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MASTER-THESIS

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„Competition policy in Europe- State Aid, Mergers and
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Abbreviations:

AML- Anti-Monopoly Law

ASEAN- Association of South East Asian Nations

COMESA- Common Market for Eastern and Southern Africa

DEE- Developing and Emerging Economy

EC- European Commission

ECJ- European Court of Justice

ECN- European Competition Network

EEA- European Economic Area

EFTA- European Free Trade Association

EU- European Union

FDI- Foreign direct investment

FTC- Federal Trade Commission

GATT- General Agreement of Tariffs and Trade

IAA- Israel Antitrust Authority

ICC- International Criminal Court

ICN- International Competition Network

ICPAC- International Competition Policy Advisory Committee

MERCOSUR- Southern Common Market

MOFCOM- China Ministry of Commerce

NCA- National Competition Authority

OECD- Organisation for Economic Co-operation and Development

TFEU- Treaty on the Functioning of the European Union

TRIPS- Agreement of Trade- Related Aspects of Intellectual Property Rights

UNCTAD- United Nations Conference on Trade and Development

US- United States

WAEMN- West Africa Economic and Monetary Union

WTO- World Trade Organisation

1. Abstract German

In meiner Masterarbeit untersuche Ich das Thema Wettbewerbsrecht in Europa und weltweit. Erstens beschäftige Ich mich mit den verschiedenen Problemen, die mit Wettbewerspolitik verbunden sind – Warum brauchen wir eine solche Politik und welche Vorteile hat sie?; Wann ist die Wettbewerspolitik gerechtfertigt und welche Wirkung hat sie auf Unternehmenszusammenschlüsse. Das Wettbewerbssystem wurde erstellt um zu sichern, dass Unternehmen ordentlich konkurrieren und dient auch zum Rechtsmittel gegen die Erscheinung eines wettbewerswidrigen Verhaltens und eine falsche Implementierung der Wettbewerbsregeln von Regierungen und Behörden. Noch dazu, die Wettbewersregeln haben das Ziel Unternehmen zu bestärken um eine grössere Vielfalt von Produkten und Dienstleistungen anzubieten und dadurch eine reichere Wahlmöglichkeit vollzubringen. Zuerst setze Ich Schwerpunkt auf die Gerechtfertigung der Rolle der Wettbewerspolitik in nationalen Rahmen und im internationalen Markt. Mein erstes Ziel ist zu zeigen was für Probleme bei der Durchsetzung der Wettbewerspolitik entstehen und wie die aufstrebende Länder diese Probleme lösen können. Ein wichtiges Problem ist mit Angebot und Nachfrage verbunden, nämlich in der

Situation wenn Monopolisten von Kunden mehr als was gerechtfertigt ist verdienen. Das Europäische Wettbewerbsnetz ist ein effektives Rechtsmittel, das den nationalen Wettbewerbsbehörden hilft um eine richtige Zusammenarbeit und einen schnellen Informationsaustausch zu schaffen und dadurch alle Probleme zu lösen. Auch die Rolle der Europäischen Kommission und der nationalen Behörden bei der Behandlung von Beschwerden wird in der Masterarbeit diskutiert. In der globalisierten Welt entstehen Probleme, die mit der Hilfe der Wettbewerbsregeln gelöst werden können. Deshalb analysiere Ich die Wettbewerbspolitik, die sich mit festen Preisen, Missbrauch einer marktbeherrschenden Stellung, Kartellwesen und internationalen Unternehmenszusammenschlüssen beschäftigt. Noch dazu, werde Ich die Herausforderungen, die die Europäische Kommission und eine nationale Behörde bei der Unterstützung von Ländern und Regierungen in anhängigen Fällen annehmen müssen, untersuchen. Die staatliche Beihilfe, Subventionen und weitere Rechtsmittel wie z.B. der Austausch von Information in dessen Rahmen mehrseitige, zweiseitige und regionale Zusammenarbeit existiert, präsentieren ein weiteres Thema, das in der Masterarbeit bearbeitet wird. Leider ist das System für Zusammenarbeit noch nicht genug entwickelt um eine effektive Zusammenarbeit zu schöpfen. Es erscheinen Situationen bei denen eine Partei keine Erfahrung hat und die andere Partei nützt die Möglichkeit um eine beherrschende Position zu bekommen. Ein wichtiger Teil meiner Masterarbeit ist das System für Unternehmenszusammenschlüsse und das System für Benachrichtigung (freiwillig oder obligatorisch), der Informationsaustausch, die Durchsetzung von Rechtsmitteln wenn der Wettbewerb und das Wohlbefinden des Marktes gefährdet sind. Die zwei populärsten und vorteilhaftesten Rechtsmittel werden diskutiert, nämlich das Verhaltensrechtsmittel und Structurrechtsmittel. Verschiedene Berichte und Vorschriften von OECD, ICN und UNCTAD werden in der Masterarbeit dargestellt. Diese Berichte zeigen, dass Veränderungen und Entwicklungen in den Gerichtsbarkeiten der aufstrebenden Ländern notwendig sind, um erstens die nationale Wettbewerbspolitik zu verbessern und dann klare Wettbewerbsrahmen zu schaffen. Mit der Hilfe der Wettbewerbsrahmen werden Unternehmenszusammenschlüsse und andere Geschäftspraktiken, die potentiell nachteilhaft für den Wettbewerb sind, erfolgreich gekämpft. Endlich unteruche Ich die Globalisierung und die Tendenz auf Übertragung von öffentlichen Unternehmen zu Privatparteien, die besonders stark in aufstrebenden Ländern sind. Diese Tendenzen führen zu dem Zusammenstoß zwischen der Einschränkung des Wettbewerbs und der neuen Epoche von Liberalisierung und

Abschaffung der alten Staatsmonopole. Verschiedene Reformen wurden von Organisation wie WTO, ICN, UNCTAD und die Europäische Kommission durchgeführt zusätzlich zu den Regierungsmassnahmen für einheitliche Regeln, die die EU angeborene Politik, die mit der nationalen Sicherheit und Stabilität verbunden ist, schützen können. Ein Grundziel der Europäischen Union und teilweise der europäischen Wettbewerbspolitik ist zu sichern, dass Unternehmen unter gleichen Bedingungen in einem neuen globalisierten Binnenmarkt konkurrieren. In meiner Masterarbeit gebe ich viele Beispiele, die meine Erörterungen beweisen.

