of IPIC's investment companies focus mainly on the areas of oil processing, petrochemicals, pipelines, power stations and energy-intensive industries. While most of IPIC's investments are non-controlling minority shareholdings, IPIC jointly controls, inter alia, Borealis AG ("Borealis", Austria) which operates, via its wholly owned subsidiary AMI Agrolinz Melamine International GmbH ("AMI", Austria), petrochemical plants for the production of, amongst others, melamine.

AMI is one of the leading melamine producers world-wide. In addition, IPIC contemplates to open a new melamine production facility in Chemaweyaat (Abu Dhabi), which will, however, according to the notifying party not be operative prior to 2014.

MAN Ferrostaal is a German Aktiengesellschaft and a (directly and indirectly) wholly owned subsidiary of MAN AG, a public company listed at the Frankfurt stock exchange. MAN Ferrostaal's business is divided into two divisions, namely the Projects Division and the Services Division. In the Project Division, MAN Ferrostaal builds turnkey industrial plants as a general contractor. It serves, amongst others, the petrochemical industry, which converts energy containing raw materials into high-quality chemical intermediate and end products. In addition, MAN Ferrostaal offers related services, such as project development, project financing and project management. In its services division, MAN Ferrostaal acts as a sales and service partner to Original Equipment Manufacturers ("OEMs"), particularly in the automotive industry.

9.40.2 The Operation

IPIC via its solely controlled subsidiary, IPIC Ferrostaal Holding GmbH & Co. KG, Germany (the "Investment Vehicle") intends to acquire 70 % interest in MAN Ferrostaal from its current shareholders, i.e., MAN AG and MAN Ferrostaal Beteiligungs-GmbH, Germany, a company wholly owned by MAN AG. After the proposed transaction, IPIC will exercise sole control over MAN Ferrostaal. Therefore, the proposed transaction constitutes a concentration according to Article 3 I lit. b MR2004.

9.40.3 Community Dimension

The concentration has a community dimension (Art 1 MR2004).

9.40.4 Competitive Assessment

Methanol Holding Trinidad Limited ("MHTL", Trinidad and Tobago) is a project company responsible for the construction of a large melamine site in Trinidad and Tobago (production capacity of 30,000 tons per annum and train) using Eurotecnica's technology and engineering know-how.

9.40.5 Commitments Submitted by the Notifying Party

In order to render the concentration compatible with the common market, the notifying party has offered commitments pursuant to Article 6 II MR2004. The commitment package was submitted by IPIC on 20 February 2009. After market testing this package, the commitments were deemed suitable to remedy the competition concerns identified. These commitments are attached to the decision and form an integral part thereof.

The commitment package provides for the full divestment of MAN Ferrostaal's minority shareholding in Eurotecnica.

The offered divestment is suitable to eliminate the serious doubts identified in the melamine market. The divestment removes the vertical link between Eurotecnica and AMI, thereby taking away the ability of AMI to foreclose any existing or potential competitor on the melamine market by influencing indirectly through MAN Ferrostaal the granting of high-pressure technology licences.

Overall, the results of the market test gave a positive feedback on the divestment package. The Commission therefore considers the commitments suitable for remedying the serious doubts on the compatibility of the concentration with the common market, which have been established in the previous sections of the decision.

9.40.6 Conditions and Obligations

Under the first sentence of the second subparagraph of Article 6 II MR2004, the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.

The achievement of the measure that gives rise to the structural change of the market is a condition, whereas the implementing steps which are necessary to achieve this result are generally obligations on the parties. Where a condition is not fulfilled, the Commission's decision declaring the concentration compatible with the common market no longer stands. Where the undertakings concerned commit a breach of an obligation, the Commission may revoke the clearance decision in accordance with Article 8 V MR2004. The undertakings concerned may also be subject to fines and periodic penalty payments under Articles 14 II and 15 I MR2004.

9.40.7 Conclusion

For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement pursuant to Article 2 II MR2004, subject to full compliance with the conditions in Section B of the Commitments annexed to the decision and with the

obligations contained in the other sections of the said commitments. The decision is adopted in application of Article 6 I lit. b in connection with Article 6 II of MR2004.

9.41 PANASONIC / SANYO CASE IV/M. 5421

On 11 August 2009, the Commission received notification of a proposed concentration pursuant to Article 4 MR2004 by which the undertaking Panasonic Corporation ("Panasonic", Japan) acquires within the meaning of Article 3 I lit. b MR2004 control of the whole of the undertaking Sanyo Electric Co., Ltd. ("Sanyo", Japan) by way of a public bid for all of Sanyo's issued and outstanding securities.

9.41.1 The Parties

Panasonic is a publicly held corporation headquartered in Japan that is primarily active worldwide in the development, manufacture, and sale of a wide range of audiovisual and communication products, home appliances, electronic components and devices (including batteries), industrial and other products.

Sanyo, which is also a publicly held corporation headquartered in Japan, is primarily active worldwide in the development, manufacture, and sale of consumer products, commercial equipment, electronic components (including batteries) and industrial logistics/maintenance equipment.

9.41.2 The Operation

On 19 December 2008, Sanyo's Board of Directors executed a Capital and Business Alliance Agreement with Panasonic's Board of Directors, pursuant to which Sanyo's Board has agreed to endorse Panasonic's tender offer for all of Sanyo's issued and outstanding common shares provided it is launched by a specified person.

9.41.3 Concentration

As explained above, Panasonic expects to acquire sole control over Sanyo through its acquisition from the Control Shareholders. The proposed transaction therefore constitutes a concentration within the meaning of Article 3 I lit. b MR2004.

9.41.4 Community Dimension

The concentration has a community dimension (Art. 1 MR2004).

9.41.5 Competitive Assessment

Regarding preliminary remarks, the proposed transaction would result in affected markets for a number of portable batteries (described more fully below) as well as batteries for hybrid electric vehicles ('HEVs').

The market shares of the Parties for CR batteries (in value) are the following:

CR Batteries	Global	EEA
Panasonic	30-40%	20-30%

Sanyo	20-30%	30-40%
Combined	60-70%	50-60%
Ultralife	10-20%	5-10%
P&G	5-10%	5-10%
FDK	0-5%	0-5%
Maxell	0-5%	0-5%

Several market players have raised concerns with regard to the transaction for CR batteries given the very high market share of the Parties. The other three competitors are two Chinese and one Japanese company all of which produce their batteries in China.

NiMH	Global	EEA
Panasonic	10-20%	30-40%
Sanyo	30-40%	40-50%
Combined	40-50%	70-80%
GS Yuasa	20-30%	5-10%
GP	20-30%	5-10%
BYD	5-10%	5-10%
Others	0-5%	0-5%

Regarding the conclusion, in light of the above, competition concerns have been identified for the market of portable NiMH batteries irrespective of the precise geographic market definition.

They are used principally as back-up power for real time clocks in mobile phones and digital still cameras as well as in certain other applications including watches, laptops and keyless entry systems in the automotive sector.

Rechargeable coins	All sub-chemistries	
	Global	EEA
Panasonic	30-40%	60-70%
Sanyo	20-30%	5-10%
Combined	60-70%	70-80%
Seiko	20-30%	20-30%
Maxell	0-5%	0-5%

Concerning the Conclusion, in view of the high market share that the merging parties would have after the proposed transaction and the results of the market investigation outlined above, the Commission has concluded that the proposed transaction would give rise to serious doubts in the market for rechargeable coin-shaped batteries, irrespective of the precise product and geographic market delineation.

9.41.7 Assessment of the Proposed Remedies

Regarding the Introduction, as set out in the Commission Notice on Remedies, the Commission assesses the compatibility of a notified concentration with the common market in line with the terms of MR2004[1705]. Where a concentration raises serious doubts which could lead to a significant impediment to effective competition, the Parties may seek to modify the concentration so as to resolve the serious doubts identified by the Commission

[1705]Commission Notice on Remedies; C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 45 p 443.

with a view to having the merger cleared. In assessing whether or not the remedy will restore effective competition, the Commission considers the type, scale and scope of the remedies by reference to the structure and the particular characteristics of the market in which these serious doubts arise.

As concerns the different types of remedy, the most effective way to maintain effective competition is to create the conditions for the emergence of a new competitive entity or for the strengthening of existing competitors via divestiture by the merging Parties.

The divested activities must consist of a viable business, which if operated by a suitable purchaser, can compete effectively with the merged entity on a lasting basis and which is divested as a going concern.

The Commission's assessment has concluded that the proposed remedy package as submitted by the Parties on 28 September 2009 addresses all serious doubts identified during the course of the procedure and adequately deals with concerns identified by market participants in response to the remedy package. As such, the Commission has concluded that the proposed remedy package is effective in removing the serious doubts brought about by the transaction in the relevant markets.

Suitability to remove the serious doubts raised with regards to the CLB and rechargeable coin-shaped battery markets.

The divestment of the Tottori plant proposed by the Parties to address the competition concerns identified with regard to the market for CR-CLB and rechargeable coin shaped batteries constitutes Sanyo's sole manufacturing facility for both CLBs and CR CLB batteries, the only sub chemistry of CLB that Sanyo is currently producing.

Regarding rechargeable coin-shaped batteries, therefore, the proposed divestment will eliminate the entire overlap between the Parties in the manufacture and sale of CLBs and rechargeable coin-shaped batteries in the EEA and worldwide.

Accordingly, the potential purchaser of the Sanyo Tottori Divestment Business will become a sizeable supplier of both CR-CLB and rechargeable coin-shaped batteries.

The market test provided positive feedback on the proposed Sanyo Tottori divestment business. Respondents also considered that the proposed divestment in principle includes all the tangible and intangible assets necessary to successfully run the business and to enable a potential purchaser to become a viable competitor in these markets, able to effectively compete against the merged entity. Some respondents highlighted that the transfer of sale, marketing and R&D personnel as well as patents that are predominantly used in the production process are essential to successfully run the divested business. The divestment as modified by the Parties on 28 September 2009 has been improved in this respect. In particular, instead of a royalty-free licence of patents as originally foreseen by the Parties, all patents predominantly used in the divestment business will be transferred

to the Purchaser. Moreover the scope of any licence back of patents from the Purchaser to the Parties will be limited to applications other than CLB and rechargeable coin-shaped batteries. In addition, the provisions for the transfer of sales, marketing and R&D personnel have been reinforced. The modified commitments thereby ensure the competitiveness of the divestment business.

The market investigation indicated that the Sanyo Tottori Divestment Business is likely to attract the interest of several buyers. Indeed, several respondents to the market investigation have expressed an interest in purchasing the Sanyo Tottori Divestment Business. In this respect, a majority of respondents indicated that the suitable Purchaser should have technical know-how and experience of the battery business and that an existing battery manufacturer would be best-placed to compete effectively with the merged entity.

In light of the above, the Commission considers the Sanyo Tottori Divestment Business as a suitable commitment to remedy the competition concerns identified with regard to the market for CL-CLB and rechargeable coin-shaped batteries.

Regarding the suitability to remove the serious doubts raised with regards to the portable rechargeable NiMH batteries markets, each of the proposed divestment alternatives for portable NiMH batteries is suitable to eliminate the serious doubts identified. Therefore, the Commission has accepted in this specific case both proposed remedies as alternatives.

Both Sanyo's and Panasonic's NIMH Divestment Business Alternatives include all the production facilities of the Parties in relation to their portable NiMH businesses.

Therefore, both Divestment Business Alternatives will eliminate the entire overlap between the Parties in the manufacture and sale of NiMH in the EEA and worldwide.

Furthermore, Sanyo and Panasonic are strong market players in both the EEA and worldwide. In 2008, the Sanyo NiMH Divestment Business Alternative generated turnover of approximately a specified amount in EUR whilst the Panasonic NiMH Divestment Business Alternative generated turnover of approximately a specified amount of EUR.

Accordingly, the acquisition of either NiMH Divestment Business Alternative will allow the potential purchaser to become a sizeable supplier of portable NiMH batteries.

The market investigation has broadly confirmed that the tangible and intangible assets necessary for a stand-alone viable business are included in both divestment alternatives. However, some concerns were expressed concerning the necessary personnel and intellectual property rights. The Divestment Alternatives as modified by the Parties on 28 September 2009 have been improved in this respect. In particular, instead of a royalty-free licence of patents as originally foreseen by the Parties, all patents predominantly used in the divestment

business will be transferred to the Purchaser. Moreover the scope of any licence back of patents from the Purchaser to the Parties will be limited to applications other than portable NiMH batteries.

In addition, the provisions for the transfer of sales, marketing and R&D personnel have been reinforced. The modified commitments thereby ensure the competitiveness of the divestment business.

Furthermore, during the market investigation several potential buyers have shown interest in both alternatives.

Based on the above, the Commission has concluded that both NiMH divestment Business Alternatives are appropriate to remedy the serious doubts identified in portable NiMH batteries. As noted in the commitments the Parties commit to ringfence both divestment alternatives until such time as the closing of one of the divestments on terms approved by the Commission takes place.

9.41.8 Conditions and Obligations

Under the first sentence of the second subparagraph of Article 6 II MR2004, the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.

The achievement of the measure that gives rise to the structural change of the market is a condition, whereas the implementing steps which are necessary to achieve this result are generally obligations on the Parties. Where a condition is not fulfilled, the Commission's decision declaring the concentration compatible with the common market no longer stands. Where the undertakings concerned commit a breach of an obligation, the Commission may revoke the clearance decision in accordance with Article 8 V MR2004. The undertakings concerned may also be subject to fines and periodic penalty payments under Articles 14 II and 15 I MR2004.

9.41.9 Conclusion

For the above reasons, the Commission has decided not to oppose the notified operation as modified by the commitments submitted by the Parties and to declare it compatible with the common market and with the EEA Agreement pursuant to Article 2 II MR2004, subject to full compliance with the conditions in Section B of the Commitments annexed to the decision and with the obligations contained in the other sections of the said commitments. The decision is adopted in application of Article 6 I lit. b in connection with Article 6 II MR2004.

9.42 RWE / ESSENT CASE IV/M. 5467

On 29 April 2009 the Commission received a notification of a proposed concentration within the meaning of Article 4 MR2004 by which RWE Aktiengesellschaft ("RWE") proposes to acquire sole control of Essent N.V.

("Essent") by way of a private offer to purchase the entire issued share capital, provided that the offer is accepted for a number of shares representing at least 80% of Essent's total number of shares (the transaction).

9.42.1 The Parties and the Operation

RWE (Germany) is an international vertically integrated energy company active on both electricity and natural gas markets. It is mainly active in Germany but also present in all EU Member States with the exception of Cyprus, Lithuania and Malta. Its presence outside Germany is particularly focusing on the United-Kingdom, the Czech Republic and Hungary. Its presence in the Netherlands prior to the Proposed Transaction is relatively limited in terms of turnover.

Essent (the Netherlands) is active in the electricity, natural gas and heating businesses, primarily in the Netherlands. It is also present in Germany and Belgium. In the Netherlands, it is currently active at all levels of activity on the electricity and gas markets, although prior to the closing of the Proposed Transaction it will have divested its distribution network (gas and electricity).

In Germany, Essent is primarily active though a 51% shareholding in Stadtwerke Bremen AG ("SWB"). SWB is an electricity generator and supplier as well as a gas supplier. It also has participations in a number of other Stadtwerke (Bielefeld, Gütersloh, Ahlen etc). The transaction concerns the acquisition of sole control of Essent by RWE. As a result of the transaction, RWE will acquire control of at least 66% and may own up to 100% of the share capital of Essent. As a consequence, the Proposed Transaction constitutes a concentration within the meaning of Article 3 I lit. b MR2004.

9.42.2 Community Dimension

The concentration has a community dimension (Art. 1 MR2004).

9.42.3 The Relevant Markets

The envisaged transaction relates to the following markets where the parties' activities overlap horizontally:

- Electricity/Netherlands: the market for generation and wholesale

  supply of electricity, the retail supply to small customers (kleinverbruikers), the retail supply to large customers (grootverbruikers), electricity trading and on-line trading portal products;
- Gas/Netherlands: wholesale supply, trading on hub, and retail supply;
- Electricity/Germany: wholesale and retail supply;
- Gas/Germany: wholesale supply, retail gas supply to industrial customers, retail supply to small customers (households) and gas storage;
- Hungary and Czech Republic - Electricity and Gas Markets;

- Other markets in Germany and the Netherlands.

On an EEA wide market for financial electricity trading, the parties estimate their combined market share to be less than 15% and therefore not affected.

Financial trading	RWE	Essent	Combined
Netherlands	5-10%	10-20%	20-30%
EEA	5-10%	5-10%	< 15%

9.42.4 Remedies

Regarding the procedure, in order to address the serious doubts as to the compatibility of the transaction, as initially notified, with the common market, identified by the Commission, RWE submitted on 2 June 2009 and modified on 19 June 2009 a remedy package consisting in the divestment of Essent's indirect controlling shareholding of 51% in Stadtwerke Bremen AG (SWB), (the "Divestment Businesses")[1706]. The Commission carried out an extensive market test among the parties' competitors and customers to assess the effectiveness of the remedy package to remove the competition concerns identified.

The Commission has assessed the remedy package and has concluded that it is sufficient to remove the identified serious doubts. The Commission therefore concludes that the remedy package, as submitted on 19 June 2009, is sufficient to remove the competition doubts brought about by the proposed transaction.

Concerning the description of the revised remedy package, as offered on 19 June 2009, the parties have offered to divest their indirect controlling shareholding of 51% in swb AG. The swb business consists of Essent's 51% controlling shareholding in swb, which is held by Essent via its wholly owned subsidiary Deutsche Essent GmbH.

These commitments are offered to take account of serious doubts, which the Commission has identified in relation to the German generation and wholesale electricity market, in particular the strengthening of RWE's collectively dominant position on that market and a possible increase in RWE's ability to foreclose retail supplier customers from competitors active upstream on the wholesale market and to the short-distance wholesale supply of L-gas in the RWE area, in particular as regards the increased ability of RWE to foreclose customers on that market.

As the Divestment Businesses exclusively consist of majority shareholdings, no assets or liabilities of either of these entities will be divested by the parties under these commitments.

In line with certain shareholder agreements dating back to 1995 and 2004, the sale of Essent's shareholding in swb is subject to pre-emption rights held by the city of Bremen, which gives Bremen the right to be offered Essent's shareholding prior to negotiations with any third party and a right to buy if Essent has received a

binding offer in relation to its shareholding by a third party bidder. In this case, the shareholding must again be offered to Bremen under the same conditions as offered by the third party. Furthermore, within a period of two months. In line with the Articles of Association of swb, its supervisory board must approve the transfer of Essent's shareholding to a third party and such approval requires the approval of the Senate of Bremen. However this consent must be granted if the sale of the sake does not negatively affect the material interests of Bremen. The remaining shares in swb are held by EWE AG (49%) and Bremer Verkehrsgesellschaft GmbH, a holding company wholly owned by the city of Bremen, which holds one single share.

Regarding the assessment of the remedy package and the introduction, as set out in the Commission Notice on Remedies, the Commission assesses the compatibility of a notified concentration with the Common Market in line with the terms of MR2004. Where a concentration raises serious doubts which could lead to a significant impediment to effective competition, the parties may seek to modify the concentration so as to resolve the serious doubts identified by the Commission with a view to having the merger cleared. In assessing whether or not the remedy will restore effective competition, the Commission considers the type, scale and scope of the remedies by reference to the structure and the particular characteristics of the market in which these serious doubts arise. As concerns the different types of remedy, the most effective way to maintain effective competition is to create the conditions for the emergence of a new competitive entity or for the strengthening of existing competitors via divestiture by the merging parties.

The divested activities must consist of a viable business, which if operated by a suitable purchaser, can compete effectively with the merged entity on a lasting basis and which is divested as a going concern. Furthermore, in order to maintain the structural effect of a remedy, the commitments have to foresee that the merged entity cannot subsequently acquire influence over the whole or parts of the divested business, unless the Commission subsequently finds that the structure of the market has changed to such an extent that the absence of influence over the divested business is no longer necessary to render the concentration compatible with the Common Market.

The Commission's assessment has concluded that the proposed remedy package as submitted by RWE on 2 June addresses all serious doubts identified during the course of the procedure and adequately deals with concerns identified by market participants in response to the remedy package. As such, the Commission has concluded that the proposed remedy package is effective in removing the serious doubts brought about by the transaction in the relevant markets.

[1706] C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 12 marginal note 12.126, p 1078.

Regarding the independence, viability and competitiveness, in line with the information at its disposal, the Commission is satisfied that swb would constitute an independent, viable and competitive business.

Swb is the incumbent municipal utility based in Bremen and the city of Bremerhaven (and some neighbouring municipalities). It is a vertically integrated electricity and gas utility present across the generation, distribution and supply of electricity and gas and other utility services. Swb is a stand alone business and disposes of all necessary tangible and intangible assets to conduct its business and will continue to do so after divestment of Essent's 51% interest. It therefore has the essential functions required for independent operation.

As regards the effectiveness of the remedies in removing the identified serious doubts as to the compatibility of the transaction, as initially notified, with the common market, the revised remedy addresses the serious doubts identified by the Commission in relation to the German generation and wholesale electricity market, in particular the strengthening of RWE's collectively dominant position on that market as well as a possible increase in RWE's ability to foreclose retail supplier customers from competitors active upstream on the wholesale market.

Likewise the revised remedy addresses the serious doubts identified by the Commission in relation to the creation of a monopoly in the market for retail supply of L-Gas to large customers in the Bielefeld distribution area. Finally the revised remedy addresses the serious doubts identified by the Commission as regards the increase of RWE's ability to foreclose L gas wholesalers in the RWE TSO area.

Through the divestment of Essent's controlling shares in swb, the remedy package effectively removes the overlap between the parties in the relevant markets brought about by the transaction and restores competition to a level existing pre-transaction.

The results of the market test on the proposed remedy clearly indicate that most respondents believe the proposed divestment would effectively remedy competition concerns.

Further, the information available to the Commission at this stage, in particular the information submitted by the parties, does not indicate that the rights affect the effectiveness of the remedy proposed by the parties.

In light of the above, it is concluded that the remedy package constitutes a clear cut remedy that directly and fully addresses the concerns identified by the Commission in relation to the German generation and wholesale market.

Regarding the Conclusion, the assessment of the proposed remedy package carried out by the Commission shows that the divestitures of indirectly controlling shares in swb, which constitute a stand alone and viable business capable of competing with the combined entity on the market for the generation and supply of

electricity in Germany, constitute a clear cut remedy that directly and fully addresses the serious doubts identified by the Commission in relation to that market.

Regarding conditions and obligations, under the first sentence of the second subparagraph of Article 6 II MR2004, the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.

It is appropriate in this case to qualify as conditions those measures that are intended to achieve a structural change in the market and to qualify as obligations the implementing or accompanying steps which are necessary to achieve this result, as well as behavioural remedies.

9.42.5 Conclusion

For the reasons set out above, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement, subject to full compliance with the commitments submitted by the notifying party. This decision is adopted in application of Article 6 I lit. b in conjunction with Article 6 II MR2004.

9.43 VATTENFALL / NUON CASE IV/M. 5496

On 28 April 2009, the Commission received a notification of a proposed concentration pursuant to Article 4 MR2004 by which Vattenfall AB ("Vattenfall", Sweden), wholly owned by the Swedish State, acquires within the meaning of Article 3 I lit. b MR2004 sole control of the whole of N.V. Nuon Energy (former n.v. Nuon PBL Holding). In the published version of the decision, some information has been omitted pursuant to Article 17 II MR2004 concerning non-disclosure of business secrets and other confidential information. "Nuon Energy", the Netherlands), is currently controlled by local and regional authorities in the Netherlands ("the sellers") and the transaction is carried out by way of purchase of shares.

9.43.1 The Parties

Vattenfall has different activities in the electricity sector namely (i) generation and wholesale supply, (ii) transmission, (iii) retail supply and (iv) financial trading of electricity. Its main business operations are in Sweden, Germany, Finland, Denmark and Poland. Further, Vattenfall operates in the (i) production, (ii) distribution and (iii) supply of heat and has a negligible presence in the gas sector.

Nuon Energy is active across the entire energy chain, that is to say in (i) generation and wholesale supply of electricity, (ii) retail supply of electricity, (iii) financial trading of electricity, (iv) exploration and production of

gas, (v) retail supply of gas and (vi) supply of heat and cooling. Nuon Energy is mainly present in the Netherlands but has also activities in Belgium and Germany.

9.43.2 The Operation

The envisaged operation involves the acquisition of sole control by Vattenfall over Nuon Energy by means of a Share purchase Agreement according to which, Vattenfall will acquire 49% of shares in Nuon Energy in a first stage and the remaining shares in three subsequent tranches over a time period of six years.

As a result, Vattenfall will have sole control over Nuon Energy from the purchase of the first tranche of shares.

9.43.3 Community Dimension

The concentration has a community dimension (Art. 1 MR2004).

9.43.4 Relevant Markets

The envisaged transaction relates to the following markets where the parties' activities overlap horizontally: (i) generation and wholesale supply of electricity in the Netherlands, Germany and the UK; (ii) retail supply of electricity to large/medium and small customers in Germany; (iii) financial electricity trading; (iv) trading of CO emission rights; and finally (v) wholesale supply of natural gas and (vi) retail supply of gas to small and large customers, each of them based in Germany.

9.43.5 Competitive Assessment

Apart from the retail supply of electricity to small customers in Berlin and Hamburg, the horizontal overlaps between the parties' activities in the electricity and gas markets are well below 15% under any alternative product and geographic market definition.

Concerning the retail supply of electricity to small customers in Berlin and Hamburg, the parties' combined market share in the market for retail supply of electricity would be respectively [80-90%] [70-80%] Vattenfall and [5-10%] Nuon Energy) in Berlin and [80-90%] ([80-90%] Vattenfall and [0-5%] Nuon Energy) in Hamburg which are much higher as compared to those of the second competitor in both cities.

	Berlin	Hamburg
Vattenfall	70-80%	80-90%
Nuon	5-10%	0-5%
Vattenfall & Nuon	80-90%	80-90%
Yello	5-10%	5-10%
Teldafax	0-5%	0-5%
Lichtblick	0-5%	-
Flexstrom	0-5%	0-5%
Eprimo	0-5%	0-5%
E wie einfach	0-5%	0-5%
Bonus Strom	0-5%	0-5%

In this regard, it maintains that in these two cities there is a large number of nationwide active electricity suppliers (for example E WIE EINFACH, Yello, Lichtblick, Flexstrom, TelDaFax and Bonusstrom) exerting increasing competitive pressure on the parties and to which small customers would easily switch if a price increase would occur.

9.43.6 Proposed Remedies

In order to render the concentration compatible with the common market, the undertakings concerned have proposed Commitments, that are attached as an Annex to the decision.

Specifically they have offered to divest Nuon Deutschland GmbH consisting of (i) all shares of Nuon Energy in the former, (ii) the premises, (iii) facilities and staff in Hamburg, Berlin and Heinsberg, (iv) the IT-platform and (v) the slogan/tariff names used by Nuon Deutschland, e.g. "lekker Strom", "geniale Strom" and "wakker gas". As a consequence, the Divestment Business will be able to supply all (load and non-load measured) customers of electricity and gas in Berlin and Hamburg as well as in fact all over Germany.

To this end, Nuon Deutschland GmbH will retain its key personnel, relevant business functions (General management, Finance, Sales, Procurement, Marketing, Service Centre and IT) and the current retail supply contracts for gas and electricity (including dual-fuel offers) to end-customers based in Hamburg and Berlin. Only the following subsidiaries and customer contracts of Nuon Deutschland GmbH will be carved out at the discretion of Vattenfall:

- all contracts not relating to the retail supply of electricity and gas to end customers in Berlin and Hamburg (except for those customers served with both gas and electricity in Berlin and Hamburg on a dual-fuel offer basis which belong to the Divestment Business);
- Nuon Power and Gas Assets GmbH and Nuon Energie und Service GmbH (together the "Retained Subsidiaries"), the first entity being essentially a shelf company therefore not active and the second managing the two industrial parks in Heinsberg and Düren.

Importantly, the parties agree to grant the future purchaser of Nuon Deutschland GmbH a license to use the brand "Nuon" for the retail supply of electricity and gas in Berlin and Hamburg for a transitional period of several months after the divestiture of the Divestment Business. At the end of this term, the rebranding will be done by the purchaser. Moreover, Vattenfall commits not to using the brand "Nuon" in the retail supply of electricity and gas in Germany for a term of a specified number of years after the expiry of a specified amount of months period following the divestiture of the Divestment Business. Finally, in relation to the energy

sourcing, the parties offer to transfer the existing sourcing agreements to the Divestment Business and, if desired by Nuon Deutschland GmbH or its future purchaser, to continue supplying energy at wholesale market prices.

The divestiture of the Divestment Business would be implemented by adopting a two step approach. In a first step the carve-out of the assets indicated above would take place and in a second step, the shares in Nuon Deutschland GmbH would be sold and transferred to a suitable purchaser.

9.43.7 Assessment of the Proposed Remedies

The proposed remedies completely eliminate the horizontal overlap between the parties' activities created by the transaction on the affected markets for retail supply of electricity to small customers in Berlin and Hamburg.

In this respect, respondents to the market test confirmed that the proposed commitment is sufficiently clear cut to remove the identified serious doubts and that the Divestment Business is provided with all the necessary tangible and intangible assets to operate in a commercially viable way.

Notwithstanding the above, some competitors contended that the scope of the commitment should be extended. However, their suggestions in this regard (such as the divestment of the whole Nuon Deutschland GmbH without any carve-out, the divestment of shares in Vattenfall or the divestment of Nuon Energy's gas business) would be disproportionate as compared to the identified serious doubts.

Finally, the broad majority of suppliers consider Vattenfall's commitment not to use the brand "Nuon" for a specified number of years after a reciprocal specified number of months phase-out period as an appropriate step to enable the Divestment Business to viably compete with the former in Berlin and Hamburg. The same conclusion was drawn in relation to the transfer of the existing sourcing agreements (electricity and gas) to the divestment business

In the light of the above, the Commission considers that the commitment entered into by the parties is sufficient to eliminate the serious doubts as to the compatibility of the transaction with the common market.

9.43.8 Conditions and Obligations

The commitment of the attached Commitments constitute conditions attached to the decision, as only through full compliance therewith can the structural changes in the relevant markets be achieved. The other commitments set out in the attached Commitments constitute obligations, as they concern the implementing steps which are necessary to achieve the modifications sought in a manner compatible with the common market.

9.43.9 Conclusion

For the above reasons, the Commission has decided not to oppose the notified operation as modified by the commitments submitted by the notifying party and to declare it compatible with the common market and with the functioning of the EEA Agreement, subject to full compliance with the conditions in section B and D of the commitments annexed to the decision and with the obligations in sections C and E of the said commitments. The decision is adopted in application of Article 6 I lit. b in conjunction with Article 6 II MR2004.

9.44 EDF / SEGEBEL CASE IV/M. 5549

On 23 September 2009, the Commission received a notification of a proposed concentration within the meaning of Article 4 MR2004 whereby Electricité de France S.A. ("EdF", France) will acquire exclusive control of Segebel, a holding company of which its only asset is a 51% stake in SPE S.A. (the "proposed transaction"). SPE is the second biggest electricity operator in Belgium, after the incumbent operator GdF Suez (Electrabel). It is present in the market with its brand Luminus.

9.44.1 The Parties

EdF and its subsidiaries are active in the generation and wholesale trading of electricity and in the transmission, distribution and retail supply of electricity, as well as in the provision of other electricity-related services, in France and other countries. EdF is also active, to a lesser extent, in the natural gas retail and wholesale markets.

Segebel is a holding company whose only asset is a 51% equity interest in SPE S.A. ("SPE"). SPE is a Belgian company active in the production of electricity and in the trading and supply of electricity and gas in Belgium. SPE produces electricity through a portfolio of power plants in Flanders and Wallonia, composed of thermal facilities and renewable energy facilities such as hydro and wind. SPE also holds drawing rights in nuclear power plants in Belgium. SPE is currently controlled exclusively by Centrica.

9.42.2 The Operation

The proposed transaction concerns the acquisition of Centrica's 100% shareholding in Segebel, following which EdF will enjoy the same rights and obligations, which Centrica currently has in Segebel[1707].

The proposed transaction will thus result in EdF acquiring sole control over SPE. It therefore qualifies as a concentration within the meaning of Article 3 ii MR2004.

9.44.3 Community Dimension

The concentration has a community dimension (Art. 1 MR2004).

[1707] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.75, p 557.

9.44.4 Procedure

On 23 September 2009 the proposed transaction was notified by EdF to the European Commission under Article 4 MR2004 for a decision under Article 6 MR2004.

On 14 October 2009, pursuant to Article 9 II lit. a MR2004, the Belgian National Competition Authority ("Belgian NCA") submitted an unsuccessfull request to partially refer the proposed transaction from the Commission in accordance with the provisions of Article 9 III lit. b MR2004 to the Belgian NCA with a view to assessing the proposed transaction under Belgian competition law as far as the Belgian electricity markets are concerned (the "Referral Request")[1708].

9.44.5 Competitive Assessment

Regarding the relevant markets, the proposed transaction creates overlaps between the parties' to the concentration activities in energy markets (electricity and gas) in France, Belgium and the Netherlands.

As regards the current and future shares in generation capacity and electricity and production/imports in Belgium, Electricity generation capacity (MW) is as follows:

Company	MW	% share
EdF	0-825	0-5%
SPE	1650-3300	10-20%
Combined	1650-3300	10-20%
GdF Suez (Electrabel)	13200-14850	80-90%
RWE Essent	0-825	0-5%
Others	0-825	0-5%
Total	16501	100%

9.44.6 Remedies

As to the procedure, following its competitive assessment of the proposed transaction, the Commission concluded that there are concerns with regard to the incentives of the post-merger entity to further develop EdF's CCGT projects. The proposed transaction removes EdF as an ambitious entrant from various Belgian electricity markets because incentives for the merged entity to develop new generation capacity in Belgium will be significantly reduced in comparison to the incentives that EdF had pre-merger.

Consequently, preliminary competition concerns have been identified as the proposed transaction would lead to significant lessening of competition on the Belgian electricity markets. This raises serious doubts as to the compatibility of the proposed transaction with the common market, specifically on the Belgian wholesale and generation market which accordingly can lead to secondary effects on the Belgian electricity retail markets and the Belgian market for balancing and ancillary services. In order to address the serious doubts identified by the Commission, as to the compatibility of the proposed transaction, as initially notified, with the common market,

EdF submitted on 21 October 2009 a remedy package[1709]. After market testing the proposed remedies, the Commission considered that a cleared definition of what constitutes a final investment decision was needed. Therefore, EdF submitted on 9 November 2009 a revised Commitments package so as to provide increased certainty that a final investment decision will result in the actual materialization of the investment.

Regarding the description of the remedies, currently, EdF is developing two sites in Belgium with a view to constructing up to [1,800 – 1,900] MW of CCGT based generation capacity. One site is located at DilsenStokkem and the other site is located at a specific site. All current assets related to these development projects are located in two separate companies, [[CCGT1 Company]] and [[CCGT2 Company]] respectively, which are both owned at 100% (minus one share) by EdF Belgium.

SPE is also developing one site, in Navagne, capable of receiving generation capacity up to 850 MW site. The final decision to construct generation capacity on these sites has not been taken for any of these projects, nor have they obtained all the necessary permits.

In order to remove the competition concerns identified by the Commission in respect of the proposed transaction, EdF has provided Commitments. The Commitments consist of:

• The immediate divestiture of the assets of either [CCGT 1] or [CCGT 2], and;

• The divestiture of the assets of the remaining of these two companies if, by a certain date, EdF has not taken a final investment decision or has taken a negative final investment decision with regard to the remaining site.

The combined effect of the Commitments is that a potential maximum generation capacity of up to [1,800 – 1,900] MW will be made available to the market (constituting approximately [10-20]% of the existing Belgian generation capacity). As a result, EdF considers that this completely addresses the Commission's concern regarding the potential removal of EdF as an ambitious entrant in the generation and wholesale market in Belgium.

Regarding the outcome of the market test on the commitments, respondents to the market test of the Commitments included mostly competitors of EdF and SPE on the Belgian electricity generation and wholesale market and on the markets for the supply of electricity to end customers.

Responses from market players can be considered as partly positive and partly negative.

Some respondents are positive with respect to the Commitments. They agree that the Commitments remove the identified concerns, for example by stating that an "invest or divest" type of remedy is appropriate to counteract the reduced incentives to build generation capacity due to the proposed transaction. Moreover, the

[1708] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.34, p 548 and marginal note 5.218, p 593 and marginal note 5.239, p 598.

overwhelming majority of respondents agreed that the immediate divestiture of the assets of the company carrying out one of the two of EdF's CCGT projects is a positive element of the commitments.

However, some players were negative in their responses. They emphasize theories of harm for which the Commission's first phase investigation did not identify any concerns. Accordingly the Commission does not consider that remedies are necessary to address those.

As explained below, the Commission takes the view that the modified commitments fully address the established concerns of the proposed transaction.

The market test did demonstrate that a preliminary interest by potential buyers exists to buy a site that is divested immediately, as well as one later (if EdF does decide not to build a generation unit by a certain date on that site). Specifically, the majority of competitors of EdF and SPE on the wholesale and generation market appear to be willing to consider acquiring the site(s) to be divested by stating their preliminary interest. It was also noted that GdF Suez (Electrabel) may need to be excluded as suitable buyer as a purchase by GdF Suez (Electrabel) may create a competition concern in view of its current position in Belgium's market for generation and wholesale. Moreover, on 3 November 2009, the Belgian NCA submitted its comments to the Commission on the commitments. In sum, the Belgian NCA considers that the Commitments are not sufficient to remove either the Commission's concerns or the additional competition concerns identified by the Belgian NCA and accordingly proposes alternative commitments.

Accordingly, the Belgian NCA proposes alternative remedies to address those competition concerns. They suggest a divestiture by EdF of its share in Tihange-1 nuclear power plant and the divestiture of SPE's Navagne site.

The Commission does not share the views of the Belgian NCA. The basis for the Commission's concerns is the reduction of incentives of EdF post merger to pursue these projects. In view of the fact that the final investment decision is to be made in the future, which is uncertain by definition, the Commission's concerns are not based on a finding that the projects would be realised under all possible scenarios. What the Commission seeks to ensure with the Commitments is that the incentive to pursue the projects is not affected by the proposed transaction. By replacing EdF as the developer of the site (immediately and, possibly, later) with a market participant that has the same incentive to develop the sites as EdF had prior to the proposed transaction, the Commission's concerns are addressed.

Regarding the modification of the commitments following the market test, pursuant to the commitments, the divestiture of the assets of the company carrying out the remaining of the two projects would take place if, by a

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[1709] C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 12 marginal note 12.119, p 1073.

specified date, EdF has not taken a final investment decision or has taken a negative final investment decision with regard to that project.

The original text of the Commitments proposed by EdF did not specify in more detail what constitutes a final investment decision. Therefore, during the market test of the commitments, the Commission enquired as what constitutes an irrevocable decision to invest in building a power plant and whether the entering into a final investment decision by a company is a sufficient guarantee that the project would be pursued. This is important as the market test indicated that the "invest or divest" type of remedy may delay the entry of competitors should EdF finally decide not to pursue its investment on the second site. By rendering the decision irrevocable or, at least, by rendering it very unlikely that EdF could delay or withdraw completely from its decision to invest, EdF will not be able to delay/prevent the entry of others by stating that it has taken a final decision by the specified date when in fact its decision to invest would be merely provisional.

With a view to incorporating these comments and suggestions expressed by market players, EdF submitted on 9 November 2009 a revised commitments package so as to provide increased certainty that a final investment decision will result in the actual materialising of the investment. In particular, EdF amended the part of the Commitments text which relates to the final investment decision. EdF undertakes to sign an unconditional binding purchase contract for the essential components of a CCGT of a potential maximum capacity of [900-950] MW dedicated to the [CCGT 1] Project or the[CCGT 2] Project, within […] from "The Final Investment Decision Date". In case that contract is not entered into in that period, EdF will be deemed to have taken a "Negative Final Investment Decision" and would thus be obliged to divest the second site[1710].

As regards, the Commission's assessment of the offered modified commitments and the introduction, as set out in the Commission Notice on Remedies[1711], the Commission assesses the compatibility of a notified concentration with the Common Market in line with the terms of MR2004. Where a concentration raises serious doubts which could lead to a significant impediment to effective competition, the parties may seek to modify the concentration so as to resolve the serious doubts identified by the Commission with a view to having the merger cleared. In assessing whether or not the remedy will restore effective competition, the Commission considers the type, scale and scope of the remedies by reference to the structure and the particular characteristics of the market in which these serious doubts arise.

[1710] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.1009, p 762.
[1711] Commission Notice on Remedies, O. J. 2008, C 267/1; C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 45 p 443.

As concerns the different types of remedy, the most effective way to maintain effective competition is to create the conditions for the emergence of a new competitive entity or for the strengthening of existing competitors via divestiture by the merging parties.

Regarding the effectiveness of the remedies in removing the identified serious doubts as to the compatibility of the proposed transaction, as initially notified, with the common market, EdF believes that the divestiture of the assets of either [CCGT 1] or [CCGT 2] would be attractive to a purchaser looking to develop CCGT in Belgium. Consequently EdF considers that a suitable purchaser approved by the Commission will be interested in acquiring the assets of any of the two companies in charge of the two CCGT projects ([CCGT 1 Company] or [CCGT 2 Company]) within the time-frame proposed by the commitments.

The Commission's assessment concluded that by acquiring SPE, which possesses the second biggest installed generation capacity in Belgium, as well as a site prepared for the construction of an 850 MW CCGT generation plant, the incentives for the combined entity to develop also EdF's sites would be reduced.

Due to the need to have clear-cut remedies that eliminate the competition concerns, the Commission considers it preferable to have a firm divestiture of the assets of one of the two EdF companies carrying out the CCGT projects immediately. In that way, EdF is immediately replaced by a different market player with incentives equivalent to those of EdF prior to the proposed transaction for one of the two sites. In view of the uncertainties related to future investment decisions, it cannot be excluded at this stage that EdF has sufficient incentives to invest in the second site alone. Should EdF however decide not to invest in the second site, then it must be ensured that this decision is not due to the fact that the proposed transaction has reduced its incentives to do so. Consequently, as a safeguard, a contingent and future divestiture of the assets of the company carrying out the second of the two projects (in other words, replacing EdF by another owner that would have incentives equivalent to those of EdF pre-merger) is adequate.

The [CCGT 1] and [CCGT 2] power plant projects constitute viable divestment businesses to suitable purchasers looking to build generation capacity in Belgium as transactions involving ongoing power plant projects are quite commonplace in the industry. Each project is having its assets in a separate company and such assets for example include feasibility studies, network connection agreement offers as well as any other licences, connection agreements and permits to be acquired as EdF undertakes to pursue. Purchasing such a business will provide an opportunity for another market participant to obtain one of the few suitable green-field large-scale power plant construction sites that has already been developed to a certain extent (e.g. regarding studies, permits preparation, identifying location, and securing of land rights). Consequently, it leads to reduced risks for such an entrant.

The majority of the participants of the market test indicated that sites for building generation capacity in Belgium can be considered as scarce. To explain this scarcity, respondents referred to a number of characteristics which a site would need to possess in order to be considered suitable for building a gas fired power plant. These included the site location relative to the high-pressure gas network, to the high voltage grid (and existence of available capacity on the grid) and to cooling water, the non-proximity to urbanised areas and the need for a positive attitude of local public authorities. Many sites would be unsuitable due to them being either close to habitable areas, due to the high density of population in Belgium, or close to nature protection areas (e.g. Nature 2000 areas). The confirmation by the market test that suitable sites to construct generation capacity in Belgium are scarce confirms that a divestment of sites to suitable buyers means that an acquirer is likely to develop it and would significantly affect the potential of other competitors to enter the market.

Moreover, the modifications that EdF has proposed to the Commitments after the market test ensure that EdF can retain the second remaining site only if a high degree of probability exists that it will make an irrevocable decision to invest to construct a power plant before a given date and it is ensured that EdF cannot delay or prevent the entry of other competitors. Failing this, EdF will also be replaced for this site by another market player that has incentives equivalent to those of EdF prior to the proposed transaction.

The divestiture of more or other sites would not be proportional given that the two sites of EdF subject to divestiture essentially constitute the overlap between the two merging parties. By the (potential) divestiture of assets of the two companies carrying EdF's CCGT projects, the incentives for any remaining sites (i.e. the sites that SPE had before the proposed transaction) will also have been restored to the level that existed prior to the proposed transaction.

The Commitments are considered proportional because they eliminate the competition concerns, without affecting the ability of the parties of the proposed transaction to continue having an ambitious expansion programme. Consequently, despite the immediate divestiture of one site, and the potential divestiture of the remaining site, there is little risk that the merged entity will be constrained should it seeks to expand its business.

First, EdF's capacity of Tihange-1 is up to a specific amount contracted until 2015 with a specific price and, thus, not merger specific. To replace EdF as an entrant, the focus must be its incentives to develop its sites under development.

Second, as regards the Navagne site, it is true that this site has obtained (nearly) all the necessary permits and is therefore a more viable business than the two (less developed) sites of EdF that are currently proposed for divestiture. However, the competition concerns identified and analysed in the competitive assessment above

are closely linked to the reduced incentives of EdF to develop generation capacity, in addition to SPE's Navagne site. It is considered that the parties to the proposed transaction's incentive to develop the Navagne site will not be reduced compared to SPE's pre-merger incentive as it is the only site available to the parties post-merger for immediate development. This is the contrary situation vis-à-vis the divestiture sites, where the final investment decision will take place later. A divestiture of Navagne site would in fact mean that the current investment plans will be substantially delayed due to the inevitable period needed for a divestiture. An acquirer will also have to prepare a new investment decision (all elements for a final investment decision to be taken appear already prepared by SPE). Because there is no other nearly fully permitted site for CCGT capacity in their portfolio, also the parties to the proposed transaction would be delayed by several years in building new capacity.

Consequently, it is considered that the remedies suggested by the Belgian NCA are disproportionate and unrelated to the concerns identified by the Commission with regard to the proposed transaction and could even defy the objective of the remedies.

As to the conclusion on the proposed Commitments, the Commission has assessed the improved remedy package and has concluded that it is sufficient to remove the identified serious doubts on the Belgian wholesale and generation market, as well as any secondary effects on the Belgian electricity retail markets and the Belgian market for balancing and ancillary services. The Commission considers that the Commitments are appropriate and proportional as they seek to restore the incentives for developing EdF's sites to the level EdF had prior to the proposed transaction.

The Commission considers that the Commitments including the modifications of 9 November 2009 address the concerns identified by the Commission with regard to the proposed transaction.

Regarding conditions and obligations, under the first sentence of the second subparagraph of Article 6 II MR2004, the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.

It is appropriate in this case to qualify as conditions those measures that are intended to achieve a structural change in the market and to qualify as obligations the implementing or accompanying steps which are necessary to achieve this result, as well as behavioural remedies. Where a condition is not fulfilled, the Commission's decision declaring the concentration compatible with the common market no longer stands. Where the undertakings concerned commit a breach of an obligation, the Commission may revoke the clearance decision in accordance with Article 8 V MR2004. The undertakings concerned may also be subject to fines and periodic penalty payments under Articles 14 II and 15 I MR2004. The decision is subject to full

compliance with the conditions set out in Sections 2.1 and 2.3 of the Commitments submitted by the notifying party and with the obligations set out in Sections 2.2 and 3 of the same Commitments. The entire text of the commitments is attached in the Annex of the decision. These commitments form an integral part of the decision. The Commission granted an extension for the implementation of the commitments shorter than requested by the parties[1712].

9.44.7 Conclusion

For the reasons set out above, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement, subject to full compliance with the conditions set out in Sections 2.1 and 2.3 of the Commitments annexed to the present decision and with the obligations contained in the other sections of the said commitments. This decision is adopted in application of Article 6 I lit. b in conjunction with Article 6 II MR2004.

9.45 GDF SUEZ / INTERNATIONAL POWER CASE IV/M. 5978

On 29 November 2010, the European Commission received a notification of a proposed concentration pursuant to Article 4 MR2004 by which the undertaking GdF Suez S.A. ("GdF Suez", France) acquires within the meaning of Article 3 I lit. b MR2004 sole control over International Power plc ("International Power", England and Wales) (hereinafter the "parties") by way of acquisition of 70% of the shares in International Power[1713].

9.45.1 The Parties and the Operation

GdF Suez is present across the entire energy chain, in electricity and in natural gas, including: (i) purchase, production and commercialisation of natural gas and electricity; (ii) transport, distribution, management and development of major natural gas infrastructures; and (iii) design and commercialisation of energy services and environment related services.

39.9% of GdF Suez' share capital is held by the French Government and another 51% are publicly held.

International Power is an international operator with activities in North America, Europe, Middle East, Australia and Asia. International Power is an operator of power generation facilities generating a (gross) capacity of approximately 32,000 MW. The proposed transaction will be implemented in two steps: (i) GdF Suez will first carry out an internal reorganisation aimed at constituting a separate subgroup of subsidiaries owning most of the international energy assets of the GdF Suez group, located mainly outside Europe; the subgroup will be held by Electrabel SA ("Electrabel"), a wholly owned subsidiary of GdF Suez. (ii) The shares in this subgroup of

[1712] Until 15/10/2012; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.1113, p 786.
[1713] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 12, marginal note 12.112, p 1615.

subsidiaries will be transferred to International Power in return for the issuance of new International Power shares representing (post-share capital increase) 70% of the share capital of International Power.

GdF Suez will as a result, through Electrabel, hold 70% of the share capital of a new International Power (enlarged by the assets previously held by GdF Suez) ("New International Power").

The proposed transaction will lead to sole control of GdF Suez over International Power. Not only will GdF Suez hold 70% of New International Power's share capital but it will also be its only significant shareholder.

9.45.2 Referral Request

On 20 December 2010, the Belgian Competition Authority requested, on the basis of Article 9 II lit. a MR2004, a partial referral of the proposed transaction in relation to the parts of the case concerning the Belgian markets for generation and wholesale supply of electricity and the provision of balancing and ancillary services, with a view to assessing them under the Belgian competition law (the "Referral Request").

9.45.3 EU Dimension

The transaction has a EU dimension (Art. 1 MR2004).

9.45.4 Relevant Markets and Competitive Assessment

In previous decisions concerning the electricity sector, the Commission has considered that the following product markets should be distinguished: (i) generation and wholesale supply of electricity; (ii) transmission (iii) distribution, (iv) retail supply (further subdivided according to the category of customers) and ancillary services and balancing power. Each of these activities belongs to a distinct product market as they require different assets and resources.

9.45.5 Remedies

As regards the procedure, following its competitive assessment of the proposed transaction, the Commission concluded that there are concerns with regard to the fact that International Power owns in Belgium 33.3% of the shares in T-Power which, moreover, is also operated by International Power. The proposed transaction gives therefore GdF Suez (a) access to sensitive information and (b) control over and discretion on the operation of the Tpower plant and, thereby, over the operations of RWE Essent, the T-Power plant and an entrant on the Belgian electricity market in competition with GdF Suez.

Consequently, preliminary competition concerns have been identified as the proposed transaction would lead to a significant lessening of competition on the Belgian electricity markets[1714]. This raises serious doubts in that the proposed transaction would significantly impede effective competition, specifically on the Belgian

wholesale and generation market. This may equally lead to secondary effects on other Belgian electricity markets.

In order to address the serious doubts identified by the Commission, GdF Suez and International Power submitted on 5 January 2011 a commitments package.

On the basis of the results of the market test, the Commission considered that certain adjustments of the proposed commitments were required. The parties submitted on 19 January 2011 a revised commitments package so as to provide increased certainty that the commitments will become timely effective and that the parties will not have access to sensitive information before full implementation of the commitments.