1.1 Abstract English

In my thesis I will discuss the Competition law in Europe and worldwide. First I will look at the competition policy issues – why we need it, what are the benefits of it, how it is justified and how does it affect the mergers? As the system was developed to ensure that companies compete fairly with each other and if there is improper implementation of the competition policy rules by the government or the authorities to fight against occurrence of anti-competitive behaviour. Moreover, competition aims to encourage businesses to provide different range of products and services which shall be distribute to the consumers variety of choice. I will first focus on the justification which concerns the role of competition policy in a national environment and international markets. One of the aims of my discussion was to find what problems arise in the competition policy enforcement and how the emerging countries could deal with these problems. Such problem is with supply and demand side where monopolists earn from the customers more than it is expected. I will concern the European Competition Network as an effective mechanism for encouraging the European competition authorities to correspond and share information between each other in order to fight the problems. I will discuss as well the question such as what is the role of the Authorities and the Commission in dealing with various complains. In the emerging globalized world there are so many issues that are addressed and associated with competition. That is why I will discuss the competition policy dealing with fixed prices, abuse of dominant position by certain parties to anticompetitive agreements, cartels or cross-border mergers. Moreover I will deal with the challenges that the Commission and European competition authorities face while they are trying to assist the governments and countries and monitor and investigate the cases which arise. State aid and subsidies is another problem that will be considered in my paper as well as the remedies which are again communicated through all the institutions in various frameworks coordinated in bilateral, multilateral and regional co-

operation (which are the key systems for co-operation between the different international and domestic agencies). Still these systems of co-operation are not developed enough to provide the effective co-operation in cases when one party is not experienced enough and is looking forward for some assistance from another (trying to become dominant in the relationship between them). But one major part of my paper will be the merger control system and its operation which include notification system (both voluntary and/ or mandatory), the exchange and sharing of information, the monitoring and enforcement process of the remedies when in some cases it is necessary because the mergers often lead to problems such as posing threat to the market and the competition. The two types of most beneficial and more often imposed remedies will be discussed as well - behavioural and structural. I take some Reports and Regulations of OECD, the ICN and UNCTAD into account in the discussion that certain developments and changes shall be made in the DEEs jurisdictions as first they should look at the domestic competition law policy and then to establish a coherent framework to battle with the mergers and other anti-competitive practices that arise. In the end I will take a closer look at the liberalization in the globalized emerging countries that appear as a process of transferring public service entities to private actors that lead to different problems restricting the competition in the countries as the major victim were the domestic companies but on the other hand liberalization bring a new era which establish the movement for breaking a long standing public monopolies. But various reforms had been made and introduced by organization as WTO, ICN, UNCTAD, the European Commission and some governmental measures proposed for various internationally unified and agreed rules in interest of the national security, stability, welfare as it is the basic aim of the whole European world and partially purpose of the European competition policy to ensure that companies compete equally and fairly in the globalized internal market as I will provide with many examples.

2. Introduction

The European Union's competition policy has been an important part of the EU's work since it was set out in the Treaty of Rome in 1957. The aim of the treaty was to establish 'a system ensuring that competition in the common market is not distorted'¹ through well-developed and effective competition rules which would help to ensure that the

¹ European Commission, *'The European Union Explained: Competition'* (Luxembourg Publications Office of the European Union) COM (November 2014) 3

European market functions properly and provide consumers with the benefits of a free market system – high quality products, variety of choices and reduced competitive prices. The system was developed to ensure that companies compete fairly with each other and appropriately applying the competition policy rules. These are the main motives of EU in fighting anticompetitive behavior; control mergers and state aid and reassures liberalization: low prices for all, better quality, wide variety of choice, innovative products, better competition.

The best way to enter the market and encourage the business development and production is to offer better price and stay competitive on the market. Then more people would afford to buy the product and it will increase the economy standard. But to fascinate the consumers the products need to offer better quality: to work better and last longer, also to have stable warranty scheme, better service and technical maintenance of the products and services. This would also lead to higher sales and will expand the market share as leading Competition aim. Moreover, competition aims to encourage businesses to provide different range of products and services which allow consumers to select the one which suits him/her best and which have some sort of a balance between price and quality, innovation, design, idea, technical features and etc. The major aim of the competition policy is to make stronger the companies and keep the interest of the enterprises not only inside the market but also worldwide against foreign competitors. I will first focus on the justification which concerns the role of competition policy in a national environment (closed economy) and later on in its international aspect. I will have a look at what happened with the emerging market. The main idea is all about offering best quality for lower price. What Professor Ehlermann referred to ‘competition means putting in more energy, more effort, more creativity in order to obtain better results. The motivation of the economic agents is probably purely individual but the result is favourable for society.’² As Adam Smith observed, ‘there is an invisible hand at work to take care of this.’³ Can we expect that the market nowadays will emerge so easily and naturally by itself alone? Yes, but if it was not such a fast growing modern civilization with high level of production. There is a possibility of natural growth of the efficient market only if there are fair players, no barriers to entry and free flow of information mostly for the small

² S. Depypere, ‘*Why do we need Competition Policy?*’ (Brno Seminar, 14 February 1995) 1.

< http://ec.europa.eu/competition/speeches/text/sp1995_014_en.html>, accessed 29 June 2015

³ Ibid 1.

market players as in mind we have small businesses. And that is why the competition policy is created. But in economically developed world with intensive production there are more barriers to entry and more threats for the competition and suppliers as I will discuss later on the paper. I will discuss the request and supply side where the business monopolists earn more from less products on higher price and not from the quantity of the sales itself which lead to a negative impact on the market and their business as well. The lower level of production lead to less production and higher prices which make the customers unpleased and market unprospective. Then the negative impact turned around into positive for the monopolists who earn more without an effort. The end result is: featureless executives, less technical innovation and production, neutral staff which affect the consumers who will get bad service and cannot even get something in return. The major problem is that monopolists usually face not the improvement of quality and innovation but aim at securing their position on the market and putting obstacles which is unfavourable in case of distortion of the market competition cases. 'The danger is that the legal barriers to entry may remain after the technical barriers have disappeared thanks to technological progress or market opening.'⁴ Here I come with the conclusion that the competition policy is the one who will regulate and try to avoid the abuse of dominant position by the parties and I will look at the problems which are overcome with the policy –cartels, mergers, anticompetitive agreements and the liberalization process. I will have a closer look mostly on the merger control which competition policy operate and all its consequences. But I will start first with defining the competition in Europe.

3. Competition in Europe

With the globalization of the markets the problem is not addressed anymore to the national competition authorities (NCA) which usually are the one which deal with the case but now it is time to face the issue to the European Commission, the one dealing with illegal behavior, cartels and external problematic competition EU cases. The Commission has the power to investigate possible anticompetitive behaviour, to take binding decisions, impose substantial fines and have jurisdiction over large mergers in late 90s. Together with NCAs of the other countries it has power to enforce EU competition rules and their powers are similar and overlapping sometimes.