Regarding the description of remedies, as a reaction to the Commission's concerns, the parties (GdF Suez and International Power) proposed, on 5 January 2011, as a remedy (the "Commitments"), (i) the divestment of all shares in T-Power currently held by International Power accounting for 33.33% of T-Power's share capital and all corresponding rights and obligations under any agreements signed between T-Power shareholders (the "Divestment Business")[1715] and (ii) the transfer of the agreement entered into between International Power and T-Power dated 10 December 2008 for the operation and maintenance of the T-Power plant for the duration of the Tolling Agreement entered into between T-Power and RWE Essent dated 13 August 2008 (the "Transferred Contract") (the Divestment Business and the Transferred Contract together are hereinafter referred to as "Divestment Interests")[1716]. The Commitments apply as of the date at which the T-Power plant will start its commercial operations ("COD"). The "First Divestiture Period" is foreseen to end.

Concerning the outcome of the market on the commitments, respondents to the market test of the Commitments included mostly competitors of GdF Suez and International Power on the Belgian electricity generation and wholesale market.

Responses from market players can be considered as partly positive as to the effectiveness of the Commitments and partly negative as to the modalities of the implementation of the Commitments submitted on 5 January 2011.

Pursuant to the Commitments originally submitted by the parties, the beginning of the First Divestiture Period would be set at COD and the procedure of appointment of the Monitoring Trustee would start one week following COD.

In this respect, while the vast majority of respondents pointed out that (i) the divestiture of the Divestment Interests should begin immediately after the adoption of the clearance decision of the Commission, there were

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[1714] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 12, marginal note 12.112, p 1615.
[1715] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.1085, p 779.

diverging responses as to the appropriate length of the period allowed to lapse between the Commission decision ("Effective Date") and the day the divestment becomes effective ("Closure"). Some respondents took the view that the period between the Effective Date and Closure should not extend beyond six months. A respondent considered that, while a three months period following COD is necessary but also sufficient to ensure the transfer of the operating arrangements to a new provider, the transfer of shares in T-Power should be done within a shorter time frame. Another respondent believed, instead, that the transfer of the Divestment Interests should take place before COD, as to avoid GdF Suez from accessing sensitive information regarding the T-Power plant. Finally, another entity proposed to define the First Divestiture Period as the period of seven months starting from the Effective Date.

In relation to (ii) the appointment of the Monitoring Trustee, none of the respondents to the market test agreed with the parties' proposal to appoint the Monitoring Trustee one week after COD.

With regard to the length and the starting date of the First Divestiture Period and the proposed timing for the appointment of the Monitoring Trustee, it was also pointed out that if the parties were to start the divestiture at COD and not at the Effective Date then (iii) the ring-fencing measures proposed by the parties (to undertake "all necessary measures") should be reinforced in order to avoid any disclosure of sensitive information during the First Divestiture Period.

In addition, the results to the market test showed that financial investors would be suitable purchasers of the Divestment Business while the new contractor of the O&M Agreement should have a certain technical expertise. Therefore, the participants to the market test suggested that the requirement of "proven expertise" is applied only to the acquirer of the O&M Agreement.

Finally, all the respondents have been positive with respect to the terms of the divestment proposed by the parties in order to preserve the viability of the Divestment Business. Additionally, they all considered the Commitments sufficiently interesting to attract potential purchasers for the Divestment Business.

With respect to the timing for the appointment of the Monitoring Trustee, the parties proposed, consistent with the Commission practice, to submit a list of suitable persons to be appointed as Monitoring Trustee no later than one week after the Effective Date for the Commission approval.

Moreover, the parties amended the Commitments text in such a way to ensure that the ring-fencing measures (including the appointment of the Hold Separate Manager) will be implemented as of the Effective Date instead of COD as originally proposed.

[1716] C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 12 marginal note 12.119, p 1073.

To conclude, the parties removed the requirement of "*proven expertise*" with reference to the purchaser of the Divestment Business while they kept it as a prerequisite of the suitable purchaser of the Transferred Contract.

AS regards the Commission's assessment of the offered modified commitments and the introduction, as set out in the Commission Notice on Remedies, the Commission assesses the compatibility of a notified concentration with the internal market in line with the terms of the Merger Regulation[1717]. Where a concentration raises serious doubts which could lead to a significant impediment to effective competition, the parties may seek to modify the concentration so as to resolve the serious doubts identified by the Commission with a view to having the merger cleared. In assessing whether or not the remedy will restore effective competition, the Commission considers the type, scale and scope of the remedies by reference to the structure and the particular characteristics of the market in which these serious doubts arise.

Commitments which are structural in nature are preferable from the point of view of the Merger Regulation. For instance, the divestiture of a business unit must consist of a viable business, which if operated by a suitable purchaser, can compete effectively with the merged entity on a lasting basis and which is divested as a going concern.

Furthermore, in order to maintain the structural effect of a remedy, the Commitments have to foresee that the merged entity cannot subsequently acquire influence over the whole or parts of the divested business, unless the Commission subsequently finds that the structure of the market has changed to such an extent that the absence of influence over the divested business is no longer necessary to render the concentration compatible with the internal market.

As concerns the different types of remedy, the most effective way to maintain effective competition is to create the conditions for the emergence of a new competitive entity or for the strengthening of existing competitors via divestiture by the merging parties.

Regarding the effectiveness of the modified commitments in removing the identified serious doubts as to the compatibility of the proposed transaction with the internal market, as initially notified, the parties consider that the commitments will remove the concerns identified by the Commission by removing their participation in T-Power and their participation in the operation and maintenance of the T-Power plant. The parties consider that the Commitments will thus remove any significant impediment to effective competition.

The Modified Commitments constitute both a divestment of International Power's shareholding in T-Power and a transfer of the O&M Agreement. This constitutes a structural remedy which results in a complete withdrawal

[1717] Commission Notice on Remedies, O. J. 2008, C 267/1; C. Bellamy & G. Child, European Community Law of Competition Appendices (5th ed.) (London, UK, Sweet & Maxwell, 2001) CH 45 p 443.

of International Power from T-Power. The competition concerns identified by the Commission originate from International Power being a co-controlling shareholder and the operator of the power plant. International Power's withdrawal thus effectively remedies these concerns. This was broadly confirmed by the responses to the market investigation.

The Divestment Interests (Divestment Business and Transferred Contract) also appear to constitute a viable business which, if acquired by one or several suitable purchasers, is likely to be able to effectively compete on the Belgian electricity generation and wholesale market. The market test has not revealed any reason contradicting this assessment. Several respondents to the market test have indicated their interest in considering purchasing the Divestment Interests.

The Modified Commitments as offered by the parties on 19 January 2011 ensure both an effective implementation of the modalities of the divestment of the divestments Interests and a sufficient ring-fencing before.

The Modified Commitments are considered proportional because they eliminate the competition concerns, without imposing conditions or obligations on the parties which go beyond this aim.

Regarding the conclusion on the modified commitments, the Commission has assessed the Modified Commitments and has concluded that it is sufficient to remove the identified serious doubts on the Belgian wholesale and generation market. The Commission considers that the Modified Commitments are appropriate and proportional.

Regarding conditions and obligations, under the first sentence of the second subparagraph of Article 6 II MR2004, the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering a concentration compatible with the common market.

It is appropriate in this case to qualify as conditions those measures that are intended to achieve a structural change in the market and to qualify as obligations the implementing or accompanying steps which are necessary to achieve this result, as well as behavioural remedies. Where a condition is not fulfilled, the Commission's decision declaring the concentration compatible with the common market no longer stands.

Where the undertakings concerned commit a breach of an obligation, the Commission may revoke the clearance decision in accordance with Article 8 V MR2004. The undertakings concerned may also be subject to fines and periodic penalty payments under Articles 14 II and 15 I MR2004.

The decision is subject to full compliance with the conditions set out in Sections B and D of the Modified Commitments submitted by the parties on 19 January 2011 and with the obligations set out in the other Sections

C and E of the same Commitments. The entire text of the Modified Commitments is attached in the Annex of the decision. These Modified Commitments form an integral part of the decision.

9.45.6 Conclusion

For the reasons set out above, the Commission has decided not to oppose the notified operation and to declare it compatible with the internal market and with the EEA Agreement, subject to full compliance with the conditions set out in Sections B and D of the Modified Commitments annexed to the decision and with the obligations contained in the other sections of the said Modified Commitments. This decision is adopted in application of Article 6 I lit. b in conjunction with Article 6 II MR2004.

9.46 STATOIL FUEL & RETAIL AVIATION / BP CASE IV/M. 7387

On 27 October 2014, the Commission received a notification of a proposed concentration pursuant to Article 4 MR2004 by which BP p.l.c ("BP", UK) acquires within the meaning of Article 3 I lit. b MR2004 sole control of the whole of the undertaking Statoil Fuel & Retail Aviation AS ("SFRA", Norway) by way of purchase of shares. BP is designated hereinafter as the "Notifying Party" and both BP and SFRA are designated hereinafter as "the parties".

9.46.1 The Parties

BP is active across the value chain of oil and gas from the exploration and production over the refining to the distribution of fuel products. BP's activities include the refining of aviation fuel and the into-plane supply of aviation fuel on a global level. SFRA is active in the into-plane supply of aviation fuel at 80 airports in the EEA with a focus on Scandinavian airports.

9.46.2 The Operation and the Concentration

The transaction consists of SFRA's parent, Alimentation Couche-Tard Inc. ("Alimentation Couche-Tard", Canada), transferring 100% of the shares in SFRA to BP. The operation therefore constitutes a concentration within the meaning of Article 3 I lit. b MR2004.

9.46.3 EU Dimension

The transaction has a EU dimension (Art. 1 MR2004).

9.46.4 Background

Regarding the background, aviation fuel is a product of the crude oil refining process, with kerosene (the base ingredient of aviation fuel) being extracted as crude oil is distilled.

9.46.5. Competitive Assessment

Having regard to non-coordinated horizontal effects, the Parties' activities overlap horizontally at 6 of the 80 airports with regard to this transaction, namely (1) Stockholm-Arlanda (Stockholm), (2) Malmö, (3) Gothenburg-Landvetter (Gothenburg), (4) Copenhagen-Kastrup (Copenhagen), (5) Hamburg and (6) Amsterdam. The transaction will lead to a reduction in the number of actual suppliers at Stockholm (from 3 to 2), Gothenburg (from 3 to 2), Malmö (from 3 to 2), Copenhagen (from 4 to 3), Hamburg (from 6 to 5) and Amsterdam (from 5 to 4).

Table 1 – market shares in Stockholm

Excluding self-supply	2011	2012	2013
BP	20-30%	30-40%	40-50%
SFRA	30-40%	30-40%	30-40%
Combined	50-60%	60-70%	70-80%
Shell	10-20%	10-20%	20-30%
Q8	0-5%	0-5%	0-5%
Chevron	20-30%	10—20%	0-5%

Market shares in the into-plane supply of aviation fuel in Malmö

Excluding self supply	2011	2012	2013
BP	30-40%	30-40%	20-30%
SFRA	40-50%	40-50%	30-40%
Combined	70-80%	80-90%	50-60%
Shell	20-30%	10-205	40-50%

As regards the notifying party's arguments, the Notifying Party submits that the market structure at the Malmö airport with only two suppliers of jet fuel and of avgas post-transaction will not impede effective competition.

Market shares in Gothenburg

Excluding self supply	2011	2012	2013
BP	40-50%	30-40%	20-30%
SFRA	30-40%	20-30%	20-30%
Combined	70-80%	60-70%	50—60%
Shell	20-30%	30-40%	40-50%

There are currently only three competing suppliers of aviation fuel in Gothenburg, i.e. BP, SFRA and Shell.

Market shares in Copenhagen

Excluding self supply	2011	2012	2013
BP	5-10%	5-10%	20-30%
SFRA	30-40%	30-40%	10-20%
Combined	40-50%	30-40%	30-40%
Shell	30-40%	40—50%	40-50%
Total	10-20%	10-20%	20-30%
Q8	0-5%	0-5%	0-5%

Regarding the removal of an important competitive constraint, the Commission took into account the notifying party's arguments and considers that most airlines carry out annual tenders and that in principle there are no

significant barriers to switching suppliers once a supply contract comes to an end and a new tender is organised.

Regarding the market structure, the Hamburg airport is an affected market.

Excluding self supply	2011	2012	2013
BP	20-30%	20-30%	20-30%
SFRA	20-30%	20-30%	20-30%
Combined	50-60%	40-50%	40-50%
Shell	40-50%	50-60%	40-50%
Exxon	0-5%	0-5%	0-5%
WFS	0-5%	0-5%	5-10%

There are currently six competing suppliers of aviation fuel in Hamburg, i.e. BP, SFRA, Shell, Exxon, WFS and Q8, which entered the market very recently.

Concerning the market structure the table below sets out the market shares of the parties and their competitors pre- and post-transaction.

Excluding self supply	2011	2012	2013
BP	20-30%	20-30%	10-20%
SFRA	10-20%	5-10%	0-5%
Combined	30%	30-40%	10-20%
Q8	20-30%	20-30%	30-40%
Shell	10-20%	30-40%	20-30%
Total	10-20%	10-20%	10-20%
Exxon	5-10%	0-5%	0-5%
Chevron	5-10%	0-5%	0-5%

As regards the competitive assessment, Amsterdam is not an affected market as the parties had a combined market share of 10-20% in 2013.

9.46.6 Proposed Remedies

In order to render the concentration compatible with the internal market, the Notifying Party has modified the notified concentration by entering into the following commitments.

Pursuant to the Commitments, BP commits to divest its into-plane supply of aviation fuel business in the following airports: (i) Copenhagen Kastrup airport (Copenhagen), (ii) Stockholm Arlanda airport (Stockholm), (iii) Gothenburg Landvetter airport (Gothenburg) and (iv) Malmö airport (Malmö) (collectively the "Relevant Airports") to an independent and unconnected party.

The Divestment Business includes all the elements of the current SFRA business at the relevant airports. These include the following: (i) SFRA's shareholdings in all the relevant infrastructure joint venture service companies (the "Relevant Infrastructure JVs") providing jet fuel storage, transportation, and into-plane refuelling services on behalf of the into-plane suppliers at the relevant airports. BP has procured signed waivers from all other

shareholders in the relevant infrastructure JVs that they will not exercise any preemption or other rights which might prevent an onward sale by BP of the SFRA shareholdings in the Relevant Infrastructure JVs to a Purchaser.

(ii) The relevant authorisations required for the Purchaser to operate at the Relevant Airports, to the extent they are capable of being assigned.

(iii) All current customer contracts under which SFRA supplies jet fuel to airline customers at the Relevant Airports.

(iv) The transfer of all relevant historical data from SFRA's systems which is available to BP relating to SFRA's customers, credit and other records.

(v) The transfer of SFRA key personnel, composed of four full-time employees: (1) one Sales and Marketing Manager who will also act as the Hold Separate Manager; (2) one Sales Assistant; (3) one JV Liaison and Stock Control; and (4) one Invoicing Assistant.

(vi) A commitment to provide pre-airfield supply and delivery of jet fuel to the purchaser at the relevant airports on back-to-back terms to those available to SFRA under the Supply Agreements. The Supply Agreements are effective for a period of 12 months from the completion of the Concentration. BP will extend the period of supply available to the Purchaser, on terms which replicate as far as possible the terms of the Supply Agreements, to a date 12 months from Closing (the "Extended Supply Arrangements"). Pricing of the supply from BP to the Purchaser for such period shall not exceed the costs incurred by BP in relation to purchase, storage and delivery of the product and any related compulsory storage services provided there under.

(vii) A commitment to provide, in relation to avgas supply in Malmö, pre-airfield supply and delivery of avgas for an interim period of 12 months from Closing. The avgas will be delivered, and legal title transferred, at the point the avgas enters the relevant on-airfield storage at Malmö airport. Pricing of the supply from BP to the Purchaser for such period shall not exceed the costs incurred by BP in relation to purchase, storage and delivery of the product.

The Divestment Business must be sold to a Purchaser approved by the Commission and having the financial resources, proven expertise and incentive to maintain and develop it as a viable and active competitive force. The Purchaser must be active either in relation to the into-place supply of aviation fuel or in related markets (that is, neighbouring markets or vertically related markets). In addition the undertakings concerned have entered into related commitments, inter alia regarding the separation of the divested businesses from their retained businesses, the preservation of the viability, marketability and competitiveness of the divested businesses, including the appointment of a monitoring trustee and, if necessary, a divestiture trustee.

9.46.7 Assessment of the Proposed Remedies

As regards the framework for the Commission's Assessment of the commitments, where a notified concentration raises serious doubts as to its compatibility with the internal market, the Parties may modify the notified concentration so as to remove the grounds for the serious doubts identified by the Commission with a view to having it declared compatible with the internal market pursuant to Article 6 I lit. b MR2004 in conjunction with Article 6 II MR2004.

Concerning the results of the market test, the Commission launched a market test of the Commitments on 25 November 2014. Overall, the market test was positive as to the scope and general suitability of the Commitments to remedy the serious doubts identified by the Commission as to the compatibility of the transaction with the internal market. However, the market test identified specific elements of the Commitments that were subsequently improved by the final version of the Commitments submitted on 5 December 2014.

These elements include the fact that financial investors would not be suitable purchasers and the fact that Gothenburg and Malmö might not be interesting on a stand-alone basis.

The respondents to the market test both from the supply and demand side generally considered that the divestment business includes all necessary assets and would be able to compete effectively with the merged entity and that the scale and scope of the divestment business is sufficient to ensure immediate viability and competitiveness at all relevant airports.

The majority of respondents to the market test from the supply side have however considered that financial investors would not be suitable Purchasers.

The Notifying Party agreed to address the issues expressed during the market test and on 5 December 2014 submitted a revised and final version of the Commitments addressing the issues in the following way:

(i) BP included as part of the commitment that the Purchaser of the Divestment Business has to be active either in relation to the into-plane supply of aviation fuel or in related markets (inside or outside the EEA).

(ii) The Divestment Business will be sold to one single Purchaser. However, the Commission may approve the sale of the Divestment Business in two separate parts to two different Purchasers, so as to ensure that Gothenburg and Malmö are sold together with Copenhagen and/or Stockholm.

As regards the suitability of the Commitments to remove the serious doubts, as explained above, the Commitments consist in the divestiture of the entire SFRA business that the Notifying Party is acquiring in relation to each of the relevant airports.

This constitutes a structural measure which will not necessitate medium or long-term monitoring measures. The Commission considers that the proposed divestment will eliminate the Parties' overlap in relation to the into-

plane supply of aviation fuel at each of the relevant airports. Moreover, the commitments can be implemented effectively within a short time and are sufficiently workable and lasting.

The proposed divestment will eliminate the Parties' overlap in the into-plane jet fuel supply in Copenhagen, Stockholm, Gothenburg and Malmö and in avgas supply in Malmö. This allows the entry of an additional competitor with proven track record, and is therefore considered suitable to remove any serious doubts as to the compatibility of the concentration with the internal market.

As confirmed by the market test and as explained in further details below, the Divestment Business includes all necessary components to enable a suitable Purchaser to operate on a lasting basis and to compete promptly with the existing suppliers.

Therefore, the Commission considers that the sale of the Divestment Business to an independent and suitable Purchaser will eliminate the serious doubts identified by the Commission on the market for into-plane supply of aviation fuel at each of the relevant airports.

Regarding the viability of the Divestment Business, the divestment business includes all necessary components to enable a suitable Purchaser to operate on a lasting basis and to compete promptly with the existing suppliers at each of the relevant airports.

First, for each of the relevant airports, the divestment business includes the entire SFRA shareholdings in the Relevant Infrastructure JVs which will grant the Purchaser the same rights that SFRA currently enjoys to use the infrastructure services at the relevant airports to supply aviation fuel to its customers.

The majority of respondents to the market test confirmed that the acquisition of shares in the on-airfield storage and into-plane services JVs are sufficient to ensure the viability and competitiveness of the divestment business on a lasting basis at all relevant airports.

The Commission also notes that there will be no limitation on the volume of fuel that the purchaser will be able to put through any of the relevant infrastructure JVs to supply its customers at any of the relevant airports. All on-airfield infrastructure required by the divestment business to provide into-plane fuel supply (e.g. storage, pipelines, hydrant system, vehicles and staff) are provided by the relevant infrastructure JVs at the relevant airports. This means the purchaser will not require any separate assets or personnel at any of the relevant airports. While the remaining shareholders in the relevant infrastructure JVs have certain pre-emption rights in relation to the transfer of shares or change of control, the notifying party provided the Commission with signed waivers from the other shareholders in the relevant infrastructure JVs that they would not exercise such rights.

Second, the Commission notes that the divestment business includes pre-airfield supply and delivery of aviation fuel at each of the relevant airports for a transitional period of 12 months.

The Commission notes that respondents to the market investigation stated that it is important to ensure access to off-airfield storage as well as to fuel supplies for such a transitional period.

Based on the results of the market test, the Commission considers that the 12 months arrangement will ensure that any purchaser has access to competitive fuel supply for a 12 months transition period while it establishes its own pre-airfield aviation fuel supply and off-airfield storage arrangements for the relevant airports.

In addition, the majority of respondents from the supply and demand side consider that other terms and conditions included in the divestment business (such as operational flexibility) would allow the purchaser to develop into a viable and effective competitor at all relevant airports.

Therefore, the Commission considers that the terms of these supply arrangements will be sufficiently competitive to allow a purchaser to exert strong competitive pressure on the remaining suppliers.

Third, for each of the relevant airports, the divestment business includes all SFRA customer contracts for the supply of aviation fuel. The market test confirmed that SFRA customers will continue to purchase from the divested business In the case of Malmö, the commitment covers both jet fuel and Avgas. The CSO determines each year and for each supplier the stocks of fuel that they have to hold in case of emergency situations and further that such transfer ensures the immediate viability of the divested business.

Therefore, the Commission considers that these transfers will allow a purchaser to quickly establish links with customers and have an immediate customer base pending future airline tenders.

Fourth, in order to operate at the relevant airports, the purchaser will need to obtain the necessary authorisations from the relevant airport authorities, as confirmed by the respondents to the market test.

The respondents to the market test also consider that such qualification would take between some weeks and 6 months.

In this respect, the notifying party commits to notify the airport authority of the transfer of the divestment business and to use all best endeavours to (i) procure the consent of the airport authority for the assignment of the Concession Agreement to the purchaser; or (ii) to assist the purchaser to enter a Concession Agreement with the airport authority. The Commission considers that this commitment is sufficient to ensure viability regarding the necessary authorisations from the relevant airport authorities.

Fifth, the Divestment Business includes all personnel which are necessary to ensure the business' viability and competitiveness. As explained above, the relevant infrastructure JVs have all the personnel required to provide into-plane fuel supply at the relevant airports. As such, the purchaser will not require any additional personnel for operational aspects of on-airfield storage and refuelling services at any of the relevant airports. The divestment business will include four full-time employees: (i) a sales and marketing manager who will also act

as the hold separate manager; (ii) one sales assistant; (iii) one JV liaison and stock controller; and (iv) one finance controller. Based on the results of the market test, the Commission considers that the above mentioned personnel are sufficient to ensure the viability and competitiveness of the divestment business.

Finally, the divestment business includes pre-airfield supply and delivery of avgas for an interim period of 12 months in Malmö. The avgas will be delivered, and legal title transferred, at the point the avgas enters the relevant on-airfield storage at Malmö airport. Therefore, the divestment business includes the transfer of SFRA's rights in avgas supply and ensures the purchaser's access to avgas supply in Malmö. The Commission considers that this commitment is sufficient to ensure the viability and competitiveness of the divestment business.

The Commitments can be implemented effectively within a short space of time and are sufficiently workable and lasting. The Commission considers that the proposed Commitments are capable of being implemented effectively within a short space of time. While some of the relevant infrastructure JV shareholder or partnership agreements may contain notice periods and pre-emption or change of control provisions, the notifying party provided the Commission with signed waivers from the other shareholders in the relevant infrastructure JVs that they will not exercise their rights and release SFRA from its obligations under the relevant provisions of the agreements. Moreover, the Commission considers that the elements of the commercial aviation airline contracts and the necessary personnel can be carved out appropriately to form the divestment business without causing any delay to the sale process, or competitiveness of the divestment business.

As regards purchaser criteria and potential buyers, the market test revealed that the divestment business is perceived as an attractive offer for a purchaser.

The market test both from the supply and demand side also showed that while Copenhagen and Stockholm are large enough to be interesting on a stand-alone basis, Gothenburg and Malmö may not be interesting to purchase on a stand-alone basis.

Therefore, the Commission considers that, for viability reasons, it may be necessary that the divestment business is sold to a single purchaser. The Commission may however approve the sale of the divestment business in two separate parts to two different purchasers. However, taking into account the market test results that stated that Gothenburg and Malmö might not be interesting on a stand-alone basis, and in order to ensure that Gothenburg and Malmö can be viably sold the sale of the divestment business in two separate parts to two Purchasers will only be approved by the Commission as long as: (i) Gothenburg and Malmö are sold together with Copenhagen and/or Stockholm and (ii) it can be demonstrated that this does not affect the viability and competitiveness of the Divestment Business after the sale, taking account of the proposed purchaser(s).

Finally, the market test revealed five interested buyers, the majority of which are already active in the market for into-plane supply of aviation fuel inside or outside the EEA.

Concerning the Conclusion on the Commitments, on the basis of the above, the Commission concludes that the Commitments are suitable and sufficient to remedy the serious doubts raised by the transaction in the markets for into-plane supply of aviation fuel in the following airports: (i) Copenhagen Kastrup airport (Copenhagen), (ii) Stockholm Arlanda airport (Stockholm), (iii) Gothenburg Landvetter airport (Gothenburg) and (iv) Malmö airport (Malmö). The commitments remove the entire increment that would have been added by the transaction in the above-mentioned airports. Moreover, the commitments are comprehensive and effective from all points of view, and are capable of being implemented effectively within a short period of time.