The European Competition Network (ECN) makes able and effective the exchange of information between the NCAs and the European Commission and the application of the

⁴ Ibid 1.

competition rules. They easily decide which authority should apply what could help the particular issues for be solved, as soon as after 2007 this authorities use the EU competition rules for most of the decided cases. Through the ECN authotiries look after the businesses and how they follow the competition rules to be in conformity with the standarts without preventing the small companies from development and innovations. The authorities inform each other of proposed decisions and share experience and best practices and they also cooperate with the national courts which have power to decide on the EU competition law issues which arise on the region. Damages are available both for companies and consumers where unreasonable, illegal behavior restricting competition is found.

3.1 The competition rules

The European Economic Area (EEA) Agreements on which basis the Commission and the Authorities are working are similar to the competition rules in the EU where agreements which include price fixing and sharing of the market are prohibited if they distort the competition on the following market as to the Article 53 EEA⁵. Only allowed in such cases are agreements that are in benefit of the society and involve economic improvements. Also prohibited are certain actions that will make the others leave the market such as abuse of dominant position by any of the companies with highest shares in this market as covered in Article 54⁶. Equivalent is also the control of mergers and acquisitions for those entities which may not be established or have their registered office in the EEA but if they operate in a course of business in the territories could harm the competition.

3.2 The role of the Authority

⁵ Decision of the Council and the Commission 94/1/ECSC/ EC on the conclusion of the Agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation [1993] OJ L1/1; [1994] OJL1/1 <http://ec.europa.eu/competition/international/multilateral/eea_agreemt_comp.pdf > accessed 12 July 2015.

⁶ Council Regulation 2894/94/EC concerning arrangements for implementing the Agreement on the European Economic Area [1994] OJ L 305/21.

Here I come to the role of the Authority and the European Commission as leading regulators of the The EEA competition rules. The authority has the power to deal with complaints and prohibitions in Iceland, Liechtenstein and Norway as soon as EFTA states follow the EEA competition rules. The Authority should monitor how the national authorities and states implement the competition rules and is powerful enough to take actions against those EFTA states which did not effectively control the undertakings or force them to apply rules contrary to the EFTA Agreement on European Economic Area (and especially Article 53 and 54). The Commission on the other hand is independent from the states on which it has jurisdiction and same is with the Authority but as a contrast to the Commission it has wide variety of powers and can impose higher fines on businesses which did not comply with the competition rules. Same as the Commission, Authority, the national authorities and the courts as well as, the Authority and Commission together, can cooperate with each other in uniformity and both have supremacies to impose fines and prohibitions under the two Articles 53 and 54 which will make the market more secure according to the competition rules and will assure the rights of the citizens. This brings a new era of uniform competition rules system and will help them in more coherent interpretation. This is the leading aim of the Authority to develop a uniform system through the EEA and encourage a complete standardized implementation and application of the EEA competition rules. It is not impossible even for Commission and Authority to cooperate together because Article 53 and 54 are equivalent to the EC Treaty the case law of the ECJ is leading in the interpretation of the Articles.⁷ The Authority and the competition authorities of the EFTA States are entitled to be involved in cases that raise competition concerns in those States. There are two major documents Notice on cooperation within the EFTA Network of Competition Authorities and Notice on cooperation between the EFTA Authorities and the courts of EFTA states⁸ which deal with the cooperation between the Authority and other bodies in application of Article 53 and 54. Later on I will discuss the merger control rules and jurisdiction which are at all in the hands of the Commission.

⁷ EFTA Surveillance Authority, *'The EEA Competition Authority and the role of the Authority'* (EFTASURV, 2004) < <http://www.eftasurv.int/competition/competition-rules-in-the-eea/> > , accessed 4 July 2015.

⁸ European Commission, 'Notice on best practices for the conduct of proceedings concerning Articles 53 and 54 of the EEA Agreement' (2011) OJ C 308/06 8.

4. What is the competition policy?

Not so dissimilar from the job of the EEA Authority is the work of the European Commission in trying to prevent illegal behavior and catch those who are aiming to secure their dominant market position using anticompetitive practices (such as sharing market between them in order not to allow others to enter into it). Together with the national competition authorities they are trying to prevent such practices, enforce the EU competition rules and ensure equality and fairness to all if not then to impose fines. 'Through state aid, antitrust and merger control the Commission ensures undistorted competition within the internal market. This level playing field ensures access to the large and sophisticated EU internal market for all European companies, including small and medium-sized enterprises (SMEs).'⁹ The internal market is largely associated with the competition policy because its aim is to provide the European society and consumers with better quality life at lowest price and if there anticompetitive conduct at stake both consumers and businesses can get damages for the fault made under the measures provided by the Commission. This leads again to the idea of fighting cartels, prevent the abuse of dominant position, support the ones who are at risk to distort the competition and control the mergers.

4.1 Main rules

Businesses are forbidden to exercise certain actions under the EU rules such as to fix prices or divide up markets amongst themselves (Article 101 of the Treaty on the Functioning of the European Union¹⁰ (TFEU); abuse their dominant position in order to eliminate the smaller competitors (Article 102 TFEU¹¹); to merge with aim to gain control over the market without the approval of the European Commission even if they are based outside the EU (the merger regulation). Art 107 TFEU¹² covers the assistance and monitoring to businesses through state aid and Commission such as grants, loans,

⁹ European Commission (n 1) 4.

¹⁰ Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ 115 Art 101 (ex Art 81 TEC) ch 1 section 1.

¹¹ Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ 115 Art 102 (ex Art 82 TEC) ch 1 section 1.

¹² Consolidated Version of the Treaty on the Functioning of the European Union, [2008] OJ 115 Art 107 (ex Art 87 TEC) ch 1 section 2.

certain rates and taxes. All the conditions such as the business to be economically sustainable should be fulfilled before enjoying the grants and state aid.

4.2 Anticompetitive agreements

To see why the competition policy is important I will have a look at what kind of faults could arise in the economic environment. An example is the anticompetitive agreements which are prohibited under Art 101 of the TFEU when they arise out of the intention of the parties to abuse their dominant position and restrict the competition on the market through price fixing and resale price fixing between distributors and manufacturers, limitation of production for numerous reasons, when major companies agree on sharing market and customers between themselves and etc. All these fall under the anticompetitive agreements with negative impact for the market and are forbidden but if the purpose of the agreement is made in favour of the consumers with the aim to improve the product, service such as a creation of a new product for whose creation more time is necessary and requires more resources in research and development (for working alone than working in cooperation with someone else); and or only possible if made in a joint production; after a sale or purchase of standards from other under such an agreement; or involve enterprises which have no impact on the overall market because they are with less market shares but to be competitive to the most powerful companies they are entering into such a cooperation with other less influential ones. Then and only in such cases the agreement is seen as positive and the Commission would probably allow its existence. The problem is not to have dominant position on the market but the company to use the obligation of its dominant position to exclude or ban someone from entering the market. This is completely prohibited under Art 102 TFEU. But it also includes agreements which are not intended to restrict the competition. These are agreements between direct competitors or between suppliers and commercial buyers known as vertical agreements which sometimes have positive effects on the competition. When such an agreement grants exclusivity to the parties or restricts the use of any products this could lead to distortion of the competition. 'In fact what vertical agreements produce is a mixture of supply-side rigidities and incentives. Part of the clauses can be really beneficial, e.g. by providing legal security for the parties which will allow them to undertake supplementary activities and accept supplementary risk.'¹³ Such an agreement