9.46.8 Conditions and Obligations

Pursuant to the first sentence of the second subparagraph of Article 6 II MR2004, the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the internal market.

The achievement of the measure that gives rise to the structural change of the market is a condition, whereas the implementing steps which are necessary to achieve this result are generally obligations on the Parties. Where a condition is not fulfilled, the Commission's decision declaring the concentration compatible with the internal market and the EEA Agreement no longer stands. Where the undertakings concerned commit a breach of an obligation, the Commission may revoke the clearance decision in accordance with Article 6 III MR2004. The undertakings concerned may also be subject to fines and periodic penalty payments under Articles 14 II and 15 I MR2004.

In accordance with the basic distinction between conditions and obligations, the decision in this case is conditional on full compliance with the requirements set out in section B of the final commitments, which constitute conditions. The remaining requirements set out in the other Sections of the said Commitments are considered to constitute obligations.

9.46.9 Conclusion

For the above reasons, the Commission has decided not to oppose the notified operation as modified by the commitments and to declare it compatible with the internal market and with the functioning of the EEA Agreement, subject to full compliance with the conditions in Section B of the commitments annexed to the

decision and with the obligations contained in the other sections of the said commitments. The decision is adopted in application of Article 6 I lit. b in conjunction with Article 6 II MR2004.

9.47 STATOIL FUEL AND RETAIL / DANSK FUELS CASE IV/M. 7603

The Commission identified competition concerns with regard to the following markets in Denmark: the petrol station market; and the wholesale markets for diesel, gasoline, light heating oil and heavy fuel oil**.** The transaction combines the fuel businesses of number 1 and 2 on the Danish wholesale markets and number 1 and 3 on the petrol station market in Denmark. The Commission had concerns that the remaining players would be unable to exercise a sufficient competitive constraint on the merged entity to avoid price rises at petrol stations and for wholesale customers.

The Commission also investigated links between the companies' activities on vertically related markets and in particular the relationship arising from the companies' activities in both the upstream wholesale of diesel, gasoline and light heating oil to resellers or retailers, and the downstream wholesale and retail supply of these products to end-customers. The Commission had concerns that the merged entity would have had the ability and the incentive to shut out competing resellers or retailers from access to these products, because of its high market share on the upstream markets and the higher margins to be made on the downstream markets.

Regarding the commitments and in order to address the Commission's competition concerns, SFR offered a comprehensive remedies package including:

- divestment of a nationwide network of 205 Shell and SFR fuel stations; divestment of Shell's commercial fuels business and aviation fuel activities; a supply agreement with Dansk Shell (i.e. the Shell Refinery in Fredericia) valid until the end of 2016;
- access to two third party oil terminals and to SFR's oil terminal in Aalborg;
- a trademark license agreement with Shell allowing the buyer of the divested businesses to use the Shell brand;
- the transfer of roughly two thirds of Dansk Shell's B2B customers to the buyer of the divestment businesses (fleet and commercial road transport ("CRT")) the ability for the buyer of the divestment businesses to issue euroShell cards to Danish customers and to accept international euroShell cards at all of its retail sites;
- the offer of a card acceptance agreement with SFR for acceptance of the euroShell card at 75 SFR sites for an initial period of 12 months, which may be prolonged by an additional 12 months upon request of the buyer; and the transfer of all existing employees of Dansk Fuels to the buyer of the divestment businesses in order to ensure business continuity.

The Commission found that the commitments address the competition concerns identified and concluded that the proposed transaction, as modified by the commitments, would raise no competition concerns.

9.48 E.ON / INNOGY CASE IV/M. 8870

Based on the notification of 31/01/2019, the Commission decided on 07/03/2019 to open a phase two investigation owing to Art. 6 I lit. c MR2004. Provisional deadline is the 20/09/2019. It is an asset swap with a 2nd transaction (CASE IV/M. 8871)[1718]. On 17/09/2019, the Commission cleared the merger[1719]. E.ON takes over RWE Innogy in terms of the electricity grid and the final customer business[1720]. RWE takes over the renewable and nuclear energy business from Innogy and E.ON and becomes the number two of global offshore wind energy business[1721]. RWE becomes a producer of power, wholesale trader and gets 16,7% of E.ON[1722]. The Commission fixed the following incidental provisions: E.ON has to spin off its motorway electric charging station business and the retail heating power business[1723]. Apart from the sale by E.ON regarding retail power business in the Czech Republic[1724], there are unfortunately no obligations to spin off power discounting businesses and participations in municipalities' energy businesses and regional energy suppliers[1725]. E.ON retains the electricity transport business, retail power sales, natural gas businesses (E.ON Ruhrgas) and energy services[1726]. Due to the transaction, 5.000 of the 40.000 Innogy jobs will be cancelled[1727].

10. U.S. Competition Law on Merger Control and BREXIT

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR-Act) requires, that specific concentrations must provide for specific information on the concentration to the Antitrust Division and the Federal Trade Commission (FTC)[1728] and must be noticed in advance[1729].

[1718] Q.v. C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.050, p 619.
[1719] https://www.spiegel.de/wirtschaft/unternehmen/rwe-und-e-on-eu-wettbewerbshueter-billigen-innogy-deal-unter-auflagen-a-1287164.html (17/09/2019); https://www.zeit.de/ wirtschaft/unternehmen/2019-09/eon-innogy-uebernahme-europaeische-union-genehmigung (17/09/2019).
[1720] https://www.spiegel.de/wirtschaft/unternehmen/rwe-und-e-on-eu-wettbewerbshueter-billigen-innogy-deal-unter-auflagen-a-1287164.html (17/09/2019); https://www.zeit.de/ wirtschaft/unternehmen/2019-09/eon-innogy-uebernahme-europaeische-union-genehmigung (17/09/2019).
[1721] https://www.spiegel.de/wirtschaft/unternehmen/rwe-und-e-on-eu-wettbewerbshueter-billigen-innogy-deal-unter-auflagen-a-1287164.html (17/09/2019); https://www.zeit.de/ wirtschaft/unternehmen/2019-09/eon-innogy-uebernahme-europaeische-union-genehmigung (17/09/2019).
[1722] https://www.spiegel.de/wirtschaft/unternehmen/rwe-und-e-on-eu-wettbewerbshueter-billigen-innogy-deal-unter-auflagen-a-1287164.html (17/09/2019); https://www.zeit.de/wirtschaft /unternehmen/2019-09/eon-innogy-uebernahme-europaeische-union-genehmigung (17/09/2019).
[1723] https://www.spiegel.de/wirtschaft/unternehmen/rwe-und-e-on-eu-wettbewerbshueter-billigen-innogy-deal-unter-auflagen-a-1287164.html (17/09/2019); https://www.zeit.de/ wirtschaft/unternehmen/2019-09/eon-innogy-uebernahme-europaeische-union-genehmigung (17/09/2019).
[1724] https://www.zeit.de/wirtschaft/unternehmen/2019-09/eon-innogy-uebernahme-europaeische-union-genehmigung (17/09/2019).
[1725] https://www.spiegel.de/wirtschaft/unternehmen/rwe-und-e-on-eu-wettbewerbshueter-billigen-innogy-deal-unter-auflagen-a-1287164.html (17/09/2019).
[1726] https://www.spiegel.de/wirtschaft/unternehmen/rwe-und-e-on-eu-wettbewerbshueter-billigen-innogy-deal-unter-auflagen-a-1287164.html (17/09/2019).
[1727] https://www.spiegel.de/wirtschaft/unternehmen/rwe-und-e-on-eu-wettbewerbshueter-billigen-innogy-deal-unter-auflagen-a-1287164.html (17/09/2019); https://www.zeit.de/ wirtschaft/unternehmen/2019-09/eon-innogy-uebernahme-europaeische-union-genehmigung (17/09/2019).
[1728] J. P., Terhechte (ed.), Internationales Kartell- und Fusionskontrollverfahrensrecht, Bielefeld 2008 (Gieseking) § 46 USA, marginal note 119 et seq..
[1729] D. Waldman, E. Jensen, Industrial Organization (4th ed.)(London, U.K., Routledge, 2016) CH 4.3.4 p 130; I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 10 I., p 276; q.v. C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.333, p 771.

First of all, the turnover thresholds must be honoured. A 2000 amendment of the HSR-Act requires the FTC to adapt the turnover thresholds to the amendments of the gross domestic product (GDP). An application under the HSR-Act is necessary if three tests are met:

Firstly, the Commerce Test, pursuant to which every party must take part in economic behaviour. Secondly, the Size-of-Person Test is met, a party has a global turnover of USD 113,4 Mio and the other party has a global turnover of USD 11,3 Mio.. This element is met if the value of the transaction exceeds USD 226,8 Mio. Thirdly, the Size-of-Transaction Test pursuant to which the acquiring party must acquire shares with a value of USD 56,7 Mio.

A dispensation of the application duty is available, it goods are acquired in the normal course of a business (i.e. purchase of a ship), of raw materials and specific forms of real estate acquisitions.

A foreign transaction is dispensated from the application duty if the following criteria are met: (i.) buyer and assets are foreign persons; (ii.) the national turnover of both parties does not exceed USD 113,4 Mio; (iii.) the overall value of the national assets does not exceed USD 113,4 Mio; (iv.) the transaction does not relate to the development of airports and nor national heritages sites.

The application document must be fulfilled regarding transaction and company specific dates.

The application must be handled in several copies to the Antitrust Division and the FTC.

The assessment procedure consists of the prohibition of implementation of a given concentration. The assessment period starts with the complete application for a transaction and ends after 30 days. The vast majority of applications is cleared under the first assessment period. An in—depth-assessment is carried out in 2,5% of a total of 1.500 application in 2004. Under the second phase, the assessment period is prolonged by 30 days.

The FTC offered amendments of the second request period in order to simplify the procedure.

Regarding the cooperation between several national competition authorities, international agreements are implemented between the EU, Australia, Brazil, Canada, Japan and Mexico.

Concerning horizontal mergers, a concentration can be assessed under Sec. 7 Clayton Act from 1914[1730], Sec. 1 Sherman Act from 1890, Sec. 2 Sherman Act[1731] or Sec. 5 Federal Trade Commission Act. Sec. 7 Clayton Act is the most familiar legal base. It outlawed mergers by stock acquisition but not by asset acquisition which was changed in 1950[1732]. The Hart-Scott-Rudino Antitrust Improvement Act of 1976 adds to the Clayton Act[1733].

[1730] I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 10 II. 3. p 284 (horizontal concentrations).
[1731] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) A. III. 2. a) p 20; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1361, p 537.
[1732] D. Waldman, E. Jensen, Industrial Organization (4th ed.)(London, U.K., Routledge, 2016) CH 4.3.5 pp 123-124 (the Celler-Kefauver Act 1950).
[1733] F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1361, p 537.

Regarding vertical concentrations, an upstream or downstream market alternatives foreclosure test is applied[1734]. Concerning conglomerate mergers, a market extension, catenation and diversification test is applied[1735].

Initially, the authority will proof if a transaction increases the market concentration and lead to a relevant concentrated market. Second, the authority assesses if a concentration leads to competitive restraints, third, the authority assesses if market entries are feasible which will offset negative competitive effects of a given concentration. Fourth, the authority proves if the reported efficiencies can be attained without the concentration. Lastly the authority approves if a party would leave the relevant product market as alternative to a given transaction.

The market shares are evaluated owing to the Herfindahl-Hirschmann Index (HHI[1736]).

The authority bases its evaluations on the amendment of the HHI (post-merger HHI and the difference of the HHI prior and post the transaction). A post-merger HHI below 1000 is an equivalent of non-concentrated markets. A post merger HHI between 1000 and 1800 a mediocre concentrated market. Is the amendment of the concentration is below 100 HHI it will be assessed that a given concentration does not impede effective competition. A post merger HHI 1800 is the equivalent of highly concentrated markets.

The antitrust division can assess concentrations alternatively on the grounds of Sec. 1 Sherman Act which formed until 1914 the only base for competitive assessments. The second alternative legal base is Sec. 2 Sherman Act which prohibits monopolisation. The FTC can attack concentration also on the basis of Sec. 5 Federal Trade Commission Act, which outlaws unfair competition.

In 1984 the department of justice published guidelines on the assessment of vertical mergers with a focus on actual potential competition with a view of avoiding the market entry of the target company.

The guidelines are also dealing with conglomerate mergers and are dealing with the same principles as to vertical mergers.

Regarding conditions and obligations, the merger authorities have a wide discretion in accepting conditions and obligations as to the divestment of assets in favour of a suitable buyer and the sub-licensing of intellectual property rights and time periods.

Regarding the summary as to the decision making of the Supreme Court, between 1962 and 1975 the supreme court established high barriers as to the implementation of concentrations. First, the effects of a given

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[1734] I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 10 II.3.b), pp. 284-285 and CH 13 III.3. p 382.
[1735] I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 10 II.3.b), p 285.
[1736] Commission Guidelines on the assessment of horizontal mergers of 16/12/2003, O. J. C 31, 05/02/2004, p 5; V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 16 2. p 144; C. Koenig, K. Schreiber, Europäisches Wettbewerbsrecht (1st ed.) (Tübingen, Germany, Mohr, 2010) CH 7 IV. 2., p 202; E. Mestmäcker / H. Schweitzer, Europäisches Wettbewerbsrecht (2nd ed.)(Munich, Germany, Beck, 2004) CH 6 § 25 II. p 598; F. Rittner / M. Dreher / M. Kulka, Wettbewerbs- und Kartellrecht (8th ed.) (Heidelberg, Germany, C.F. Müller, 2014) marginal note 1419, p 559; A. Neef, Kartellrecht (1st ed.) (Heidelberg, Germany, C.F. Müller, 2008) marginal note 379, p 178; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.)

concentration are assessed in a quantitative manner (concentration, market shares). Second, horizontal mergers are prohibited based on comparatively low market shares. Third, as to vertical mergers a low level of competitive foreclosure is sufficient. Fourth, the court discourages efficiency effects of the given concentration.

Regarding the BREXIT pursuant to Art. 50 TEU, it has to be noted that the MR2004 will still be applicable to mergers in the UK under Art. 1 II MR2004 with one exception: The UK wide turnover of undertakings will be dealt by the global turnover and no longer be attributed to the EU wide turnover of undertakings. This is related to the effects doctrine of international application of merger control law so that merger control law is applicable if a merger has a direct, substantial and foreseeable effect on competition within the EU[1737].

(Munich, Germany, Beck, 2008) § 16 marginal note 12 p 574; B. Woeckener, Strategischer Wettbewerb (3rd ed.)(Berlin, Germany, Springer, 2014) CH 3.5.1.3, p 88; I. Schmidt, Wettbewerbspolitik und Kartellrecht, (9th ed.)(Munich, Germany, Oldenbourg, 2012) CH 6 V 1. c), p 171.

[1737]R. Whish, D. Bailey, Competition Law (8th ed.) (Oxford, U.K., OUP, 2015) CH 12 3. (A) p. 523; C. Koenig, K. Schreiber, Europäisches Wettbewerbsrecht (1st ed.) (Tübingen, Germany, Mohr, 2010) CH 7 III. 3., p 199.

11. Conclusion

After having introduced the diverse business economic considerations which are responsible for corporate decisions whether to implement a concentration or not, this doctoral thesis went on to discuss the micro-economic aspects of a growing tendency towards concentration[1738]. The analytic bases of European Merger Control Law were explained which evolved not only from Art. 66 ECSCT, but also from Art. 102 and 101 TFEU (Art. 82 and 81 ECT), the MR1989 and its successors of 1997 and 2004.

The application of the principles of European merger control to the energy sector revealed that it is quite difficult to assure that only these concentrations are declared compatible with the common market that honour the principles of liberalisation of the electricity and gas industries as they are formulated in the primary EC law and specified in the IEMD and IGMD[1739]. It was elaborated with regard to the acquisitions of two U.K. regional electricity companies by EdF that the current merger control law leaves no scope for reciprocity considerations as to acquisitions by incumbent companies in liberalised markets even though the acquirer is a protected public undertaking.

Moreover, it is established that different decisions apply inconsistent market definitions.

With respect to the efficacy of incidental provisions, it is remarkable, that the provisions dealing with the parties' initiative regarding the formulation of incidental provisions should be accompanied by the power of the Commission to add certain aspects ex officio. Especially conditions are valuable as they do not coerce the parties to implement anything: Only if the parties are still interested in pursuing the merger, they are obliged to comply.

The deficit regarding incidental provisions corresponds to the incomplete provisions as to the enforcement of incidental provisions or so called undertakings. Contrary to the wording of MR2004 and based on the proportionality principle owing to the principle of constitutional states or rule of law under Art. 2 EUT and Art. 20 III German Basic Law (GG) it would be more efficient if the Commission could re-define and enforce incidental provisions and partly revoke clearances and incidental provisions/undertakings attached to its decisions rather than the inflexible power to revoke the complete compatibility decision.

By means of the VEBA/VIAG and RWE/VEW cases, the question was addressed which grounds are responsible for the established analytical and practical deficiencies of merger control in the energy sector.

[1738] However, this view is not uncontested, as some Academics believe that the global economy is actually de-merging and becoming less-concentrated: q.v. P. Ghemawat and F. Ghadar, Financial Times, *Testing The Logic of Mergers* 13 (07/06/2000).

[1739] R. Whish, D. Bailey, Competition Law (9th ed.) (Oxford, U.K., OUP, 2018) CH 23 10. (A) (i) p 1021.

It was stated that the weaknesses of the IEMD and IGMD are partly responsible for weak undertaking which do not sufficiently remove the scope for dominance on the affected markets and which do not rule out any possibility of impediments of effective negotiated TPA and do not remove any commercial incentive of the grid subsidiaries of the vertically integrated companies as to access which discriminates between intra and extra group applicants. It was reported that another argument relates to the limited scope that the Commission has if it wants to remedy deficiencies of written primary law owing to the extraordinary nature of the implied powers doctrine based on the principle of constitutional state. Then, the adverse political difficulties that competition authorities are facing are taken into account.

Further, it is analysed that accidental regulations based on incidental provisions imposed on undertakings which may or not implement a concentration is by no means a consistent and non-discriminatory and predictable tool to overcome drawbacks of primary or secondary European law in a given sector: These aspects must not be neglected as they are based on the democratic principle and the constitutional state doctrine.

With regard to a more stringent framework for TPA in the IEMD and the IGMD, it was stated that secondary legislation with regard to energy networks is bound not only by Art. 345 TFEU (Art. 295 ECT) but will be bound by the new protocol on human rights and by national constitutions which protect property rights again dis-proportionate expropriations or re-definitions and require a system of state liability law so as to give necessary compensation. Adverse political pressures are taken into account as well but egoistic national policies which abstain from transnational task forces in order to settle difficulties and disputes are considered, too.

Furthermore, it has been stated that different stages of the maturity of domestic markets, different consumer patterns and a potential isolation of the system makes it more difficult to apply consistent standards as to the appropriate market definition in order to boost harmonisation.

The implementation of the VEBA/VIAG merger was further complicated owing to several circumstances which were difficult if not impossible to project: the extremely valuable assets at stake, the mandatory consent of the government as to the acquisition of VEAG, the minority shareholdings of the bidders EnBW, BEWAG and HEW in VEAG, the controversy regarding BEWAG and the increased sensitivity of the public owing to the high energy crisis in combination with eco tax increases. Nevertheless, the Commission should take additional care with respect to potential impediments as to the realisation of parties' commitments: It must be properly assessed whether the parties are to be made responsible for the alleged difficulties or not. This argument is broadened by the idea that any legal uncertainty as to the assets that are due to be disposed can well undermine the commercial value of the assets so as to prevent the future acquirers from creating a powerful competitor. Similarly, the parties may pursue a policy so as to maximise the number of valuable bids so that the acquirer

that was favoured by the Commission in its reasoning may be well removed from the group of likely bidders in the future.

In contrast to the negative aspects, it can be highlighted that the Commission realised the drawbacks and flaws of the energy liberalisation project as expressed by the present IEMD and IGMD quickly so that the co-ordinative and innovative mechanisms of Florence and Madrid were created: It was a unique idea to create single view pressure groups in order to obtain an independent view from transmission system operators. Although these matters are highly complex in technical and economic terms, it is expected to reach agreement with regard to congestion management by means of either counter-trading, re-balancing, auctions or obligations to offer free capacity etc., soon. Thereby, the Commission's approach is justifiable unless better legal instruments of liberalisation and regulation are in place.

Moreover, it was stressed that incidental provisions put forward by the parties and accepted by the Commission must be restricted to a subsidiary legal instrument, only applied if it is strictly necessary to overcome certain detrimental aspects of given concentrations in order to provide a hint for the legislator, that the legislation should be specified.

Hence, competition as a de-central distributor of risk, wealth and power will be extended to its maximum extent, if wholesale industrial and small consumers benefit from lower energy prices which allow both greater productivity of European products on the world markets and higher environmental standards owing to modern, cost-efficient plants and networks which would not be created if unilateral or joint dominance spread to many segments of the future internal market. The successful implementation of both national spot markets for power and gas, which will be accompanied by tools of financial risk management like forwards, futures and options, will be a valuable indication of an efficient liberalisation of national power and gas markets. Said liberalised national markets are a pre-requisite for additional convergence which will lead to energy markets of European geographic scope.

This doctoral thesis has assessed in its main part (Chapter 9.3 – 9.48) the incidental provisions or undertakings offered by the parties in order to make a concentration compatible with the common market and which allow the Commission to add incidental provisions to its clearance decision. The following methodology was applied: Firstly, the parties were assessed before the concentration (merger) was analysed. Furthermore the Community dimension has been evaluated. Then the relevant product and geographic market definition was discussed followed by the assessment of incidental provisions before the final conclusion was drawn.

In the case ENI / EDP / GDP CASE IV/M. 3440 in section 9.31 it was found that the incidental provisions promised by the parties are not sufficient in order to address the competitive concerns of the concentration.

Regarding non-horizontal effects (raising rival costs) and EDP's privileged and preferential access to the Portuguese gas infrastructure, the sale of the Sines LNG terminal and Carrico underground storage to the gas high pressure network operator, i.e. an ownership unbundling, is a positive proposal welcomed by the Commission. However, the terms and conditions attached to these transfers did not ensure that a sufficient capacity would be available for third parties. In particular the remedies explicitly allows subsidiaries of the parties active in gas in Spain, Union Fenosa Gas and Naturcorp, to book further capacity even before the transfer, as well as the parties after the transfer. The parties also proposed to make capacity available in the Spain-Portugal pipeline at the Portuguese entry point (Campo Major). According to the market test, this capacity was found to be far too small (less than 10% of this pipeline's capacity, not enough to supply a single 400 MW CCGT unit) and is not ensured in the upstream pipeline (Extremadura pipeline) to bring gas up to the Portuguese border. A mechanism has been included to provide additional capacity but under conditions which make the access to this extra capacity neither timely, economically feasible nor long standing enough for third parties to rely thereon. Concerning other vertical impacts of the merger, as regards the other vertical competition concerns raised by the operation, the commitment provide mainly for Chinese Walls to limit flows of information between GDP and EDP. The market test clearly indicated that, in the present case, it was found that such measures were not sufficient to address these issues. Other remedies may indirectly positively affect the retail electricity market but do not as was found ensure that new competitors will effectively enter the retail supply of electricity in Portugal in a timely and sufficiently large way so as to compensate for the loss of GDP's future competition.

Having regard to natural gas markets and gas supply to power producers (customer foreclosure), three commitments were found to directly relate to this concern: (i) the elimination of GDP's right of first refusal for the gas supply of TER, (ii) the suspension of some of EDP's voting rights in Turbogas for three years and (iii) the partial lease of TER.

After the expiration of the deadline set for the submission of remedies, on 26/11/2004, the parties had submitted documents proposing to amend the remedies already presented, with a view to addressing the concerns raised by the Commission. However, it was found that these remedies did not fully and unambiguously remove the competition concerns identified by the Commission.

For these reasons, it has been considered individually or together, that the Commission issued a decision on 09/12/2004, which declared the proposed concentration incompatible with the common market pursuant to Art. 8 III MR1989 in that it strengthens dominant positions in several gas and electricity markets in Portugal as a

result of which effective competition would be significantly impeded in a substantial part of the common market.

In the case EXXON / Mobil CASE IV/M.1383 in section 9.11 it was found that both undertakings merge their global activities. On the 02/06/1999, the UK notified the Commission in accordance with Art. 9 II lit. b MR1989 that it considered that the concentration affected competition in the north west of Scotland in the retail motor fuel sector. On the 26/07/1999 the Commission issued a statement of objections identifying inter alia competition concerns in the market for motor fuel retailing in the whole of the UK. By decision dated 09/06/1999, the Commission found that the notified operation raised serious doubts as to its compatibility with the common market and accordingly initiated proceedings in the case pursuant to Art. 6 I lit. c MR1989.

It was found that the concentration would have given rise to the creation or strengthening of a dominant position in the following markets:

- Wholesale transmission of natural gas in the Netherlands
- Long distance wholesale transmission of natural gas in Germany
- Underground storage facilities for natural gas servicing the south of Germany
- Group 1 base oils in the EEA
- Motor fuel retailing in Austria, Germany, Luxembourg, Netherlands and the UK
- Motor fuel retailing on toll motorways in France
- Aviation lubricants world-wide
- Aviation fuels at Gatwick Airport.

On 03/09/1999, the parties offered certain commitments to remove the competition concerns which the Commission had identified in its statement of objections of 26/07/1999. On 20/09/1999 it was found, that the parties submitted amended commitments taking into account certain adjustments required by the Commission in view of, in particular, the results of the market test. The commitments were summarised in the following points, following the order of the relevant markets on which the Commission stated objections as followed in the assessment part of said decision.

Regarding the Dutch wholesale transmission market, the parties would reach a binding agreement on the sale of Mobil Europe Gas Inc. (MEGAS) to a purchaser approved by the Commission.