¹³ S. Depypere (n 2) 1.

may have negative impact on the innovation and inventiveness then it comes the need from transparent competition system to provide guidances and regulations in order to strike a balance in the relations between competitors as well as to prohibit when its required such agreements. This becomes "High Tech" competition technology.¹⁴ The system deals with some problems in particular time frame limit thought the exemption regulations which are only available for certain types of agreements. The issue with special rights and mergers is similar with those raised by monopolies and dominant positions in such agreements and will be discussed further below. So we should touch upon before that the issue of cartels, state aid monitoring.

4.3 Cartels

We discussed already the danger of monopoly and we should turn now to the demand and supply side of the cartels. What are they and how they restrict competition? The anticompetitive agreements could be also 'cartels where companies agree to avoid competing with each other, or agree the prices at which their products will be sold.'¹⁵ This is seen as 'association or an agreement between independent entrepreneurs to do away partially or entirely with competition'¹⁶. The most injurious one is known as "hard-core cartel", i.e. 'a "horizontal" agreement between undertakings at the same level of supply which aims at particularly dangerous restrictions of competition such as price-fixing, market-sharing or limitation of production.'¹⁷ Cartels can be compared to a monopoly created by a small group of suppliers (buyers) and their purpose is to benefit the members similar to benefiting members of individual monopoly and reduce competition. This "hard-core cartel" is similar to an abuse of a monopoly by restricting the market supply and offering higher prices where both have no benefit to society and are detrimental to them. Again I see that it is the job of the competition policy to deal with it thought the law. It is necessary to enforce the law and not to allow the cartel members to benefit from the position. Cartels are illegal under EU Competition law because companies in cartels are trying to fix prices and escape from fighting with the small businesses and as a 'bad' thing the Commission is trying to battle it. As a result from

¹⁴ Ibid 1.

¹⁵ European Commission (n 1) 5.

¹⁶ S. Depypere (n 2) 1.

¹⁷ Ibid 1.

price fixing and deviding of markets consumers are faced with the problem of buying goods and services with lower quality on higher price which is absolutely NOT in conformity with the major aim of the Commission to create a competitive and fair market environment. This includes higher prices offered to customers when there is no variety of choice because there is no other competitive undertaking. Moreover, the elimination of the competitors on the market could be made when the company refuses to deal with certain supplier and choose to deal with others on preferencial discount basis. In such cases for the suppliers and customers is difficult to continue operating the business. Other point which shows abuse of the dominant position is lowering the sale price in an unreasonable way or charges in an unreasonable way the customers in order to exclude the others from the marker.

A huge problem for the Commission is catching and fighting the cartels which are created, united and guided by this principles as illegal they are made secretly and it is hard to find information and evidence against them. This was one of the reasons the Commission to create the 'leniency policy' that 'offers companies involved in a cartel which confess and hand over evidence either total immunity from fines or a reduction of fines which the Commission would otherwise have imposed on them. Parties to a cartel case can also acknowledge what they did and accept their liability for it using the Commission's cartel settelement procedure.'¹⁸ The leniency policy makes the system workable and efficient, reduce fines and help the Commission to go through faster investigation procedures. Nevertheless, it is similar to the settlement dispute procedure where it did not seem to be a negotiation between the Commission and the cartels created.

4.4 Antitrust

We should be familiar with the term 'antitrust' as well, which refers to 'action of preventing or controlling trusts or other monopolies.'¹⁹ This means that the Commission's aim is to promote competition between businesses and not to distort it. There are some antitrust rules which deal with specific anticompetitive agreement conduct and also contain some of the powers of the Commission such as to investigate companies, enter and search premises for important documentation or other evidence

¹⁸ European Commission (n 1) 6.

¹⁹ Ibid 5.

which could be leading for tracing the case, examine any record or bank documents, inspect all the valuable stocks and shares, can request information from member of the company about facts important for the finalizing of the case and etc. In the Commission's notices and guidelines²⁰ could be found various signs for interpretation of the rules and also information about what is the aim of the policy.

4.5 State Aid

The case where Commission is taking the power in its hands is again when state aid on behalf of the state distort the EU competition because the state devote public money such as allowances, tax benefits, guarantees or others to support private companies or industries in the region which is absolutely anticompetitive because they become more strength then others, unless it is for specific purpose or in geniu interest to the public (Art 108 TFEU²¹), it is prohibited under Art 107 TFEU. There are few exceptions when the Commission decide to allow the support but otherwise the support will not be allowed if distort the EU competition. 'In the last couple of years the Commission has made it easier for EU countries to use aid targeted at market failures and objectives of common European interest. The Commission focuses its enforcement on cases with the biggest impact on the internal market, streamlining rules and taking faster decisions.'²² In some situations Commission allows the support because it is in the public benefit not to close certain entity and reduce the emplymet or loosing certain kind of important production for the entire market. The major questions which arise during the decision to stop the state proceeding with the aid or not is whether it will abuse part of the business or it will be with more positive impact for the customers. Mostly allowed benefits are in the spheres of research and development for the small enterprises but this is done after a strict monitoring by the Commission which includes approval for the allowance and assessment of harm which could be caused to other. There should be a calculation of the subsidies and have in mind other benefits given. The Commission is free to receive any

²⁰ Council Regulation (EC) No 139/2004 guidelines on the assessment of horizontal mergers on the control of concentrations between undertakings [2004] OJ C 31/03; Council Regulation (EC) 139/2004 guidelines on the assessment of non-horizontal mergers on the control of concentrations between undertakings [2008] OJ C 265/07

²¹ Consolidated Version of the Treaty on the Functionain of the European Union [2008] OJ 115 Art 108 (ex Art 88 TEC) ch 1 section 2

²² European Commission (n 1) 5-6.

comments and suggestions as well as provide information for the whole process and all the businesses that are benefiting through the time collected in an open EU system available for everyone. Such system will start working since 2016 in all European countries and 'citizens in all EU countries will be able to find information on subsidies over €500 000 on the internet. This should help make the European economy more competitive on the global market.'²³ There is a different type of aid that damages the market and make some competitors unfaithful and discourages them. This is when producers did not make appropriate aid and produce wrong quantity of goods or make a 'bad' investment which lead others to switch off from the market. I are talking about aid for certain kind of production and goods which are more benefited than others and this is different from state aid where certain consumers gain the benefit from the aid. This kind of benefit could lead to market failure and clear need from aid policy is necessary. There is a problem with the postitive and negative 'externalities' which follow the outside investment of certain company which invest in an alternative products just because they cannot use the investment otherway around and 'underinvestment is borne then by someone else.' What needs to be done is to "internalise the externalities" that means taking such measures that the company will take account of the external effects during its own decision process.'²⁴ Such measures can be taken on behalf of the Commission through the competition policy providing aid scheme and monitoring as well as by giving aid or imposing certain regulations. Some aids such as covering the uncertain costs of production should be escaped because they could result in an unhappy competitors aiming to leave the market but other aids such as environmental protection and regional development is important to be faced. A monitoring scheme can only be effective if it is transparent and conditions intended to be met are fulfilled as well as when the authority is reliable enough to control the competition policy and all its issues.²⁵ As we saw there are various ways which could lead to abuse of the market power. All these pressures endangered the society and to avoid such harms effective competition policy and enforcement is at stake. 'Competition policy must not only be applied, it must also be

²³ Ibid 5-6.

²⁴ S. Depypere (n 2) 1.

²⁵ Ibid 1.

expected to be applied. If we succeed in doing this we produce a Public Good which is welfare enhancing for the benefit of society at large.²⁶

4.6 Mergers

After the discussion of the possible aids, agreements and dominance I should take a closer look at the mergers and how they affect the competition. The European Commission is the one who review and authorize the mergers, not only in one country (that is done by the national competition authorities (NCAs)) but also between countries of the EU, being valid and allow them to merge only if there is no suspicion of any harm that could lead to distortion of the competition on the market or higher price, less choice and less favourable good/services for the consumer. Such a merger can be effective and fair if it is with the aim of developing innovative product with competitive price or a scheme and could be efficient for the market which will maintain the competition and consumer will benefit from high class goods on better price. The Commission is the one who should ensure that there is no distortion on the competitive market and if so can prohibit such merger by its regulations which include the rules for assessment and procedural issues when they reduce the competition by making one company dominant and powerful more than others on the market.

Important are only the mergers with certain high level threshold and does not matter whether they are registered in EU or not or whether their office and manufacturing is outside EU if they affect the EU market they are under the control of the Commission or NCAs in some circumstances if they are an important player on the market. The Commission may prohibit such merger and may impose certain measures or fines against the competitor together or in cooperation with the NCAs, not to allow distortion of the market if the merging companies are in dominant position and abuse its position to block the market. The merger will only be allowed and could proceed if after the investigation Commission conclude that the market competition is restored and there is no suspicion of disorder. If during transfer of shares between companies or buying other companies expertise and equipment the Commission is not pleased with the conditions fulfilled then it could prevent the merger from merging.

4.6.1 Role of the Authorities

²⁶ Ibid1.

I will take a closer look now at the merger control of cross-border mergers and the absence of proper competition regime which could eliminate the problems in the cross-border merger control system. Moreover I will talk over the increasing role of the Authorities on that process and mostly in the cooperation they are engaged with the other authorities. There should be an effective cross border merger control regime in every country which should regulate the mergers but often it is not that simple because it could lead to problems in most developed countries which will cause problems due to overlaps with the competition law rules. Such challenges are often faced by many developing and emerging economies (DEEs) given the complexities of enforcing competition law in these economies due to 'lack of resources, an inadequate legal framework, the absence of a proper competition culture, the difficult transition towards a market-based economy, the dominance of industrial policy, problems with implementation, and the role of foreign direct investment (FDI).'²⁷ The leading part in the discussion will be the focus on the co-operation between the competition authorities and the development of the transactions they make which include interpretation of the law, monitoring, taking important decision and imposing remedies together. Such a co-operation which is separated in three leading groups: multilateral, regional and bilateral (the major player in the effective review of cross-border mergers) will encourage the authorities to do their job.²⁸ With the market expansion the focus is more centralized on the competition authorities to strictly review the cross-border transactions, enforce and control regime over it because more and more cases affect the market not only inside but worldwide touching several countries' interests. The absence of effective control over the mergers could lead to various economic, trade and law problems but valid and efficient such could help to prevent problems with the emerging economies, also will help the prosperity of stronger economic market place, happy consumers and business outcomes in different sectors. The system of cross-border merger control is really important and requires striking 'a balance between competition policy and other public policy considerations, most notably social and industrial policy.'²⁹ Together with these other considerations also should be beared in mind such as legal, technical and functional issues, the overlap

²⁷ OECD Policy Roundtables, 'Cross-border Merger Control: Challenges for Developing and Emerging Economies' (2011) DAF/COMP/GF 13, 1

²⁸ Ibid 1.

²⁹ OECD Policy Roundtables, 'Cross-border Merger Control: Challenges for Developing and Emerging Economies' (2011) GD (96) 22, 9

between the legal rules and business plans, the overlaps between the global, regional and domestic interests.³⁰ DEEs face numerous challenges when seeking to regulate cross-border mergers such as lack of financial and other resources because it is a largely developed and fast growing process. Furthermore, sufficient expert positions in law and economics which will be useful for completing the necessary issues. There is an absence of appropriate legal framework which usually is necessary to regulate the cross-border mergers which compels the DEEs to use the basic law provisions to control the mergers. This cause a problem in the state positions which did not give full power to DEEs to control the economic competition process and lack competition culture. There are some implementation doubts about the slow process of implementing the competition policy in DEEs due to governmental issues.

4.6.2 Direct foreign investments

The idea of DEEs is for moving from centralised to market-based economy which is really difficult to become true but only then the competition could be an efficient process. Likewise, there is a problem in the industrial policy considerations which play a leading role in the policy formulation and take part in economically important decision-making which in fact unconsciously leave the competition outside the decisions. Attention should be paid as well to the foreign investments which encourage the development of the global economy but effective policy and monitoring should be established with the focus mostly on the cross-border mergers which could lead to groundless investements with different outcome. DEEs should develop a system which will apply uniformly to all states because now the challenges in each country are addressed in different way. A generalized uniform system should be build to secure the competition on the market in the same way and not to allow more free way in some of the states.³¹ But what if such uniform system is developed and the relationship between both merger control and competition policy itself and FDI overlap? This is largely discussed and number of opinions had been raised. The discussion goes around the question whether the existence of effective meger control in DEEs encourages or discourages FDIs. Some of them say that effective merger control should not impact adversely and negatively on efforts of DEEs to attract FDI. Some other legislations gave a broad opinion that the merger control might discourage FDI but most

³⁰ Ibid 9.