Within a specified period from the effective date, the parties have committed themselves to transfer control over one or more base oil businesses together encompassing a specified amount of barrels per day of base oil manufacturing capacity to BP Amoco and / or one or more third parties to be approved by the Commission. In response to the Commission's conclusion that the concentration will create or strengthen oligopolistic

dominance over Austria, French toll motorways, Germany, Luxembourg, the Netherlands and the UK, the parties have undertaken to dispose of Mobil's share in Aral and to terminate Mobil's participation in the fuels part of the BP/Mobil JV.

Within a certain time behind the effective date, the parties are bound to divest themselves Exxon's global aviation lubricants business with commercial airlines.

The parties have undertaken to sell within a certain period from the effective date aviation fuel pipeline capacity from the Coryton refinery to Gatwick airport equivalent to Mobil's 1998 sales volume at Gatwick.

Therefore, the parties offer the following commitments to allow the Commission to approve the transaction owing to Art. 8 II MR1989. These commitments concern the following items: (1) the divestiture of Mobil's interest in Aral; (2) the divestiture of Mobil's interest in BP/Mobil JV fuels businesses; (3) the divestiture of one or more base oil businesses together encompassing approximately a specified amount of barrels per day of base oil manufacturing capacity; (4) the divestiture of Mobil's interest in certain pipelines from the Coryton refinery to Gatwick airport; (5) the divestiture of assets associated with Exxon's global commercial aviation lubricants business; (6) the divestiture of Mobil's Dutch gas trading affiliate MEGAS; (7) the divestiture of Exxon's 25% equity interest in Thyssengas; (8) a reduction of Mobil's voting rights in Erdgas Münster; and (9) a commitment to offer to sell Mobil's rights in one or more depleted reservoirs suitable for conversion into natural gas underground storage facilities in Bavaria.

The parties should sell, or caused to be sold, to a purchaser to be approved by the Commission, either all of the shares held by Mobil Marketing und Raffinerie GmbH (MMRG) in Aral Ag (Aral), or all of the shares of Mobil Oil AG (MOAG) in Warburg Beteiligungsgesellschaft für Mineralölinteressen KgaA & Co. oHG (Warburg oHG), or all of the shares held by Warburg oHG in MMRG, to the effect that, following the divestiture, the parties would no longer hold any shareholding, either directly or indirectly, in Aral.

From the effective date, the parties should continue to exercise in good faith all reasonable endeavours to reach a binding agreement with BP Amoco for the sale of Mobil's interest in the BP/Mobil JV fuels businesses or the dissolution of the BP/Mobil JV.

Within a certain amount of days from the effective date, the parties should reach binding agreement on the transfer or return of control (within the meaning of MR1989) over one or more base oil businesses together encompassing approximately a specified amount of barrels per day of base oil manufacturing capacity to BP Amoco and / or one or more third parties to be approved by the Commission. If at any time following the effective date, BP Amoco elected to submit all outstanding issues on the termination of the BP/Mobil JV (for both fuels and lubricants) to binding expert resolution, Exxon Mobil should agree to such binding expert

resolution and should agree that as of the closing of the transaction: BP Amoco and Mobil should be released from their obligation. Within five working days of receipt of BP Amoco's written election of binding expert resolution, Exxon Mobil should notify BP Amoco in writing of its nomination of an independent expert. Within 10 working days thereafter, the two experts shall meet and shall choose a third independent expert.

Within a specified duration from the effective date, the parties shall reach binding agreement for the sale of aviation fuel pipeline capacity from the Coryton refinery to Gatwick airport equivalent to Mobil's 1998 sales volume at Gatwick, subject to the appropriate pipeline co-shareholder consents and pre-emptive rights and any government approvals.

Within a specified period of time from the effective date, unless extended by the Commission, the parties should reach binding agreement on the sale of the assets associated with Exxon's global aviation turbine lubricants business with commercial airlines to a purchaser approved by the Commission.

The parties as it was found should reach binding agreement on the sale of Mobil Europe Gas Inc. (MEGAS) to a purchaser approved by the Commission. Within a specified period from the effective date, the parties should reach binding agreement on the sale of Exxon's 25% equity stake in Thyssengas GmbH to a third party approved by the Commission. Exxon, Mobil and Exxon Mobil should use their reasonable best efforts to obtain the agreement of the other shareholders in Erdgas Münster to reallocate a certain percentage of voting rights associated with Mobil's current equity interest in Erdgas Münster to such shareholders (pro rata to their current voting rights) so that Exxon Mobil and Elwerath (BEB) combined should hold less than 50% of the voting rights in Erdgas Münster.

For a certain period following the effective date or until the expiration of Mobil's rights to the depleted reservoirs, whichever is earlier, Mobil or Exxon Mobil should offer to enter into a binding agreement with third parties to be approved by the Commission for the sale of any and all of its rights to one or more of the depleted reservoirs suitable to conversion into storage facilities servicing the Munich area, until it has sold a combined estimated working gas volume, after conversion.

If the parties have agreed to appoint a trustee, they shall propose the name of an independent and experienced institution that they consider appropriate to be appointed as trustee. The Commission should have the discretion to approve or reject the proposed institution. If the proposed institution were rejected, the parties shall submit the names of at least two further institutions, within five working days of being informed of the rejection. If more than one name is approved by the Commission, the parties shall be free to choose the trustee to be appointed from among the names approved. If all further names are rejected by the Commission, it was found that the Commission should nominate a trustee to be appointed by the parties.

Finally, it can be summarized that MR2004 constitutes a so called definition of contents and delineation ("Inhalts- und Schrankenbestimmung") in terms of entrepreneurial freedom of property (Art. 17 EU Charter of fundamental rights and Art. 14 I 2 German Basic Law (GG - Chapter 8.2) and the entrepreneurial freedom under Art. 16 Charter of fundamental rights. Only decisions, honouring the principle of constitutional state or so-called rule of law are justifiable under Art. 2 EUT and Art. 20 III German Basic Law (GG). The principle of constitutional state defines a state where law is the primary regulatory regime factor: It deals with legality of the administration (Gesetzmäßigkeit der Verwaltung)[1740], i.e. the precedence of laws[1741] and reservation of laws[1742] (Vorrang und Vorbehalt des Gesetzes), the determination of laws (Bestimmtheitsgrundsatz)[1743], the principle of proportionality (Verhältnismäßigkeitsgrundsatz[1744], i.e. admissibility of objectives[1745], suitability of measures to attain targets[1746], principle of necessity[1747] and of proportionality in the narrow sense where the drawbacks related to the pursuance of an objective do not outweigh the related benefits)[1748] and the horizontal division of powers (legislative, executive branch and judiciary under Art. 20 II 2 German Basic Law (GG))[1749], legal certainty (Rechtssicherheit)[1750] and the protection of trust (Vertrauensschutz)[1751].

At first sight, it remains extremely questionable that the Commission is not allowed to invent and define new incidental provisions (conditions and obligations)[1752] so as to deal with a case and make a concentration compatible to the common market (Art. 2 MR2004) and in contrast to § 36 I-II German Administrative Proceedings Act (VwVfG) where the administrative unit is allowed to introduce proportional incidental provisions, as the Commission is rather bound only to address those divestiture commitments that the parties have proposed and to transfer them into proportionate incidental provisions (Art. 6 II and Art. 8 II MR2004)[1753] that are suitable and practicably feasible[1754]. It is stated that the Commission has a broad discretion as to the

[1740] H. Jarass and B. Pieroth, Grundgesetz (16th ed.) (Munich, Germany, Beck, 2020) Art. 20 marginal note 41.
[1741] H. Jarass and B. Pieroth, Grundgesetz (16th ed.) (Munich, Germany, Beck, 2020) Art. 20 marginal note 45, 51; BVerfGE 80, 137, 161.
[1742] H. Jarass and B. Pieroth, Grundgesetz (16th ed.) (Munich, Germany, Beck, 2020) Art. 20 marginal note 69; BVerfGE 98, 218, 251.
[1743] H. Jarass and B. Pieroth, Grundgesetz (16th ed.) (Munich, Germany, Beck, 2020) Art. 20 marginal note 82-83; BVerfGE 49, 168, 181; BVerfGE 59, 104, 114; BVerfGE 62, 169, 183; BVerfGE 80, 103, 107.
[1744] H. Jarass and B. Pieroth, Grundgesetz (16th ed.) (Munich, Germany, Beck, 2020) Art. 20 marginal note 112; BVerfGE 76, 256, 359; BVerfGE 80, 109, 120; BVerfGE 108, 129, 136; BVerfGE 111, 54, 82; BVerfGE 113, 154, 162.
[1745] H. Jarass and B. Pieroth, Grundgesetz (16th ed.) (Munich, Germany, Beck, 2020) Art. 20 marginal note 116-117; BVerfGE 100, 313, 333; BVerfGE 115, 276, 304; BVerfGE 115, 320, 345, BVerfGE 117, 163, 182.
[1746] H. Jarass and B. Pieroth, Grundgesetz (16th ed.) (Munich, Germany, Beck, 2020) Art. 20 marginal note 116, 118; BVerfGE 134, 204, marginal note 79; BVerfGE 126, 112, 144; BVerfGE 130, 151, 188.
[1747] H. Jarass and B. Pieroth, Grundgesetz (16th ed.) (Munich, Germany, Beck, 2020) Art. 20 marginal note 119; BVerfGE 79, 179, 198; BVerfGE 100, 226, 241, BVerfGE 110, 1, 28; BVerfGE 148, 40, marginal note 47.
[1748] H. Jarass and B. Pieroth, Grundgesetz (16th ed.) (Munich, Germany, Beck, 2020) Art. 20 marginal note 116, 120; BVerfGE 126, 112, 152; BVerfGE 133, 277, marginal note 108; BVerfGE 148, 40, marginal note 48; BVerfGE 104, 337, 349; BVerfGE 90, 145, 173; BVerfGE 105, 17, 36; BVerfGE 113, 29, 54.
[1749] H. Jarass and B. Pieroth, Grundgesetz (16th ed.) (Munich, Germany, Beck, 2020) Art. 20 marginal note 32-33; BVerfGE 9, 268, 279; BVerfGE 67, 100, 130; BVerfGE 124, 78, 120; BVerfGE 143, 101, marginal note 118.
[1750] H. Jarass and B. Pieroth, Grundgesetz (16th ed.) (Munich, Germany, Beck, 2020) Art. 20 marginal note 94; BVerfGE 108, 370, 396; BVerfGE 126, 286, 313; BVerfGE 132, 302, marginal note 41.
[1751] H. Jarass and B. Pieroth, Grundgesetz (16th ed.) (Munich, Germany, Beck, 2020) Art. 20 marginal note 94; BVerfGE 105, 48, 57; BVerfGE 108, 370, 396; BVerfGE 126, 286, 313; BVerfGE 132, 302, marginal note 41.
[1752] R. Bechtold/ W. Bosch / I. Brinker / S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) Art. 8 FKVO marginal note 6.
[1753] R. Bechtold/ W. Bosch / I. Brinker / S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) Art. 8 FKVO marginal note 6 and 10.
[1754] R. Bechtold/ W. Bosch / I. Brinker / S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) Art. 8 FKVO marginal note 13-14.

acceptance of incidental provisions under Art. 6 II MR2004[1755] and Art. 8 II MR2004 as proposed by the parties, which is only addressed by the Court and the CJEU regarding apparent mistakes of judgements ("offensichtliche Beurteilungsfehler")[1756]. However, the missing ability of the Commission to define new incidental provisions on merging parties protects the notifying party against unfair, overreaching incidental provisions leading to a not wanted concentration ex officio. So, the parties remain in charge as they can easily abstain from a concentration when the offered or negotiated incidental provisions would go too far. Incidental provisions may cover behavioural factors like hold-separate-obligations and structural factors like divestments[1757] potentially backed by the involvement of trustees[1758]. Structural factors are preferred by the Commission[1759] and may involve transitional arrangements so as to assure the security of supply of the purchaser, the prohibition of competition stipulations ("Wettbewerbsverbotsklauseln") concerning the divested businesses and the prohibition of re-acquisitions of divested parts of an undertaking for a specified period of time[1760]. Additionally and at first sight, it is questionable that such provisions are usually prepared and negotiated in secretive negotiations rounds prior and in parallel to the formal introduction of merger proceedings in order to better cope with strict time limits in the official procedures[1761]. Secretive negotiation rounds are hardly sustainable under the principle of constitutional state and its sub-principle of protection of trust (Art. 2 EUT and Art. 20 III German Basic Law (GG)) and maximum transparency. Thus, incidental provisions are an underestimated and sometimes dangerous tool to address the energy union under Art. 194 TFEU or govern the re-regulation of economical sectors by virtue of merger control proceedings. Under Art. 15 TFEU (Art. 255 ECT) and Art. 11 Charter of fundamental rights, each citizen enjoys a right to access pieces of information available at Community institutions[1762]. However, an exception applies to preparatory documents for internal use[1763] or documents with essential overriding public interests as regards inter alia public security and the protection of business secrets of the notifying party[1764]. This applies to secretive merger consultations prior and in parallel to the issuance of formal phase 1 or 2 merger control proceedings.

[1755] R. Bechtold/ W. Bosch / I. Brinker / S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) Art. 6 FKVO marginal note 9, Art. 8 FKVO marginal note 4.
[1756] R. Bechtold/ W. Bosch / I. Brinker / S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) Art. 6 FKVO marginal note 9, Art. 8 FKVO marginal note 4.
[1757] R. Bechtold/ W. Bosch / I. Brinker / S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) Art. 8 FKVO marginal note 15.
[1758] R. Bechtold/ W. Bosch / I. Brinker / S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) Art. 8 FKVO marginal note 20.
[1759] R. Bechtold/ W. Bosch / I. Brinker / S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) Art. 8 FKVO marginal note 15-16.
[1760] R. Bechtold/ W. Bosch / I. Brinker / S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) Art. 8 FKVO marginal note 19.
[1761] R. Bechtold/ W. Bosch / I. Brinker / S. Hirsbrunner, EG-Kartellrecht (2nd ed.) (Munich, Germany, Beck, 2009) Art. 8 FKVO marginal note 6.
[1762] Art. 2 I Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 Regarding Public Access to European Parliament, Council and Commission Documents, O.J. L 145 31/05/2001, p 43.
[1763] Art. 4 III Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 Regarding Public Access to European Parliament, Council and Commission Documents, O.J. L 145 31/05/2001, p 43.
[1764] Art. 4 I lit. a and b. Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 Regarding Public Access to European Parliament, Council and Commission Documents, O.J. L 145 31/05/2001, p 43.

12. Annex 1

12.1 Major Mergers in the Oil and Gas Industry in 1998/1999

Target ultimate parent	Target name	Target business description	Target nation	% sought	Acquiror ultimate parent	Acquiror name	Acquiror nation	Value of deal($m)
Mobil	Mobil	Integrated	US	100.0	Exxon	Exxon	US	86398.8
Amoco	Amoco	Integrated	US	100.0	BP	BP	UK	55040.1
YPF	YPF	Integrated	Argentina	85.0	Repsol	Repsol	Spain	17436.7
Italy	Eni	State's energy holdings	Italy	13.0	Investors	Investors	Italy	6643.1
Sonat	Sonat	Gas utility holding company	US	100.0	El Paso Energy	El Paso Energy	US	5799.8
Western Atlas	Western Atlas	O&G services	US	100.0	Baker Hughes	Baker Hughes	US	5298.8
Saga Petroleum	Saga Petroleum	E&P	Norway	100.0	Investor group	Investor group	Norway	4437.1
Sempra Energy	Pacific Enterprises	Natural gas utility	US	100.0	Sempra Energy	Enova	US	4153.0
Occidental Petroleum	MidCon	Gas transmission	US	100.0	Kinder Morgan	KN Energy	US	3990.0
USA	USA-Elk Hills	E&P	US	78.0	Occidental Petroleum	Occidental Petroleum	US	3650.0
Union Texas Petroleum	Union Texas Petroleum	E&P	US	100.0	Arco	Arco	US	3422.0
Onyx Energy	Onyx Energy	E&P	US	100.0	Kerr-McGee	Kerr-McGee	US	3211.9
Schlumberger	Sedco Forex Offshore	Drilling services	US	100.0	Transocean Offshore	Transocean Offshore	US	3160.0
Ashland	Ashland-Downstream	R&M	US	100.0	USX-Marathon	Marathon Oil-Downstream	US	2660.0
Norcen Energy Resources	Norcen Energy Resources	R&M	Canada	100.0	Union Pacific	Union Pacific Resources	US	2548.7
Poco Petroleums	Poco Petroleums	E&P	Canada	100.0	Burlington Resources	Burlington Resources	US	2519.9
Ocean Energy	Ocean Energy	E&P	US	100.0	Seagull Energy	Seagull Energy	US	2283.9
Devon Energy	PennzEnergy	E&P	US	100.0	Devon Energy	Devon Energy	US	2252.2
Tejas Gas	Tejas Gas	Natural gas pipelines	US	100.0	Royal Dutch/Shell	Shell Oil	US	2204.6
Duke Energy	Panhandle Eastern, Trunkline	Natural gas pipelines	US	100.0	CMS Energy	CMS Energy	US	2200.0

Source:

D. Townsend, *Mergers & Acquisitions - Leading the Merger Pack,* Petroleum Economist 34 (March 2000).

12.2 Major Mergers in the Power Sector in 1998/1999

Target ultimate parent	Target name	Target business description	Target nation	% sought	Acquiror ultimate parent	Acquiror name	Acquiror nation	Value of deal($m)
Italy	Ente Nazionale per l'Energia	Electricity utility	Italy	34.5	Investors	Investors	Italy	18733.5
PacifiCorp	PacifiCorp	Electricity utility; telecom	US	100.0	Scottish Power	Scottish Power	UK	12589.1
Energy Group	Energy Group	Electricity utility; coal mining	UK	100.0	Texas Utilities	Texas Utilities	US	8844.7
Suez Lyonnaise des Eaux	Tractebel	Electricity and gas utility	Belgium	49.2	Suez Lyonnaise des Eaux	Suez Lyonnaise des Eaux	France	8178.5
Endesa	Endesa	Electricity utility	Spain	33.0	Investors	Investors	Unknown	7211.5
UK	Magnox Electric	Congeneration plant	UK	100.0	UK	British Nuclear Fuels	UK	6171.6
Lilco	Long Island Lighting-Electric	Electricity utility	US	100.0	New York State	Long Island Power Authority	US	6100.0
Southern Electric	Southern Electric	Electricity utility	UK	100.0	Scottish Hydro-Electric	Scottish Hydro-Electric	UK	4822.4
Unicom	Commonwealth Edison – 16 plants	Electricity utility	US	100.0	Edison International	Midwest Generation EME	US	4800.0
Lilco	Lilco	Electricity utility	US	100.0	KeySpan Energy	Brooklyn Union Gas	US	4725.5
MidAmerican Energy Holdings	MidAmerican Energy Holdings	Electricity utility	US	100.0	CalEnergy	CalEnergy	US	4065.7
Energie Baden-Wuerttemberg	Energie Baden-Wuerttemberg	Electricity utility	Germany	34.1	Investor group	Investor group	France	3381.9
Entergy	London Electricity (Entergy)	Electricity utility	UK	100.0	France	Electricité de France	France	3204.8
National Power Portugal	National Power Drax EDP-Electricidade de Portugal	Electricity generation	UK	100.0	AES	AES	US	3008.4
Conectiv	Atlantic Energy (Conoco)	Electricity utility	Portugal	15.9	Investors	Investors	Unknown	2227.1
Endesa	Endesa	Public utility holding company	US	100.0	Conectiv	Delmarva Power & Light	US	2156.2
KU Energy	KU Energy	Electricity utility	Chile	34.7	Endesa	Aguas de los Andes	Panama	2124.9
PowerGen	PowerGen – 2 power stations	Electric utility holding company	US	100.0	LG&E Energy	LG&E Energy	US	2112.9
Stockholm	Stockholm Energi (Stockholm)	Electricity generator	UK	100.0	Edison International	Edison Mission Energy	US	2099.0
		Electricity utility	Sweden	100.0	Republic of Finland	Gullspangs Kraft (Imatran Voim)	Sweden	1951.2

Source:

D. Townsend, *Mergers & Acquisitions - Leading the Merger Pack*, Petroleum Economist 34 (March 2000).

12.3 Significant Influence of External Business Consultants in Oil & Gas Mergers and Acquisitions

Full credit to target and acquiring advisers

Rank 1999	Rank 1998	Adviser	Value $m	Market share %	Number of deals
1	7	Goldman Sachs	120114.9	74.1	14
2	3	JP Morgan	94844.7	58.5	8
3	1	Merrill Lynch	36561.4	22.6	17
4	4	Credit Suisse First Boston	25123.5	15.5	19
5	5	Salomon Smith Barney	22139.9	13.7	8
6	9	Donaldson, Lufkin & Jenrette	11298.7	7.0	18
7	2	Morgan Stanley Dean Witter	10127.2	6.3	5
8	8	Lehman Brothers	6976.3	4.3	12
9	17	Chase Manhattan	4932.7	3.0	8
10	-	DNB Fonds	4437.1	2.7	1
11	-	Fondsfinans	4437.1	2.7	1
12	-	KPMG	4099.4	2.5	8
13	14	Deutsche Bank	3806.2	2.4	10
14	-	Banc of America Securities	3292.9	2.0	5
15	-	Simmons & Company	3160.0	2.0	1
16	16	Warburg Dillon Read	2865.2	1.8	4
17	13	RBC Dominion Securities	2519.9	1.6	1
18	-	PaineWebber	2337.5	1.4	2
19	-	Banco Bilbao Vizcaya	2010.8	1.2	1
20	15	Dresdner Kleinwort Benson	1708.2	1.1	6
21	21	CIBC World Markets	1438.5	.9	11
22	-	Schroders	1289.6	.8	3
23	-	Wasserstein Perella	1117.5	.7	2
24	-	MacQuarie Bank	1074.1	.7	2
25	18	Bear Stearns	910.3	.6	4
Deals with adviser			155121.7	95.7	132
Deals without adviser			6982.4	4.3	403
Industry totals				**162104.1**	**100.0**
535					

Source:

D. Townsend, *Mergers & Acquisitions - Leading the Merger Pack,* Petroleum Economist 34 (March 2000).

12.4 Importance of Consultants for Power Mergers

Full credit to target and acquiring advisers

Rank 1999	Rank 1998	Adviser	Value $m	Market share %	Number of deals
1	1	Morgan Stanley Dean Witter	13633.5	29.1	10
2	6	Warburg Dillon Read	10638.8	22.7	6
3	5	Merrill Lynch	9683.1	20.7	6
4	–	Petercam Securities	8178.5	17.5	1
5	–	Fortis	8178.5	17.5	2
6	11	Deutsche Bank	7943.3	17.0	6
7	9	Dresdner Kleinwort Benson	6493.3	13.9	9
8	7	Goldman Sachs	6245.1	13.3	7
9	18	Chase Manhattan	6035.8	12.9	5
10	4	Credit Suisse First Boston	4099.9	8.8	10
11	16	Schroders	3425.9	7.3	4
12	2	Salomon Smith Barney	2139.7	4.6	8
13	20	Flemings	1912.8	4.1	5
14	17	JP Morgan	1724.3	3.7	8
15	3	Lehman Brothers	1525.8	3.3	3
16	13	Maxima Consultoria	1158.8	2.5	2
17	25	ABN AMRO	997.6	2.1	10
18	–	Uniao de Bancos Brasileiros	989.2	2.1	1
19	–	Deloitte & Touche	989.2	2.1	1
20	–	MacQuarie Bank	697.3	1.5	5
21	14	Donaldson, Lufkin & Jenrette	678.3	1.5	3
22	10	Rothschild	643.4	1.4	1
23	–	Banco Bradesco	452.8	1.0	1
24	–	CIBC World Markets	371.1	.8	1
25	–	The Blackstone Group	360.3	.8	1
Deals with adviser			42980.7	91.8	96
Deals without adviser			3831.4	8.2	178
Totals (top 25 advisers)			**46812.0**	**100.0**	**274**

Source:

D. Townsend, *Mergers & Acquisitions - Leading the Merger Pack,* Petroleum Economist 34 (March 2000).

This table shows that power companies rely to a lesser extent on external business consultants compared to oil and gas undertakings.

12.5 Product Market Definition Pursuant to Art. 2 MR1989

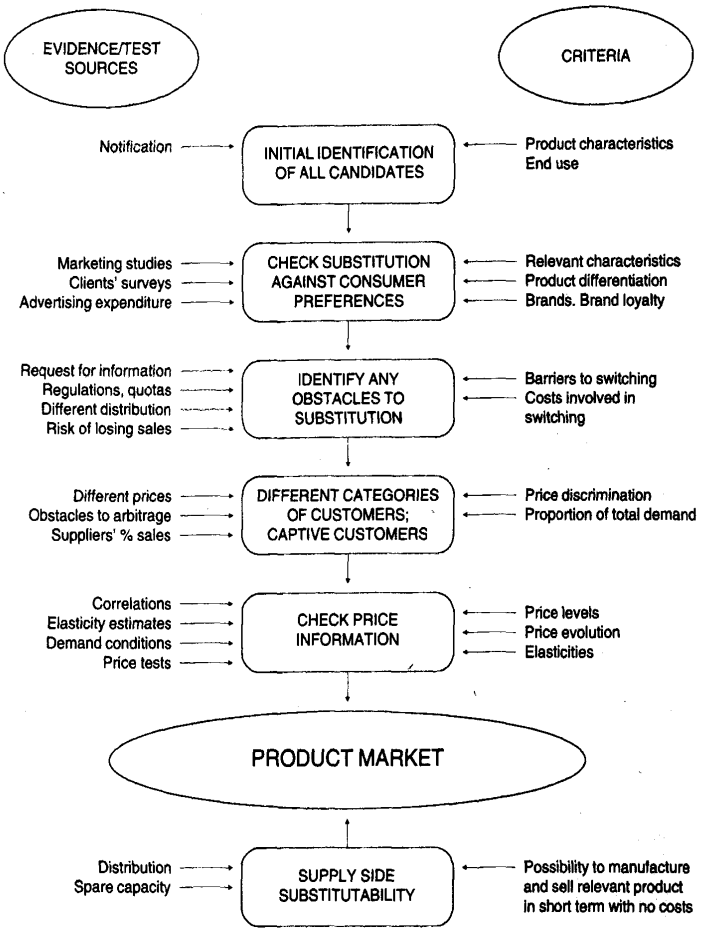

Figure 1: Steps in Product Market Definition

Source:

J.B. Alonso, *Market Definition in The Community's Merger Control Policy*, ECLR 197 (1994).