³¹ Ibid 10.

of them say that the control system shall not have negative impact on the FDI even if it exist and has effect on it. In some countries DEEs countries such as Korea, Morocco, Brazil and some African countries ‘FDI may have priority over merger control because FDI policy is already developed as part of the economic development standard system by them.’³² Every single economy should be looked at separately on case-by-case basis and not be put at the same boat because different experiences and objections arise in each country policy when discussing the relationships between the merger control and FDI. In each country it is really important to have an effective co-operation between the competition authorities even when the government or the appointed ministers have power over the competition authorities to decide on the cases on non-competition relevant issues. Such non-competition grounds could be as to the economic enlargement or international effectiveness.³³ This kind of intervention on behalf of the government represents a considerable challenge for competition authorities to deal effectively in the course of their jurisdiction but if they did not interfere with each others job then the cooperation will lead to positive effects such as effective review of the cross-border transactions and consistent decisions.

4.6.3 Co-operation –multilateral, bilateral, regional

As I discussed already there are three major types of co-operation which help the authorities to minimize the unnecessary costs by working together on the cross-border mergers cases. These three types are: multilateral, regional and bilateral (which is the most important one) for which I will speak more now.

The bilateral co-operation is usually established through a formal system such as a bilateral contract, usually made to help the authorities to co-operate easily and facilitate the exchange of information between each other according to the merger review investigation that is at stake but there is enough evidence that even without such an agreement authorities could operate transfer information between their agents and the absence of such formal link did not obstruct their job in order to achieve a great co-operation. ‘It was noted that informal relationships can be particularly effective in forging strong links between competition authorities... and can take a form of email

³² Ibid 10.

³³ Ibid 10.

communications, telephone calls and meetings along the sidelines of multilateral events and gatherings, such as those of the OECD and the ICN.³⁴

Such cooperation is between the EC-US joint merger working groups, the OECD, the International Chamber of Commerce (ICC) known as 'Merger Steamlining Groups' and ICN today as well, are all working over greater convergence in merger control. They cooperate mostly in defining the potential of procedural convergence over substantive convergence as procedural one is much easier to facilitate and it can reduce a number of jurisdictions examining the merger, as well as reduce costs because most of them are brought by the merging groups.³⁵ Before explaining the three major co-operations I could say that there is really close case co-operation between the EC Commission and the US Federal Trade Commission (FTC) and Department of Justice during the merger review and this often involve co-operation on procedural matters such as synchronising of the review and accumulate each others hearings and substantive matters as discussing the remedies and market definitions. As an evidence for a great co-operation between the FTC and the European Commission on competition matters (such as discussing remedies) is the case Bayer/ Aventis Crop Science.³⁶ Sanofy-Synthelabo/Aventis case is another example of close co-operation between the Commission and the FTC concerning multiple pharmaceutical market, intellectual property rights and third party interests in US. The merger was effective only after a really high ranking investigation and co-operation between EC and US authorities.³⁷ This kind of co-operation between US and EU authorities which often takes place is known as bilateral co-operation which is the key type of co-operation in the international merger control. This co-operation has few comparators, setting aside the co-operation possible within the European Competition Network (ECN) and EFTA due to the overarching political framework existing in Europe. Often the cooperation between EC and Japanese, Mexican, Australian authorities is greater than the one with the US even with the cases in which Canadian enterprises are involved. It happens often that merger that needs to be investigated under the merger control review over several national jurisdictions did not fall under the bilateral agreement co-operation and sometimes it is not even a co-operation. To have

³⁴ Ibid 10.

³⁵ Jonathon Galloway, 'Convergence in International Merger Control' (July 2009) Vol 5 Issue 2 CLR 182 <<http://www.clasf.org/CompLRev/Issues/Vol5Iss2Art2Galloway.pdf>>, accessed 20 June 2015

³⁶ Ibid 187.

³⁷ Ibid 189.

such co-operation in place there should be a strong relationship and faith on behalf of the both authorities and the merger should be mutually beneficial to each other. This process involves many factors and sometimes it is really hard to define whether there is a bilateral co-operation or not.³⁸

Multilateral co-operations are usually these which engage various interests of multilateral merging states and for example are these which include the co-operation in investigation of the merging process between the European Commission, US and the Canadian authorities and there is often help from the FTC. This is usually a compilation of different principles and recommendations produced by different competition authorities on international level. Sometimes it is hard to get a multinational conclusion and co-operate because there is a lack of ‘mutual benefit’ in such cases. The difference in the various concurrent merger reviews often leads to difficulty to achieve a good degree of multilateral co-operation. There may be also a delay in the process and sometimes the parties lose the major point of the discussion and what is more common is to describe the case as a bilateral co-operation involving various multilateral examples. The Alcan/ Pechiney II case gives an example of this type of international cooperation in the investigation merger control system.³⁹ The most likely used model is the soft law one in such co-operations which did not impose rules, principles and standards on DEEs or on their competitive authorities and which allow harmonization of the principles. In the end I could say that it is an effective international prototypical system in the investigation process of the merger control.⁴⁰

Close co-operation in concurrent merger review is possible and the **regional co-operation** confirms that as a new phenomenon in the fastly developing world. To have effective merger control there should be at least some in most of the countries in which the merger takes place or in these concerned. But there are many issues that should take place such as the exchange of information between authorities which is important for the whole process of investigation and review and safeguards should be put at stake but still there are many serious concerns involved in the cross-border merger. There is one major problem which the authorities met. This is the hard authorization to exchange information which should be given by the merging parties themselves under the local or international

³⁸ Ibid 188.

³⁹ Ibid 189.

⁴⁰ OECD Policy Roundtables (n 27) 11.

law.⁴¹ That makes the process cumbersome and time consuming and usually impossible. But in the last few years things changed and two important updates had been given. First, ‘the number of cross-border merger cases in which competition authorities exchanged confidential information (for example, through the use of a confidentiality waiver granted by the merging parties) has increased.’⁴² And second in order to enforce the cross-border merger merging parties have the interest to go into a faster procedure through fully and unconditionally disclosure of the whole confidential information with the authorities which simply mean to waive the right authorities to ask for authorization to use the confidential information which concerns them. This would enable the authorities to cooperate freely. ‘Some competition authorities reported the use of these waivers as standard practice.’⁴³ Nevertheless, that the authorities are simply allowed to use the confidential information they should be careful because the merging parties are sensitive as to that information and if something happened against their interest could lead to really ‘heavy’ costs out of the impossibility to conclude the transactions. The business community is trying to limit the burden, both financial and time-consuming, that is imposed on the merging parties who originate from different jurisdiction, like translation of documents in the various languages and presenting them to two and more different competent agencies with same aim where double higher costs occur during the multi-jurisdictional review. Few suggestions for the competition authorities were proposed. First, ‘to implement relevant ICN and OECD recommendations and best practices on asserting jurisdiction over merger transactions and co-operation between competition authorities’⁴⁴ which will reduce the authorities which overlap their functions in reviewing same mergers, simply eliminate the irrelevant once or harmonise their job and strengthen the transparency and legal certainty. There should be one basic language for filling and submission of the documents, usually English which will reduce the time for translation which is often cumbersome, also an average system for filling the documents which would make the review easier and faster for both merging firms and agencies. There is already a movement in the sphere with the last adopted Regulation on co-operation

⁴¹ Ibid 11.

⁴² Ibid 11.

⁴³ Ibid 11.

⁴⁴ Ibid 12.

through the Internal Market Information System and the Commission⁴⁵ which entered into force in 2012 and was considered and accepted by the European Parliament in July 2015 and is simply waiting for the Commission's approval. It was considered that legalization and translation of important documents such as registration of the company or other certificates will not be necessary any more and all the documents with significant importance for countries in the European Union will begin to be created in few central European languages include the national from which the document originated. This simply mean that the investigation process and exchange of information between the agencies and the Commission in the internal market areas will become easier and especially in course of mergers or when one company wants to transfer its business in other European company the procedure will be much more easier. As soon as all countries are obliged to fulfill with the Regulation transparency will be achieved.

4.6.3 Notification –voluntary, mandatory

There are two types of systems of notification –voluntary and mandatory (most common and widely supported) but both of them have its advantages and disadvantages. The voluntary system have some advantages because it did not impose such a great burden on the merging parties and allow the authorities to freely focus only on transactions that they forsee to have a hostile effect on the competition but on the other hand it has more disadvantages and could damage the competition if it is proceeded without a proper control. More pressure will occur to parties as a result of the voluntary system if there is a late notification and this would have a negative effect over the effectiveness of the whole international co-operation between the reviewing agencies. This is a further disadvantage of the voluntary system. Problems could occur after the merger is completed if the countries are operating under the voluntary system but the cross-border merger is allowed through the mandatory reviewing system by the competition authorities. In such cases the competition authorities should carefully make a plan or consider future de-merger if it could harm the interests of the business or market competition. That is why majority of the parties choose the mandatory notification system as its advantages prevail over the disadvantages.

⁴⁵ Council Regulation (EU) 1024/2012 on administrative cooperation through the Internal Market Information System (2008) OJ L 316 49/EC

4.6.4 Remedies

Competition authorities co-operate also in case to create and impose remedies if needed in cross-border merger cases and this process should carefully be maintained in order to inspire them. Co-operation between authorities is important in order to design the merger remedies and it helps a lot the process but still there are some obstacles for the co-operation and these are for example the restrictions imposed by the confidentiality.

Behavioural remedies are the ones which sometimes lead to over-regulations and are applied by the agencies in DEEs but behavioural remedies were found as appropriate for DEEs 'given the difficulties in DEEs to find suitable purchasers who would be interested in purchasing the assets to be divested.'⁴⁶ Sometimes the competition authorities in DEEs are unable to enforce their action against a major firms which have different from the jurisdiction enjoyed by the authorities that are involved in the cross-border merger and the assets and shares owned by the company are established in the region of this foreign jurisdiction but on the other hand there are many cases in which competition authorities managed to impose successfully the structural remedies.

In the end I will speak about the 'Free-riding' between the competition authorities which happens when one of the authorities has no power in the jurisdiction of the other DEEs in order to complete the cross-border merger review. This is for example with the case of more experienced competition authorities where it is really beneficial to the one with less jurisdictional grounds in the local market of the pointed DEE. 'Free-riding can benefit both the competition authorities in DEEs and the merging parties: the former economise on their scarce resources and the latter benefit from a reduction in the burden and costs associated with cross-border mergers.'⁴⁷

4.7 Conclusion

Finally, I would say that close co-operation in concurrent merger review as already seen above is possible and often takes place but also there are still limitations which bar from entering an extensive co-operation on more than a bilateral basis for the reasons already discussed. While the well working case co-operation involve the EC and US competition authorities (examples are the cases stated above) there are not so many examples of clear co-operation between larger (excluded from consideration are the small groups of identical settled competition authorities) authorities when left out from the consideration

⁴⁶ OECD Policy Roundtable (n 28) 12.

⁴⁷ Ibid 13.

are both ECN and EFTA.⁴⁸ Furthermore, it is more difficult to be engaged in larger multi-jurisdictional merger review than to be involved in close co-operation which appeared in cartel investigation cases.’ The system of cooperation in cross-border merger control still develops in the area to limit the costs and time which is borne by the merging parties. It was all about to reduce the unnecessary costs, establish clearer and easier procedure for cooperation which will be necessary to minimize the subjectivity. Only after that Competition authorities would be able to effectively cooperate in order to enforce merger control laws and conduct merger control reviews.⁴⁹

5. Merger control in deep

I will discuss more deeply into details the special nature and characteristics of merger control, the strengths and weaknesses of the DEEs in dealing with the mergers and in the end of the further consequences of the cooperation between authorities. ‘Merger control is a unique aspect of competition law.’⁵⁰ ‘Merger operations are a business phenomenon, and are therefore distinct in fundamental respects from other key antitrust conduct, such as cartels and abuse of dominance.’⁵¹ Sometimes there is an overlap between the merger and the other antitrust conducts which have negative effect where mergers involve structural issues different from temporary behavioural issues and have positive effect nevermind that could steered to abuse of dominant position when one of the competitive parties is using its power to strengthen its positions on the market. Mergers directly affect the industry as they are one of the leading players in the development of the economy.⁵² It is important to point out what is the role of the merger control as a main player in the financial market and stock exchange and how it can be regulated through variety of rules not to impose any marketable or pecuniary risk to the public and businesses but to help them to develop a secure system for their investments and to led to positive influence on the economy, protecting both competition and consumers. Moreover merger control is trying to prevent the occurrence of monopolistic results. ‘This point is of crucial importance for DEEs: merger control in such economies can have positive impact in

⁴⁸ Jonathon Galloway (n 35) 191.

⁴⁹ Ibid 191.