12.6 Structure of the German Electricity Supply Industry Prior to the Liberalisation and the VEBA/VIAG and RWE/VEW Mergers

12.6.1 Three Fold Structure of the German Electricity Undertakings prior to 1998

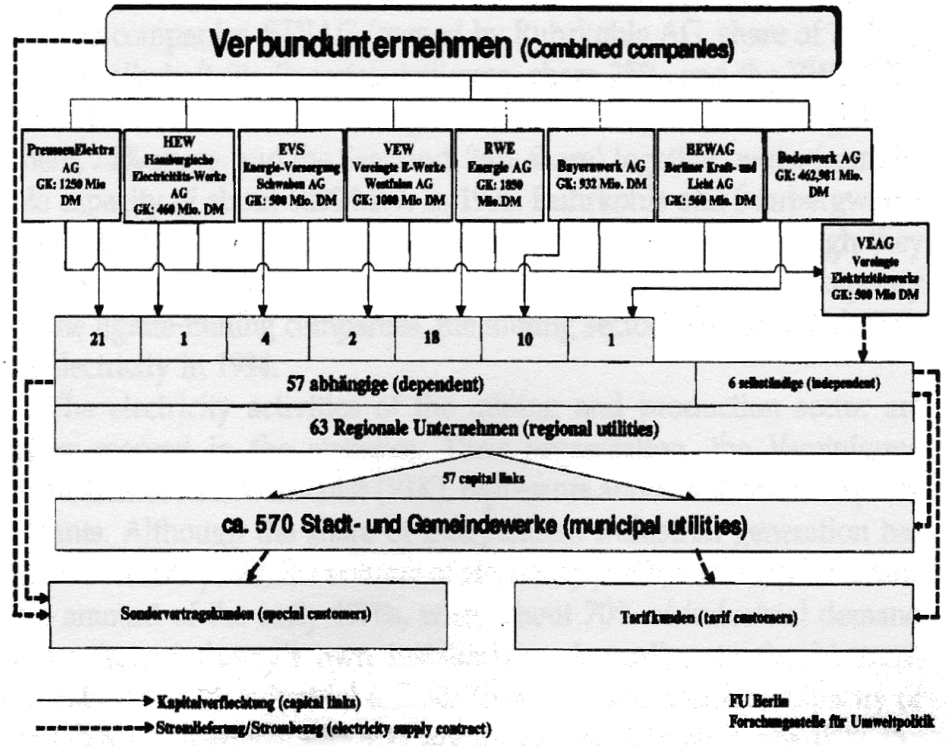

Fig. VIII.2. Structural set-up of the German electricity system.

Source:

L. Mez, *The German Electricity Reform Attempts: Reforming Co-optive Networks, in*

European Electricity Systems in Transition A Comparative Analysis of Policy and Regulation in Western Europe

(A. Midtun, ed., Oxford, U.K., 1997) p 235

12.6.2 Capital Links between German Integrated Electricity Companies (1994)

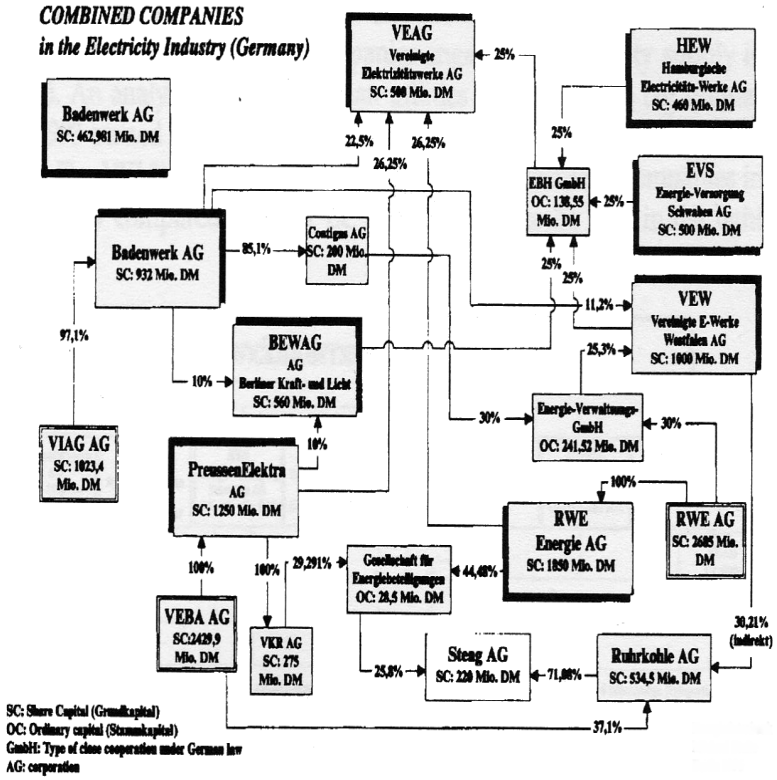

Fig. VIII.1. Capital links among German utilities.

Source:

L. Mez, *The German Electricity Reform Attempts: Reforming Co-optive Networks, in* European Electricity Systems in Transition A Comparative Analysis of Policy and Regulation in Western Europe (A. Midtun, ed., Oxford, U.K., 1997) p 233 with reference to M. Stelte, Energy Databank, Berlin, 1994 and 1996.

12.6.3 Installed Power Capacity of The Combined Electricity Companies in MW in 1994

Badenwerk AG	5034
Bayernwerk AG	8693
Berliner Kraft- und Licht (Bewag) AG	2847
Energie-Versorgung Schwaben AG (EVS)	4666
Hamburgische Electricitäts-Werke AG (HEW)	3823
PreussenElektra AG	18,597
RWE Energie AG	25,960
Vereinigte Elektrizitätswerke Westfalen AG (VEW)	6719
Vereinigte Energiewerke AG (VEAG)	14,813
Total	91,152

Source:

Vereinigung Deutscher Elektrizitätswerke (ed.), VDEW Statistik 1994 (Frankfurt, Germany, VWEW Verlag, 1995).

12.6.4 Fuel Sources of Installed Capacity and Electricity Generation in 1992

Table VIII.5. Installed capacity and electricity generation of German public utilities, 1992

	Capacity (MW)	Generation (GWh)	Share (%)
Lignite	22,207	136,065	29.9
Hard coal and mixed fuel	26,760	118,348	26.0
Oil	8458	4883	1.1
Natural gas	14,425	23,299	5.1
Nuclear	23,770	149,983	32.9
Hydro	8351	20,129	4.4
Others	853	2841	0.6
Total	104,826	460,823	100.0

Source:

Bundesministerium für Wirtschaft, Die Elektrizitätswirtschaft in der Bundesrepublik Deutschland 1994 (Frankfurt, Germany, 1996) pp. 44, 47 .

12.6.5 Transmission, Distribution and Supply Grid Operators in 1994

Table VIII.4. Ownership of the German electricity grid, 1994 (in km)

	Under 60 kV	110–380 kV	Total
Badenwerk	—	4022	4022
Bayernwerk	—	5614	5614
BEWAG	—	523	523
EVS	—	5416	5241
HEW	—	1385	1385
PreussenElektra	—	18,385	18,385
RWE	—	21,063	21,063
VEAG	—	11,300	11,300
VEW	—	5345	5345
DVG	—	73,053	73,053
ARE	764,644	35,393	800,037
public supply	1,399,870	114,981	1,514,851

Source:

Mez, L., *The German Electricity Reform Attempts: Reforming Co-optive Networks, in* European Electricity Systems in Transition - A Comparative Analysis of Policy and Regulation in Western Europe (A. Midtun, ed., Oxford, U.K., 1997) p 239.

13 Annex 2 Merger Control Decisions in the Energy Sector without Commitments and Incidental Provisions or Undertakings

13.1 ELF / ERTOIL CASE IV/M. 63

The Commission clears said merger owing to Art. 6 I lit. b MR1989 as it is a concentration with a community dimension without causing serious detriments to the common market for manufacture of refined petroleum products. There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.2 ELF / OCCIDENTAL CASE IV/M. 85

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.3 ELF/ ENTERPRISE CASE IV/M. 88

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration as raised by the Commission (Art. 6 I lit. b MR1989).

13.4 ELF / BC / CEPSA CASE IV/M. 98

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.5 BP / PETROMED CASE IV/M. 111

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.6 KELT / AMERICAN EXPRESS CASE IV/M. 116

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989)

13.7 CAMPSA CASE IV/M. 138

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989)

13.8 ELF AQUITAINE – THYSSEN / MINOL AG CASE IV/M. 235

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989). In analogy to Art. 8 II MR1989, the commission accepts incidental provisions in a phase one decision, which is now governed by Art. 6 II MR1997 and MR2004 (opening up of East German tanking facilities to competitors)[1765]. The Commission took note of a downward trend in the market shares of the parites in East Germany[1766].

13.9 NESTE / STATOIL CASE IV/M. 361

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989). The case deals with the access to transport equipment and grids[1767].

13.10 POWERGEN / NRG ENERGY / MORRISON KNUDSEN / MIBRAG CASE IV/M. 402

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.11 RWE / MANNESMANN CASE IV/M. 408

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.12 VIAG / BAYERNWEK CASE IV/M. 417

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.13 DAIMLER BENZ AG / RWE AG CASE IV/M. 441

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.14 TRACTEBEL / SYNATOM CASE IV/M. 466

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

[1765] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 191, p 644.
[1766] I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.15 (1) (c) p 689.
[1767] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 69, p 593.

13.15 SHELL CHIMIE / ELF ATOCHEM CASE IV/M. 475

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.16 SHELL / MONTESHELL CASE IV/M. 505

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.17 TEXACO / NORSK HYDRO CASE IV/M. 511

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989). The case is an example of a concentrative full function trading JV[1768].

13.18 EDF / EDISON-ISE CASE IV/M. 568

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.19 Saudi Aramco / MOH CASE IV/M. 574

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.20 GE / POWER CONTROLS BV CASE IV/M.577

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.21 RWE-DEA / ENICHEM AUGUSTA CASE IV/M. 612

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.22 BP / SONATRACH CASE IV/M. 672

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.23 ELEKTROWATT / LANDIS & GYR CASE IV/M. 6924

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

[1768] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 62, p 541.

13.24 RWE / THYSSENGAS CASE IV/M. 713

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration. The case is referred to the Bundeskartellamt (Art. 9 III MR1989)[1769].

13.25 BP / MOBIL CASE IV/M. 727

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989). The Commission rejected the ancillary restraint privilege owing to Art. 6 I 3rd sentence MR2004 and thus an exemption from an assessment under Art. 81 EC (Art. 101 TFEU) for a delivery agreement between Mobil and Aral and company law related information rights owing to the 28% participation from Mobil in Aral[1770].

13.26 KVAERNER / TRAFALGAR CASE IV/M. 731

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.27 BAYERNWERK / GAZ DE FRANCE CASE IV/M. 745

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.28 CHEVRON CORP. / BRITISH GAS / NOVA CORP. / NGC CORP. CASE IV/M. 747

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.29 ANGLO AMERICAN CORPORATION / LONRHO CASE IV/M. 754

Regarding Lonrho's activities on the market for hard coal, the MR1989 is not applicable since it is relevant for the application of Art. 66 ECSC[1771]. The other relevant product markets affect platinum group metals.

13.30 WESTINGHOUSE / EQUIPOS NUCLEARES CASE IV/M. 773

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

[1769] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 160, p 710.
[1770] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 204, p 650.
[1771] Commmission Decision, Anglo American Corporation / Lonrho, CASE IV/M. 754 Recital 43 and 49.

13.31 BRITISH GAS TRADING LTD / GROUP 4 UTILITY SERVICES LTD CASE IV/M. 791

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.32 BAYERNWERK / ISARWERKE CASE IV/M. 808

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration. As a result of the reasoning, the concentration fulfils the requirements for a referral of the case to the Bundeskartellamt owing to Art. 9 III MR1989[1772].

13.33 LYONNAISE DES EAUX / SUEZ CASE IV/M. 916

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.34 MESSER GRIESHEIM / HYDROGAS CASE IV/M.926

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.35 SEHB / VIAG / PE-BEWAG CASE IV/M. 932

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989)[1773]. A referral of said concentration is indispensable according to Art. 9 III MR1989, as only local and regional geographic markets are affected by the operation[1774].

13.36 WATT AG (II) CASE IV/M. 958

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.37 SHELL UK / GULF OIL (GREAT BRITAIN) CASE IV/M.1013

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.38 EDFI / ESTAG CASE IV/M. 1107

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

[1772] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 160, p 710.
[1773] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 200, p 648.
[1774] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 160, p 711.

13.39 ELF / TEXACO / ANTIFREZE JV CASE IV/M. 1135

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989; Art. 57 EEA-Agreement).

13.40 EDFI / GRANINGE CASE IV/M. 1169

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.41 KOCH /EURO SPLITTER & J. ARON CASE IV/M. 1178

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.42 AMOCO / REPSOL / IBERDROLA / ENTE VASCO DE LA ENERGIA CASE IV/M. 1190

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989; Art. 57 EEA agreement).

13.43 ARCO / UNION TEXAS CASE IV/M. 1200

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.44 IVO / STOCKHOLM ENERGI CASE IV/M. 1231

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989; Art. 57 EEA Agreement).

13.45 RWE-DEA / FUCHS PETROLUB CASE IV/M. 1239

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.46 TEXACO / CHEVRON CASE IV/M.1301

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989)[1775].

[1775] D. Yergin, The Quest (1st ed.)(New York, US, Penguin, 2011) CH 4, p 101.

13.47 ENW / EASTERN CASE IV/M. 1315

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration. The Commission has concluded that the notified operation does not constitute a concentration under Art. 3 II MR1989.

13.48 TOTAL / PETROFINA (II) CASE IV/M. 1464.

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.49 EDF / LOUIS DREYFUS CASE IV/M. 1557

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989 as amended through MR1997). EdF proposed to set up a JV in electricity trade so that EdF would become the only electricity trader in France[1776]. The Commission distinguishes markets for eligible and non eligible consumers[1777] and a generation market which is national in scope[1778].

13.50 NORSK HYDRO / SAGA CASE IV/M. 1573

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.51 CASTROL / CARLESS / JV CASE IV/M.1597

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.52 FORTUM / ELEKTRIZITÄTSWERK WESERTAL CASE IV/M.1720

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989 and Art. 57 EEA-agreement).

13.53 DEUTSCHE BP / DAIMLERCHRYSLER AG / UNION TANK ECKSTEIN CASE IV/M. 1774

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

[1776] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (1) (b) p 393.
[1777] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 184, p 1256.
[1778] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 192, p 1258.

13.54 ELECTRABEL / EPON CASE IV/M. 1803

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989). The market for generation of power is of national scope[1779].

13.55 BP / JV DISSOLUITION CASE IV/M.1820

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989). The Commission granted an exemption from the prohibition of implementing a concentration prior to its approval under Art. 7 MR1997[1780].

13.56 MOBIL / JV DISSOLUTION CASE IV/M.1822

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989). The Commission granted an exemption from the prohibition of implementing a concentration prior to its approval under Art. 7 MR1997[1781].

13.57 ENI / GALP CASE IV/M. 1859

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.58 WESTERN POWER DISTRIBUTION (WPD) HYDER CASE IV/M. 1949

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.59 RWE / IBERDROLA / TARRAGONA POWER JV CASE IV/M. 1952

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.60 SHELL / HALLIBURTON / WELL DYNAMICS CASE IV/M. 1976

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.61 TOTALFINA / SAARBERG / MMH CASE IV/M. 2015

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

[1779] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 192, p 1258.
[1780] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. VI. 1. c) p 537.
[1781] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. VI. 1. c) p 537.

13.62 TXU GERMANY / STADTWERKE KIEL CASE IV/M. 2107

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.63 COMPART / FALCK (II) CASE IV/M. 2179

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.64 CHEVRON / TEXACO CASE IV/M. 2208

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989). The concentration is a legal merger (Art. 3 I lit. a MR2004)[1782].

13.65 EdF Group / Cottam Power Station CASE IV/M. 2209

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989; Art. 57 EEA agreement).

13.66 E.ON ENERGIE / ENERGIE OBERÖSTERREICH / JCE + JME CASE IV/M. 2219

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.67 GOLDMAN SACHS / MESSER GRIESHEIM CASE IV/M. 2227

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989 and Art. 57 EEA agreement).

13.68 NEHLSEN / RETHMANN / SEB / BREMERHAVENER ENERGIEWIRTSCHAFT CASE IV/M. 2234

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.69 EDIZIONE HOLDING / NHS / COMUNE DI PARMA / AMPS CASE IV/M. 2253

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

[1782] A. Ezrachi, EU Competition Law (5th Ed.) (London, UK, Bloomsbury, 2016) CH 9, p 411.

13.70 ENDESA / CDF / SNET CASE IV/M. 2281

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.71 ENI / LASMO CASE IV/M. 2296

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.72 SHELL / BEACON / 3I / TWISTER CASE IV/M. 2328

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.73 EDP / CAJASTUR / CASER / HIDROELECTRICA DEL CANTABRICO CASE IV/M. 2340

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989). The market for electricity generation is of national scope[1783].

13.74 E.ON / SYDKRAFT CASE IV/M. 2349

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989, Art. 57 EEA agreement).

13.75 SWB / STADTWERKE BIELEFELD / JV CASE IV/M. 2352

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.76 RWE / HIDROELECTRICA DEL CANTABRICO CASE IV/M. 2353

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989 and Art. 57 EEA agreement).

13.77 VATTENFALL / HEW / NORDIC POWERHOUSE CASE IV/M. 2357

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989)[1784].

[1783] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 192, p 1258.
[1784] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. p 390.

13.78 INTERNATIONAL FUEL CELLS (UTC) SOPC (SHELL) / JV CASE IV/M. 2359

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.79 PI + UGI / ELF ANTARGAZ CASE IV/M. 2375

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.80 SYDKRAFT / ABB / GERMAN POWER TRADING JV CASE IV/M. 2377

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.81 VATTENFALL / HEW CASE IV/M. 2414

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.82 E.ON / POWERGEN CASE IV/M. 2443

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.83 CDC / CHARTERHOUSE / ALSTOM CONTRACTING CASE IV/M. 2459

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.84 VERBUND / ESTAG CASE IV/M. 2485

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.85 RWE / KÄRTNER ENERGIE HOLDING CASE IV/M. 2513

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.86 FIAT / ITALENERGIA / MONTEDISON CASE IV/M. 2532

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.87 RWA / VERBUND / JV CASE IV/M. 2541

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.88 ENDESA / ENEL-ELETTROGEN CASE IV/M. 2553

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.89 SHELL-CINERGY / EDA / EPA JV CASE IV/M. 2566

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.90 CE / YORKSHIRE ELECTRIC CASE IV/M. 2586

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.91 RHEINBRAUN BRENNSTOFF / SSM COAL CASE IV/M. 2588

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.92 ENEL / VIESGO CASE IV/M. 2620

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989, Art. 57 EEA agreement).

13.93 BP / ERDÖLCHEMIE CASE IV/M.2624

The Commission imposed a fine with a value of EUR 35.000.- on BP under Art. 14 I lit. b MR1997 as BP omitted to identify important information in its form CO[1785].

13.94 MERLONI / FOSTER / WHEELER ITALIANA / JV CASE IV/M. 2626

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.95 FORTUM / BIRKA ENERGI CASE IV/M. 2659

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.96 UTILITYCORP / DB AUSTRALIA / Midlands / ELECTRICITY / JV CASE IV/M. 2667

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.97 ENDESA ENERGIA / SPINVESTE / ECOCICLOENDESA-ENERGIA CASE IV/M. 2668

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.98 EDF / TXU EUROPE / WEST BURTION POWER STATION CASE IV/M. 2675

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989)[1786]. A market share of 30% was accepted by the Commission because the process of liberalisation was ongoing[1787].

13.99 EDF / TXU EUROPE / 24 SEVEN CASE IV/M. 2679

This concentration is dealt by Commission Decision EdF / TXU Europe / West Burton Power Station CASE IV/M. 2675 (supra, 13.97). EdF acquires control of an undertaking and a distribution grid in three transactions[1788].

13.100 ECYR / SPINVESTE / TP CASE IV/M. 2680

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.101 CONOCO / PHILLIPS PETROLEUM CASE IV/M. 2681

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989). It was a factual economic merger[1789].

13.102 VATTENFALL / BEWAG CASE IV/M. 2701

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989). The Commission is of the opinion that a transnational European market is available for power trade[1790].

[1785] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. VI. 5. a) p 602, C. VI. 5. a) (1) (a) p 605; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 4. F., p 1129; A. Ezrachi, EU Competition Law (5th Ed.) (London, UK, Bloomsbury, 2016) CH 9, p 400 and p 425.
[1786] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. II. 1. c) (6) (c)(iv) p 332.
[1787] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 150, p 627.
[1788] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. II. 1. c) (6) (c)(iv) p 332.

13.103 E.ON / OBERÖSTERREICHISCHE FERNGAS / JIHOCESKA CASE IV/M. 2715

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.104 TOTALFINAELF DEUTSCHLND / MMH / TSG / EMB CASE IV/M. 2735

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.105 RWE GAS / LATTICE INTERNATIONAL / JV CASE IV/M. 2744

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.106 SHELL / ENTERPRISE OIL CASE IV/M. 2745

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.107 BP / VEBA OEL CASE IV/M. 2761

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989). The case is referred to the Bundeskartellamt (Art. 9 III MR1989)[1791].

13.108 RWE POWER / LUCCHINI / ELETTRA GLL JV CASE IV/M. 2789

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.109 GAZ DE FRANCE / RUHRGAS / SLOVENSKY CASE IV/M.2791

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.110 EDISON / EDIPOWER / EUROGEN CASE IV/M. 2792

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

[1789] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 33, p 524; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.45, p 551; D. Yergin, The Quest (1st ed.)(New York, US, Penguin, 2011) CH 4, p 103.

[1790] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 192, p 1258.

[1791] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 160, p 711.

13.111 NOK / WATT CASE IV/M. 2795

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.112 RWE / INNOGY CASE IV/M. 2801

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989, Art. 57 EEA agreement).

13.113 CANAL DE ISABELII / HIDROCANTABRICO / JV CASE IV/M. 2819

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.114 TXU / BRAUNSCHWEIGER VERSORGUNGS AG CASE IV/M. 2841

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.115 SAIPEM / BOUYGUES OFFSHORE CASE IV/M. 2842

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.116 ELECTRABEL S.A. / ACEA S.P.A. CASE IV/M. 2855

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.117 ECS / IEH CASE IV/M. 2857

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.118 LINDE / SONATRACH / JV CASE IV/M. 2868

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.119 AIR LIQUIDE / BOC / JAPAN AIR GASES CASE IV/M. 2871

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.120 LEGAL AND GENERAL VENTURES / IWP (UK) HOLDINGS CASE IV/M. 2880

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.121 EDF / SEEBOARD CASE IV/M. 2890

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989). The market for generation of power includes the wholesale import of electricity through interconnectors[1792] and the market for metering has a national British scope[1793].

13.122 ENBW / LAUFENBURG CASE IV/M. 2966

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989). The relevant geographic product market for retail supply is of regional or local scope[1794].

13.123 E.ON / TXU EUROPE GROUP CASE IV/M. 3007

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989). The market for wholesale supply of natural gas is national[1795].

13.124 ENI / FORTUM CASE IV/M. 3052

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.125 CVC / REE / IBERDROLA CASE IV/M. 3057

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.126 ECS / INTERCOMMUNALE IVEKA / IGAO / INTERGEM / GASELWEST / IMEWO / IVERLEK CASE IV/M. 3075-3080

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

[1792] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 184, p 1256.
[1793] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 193, p 1259.
[1794] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 189, p 1258.
[1795] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 197, p 1260.

13.127 GAZ DE FRANCE / PREUSSAG ENERGIE CASE IV/M. 3086

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.128 TOTALFINAELF / MOBIL GAS CASE IV/M. 3096

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.129 COMPASS / CREMONINI / JV CASE IV/M. 3104

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.130 OMV / BP (SOUTHERN GERMANY PACKAGE) CASE IV/M. 3110

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.131 UNION FENOSA / ENI / UNION FENOSA GAS CASE IV/M. 3114

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.132 BP / ALFA GROUP ACCESS / RENOVA / TNK-BP CASE IV/3119

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.133 SGAM4D / GUGGENHEIM / IES CASE IV/M. 3135

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.134 E.ON / FORTUM BURGHAUSEN / SMALAND / EDENDERRY CASE IV/M. 3173

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.135 ENTE VASCO DE LA ENERGIA / HIDROCANTABRICO / NATURCORP CASE IV/M. 3187

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.136 EDF / EDFT CASE IV/M. 3210

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.137 GDF / ITALCOGIM / JV CASE IV/M. 3212

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.138 STATOIL / BP / SONATRACH / INSALAH JV CASE IV/M. 3230

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989). A market share of 40% is irrelevant for the risk of coordination[1796].

13.139 CANDOVER / JPMP / 3I / ABB CASE IV/M. 3249

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.140 VESTAR CAPITAL PARTNERS / FL SELENIA CASE IV/M.3257

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.141 SYDKRAFT / GRANINGE CASE IV/M. 3268

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989). According to the Commission, the market for electricity trading is distinguished between physical and financial trading[1797]. The relevant geographic market for generation and wholesale supply is larger than national (nordic market for Norway, Sweden, Denmark and Finland[1798]. The same is true for the market of balancing energy[1799]. The creation of an oligopoly through the transaction was denied by the Commission[1800].

13.142 UFG / ENEL / UFEE / JV CASE IV/M. 3270

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

[1796] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 16 marginal note 150, p 627.
[1797] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 183, p 1256.
[1798] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 191, p 1258; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.727, p 704.
[1799] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 194, p 1259.
[1800] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 200, p 1261.

13.143 SHELL ESPANA / CEPSA / SIS JV CASE IV/M. 3275

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration. A derogation from the obligations imposed by Art. 7 I MR2004 is granted owing to Art. 7 III MR2004 so that an exemption from the prohibition to implement a concentration prior to its approval is applicable[1801]. The case is referred to a national competition authority (Art. 9 MR2004)[1802].

13.144 TNK-BP / SIBNEFT / SLAVNEFT JV CASE IV/M. 3288

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.145 PREEM / SKANDINAVISKA RAFFINADERI CASE IV/M. 3291

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.146 SHELL / BEB CASE IV/M. 3293

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989). In this case two undertakings dissolve a JV BEB on gas transport which results in two transactions under MR1989[1803].

13.147 EXXONMOBIL / BEB CASE IV/M. 3294

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989). In this case two undertakings dissolve a JV BEB on gas transport which results in two transactions under MR1989[1804]. The relevant geographic market for wholesale natural gas supply in Germany is national[1805].

13.148 NORSK HYDRO / DUKE ENERGY CASE IV/M. 3297

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989). The market for wholesale supply of natural gas is national[1806].

[1801] V. Emmerich, K. Lange, Kartellrecht (14th ed.) (München, Germany, C.H.Beck, 2018) § 18 I p 158.
[1802] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 17 marginal note 160, p 711.
[1803] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 78a, p 554.
[1804] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 78a, p 554.
[1805] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 197, p 1260.
[1806] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 197, p 1260.

13.149 E.ON / MIDLANDS CASE IV/M. 3306

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989). A distinct market is available for the supply of gas of retail consumers, small business consumers, large industrial consumers and interruptable consumers[1807].

13.150 ECS / SIBELGA CASE IV/M. 3318

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 9 III MR1989).

13.151 GESO / ZWECKVERBAND / GASO CASE IV/M. 3332

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.152 NORSK HYDRO / WINGAS / HYDROWINGAS JV CASE IV/M. 3350

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.153 DILLINGER HÜTTENWERKE / SAARSTAHL / COKERIE DE CARLING CASE IV/M. 3376

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.154 TOTAL / GAZ DE FRANCE CASE IV/M. 3410

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 II MR1989). The Commission finds that separate markets for the supply of natural gas are applicable (wholesale supply and regional retail supply)[1808]. The Commission stated that the transaction leads to potential refusals of third party access to grids[1809].

13.155 ENDESA / SNET CASE IV/M. 3412

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

[1807] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 196, p 1260.
[1808] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 196, p 1260 and marginal note 197, p 1261.
[1809] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 200, p 1262.

13.156 UBS / MOTOR COLUMBUS CASE IV/M. 3444

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989).

13.157 EDP / HIDROELECTRICA DEL CANTABRICO CASE IV/M. 3448

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR1989). This is the last decision under MR1989 as amended by MR1997. The Commission is of the opinion that relevant product markets for electricity are separate from the relevant product markets for natural gas[1810].

13.158 RIVR / PETROPLUS CASE IV/M. 3478

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.159 HELSINGIN / VANTAAAN / E.ON FINLAND / LAHTI / SEU CASE IV/M. 3507

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.160 SHELL / SAUDI ARAMCO / SHOWA SHELL CASE IV/M. 3510

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.161 REPSOL YPF / SHELL PORTUGAL CASE IV/M. 3516

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.162 PKN ORLEN / UNIPETROL CASE IV/M. 3543

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.163 IPR / MITSUI / MEC CASE IV/M. 3557

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

[1810] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 195, p 1259.

13.164 CONOCO / LUKOIL / NMN / JV CASE IV/M. 3573

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.165 HUTCHISON WHAMPOA / NORTH DN CASE IV/M. 3584

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.166 VEOLIA / BVAG CASE IV/M. 3630

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.167 PETRONAS / SASOL /UHAMBO JV CASE IV/M. 3636

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.168 INDUSTRI KAPITAL / IDEX CASE IV/M. 3645

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.169 REPSOL BUTANO / SHELL GASS (LPG) CASE IV/M. 3664

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.170 EL / SLOVENSKE ELEKTRARNE CASE IV/M. 3665

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.171 EDF / AEM / EDISON CASE IV/M. 3729

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004). The Italian electricity market is segmented in 7 geographical zones[1811].

13.172 LUKOIL / TEBOIL / SUOMEN PETROOLI CASE IV/M. 3730

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

[1811] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 11 C. (1) (b) p 292.

13.173 ORANJE-NASSAU GROUP / SHV HOLDING / EDINBURGH OIL & GAS CASE IV/M. 3831

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.174 IPR / MITSUI / CALPINE UK CASE IV/M. 3849

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.169 VATTENFALL / ELSAM AND E2 ASSETS CASE IV/M. 3867

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004). The merger provides for an extension of competition in West and East Denmark[1812].

13.174 TESSENDERLO / SIEMENS / ADVANCED POWER / JV CASE IV/M. 3869

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.175 GDF / CENTRICA / SPE CASE IV/M. 3883

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004). The market of supply is distinguised between wholesale supply and residential retail supply[1813].

13.176 SHELL / ERG / IONIO GAS / JV CASE IV/M. 3949

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.177 AP. MOLLER-MAERSK / KERR-MCGEE (NORTH SEA BUSINESS) CASE IV/M. 3950

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.178 BERKSHIRE / HATHAWAY / MEHC CASE IV/M. 3964

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

[1812] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 C. (3) (a) p 403.
[1813] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 184, p 1256.

13.179 TECHNIP / SUBSEA 7 / ASIA PACIFIC JV CASE IV/M. 3982

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.180 GAZPROM / SIBNEFT CASE IV/M. 3999

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.181 OMV / ARAL CR CASE IV/M. 4002

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.182 INEOS / INNOVENE CASE IV/M. 4005

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.183 WINGAS / ZGHG / JV CASE IV/M . 4020

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.184 ATEL / EOSH CASE IV/M. 4025

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.185 FLAGA / PROGAS / JV CASE IV/M. 4028

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004). The Commission is of the opinion that a single market for natural gas and LNG exists providing that a region is concerned where gas pipelines are situated[1814].

13.186 ENDESA EUROPA / ZEDO CASE IV/M. 4060

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

[1814] G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 34 marginal note 196, p 1260.

13.187 CONOCO PHILLIPS / LOUIS DREYFUS REFINING AND MARKETING / LOUIS DREYFUS ENERGY HOLDING CASE IV/M. 4073

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.188 Linde / Spectra CASE IV/M. 4091

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.189 INEOS / BP DORMAGEN CASE IV/M. 4094

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 8 I MR2004).

13.190 ENBW / SWD CASE IV/M. 4103

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.191 E.ON / ENDESA CASE IV/M. 4110

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004)[1815]. The concentration was abandoned after Spain requested illegal commitments from E.ON that lead to a successful court action of the Commission[1816] wrongfully stating legitimate interests (Art. 21 IV MR2004)[1817].

13.192 EDISON / EDF / ENERGIA ITALIA CASE IV/M. 4127

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.193 ENI / GRUPO AMORIM / CGD / GALP CASE IV/M. 4130

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.194 MITSUI / VOPAK CASE IV/M. 4167

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

[1815] P. Cameron, Competition in Energy Markets (2nd ed.) (New York, US, Oxford, 2007) CH 14 B. (2) (a) p 382, CH 14 B. (2) (b) p 388-389; CH 19 C. (2) (b) p 566.

13.195 E.ON / ENDESA CASE IV/M. 4197

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004). The concentration was withdrawn after the Spanish government issued restrictions backed by public security reasons (Art. 21 IV MR2004)[1818]. The public security of supply exemption was turned down by the CJEU (Art. 21 IV MR2004)[1819].

13.196 BAYERNGAS / DEUTSCHE ESSENT / NOVOGATE JV CASE IV/M. 4203

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 Iit. b MR2004).

13.197 PETROPLUS / EUROPEAN PETROLEUM HOLDING CASE IV/M. 4208

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.198 BP FRANCE / VITOGAZ / ENERGAZ JV CASE IV/M. 4233

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.199 E.ON / PRAZSKA PLYNARENSKA CASE IV/M. 4238

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.200 ATEL ENERGIA / AZIENDA ENERGETICA-ETSCHWERKE / ENERG.IT CASE IV/M. 4266

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.201 GDF / CAMFIN / ENERGIA INVESTMENT JV CASE IV/M. 4279

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

[1816] CJEU, Case C-196/07 Commission v Spain [2008] ECR I 48; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 28c, p 520.
[1817] A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 3. C. (v), p 1118.
[1818] I. van Bael and J.-F. Bellis, Competition Law of the European Community (5th ed.) (Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2010) CH 7 § 7.4 (1) pp. 653-654; J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5 marginal note 5.288, p 607.
[1819] CJEU Case C-196/07 Commission v Spain; C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.113, p 652; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 3. C. (v), p 1118.

13.202 ENDESA / FOSTER WHEELER / JV CASE IV/M. 4295

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.203 TOTAL / CEPSA CASE IV/M. 4329

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.204 PKN / MAZEIKIU CASE IV/M. 4348

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.205 PETROPLUS / EXXONMOBIL CASE IV/M. 4359

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.206 EDISON / ENECO ENERGIA CASE IV/M. 4368

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.207 MACQUARIE / CORONA CASE IV/M. 4369

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.208 EBN / COGAS ENERGY CASE IV/M. 4370

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.209 EST / DALMINE CASE IV/M. 4380

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.210 BG GROUP / SERENE CASE IV/M. 4431

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.211 BC PARTNERS / TECHEM CASE IV/M. 4474

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.212 MEIF II / TECHEM CASE IV/M. 4485

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.213 IBERDROLA / SCOTTISH POWER CASE IV/M. 4517

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.214 LUKOIL / CONOCOPHILLIPS CASE IV/M. 4532

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.215 STATOIL / HYDRO CASE IV/M. 4545

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.216 PETROPLUS / CORTON REFINERY BUSINESS CASE IV/M. 4588

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.217 SABANCI / VERBUND / ENERJISA JV CASE IV/M. 4634

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.218 CHARTERHOUSE / ISTA CASE IV/M. 4649

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.219 NATIONAL GRID / TENNET / BRITNED JV CASE IV/M. 4652

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.220 IPR / MITSUI (UK ELECTRICITY GENERATION BUSINESS) CASE IV/M. 4654

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.221 E.ON / ENDESA EUROPA / VIESGO CASE IV/M. 4672

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.222 IBERDROLA / API / SER JV CASE IV/M. 4675

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.223 ENEL / ACCIONA / ENDESA CASE IV/M. 4685

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004). Certain assets were required to be transferred to E.ON[1820]. Before that concentration E.ON applied for an acquisition of Endesa[1821] which was withrdrawn after illegal requirements were demanded by Spain according to the CJEU unsuccessfully invoking Art. 21 IV MR2004[1822].

13.224 WINGAS / HYDRO WINGAS CASE IV/M. 4689

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.225 ERG / IPM / ISAB ENERGY SERVICES CASE IV/M. 4712

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b and 7 III MR2004).

13.226 ENI / EXXONMOBIL (HUNGARIAN, CZECH AND SLOVAK PACKAGE) CASE IV/M. 4723

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.227 ALTOR FUND II / WRIST GROUP CASE IV/M. 4736

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

[1820] C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.191a, pp. 694-695.
[1821] Commission Decision E.ON / Endesa Case IV/M. 4110; G. Wiedemann (ed.), Handbuch des Kartellrechts (2nd ed.) (Munich, Germany, Beck, 2008) § 15 marginal note 28c, p 520.

13.228 DELEK / TEXACO BENELUX CASE IV/M. 4782

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.229 BP / Associated British Foods / JV CASE IV/M. 4798

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.230 OMV / MOL CASE IV/M. 4799

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.231 AREVA NP / MHI / ATMEA CASE IV/M. 4839

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.232 ENEL / EMS CASE IV/M. 4841

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.233 GDFI / ENERGIE INVESTMENT CASE IV/M. 4876

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.234 PETROPLUS / SHELL FRENCH REFINERIES CASE IV/M. 4886

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.235 ARCELOR / FERNGAS CASE IV/M. 4890

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.236 MOL / ITALIANA ENERGIA E SERVICZI CASE IV/M. 4895

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

[1822] CJEU, Case C-196/07 Commission v Spain [2008] ECR I 48; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 3. C. (v), p 1118.

13.237 STV FUND / SMITH / AT-BALANCE CASE IV/M. 4908

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.238 GOLDMAN SACHS / LOMO CASE IV/M. 4911

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.239 EMCC CASE IV/M. 4922

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.240 BASELL / BERRE L´ETANG REFINERY CASE IV/M. 4926

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.241 KAZMUNAIGAS / ROMPETROL CASE IV/M. 4934

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.242 EDF / ENBW / KOGENERACJA CASE IV/M. 4993

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.243 ELECTRABEL / COMPAGNIE NATIONALE DU RHONE CASE IV/M. 4994

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004, 14 II MR1989). The Commission issued a fine under Art. 14 MR2004[1823].

13.244 EDF / ENBW / ERSA CASE IV/M. 4998

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.245 COFATHEC / EDISON CASE IV/M. 5023

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

[1823] J. Schulte, Handbuch Fusionskontrolle (2nd ed.) (Cologne, Germany, Heymanns, 2010) C. VI. 5. a) p 602; C. VI. 5. a) (4)-(5) pp 610-611; A. Ezrachi, EU Competition Law (5th Ed.) (London, UK, Bloomsbury, 2016) CH 9, p 400.

13.246 CEZ / MOL / JV CASE IV/M. 5090

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.247 GDF / SUEZ / TEESIDE POWER CASE IV/M. 5092

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.248 CASC JV CASE IV/M. 5154

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.249 GALP ENERGIA ESPANA / AGIP ESPANA CASE IV/M. 5169

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.250 E.ON / ENDESA / EUROPA / VIESGO CASE IV/M. 5170

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.251 ENEL / ACCIONA / ENDESA CASE IV/M. 5171

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004). This case relates to Commission Decision *ENEL / ACCIONA / ENDESA* CASE IV/M. 4685 and requires the modified transfer of certain assets from the parties to E.ON[1824].

13.252 GOLDMAN SACHS / CANDOVER / EXPRO CASE IV/M. 5177

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.253 CENTREX / ZMB / ENIA / JV CASE IV/M. 5183

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

[1824] C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.191a, pp. 694-695.

13.254 ENI / DISTRIGAZ CASE IV/M. 5220

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.255 OMV / LEHMAN / MET / JV CASE IV/M. 5229

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.256 CAPMAN / LITORINA / CEDERROTH CASE IV/M. 5230

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.257 SABANCI / VERBUND / BASKENT CASE IV/M. 5235

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.258 EDISON / HELLENIC PETROLEUM / JV CASE IV/M. 5249

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.259 DELEK NEDERLAND / SALLAND OLIE HOLDING CASE IV/M. 5275

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.260 GMR INFRASTRUCTURE (MALTA) / ONTARIO TEACHERS' PENSION PLAN / INTERGEN CASE IV/M. 5288

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.261 STICHTING ADMINSTRATIEKANT OOR VAN DER SLUIJS GROEP / FRISOL BEHEER / NORTH SEA PETROLEUM HOLDING CASE IV/M. 5315

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.262 CENTRICA / SEGEBEL CASE IV/M. 5324

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.263 TESSENDERLO CHEMIE / SPV / IPCHL / T-POWER JV CASE IV/M. 5359

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.264 IPO /ENBW / PRAHA PT CASE IV/M. 5365

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.265 IBERDROLA RENOVABLES / GAMESA CASE IV/M. 5366

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.266 MIDAMERICAN / CONSTELLATION CASE IV/M. 5368

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.267 CEZ / AKKOK / SEDAS / AKENERJY CASE IV/M. 5370

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.268 ELECTRABEL DEUTSCHLAND / WSE WUPPERTALER STADTWERKE / WSW ENERGIE & WASSER CASE IV/M. 5375

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.269 EN+ / RUSSNEFT CASE IV/M. 5396

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.270 STATOILHYDRO / STI / STI AVIFUELS CASE IV/M. 5422

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.271 E.ON ITALIA / MPE ENERGIA CASE IV/M. 5442

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.272 MYTILINEOS / MOTOR OIL / CORINTHOS POWER CASE IV/M. 5445

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.273 GDF SUEZ / GEK CASE IV/M. 5468

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.274 GOLDMAN SACHS / CONSTELLATION ENERGY COMMODITIES CASE IV/M. 5471

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.275 MOL / INA CASE IV/M. 5490

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.276 ENEL / ENDESA CASE IV/M. 5494

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.277 SD / JTIA / MIBRAG CASE IV/M. 5498

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.278 GDF SUEZ ENERGY SERVICES / ELYO ITALIA CASE IV/M. 5501

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.279 SIBUR / CITCO CASE IV/M. 5503

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.280 ELECTRABEL / E.ON CASE IV/M. 5512

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.281 KMG / CNPC / MMG CASE IV/M. 5513

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.282 RWE INNOGY / RHEINENERGIE / STADTWERKE MÜNCHEN / MAN FERROSTAAL / MARQUESADO SOLAAR CASE IV/M. 5515

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.283 E.ON / ELECTRABEL ACQUIRED ASSETS CASE IV/M. 5519

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.284 ITOCHU / MITSUBISHI / ENOLIA / JV CASE IV/M. 5520

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.285 ENBW / BORUSAN / JV CASE IV/M. 5543

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.286 BP / DUPONT / JV CASE IV/M. 5550

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.287 F2I / FINAVIAS / ERG CASE IV/M. 5551

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.288 OAO LUKOIL / TRN CASE IV/M. 5571

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.289 CENTRICA / VENTURE PRODUCTION CASE IV/M. 5585

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.290 CEZB / JAVYS / JESS JV CASE IV/M. 5591

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.291 RREEF FUND / BP / EVE / REPSOL / BBG CASE IV/M. 5602

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.292 ENI / TEC CASE IV/M. 5603

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.293 DONG / KOM-STROM CASE IV/M. 5604

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.294 ROBERT BOSCH / ALEO SOLAR / JOHANNA SOLAAR TECHNOLOGY CASE IV/M. 5618

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.295 NORMESTON / MOL / MET JV CASE IV/M. 5629

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.296 MOTOR OIL (HELLAS) / CORINTH REFINERIES / SHELL OVERSEAS HOLDINGS CASE IV/M. 5637

The notified concentration is referred in its entirety to the competent authorities of the Hellenic Republic owing to Art. 9 III lit. b MR2004.

13.297 RREEF FUND / ENDESA / UFG / SAGGAS CASE IV/M. 5649

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.298 ENBW KRAFTWERKE / EVONIK POWER MINERALS / JV CASE IV/M. 5657

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.299 AVIO / SECI-E/ JV CASE IV/M. 5663

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.300 BOREAS HOLDINGS / CENTRICA / RENEWABLE ENERGY LTD / GLID WIND FARMS CASE IV/M. 5679

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.301 BROOKFIELD / BBI / DBCT CASE IV/M. 5683

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.302 VITOL HOLDING / PETROPLUS REFINING ANTWERP / PETROPLUS REFINING ANTWERP BITUMEN CASE IV/M. 5686

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.303 OCCIDENTAL PETROLEUM CORPORATION / PHIBRO CASE IV/M. 5690

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.304 DCC ENERGY / SHELL DIRECT AUSTRIA CASE IV/M. 5694

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.305 TENNET / E.ON CASE IV/M. 5707

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.306 RWE / ENSYS CASE IV/M. 5711

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.307 COMMERZBANK / CONERGY CASE IV/M. 5738

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.308 GAZPROM / A2A / JV CASE IV/M. 5740

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.309 TORAY / TCC / JV CASE IV/M. 5744

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.310 GLENCORE / CHEMOIL ENERGY CASE IV/M. 5749

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.311 MACQUARIE FUNDS / ANTIN IP / PISTO GROUP CASE IV/M. 5759

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.312 ENBW / PRE CASE IV/M. 5766

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.313 SORGENIA / J&P / ARGESTIS CASE IV/M. 5767

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.314 QATAR PETROLEUM / GENERAL ELECTRIC COMPANY / PII GROUP CASE IV/M. 5773

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.315 TOTAL HOLDINGS EUROPE SAS / ERG SPA / JV CASE IV/M. 5781

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.316 SHARP / ENEL GREEN POWER / JV CASE IV/M. 5788

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.317 DALKIA CZ / NWR ENERGY CASE IV/M. 5793

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.318 ENI / MOBIL OIL AUSTRIA CASE IV/M. 5796

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.319 RWE ENERGY / MITGAS CASE IV/M. 5802

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.320 ENI / FOX ENERGY CASE IV/M. 5807

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.321 ELIA / IFM / 50 HERTZ CASE IV/M. 5827

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.322 AVELAR / ENOVOS / AVELEOS CASE IV/M. 5832

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.323 SCHLUMBERGER / SMITH INTERNATIONAL CASE IV/M. 5839

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.324 SHELL / COSAN / JV CASE IV/M. 5846

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.325 SHELL / TOPAZ / JV CASE IV/M. 5880

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.326 DELEK EUROPE / BP FRANCE RETAIL CASE IV/M. 5888

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.327 MARTANK / MTTI / VTTI CASE IV/M. 5910

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.328 TENNET / ELIA / GASUNIE / APX-ENDEX CASE IV/M. 5911

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.329 GDF SUEZ / GASELYS CASE IV/M. 5918

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.330 VERBUND / EVN CASE IV/M. 5923

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.331 OSAKA / UFG / INFRASTRUCTURE ARZAK / SAGGAS CASE IV/M. 5944

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.332 SSI / QP / ORYX CASE IV/M. 5962

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.333 BROOKFIELD / PRIIME CASE IV/M. 5965

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.334 PPC / URBASER / JV CASE IV/M. 5971

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.335 CKI / HEH / EDF (UK ELECTRICITY DISTRIBUTION BUSINESS CASE IV/M. 5972

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.336 KGHM / TAURON WYTWARZANIE / JV CASE IV/M. 5979

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.337 ZMB CH / GWH CASE IV/M. 5985

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.338 HC / NATURGAS CASE IV/M. 5989

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.339 E.ON / PP (II) CASE IV/M. 6000

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.340 CINVEN / SPICE CASE IV/M.6005

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.341 GDF SUEZ / CERTAIN ASSETS OF ACEA ELECTRABEL CASE IV/M. 6014

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.342 FIRST RESERVE CORPORATION / BLACKSTONE / PBF ENERGY CASE IV/M. 6054

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.343 ENI / ACEGASAPS / JV CASE IV/M. 6068

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.344 MITSUI RENEWABLE / FCCE / GUZMAN CASE IV/M. 6069

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.345 CEZ / EPH / MIBRAG GROUP CASE IV/M. 6074

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.346 VEOLIA / EDF / SOCIETE D'ENERGIE ET D'EAU DU GABON CASE IV/M. 6105

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.347 HUANENG / OTPPB / INTERGEN CASE IV/M. 6111

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.348 GOOD ENERGIES / NEIF / NEWCO CASE IV/M. 6112

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.349 ARCELORMITTAL BREMEN / KOKEREI PROSPER / ARSOL AROMATICS CASE IV/M.6123

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.350 ROSNEFT OIL COMPANY / BP / RUHR OEL CASE IV/M. 6147

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.351 PETROCHINA / INEOS / JV CASE IV/M. 6151

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.352 GEM / DEME / ELECTRAWINDS OFFSHORE / SRIWE / Z-KRACHT / POWER@SEA / RENT A PORT ENERGY / SOCOFE / JV CASE IV/M. 6155

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.353 ALTOR FUND III / E.ON ES CASE IV/M. 6157

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.354 RWA / OMV / WARME CASE IV/M. 6167

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.355 IPIC / CEPSA CASE IV/M. 6171

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.356 ATLAS / SUNLIGHT / ADVANCED LITHIUM SYSTEMS EUROPE JV CASE IV/M. 6174

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.357 MITSUBISHI CORPORATION / BARCLAS BANK / WALNEY I TOPCO / WALNEY II TOBCO / SHERINGHAM SHOAL TOPCO CASE IV/M. 6176

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.358 VITOL / HELIOS / SHELL / PLATEEAU HOLDING / BV3 CASE IV/M. 6188

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.359 GRUPO IBERDROLA / CAJA RURAL DE NAVARRA / RENOVABLES DE LA RIBERA CASE IV/M. 6206

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.360 MOLARIS / COMMERZ REAL / RWE / AMPRION CASE IV/M. 6225

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.361 RREEF / SMAG / OHL / ARENALES CASE IV/M. 6238

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.362 CE GAS MARKETING & TRADING / VERBUNDNETZ GAS AG / VNG AUSTRIA CASE IV/M. 6243

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.363 TOTAL / SUNPOWER CASE IV/M. 6252

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.364 REGGEBORGH / NORTH SEA GROUP CASE IV/M. 6260

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.365 North Sea Group / Argos roep / JV CASE IV/M. 6261

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.366 SAMSUNG C&T DEUTSCHLAND / KOREA DEVELOPMENT BANK / KNS SOLAR CASE IV/M. 6273

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.367 ERG / LUKOIL / JV CASE IV/M. 6282

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.368 VALERO / CHEVRON CASE IV/M. 6283

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.369 SHELL / RONTEC INVESTMENTS CASE IV/M. 6294

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Referral to the UK OFT Art. 4 IV MR2004).

13.370 KKR / SORGENIA / SORGENIA FRANCE CASE IV/M. 6299

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.371 F2I / AXA FUNDS / G6 RETE GAS CASE IV/M. 6302

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.372 ANTIN INFRASTRUCTURE PARTNERS FCPR / RREEF PAN EUROPEAN INFRASTRUCTURE FUND LP / ANDASOL 1- CENTRAL TERMOSOLAR UNO SA AND ANSADOL–2 CASE IV/M. 6303

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.373 CASSA DEPOSITY E PRESTITI / OMV GAS / TRANS AUSTRIA GASLEITUNG JV CASE IV/M. 6307

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.374 ILVA / TARANTO ENERGIA CASE IV/M. 6351

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.375 VITOL / TTI / ARCLIGHT / PETRO LUX CASE IV/M. 6352

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.376 NYNAS / SHELL / HARBURG REFINERY CASE IV/M. 6360

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 8 I MR2004).

The Commission accepted efficiency gains as a defense of the concentration on the very concentrated European markets for naphtenic base oils, process oils and transformer oils which would benefit the consumers[1825]. Nynas successfully triggered the failing firm defense although the acquisition lead to market shares of up to 70% in the EEA for certain refinery products[1826].

13.377 RWE INNOGY / CONETWORK CASE IV/M. 6366

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.378 ENI / NUON BELRGIUM / NUON WIND BELGIUM / NUON POWER GENERATION CASE IV/M. 6389

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.379 HOCHTIEF SOLUTIONS / VENTIZZ / JV CASE IV/M. 6404

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.380 APACHE / MOBIL NORTH SEA CASE IV/M. 6407

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.381 GAZPROM SCHWEIZ / PROMGAS CASE IV/M. 6409

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.382 EVRAZ / ALROSA / MINING AND METALLURGICAL COMPANY TIMIR JV CASE IV/M. 6412

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

[1825] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.938, pp. 745-746 and marginal note 5.942, p 746.
[1826] J. Faull & A. Nikpay, The EU Law of Competition (3rd ed.) (Oxford, UK, OUP, 2014) CH 5, marginal note 5.974, p 753; A. Jones & B. Sufrin, EU Competition Law (6th Ed.) (Oxford, UK, OUP, 2016) CH 15 5. D. (vii), p 1172; A. Ezrachi, EU Competition Law (5th Ed.) (London, UK, Bloomsbury, 2016) CH 9, p 407.

13.383 ITOCHU / TESSENDERLO CHEMIE / SIEMENS PROJECT VENTURES / T-POWER JV CASE IV/M. 6414

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.384 DONG ENERGY / SHELL GAS DIRECT CASE IV/M. 6420

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.385 TOKYO GAS / SIEMENS / TESSENDERLO CHEMIE / INTERNATIONAL POWER / GDF Suez / T-POWER JV CASE IV/M. 6422

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.386 TEEKAY / MARUBENI / MAERSK LNG CASE IV/M. 6434

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.387 DCC ENERGY / SWEA ENERGI CASE IV/M. 6449

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.388 EDF / ERSA CASE IV/M. 6450

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.389 EDF / KOGENERACJA CASE IV/M. 6456

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.390 MARQUARD & BAHLS / BOMINFLOT CASE IV/M. 6463

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.391 BP / CHEVRON / ENI / SONANGOL / TOTAL JV CASE IV/M. 6477

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.392 TOTAL / NOVATEK / OAO YAMAL LNG CASE IV/M. 6494

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.393 FCC / MITSUI RENEWABLE ENERGY / FCC ENERGIA CASE IV/M. 6499

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.394 GIP / FLUXYS G / FLUXYS SWITZERLAND CASE IV/M. 6508

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.395 GE / KGAL / EXTRESOL-2 CASE IV/M. 6509

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.396 OK EKONOMISK FÖRENING / KUWAIT PETROLEUM EUROPE / KUWAIT PETROLEUM DANMARK CASE IV/M. 6514

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.397 SESA / DISA / SAE / JV CASE IV/M. 6525

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 9 III lit. b MR2004).

13.398 ABB / THOMAS & BETTS CASE IV/M. 6529

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.399 EDF / EDISON CASE IV/M. 6530

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.400 DONG ENERGY BORKUM RIFFGRUND I HOLDCO / BOSTON HOLDING / BORKUM RIFFGRUND I OFFSHORE WINDPARK CASE IV/M. 6540

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.401 VIFOL /GRINDROD / COCKETT GROUP CASE IV/M. 6571

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.402 TENNET OFFSHORE GmbH / MITSUBISHI CORPORATION / TENNET OFFSHORE 2 CASE IV/M. 6591

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.403 VITOL / ATLASINVEST / PETROPLUS MARKETING CASE IV/M. 6612

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.404 TRAFIGURA / BAYCLIFFE / BLUE OCEAN CASE IV/M. 6617

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.405 VINCI / EVT BUSINESS CASE IV/M. 6623

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.406 LUKOIL / ISAB REFINERY CASE IV/M. 6635

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration.

13.407 GUNVOR INGOLSTADT / GUNVOR DEUTSCHLAND / PETROPLUS ASSETS CASE IV/M. 6656

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.408 CDC INFRASTRUCTURE / FORESIGHT SOLAR / ADENIUM SOLAR / VEI CAPITAL FOR VEI CASE IV/M. 6669

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.409 MOL / KMG EP / JV CASE IV/M. 6677

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.410 STEAG / FRONTERASOL / OHL INDUSTRIAL / ARENALES SOLAR CASE IV/M. 6679

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.411 O. W. BUNKER / BERGEN BUNKERS CASE IV/M. 6697

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.412 CHEUNG KONG HOLDINGS / CHEUNG KON INFRASTRUCTURE HOLDINGS / POWER ASSETS HOLDINGS / MGN GAS NETWORKS CASE IV/M. 6698

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.413 TALISMAN / SINOPEC / JV CASE IV/M. 6700

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.414 SK INNOVATION CO / CONTINENTAL AG CASE IV/M. 6706

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.415 CNOOC / NEXEN CASE IV/M. 6715

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.416 FIRST RESERVE MANAGEMENT / SK CAPITAL PARTNERS / TPC CASE IV/M. 6721

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.417 KOCH INDUSTRIES / GUARDIAN CASE IV/M. 6734

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.418 ENERGIE STEIERMARK / STEWEAG STEG CASE IV/M. 6747

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.419 EVN NETZ / OÖ.FERNGAS NETZ / GASNETZ STEIERMARK / GAS CONNECT AUSTRIA / AGGM AUSTRIAN GAS GRID MANAGEMENT CASE IV/M. 6780

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.420 EPH / SPP CASE IV/M. 6786

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.421 ROSNEFT / TNK-BP CASE IV/M. 6801

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.422 E.ON / SABANCI / ENERJISA CASE IV/M. 6810

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.423 ENEL GREEN POWER / SECI ENERGIA / POWERCROP CASE IV/M. 6849

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.424 CAMERON / SCHLUMBERGER / ONESUBSEA CASE IV/M. 6854

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.425 DSE / INCJ / SOLAR VENTURES / JV CASE IV/M. 6864

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.426 GE / MUNICH RE / IBERDROLA RENOVABLES France CASE IV/M. 6870

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.427 TENNET OFFSHORE / MITSUBISHI CORPORATION / TENNET OFFSHORE 8 CASE IV/M. 6875

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.428 OILTANKING GmbH / GUNVOR GROUP LTD / PT OILTANKING KARIMON CASE IVM. 6877

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.429 SHELL / REPSOL (MAJOR PART OF LNG BUSINESS) CASE IV/M. 6897

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.430 RWA / GENOL CASE IV/M. 6903

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.431 GAZPROM / WINTERSHALL / TARGET COMPANIES CASE IV/M. 6910

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.432 VITOL / PHILLIPS 66 POWER OPERATIONS CASE IV/M. 6933

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.433 ARGOS / SOPRETAL CASE IV/M. 6935

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.434 ABB / POWER-ONE CASE IV/M. 6945

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.435 UPC / GPT / JV CASE IV/M. 6950

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.436 EPH / STREDOSLOVENSKA ENERGETIKA CASE IV/M. 6984

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.437 BP EUROPA / GRUPA LOTOS / LOTOS TANK CASE IV/M. 6987

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.438 CKH / CKI / PAH / AVR CASE IV/M. 6988

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.439 REGGEBORGH / BOSKALIS / VSMC CASE IV/M. 6995

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.440 CARLYLE / KLENK HOLZ CASE IV/M. 7001

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.441 DLG / TEAM CASE IV/M. 7003

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.442 OAO LUKOIL / LUBRICANTS BUSINESS OMV CASE IV/M. 7006

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.443 MARUBNI / NPIH CASE IV/M. 7014

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.444 TRIMET / EDF / NEWCO CASE IV/M. 7019

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.445 OILTANKING / MACQUARIE / CHEMOIL STORAGE CASE IV/M. 7025

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.446 TRITION / AE HOLDING CASE IV/M. 7034

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.447 PGGM / GDF SUEZ / EBN /NOGAT CASE IV/M. 7039

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.448 PARKWIND / SUMMIT RENEWABLE ENERGY BELWIND 1 / BELWIND CASE IV/M. 7046

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.449 QATAR PETROLEUM INTERNATIONAL / GEK TERNA / GDF SUEZ / HERON II VIOTIA THERMOELECTRIC STATION CASE IV/M. 7053

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.450 CNODC / NOVATEK / TOTAL EPY / YAMAL LNG CASE IV/M. 7066

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.451 GOLDMAN SACHS / KINGDOM OF DENMARK / DONG ENERGY CASE IV/M. 7068

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.452 GESTAMP / EOLICA / BANCO SANTANDER / JV CASE IV /M. 7070

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.453 JSR / MOL / JV CASE IV/M. 7074

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.454 VITOL / CARLYLE / VARO CASE IV/M. 7087

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.455 SOCAR / DESFA CASE IV/M. 7095

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. c MR2004).

13.456 ENI ULX / LIVERPOOL BAY JV CASE IV/M. 7096

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.457 SALES & SOLUTIONS / VERBUND / JV CASE IV/M. 7098

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.458 PENSIONDANMARK HOLDING / GDF-SUEZ / NOORDGASTRANSPORT CASE IV/M. 7106

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.459 AXPO GROUP / EDF GROUP / JV CASE IV/M. 7108

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.460 E.ON SVERIGE / SEAS-NVE HOLDING / E.ON VIND SVERIGE CASE IV/M. 7121

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.461 EDF / DALKIA EN FRANCE CASE IV/M. 7137

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.462 GDF SUEZ / OMNES CAPITAL / PREDICA PREVOYANCE / FEIH CASE IV/M. 7139

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.463 VEOLIA ENVIRONMENT / DALKIA INTERNATIONAL CASE IV/M. 7145

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.464 BOREALIS ERUOPEAN HOLDINGS / FIRST STATE INVESTMENTS / FORTUM DISTRIBUTION FINLAND CASE IV/M. 7148

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.465 WORLD FUEL SERVICES CORPORATION / WATSON PETROLEUM LTD. CASE IV/M. 7154

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.466 WEX / RADIUS / EUROPEAN FUEL CARD BUSINESS OF ESSO CASE IV/M. 7156

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.467 DCC ENERGY / QSTAR FÖRSÄLJNING / QSTAR / CARD NETWORK SOLUTIONS CASE IV/M. 7161

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.468 LUKOIL / ISAB / ISAB ENERGY / ISAB ENERGY SERVICES CASE IV/M. 7168

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.469 VARO ENERGY / BAYERNOIL PACKAGE CASE IV/M. 7171

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.470 KENDRICK / TOPAS / RPIF CASE IV/M. 7183

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.471 KUWAIT PETROLEUM BV / KUWAIT PETROLEUM ITALIA / SHELL ITALIA / SHELL AVIAZIONE CASE IV/M. 7196

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.472 AMEC / FOSTER WHEELER CASE IV/M. 7215

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.473 REGGEBORGH / ARGOS GROUP HOLDING CASE IV/M. 7216

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.474 SONACI / DTS / SONACI DT CASE IV/M. 7219

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.475 ENERCON INEPENDENT POWER PRODUCER / GOTHAER LEBEN RENEWABLES / SKOGBERGET VIND CASE IV/M. 7222

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.476 CENTRICA / BORD GAIS ENERGY CASE IV/M. 7228

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.477 LETTERONE / RWE-DEA CASE IV/M. 7254

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.478 FORTUM CORPORATION / OAO GAZPROM / AS EESTI GAAS / AS VÖRUTEENUS VALDUS CASE IV/M. 7272

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.479 PARKWIND / ASPIRAVI OFFSHORE / SUMMIT RENEWABLE ENERGY NORTHWIND / NORTHWIND) CASE IV/M. 7295

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.480 TDR CAPITAL / DELEK EUROPE CASE IV/M. 7305

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.481 ELECTRICITY SUPPLY BOARD / VODAFONE IRELAND / JV CASE IV/M. 7307

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.482 MOL / ENI CESKA / ENI ROMANIA / ENI SLOVENSKO CASE IV/M. 7311

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.483 DET NORSKE OLJESELSKAP/ MARATHON OIL NORGE CASE IV/M. 7316

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.484 MEECRURIA / JP MORGAN CHASE & CO. COMMODITIES TRADING BUSINESS CASE IV/M. 7317

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.485 ROSNEFT / MORGAN STANLEY GLOBAL OIL MERCHANTING UNIT CASE IV/M. 7318

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.486 GDF SUEZ / SOPER / NATIXIS / LSCI / LCS2 / LCS5 / LCS9 / LCSGO CASE IV/M. 7352

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.487 AREVA ENERGIES RENOUVELABLES / GAMESA ENERGIA / JV CASE IV/M. 7363

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.488 OFI INFRAVIA / GDF SUEZ / PENSIONDANMARK / NGT CASE IV/M. 7390

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.489 SAUDI ARAMCO / S-Oil CASE IV/M. 7396

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.490 KLESCH REFINING / MILFORD HAVEN REFINERY ASSETS CASE IV/M. 7402

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.491 EPH / EGGBOROUGH HOLDCO 2 CASE IV/M. 7439

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.492 O. J.I HOLDINGS / ITOCHU CORPORATION / Sales AND PRODUCTION JVs CASE IV/M. 7468

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.493 MACQUARIE / WREN HOUSE / E.ON SPAIN CASE IV/M. 7490

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.494 DCC ENERGY / ESSO SAF CASE IV/M. 7508

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.495 REPSOL / TALISMAN ENERGY CASE IV/M. 7519

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.496 EPH / E.ON ITALIA COAL AND GAS BUSINESS CASE IV/M. 7534

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.497 ROYAL DUTCH SHELL / KEELE OY / AVIATION FUEL SERVICES NORWAY CASE IV/M. 7579

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.498 RWE / VSE CASE IV/M. 7589

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.499 3I GROUP / OILTANKING GmbH / OILTANKING GHENT / OILTANKING TERNEUZEN CASE IV/M. 7591

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.500 BOREALIS SIEGFRIED HOLDINGS / FORTUM DISTRIBUTION AB CASE IV/M. 7608

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.501 DCC / DLG DANISH ENERGY BUSINESS CASE IV/M. 7616

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.502 PSP / OTTP / TONOPAH SOLAAR INVESTMENTS / TONOPAH SOLAR ENERGY CASE IV/M. 7629

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.503 ROYAL DUTCH SHELL / BG GROUP CASE IV/M. 7631

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.504 KIA / GAS NATURAL FENOSA / GPG CASE IV/M. 7633

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.505 CASTLETON / MORGAN STANLEY GLOBAL OIL MERCHANTING UNIT CASE IV/M. 7665

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.506 DCC / BUTAGAZ CASE IV/M. 7680

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.507 WORLD FUEL SERVICES / BP AVIATION FUEL DIVESTMENT BUSINESS CASE IV/M. 7694

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.508 FORTUM / LIETUVOS ENERGIJA / JV CASE IV/M. 7745

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.509 CVC CAPITAL PARTNERS / SICAV-FIS / PKP ENERGETYKA CASE IV/M. 7751

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.510 VATTENFALL / ENGIE / GASAG CASE IV/M. 7778

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.511 GUNVOR GROUP / KUWAIT PETROLEUM EUROPOORT CASE IV/M. 7832

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.512 LETTERONE HOLDINGS / E.ON E&P NORGE CASE IV/M. 7840

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.513 ENI HUNGARIJA / ENI SLOVENIJA / MOL HUNGARIAN OIL AND GAS PLC CASE IV/M. 7849

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.514 EDF / CGN / NNB GROUP OF COMPANIES CASE IV/M. 7850

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.515 OMV / ECONGAS CASE IV/M. 7859

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.516 MACQUARIE / DOLOMITI ENERGIA / HYDRO DOLOMITI ENEL CASE IV/M. 7869

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.517 SAUDI ARAMCO / LANXESS / JV CASE IV/M. 7879

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.518 BP EUROPA / RUHROEL CASE IV/M. 7885

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.519 ALIMENTATION COUCHE TARD / TOPAZ ENERGY GROUP / RESOURCE PORPOERTY INVESTMENT FUND / ESSO IRELAND CASE IV/M. 7899

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.520 EPH / ENEL / SE CASE IV/M. 7927

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.521 PETROL / GEOPLIN CASE IV/M. 7936

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.522 The KINGDOM OF DENMARK / DONG CASE IV/M. 7994

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.523 DCC / DANSK FUELS CASE IV/M. 8000

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.524 PITPOINT / PRIMAGAZ / PITPOINT.LNG JV CASE IV/M. 8013

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.525 CENTRICA / NEAS ENERGY CASE IV/M. 8042

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.526 BOSKALIS / VOLKER WESSELS OFFSHORE BUSINESS CASE IV/M.8045

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.527 EPH / PPF INVESTMENTS / VATTENFALL GENERATION / VATTENFALL MINING CASE IV/M. 8056

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.528 TOTAL / SAFT CASE IV/M. 8072

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.529 PARTNERS GROUP / INFRARED CAPITAL PARTNERS / MERKUR OFFSHORE CASE IV/M. 8075

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.530 PSP / OTPP / CUBICO / RENEWABLE ENERGY POWER GENERATION COMPANIES CASE IV/M. 8092

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.531 DIF / ELECTRICITE DE FRANCE / THYSSENGAS CASE IV/M. 8119

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.532 TOTAL / LAMPIRIS CASE IV/M. 8123

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.533 ALPIC / GETEC ENERGIE / JV CASE IV/M. 8154

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.534 ENECO / ELICIO / NORTHER JV CASE IV/M. 8165

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.535 FIRST RESERVE / MORRISON UTILITY SERVICES CASE IV/M. 8178

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.536 ATLANTIA / EDF / ACA CASE IV/M. 8185

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.537 MARUBENI / TOHO GAS / GALP ENERGIA / GGND CASE IV/M. 8211

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.538 DIAMOND OFFSHORE WIND HOLDINGS II / ENECO WIND BELGIUM / ELNU / NORTHER CASE IV/M. 8232

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.539 NKT / ABB HIGH VOLTAGE CABLE BUSINESS CASE IV/M. 8239

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.540 EdF / CDC / RTE CASE IV/M. 8270

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.541 GENERAL ELECTRIC COMPANY / LM WINDPOWER HOLDING CASE IV/M. 8283

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004)[1827].

13.542 ENGIE / OMNES CAPITAL / PREDICA / MAIA EOLIS CASE IV/M. 8289

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.543 CEFCI / JSC KAZMUNAIGAZ / ROMPETROL FRANCE CASE IV/M. 8319

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.544 DONG ENERGY / MACQUARIE / SWANCOR / FORMOSA 1 WIND POWER CASE IV/M. 8343

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

[1827] Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 12 marginal note 12.119, p 1073.

13.545 Eqt Fund Management / GETEC ENERGY HOLDING / GETEC TARGET COMPANIES CASE IV/M. 8347

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.546 MACQUIRE / NATIONAL GRID / GAS DISTRIBUTION BUSINESS OF NATIONAL GRID CASE IV/M. 8358

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.547 ENGIE GROUP / SOPER / BPCE GROUP / LCS4 ET LCS DU CENTRE CASE IV/M. 8400

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.548 ENGIE SERVICES HOLDING UK / KEEPMOAT REGENERATION HOLDINGS CASE IV/M.8412

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.549 ENGIE / OMNES CAPITAL / PREDICA / ENGIE PV BESSE / ENGIE PV SANGUINET CASE IV/M. 8413

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.550 TPG / OAKTREE / IONA ENERGY CASE IV/M. 8443

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.551 DUFERCO ENERGIA / ENERGHE CASE IV/M. 8445

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.552 STRABAG / ROHÖL-AUFSUCHUNGS AG / JV CASE IV/M. 8455

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.553 INEOS / FORTIES PIPELINE SYSTEM CASE IV/M. 8456

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.554 INEOS / DONG E&P CASE IV/M. 8473

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.555 GASUNIE / VOPAK / OILTANKING / JV CASE IV/M. 8484

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.556 EDF ENERGY SERVICES / ESSCI CASE IV/M. 8504

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.557 MACQUARIE GROUP / CARGILL PETROLEUM BUSINESS ASSETS CASE IV/M. 8506

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.558 ENGIE / CDC / SOLAIRECORSICA 1-2-3 CASE IV/M. 8508

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.559 EPH / CENTRICA LANGAGE AND CENTRICA SHB CASE IV/M. 8516

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.560 BROOKFIELD / ENGIE / FHHGL CASE IV/M. 8530

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.561 USSL / GOLDMAN SACHS / REDEXIS GAS CASE IV/M. 8550

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.562 INTERVIAS / ESSO ITALIANA BUSINESS CASE IV/M. 8563

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.563 GREENERGY / INVER CASE IV/M. 8601

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.564 ENGIE / LA CAISSE DES DEPOTS ET CONSIGNATIONS / CEOLFALRAM76 CASE IV/M.8608

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.565 TOTAL / MAERSK OLIE OG GAS CASE IV/M. 8662

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.566 BP / BRIDAS / AXION CASE IV/M.8671

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.567 INNOGY / EUROPEAN ENERGY EXCHANGE CASE IV/M.8691

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.568 CEPSA / CEPSA GAS CASE IV/M.8699

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.569 ENGIE / OMNES CAPITAL / PREDICA PREVOYANCE / TARGET CASE IV/M.8700

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.570 MACQUARIE / OIL TANKING / OILTANKING ODFJELL TERMINAL SINGAPORE CASE IV/M.8727

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.571 CGE / EDPR / TRUSTWIND / DGE / REPSOL / WINDPLUS CASE IV/M.8711

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.572 ENGIE / IPM ENERGY TRADING / INTERNATIONAL POWER FUEL COMPANy CASE IV/M.8717

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.573 EG GROUP / ESSO GERMANY BUSINESS CASE IV/M.8746

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.574 BAYWA / CLEAN ENERGY TRADING CASE IV/M. 8758

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.575 SHELL / IMPELLO CASE IV/M. 8775

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.576 TORANTIM / CPPIB / VTRM ENERGIA PARTICIPACOES / VENTOS DO ARARIPE III CASE IV/M. 8777

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.577 WATERLAND / DE NEDERLANDSE ENERGIE MAATSCHAPPIJ CASE IV/M. 8781

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.578 GOLDMAN SACHS / RIVERSTONE INVESTMENT / LUCID ENERGY GROUP II CASE IV/M. 8800

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.579 ELIA SYSTEM OPERATOR / EUROGRID INTERNATIONAL CASE IV/M. 8826

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.580 STADTWERKE OLCHING / BAG NETZ / NG OLCHING VERWALTUNGS GmbH CASE IV/M. 8835

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.581 OTARY / ENECO / ELECTRABEL / JV CASE IV/M. 8855

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.582 RWE / E.ON ASSETS CASE IV/M. 8871

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004). RWE is acquiring E.ON assets regarding renewable and nuclear electricity generation and acquires 16.67% of E.ON shares in context with an asset swap under CASE IV/M.8870[1828].

13.583 JERA TRADING / LNG OPTIMISATION CASE IV/M. 8879

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.584 TOTAL / DIRECT ENERGIE CASE IV/M. 8926

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.585 STEAG / SIEMENS / JV STEAG GUD CASE IV/M. 8952

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

1828 ***http://europa.eu/rapid/press-release_IP-19-1432_en.htm***; q.v. supra 9.48 E.ON / INNOGY CASE IV/M. 8870; q.v. C. Bellamy & G. Child, European Union Law of Competition (8th ed.) (New York, USA, OUP, 2018) CH 8 marginal note 8.050, p 619.

13.586 SONATRACH / AUGUSTA REFINERY ASSETS CASE IV/M. 8959

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.587 SUMITOMO / PARKWIND / NORTHWESTER2 CASE IV/M. 8970

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.588 AMF / KLP / STENA SPHERE / STENA RENEWABLE CASE IV/M. 8978

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.589 PARTNERS GROUP / TECHEM CASE IV/M. 8980

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.590 SPIGAS / CANARBINO / MIOGAS CASE IV/M. 8983

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.591 ENGIE / GREENYELLOW / JV CASE IV/M. 9020

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.592 E.ON / CLEVER / UFC SCANDINAVIA JV CASE IV/M. 9049

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.593 KUWAIT INVESTMENT AUTHORITY / NORTHSEA MIDSTREAM PARTNERS CASE IV/M. 9069

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.594 TOTAL / PONT SUR SAMBRE POWER / TOUL POWER CASE IV/M. 9074

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.595 EXXONMOBIL / QATAR PETROLEUM / EXXONMOBIL EXPLORATION ARGENTINA / MOBIL ARGENTINA CASE IV/M. 9101

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.596 MET RENEWABLES / O ZONE / NIS ENERGOWIND CASE IV/M. 9133

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.597 ENGIE / PREDICA PREVOYANCE DIALOGUE DU CREDIT AGRICOLE / OMNES CAPITAL / EQUINOX VIIIA CASE IV/M. 9181

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.598 ENGIE / PREDICA PREVOYANCE DIALOGUE DU CREDIT AGRICOLE / OMNES CAPITAL / 4 WINDFARMS CASE IV/M. 9184

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.599 ENGIE / EDPR / REPSOL / WINDPLUS CASE IV/M. 9217

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).

13.600 MACQUARIE / JERA POWER INTERNATIONAL / ORSTED INVESTCO / SWANCOR / FORMOSA I WIND POWER CASE IV/M. 9268

There are no commitments available which the parties offer in order to remedy competition concerns of the concentration (Art. 6 I lit. b MR2004).