⁵⁰ See Elinor M Fox, *Policy Directions for Global Merger Review* (Report by Global Forum for Competition and Trade Policy GCR 1999) 1

⁵¹ Case C-6/72 Europemballage Corporation and Continental Can Company Inc v Commission [1973] ECR 215

⁵² Maher Dabbah and Paul Lasok, *Merger Control Worldwide* (Cambridge, 2005) ch. 1

terms of structuring different sectors of the economy and enhancing the prospects of stronger economic performance.’⁵³ Cross-border merger control involve many topics such as the competition policy regulation, jurisdictional and procedural approach and substantive issues as well as concerning various legal regimes according to the interests of the society and businesses on all of the grounds internationally, regionally and domestically. All these issues interact with each other and for that reason the cross-merger control regime is so complicated focusing mainly on the economic outcomes and not so much paying attention on the merging process. But also this control regime system is aiming to guarantee and maintain the competition. ‘Merger control is designed to achieve public policy objectives concerned with the structure of industry within a particular jurisdiction.’⁵⁴ The specific objectives behind merger control, however, may differ between jurisdictions. Merger control is trying to achieve different things from protecting the consumers, both employees and employments, ensuring the fair competition on the market, encouraging the technical developments and promoting the international competitiveness of the local economy through establishing stable firms with well-developed plans. Nonetheless, the consensus around the world is that the objective of merger control is maintaining competitive market structures to safeguard consumer welfare.⁵⁵ The OECD Merger Review Recommendation 2005 offers number of suggestions how to build an effective, efficient and timeless procedure which helps large number of merger operations to be completed. Moreover number of documentations had been posted by UNCTAD which deal with merger control and also useful is the OECD Report⁵⁶ in international cooperation in transnational mergers from 2001 which is renewed during the meeting of the OECD Council in Paris in 2014.

5.1 Challenges faced by DEEs

⁵³ See ‘The analytical framework for merger control’ (UK Office of Fair Trading for the International Competition Network Merger Working Group)

<<http://www.internationalcompetitionnetwork.org/uploads/library/doc333.pdf>>, accessed 8 July 2015

⁵⁴ Giuliano Mussati, *Mergers, Markets and Public Policy* (Kluwer, 1995) 6

⁵⁵ OECD Policy Roundtables (n 27) 23

⁵⁶ See OECD, *International Co-operation in Competition Law Enforcement* (Paris, May 2014)

<<http://www.oecd.org/mcm/C-MIN%282014%2917-ENG.pdf>>, accessed 29 June 2015

Those who are trying to establish a well developed control systems of mergers are the developing and emerging economies known as DEEs often fronting various difficulties.⁵⁷ They have unique economic, social and political circumstances and particular care should be taken as to the fact that they are slightly different from the developed and advanced economies. There are four main variations where DEEs affect the cross-border merger. When, two or more foreign countries located in the same jurisdictions but one or more of them operate in the relevant DEE, when two or more firms are located in different jurisdictions, when foreign firms have no presence and operation in the former DEE but the merger could allow them entry and presence as such same as full function joint venture and the last one: when at least one firm is located in the relevant DEE. Then I should discuss what challenges DEEs face and how they are able to operate to keep the effective competition law regimes in the area of cross border merger control because in the past unsatisfactory attention was given to the challenges in this area but it is the same with the challenges faced by the other pitches of competition policy.

5.1.1 Absence of competition culture

The absence of a proper competition culture – I already concerned the lack of appropriate competition culture of the DEEs but it concerns number of factors and now I will look at it more deeply because it is a leading point. DEEs had no power in the market in the past and they were under the strong influence of the state which lead to unawareness for the economic process as a whole.⁵⁸ Mostly widespread all over the world and especially in countries including Latin America, Africa and the Middle East is the trend that competition is mostly unfair practice where competitors defeat themselves by illegitimate instruments and this is meant by improper competition culture.⁵⁹ When the principles are not understood in a correct way then this by default lead to impossibility of effective merger and the need for a strong competition law regime, with an independent and powerful competition authority. When there is no clear view of the significance and importance of the competition it could make the job of the DEEs groundless. The

⁵⁷ OECD Roundtables (n 27) 24

⁵⁸ Michal S Gal, 'The Ecology of antitrust Preconditions for Competition Law Enforcement in Developing Countries' (OECD, New York University Law and Economics Working Papers 10, June 2004) 3
<http://lsr.nellco.org/nyu_lewp/10>, accessed 30 June 2015

⁵⁹ Maher Dabbah, *Competition Law and Policy in the Middle East* (Cambridge, 2007) 3; Fox, Eleanor and Daniel Sokol, *Competition Law and Policy in Latin America* (Hart Publishing, 2009) 12.

significant growth in the merging deals increase the attention and put the thought over the actions taken by DEEs to engage in competition advocacy and create domestic competition cultures. Moreover the focus is on the private players and their role in the competition and in the end on the denationalization. Moving towards to a market-based economy as stated above is only possible if a well-developed competition system is built in the exact country and the nearest example is China which starts with one of the first proposed laws which are trying to fight the anti-competitive behaviour the Anti-Unfair Competition law which came into force 1993. Later in 2007 this process evolved and new Anti-monopoly law (AML) was developed which was the first specific competition law in China applying generally to public, private, domestic and foreign owned firms. The AML mostly combined and developed similar to the already known laws from the emerging economies. So soon in 2009 the China's Ministry of Commerce (MOFCOM) together with the Council of the People's Republic of China (leading merger control authority in China) has adopted impressive number of guidelines and regulations⁶⁰: Guidelines for merger review of concentrations; Guidelines on notification of concentrations; Guidelines on merger filing documentations for the notification of concentration and Provisions on the Notification Thresholds for Concentration of Undertakings (2008); Measures for Calculating the Turnover of Financial Sector Undertakings in Notification of Concentration(2009); Measures on Notification of Concentrations issued by MOFCOM (2010); and Measures on Review of Concentrations issued by MOFCOM (2010) with which it gives the start of a new merger control beginning.

5.1.2 Industrial policy interference

Here I should stress the problem which DEEs met because of the overlap of the industrial policy considerations and the competition.⁶¹ Major part of the governmental policy is taken by the considerations such as the employment, industrial development and other important stuff which is sometimes contrary to the competition policy issues never mind that their aim is also maintaining the international competitiveness. DEEs also should bear in mind the DEEs industrial policy considerations in the meantime of the policy

⁶⁰ Herbert Smith, Gleiss Lutz and Stibbe, 'Merger Control : China' (Herbert Smith LLP, China, June 2011) <<http://www.herbertsmithfreehills.com/-/media/HS/SHBEHK30061157.pdf>>, accessed 12 June 2015

⁶¹ Stephen C Smith , *Industrial Policy in Developing Countries* (Washington, Economic Policy Institute 1991) 22.

creation processes the same as Korea and all other countries did such as Japan and Germany especially where the Federal Cartel Office have the power to deal with blocked mergers and if they decide that the particular merger could be beneficial for the economy of the country they use its statutory-based ministerial authorisation mechanism to allow it.⁶² This kind of intervention same as subsidies made on behalf of the country to a particular national company could lead to distortion of competition in local markets but sometimes the treatment has its advantages and benefits when local national firms are involved in a merger activity because in this way they are free to expand the market and aim at giving free flow of the considerations stated above. There is a strong disparity between the competition considerations and the non-competition considerations which are mostly favoured by the government in case of controlling the mergers and important here is the relationship between the merger control and the foreign investments to local firms.⁶³

5.1.3 Lack of resources

We already discussed above that merger control is widely developed in the emerging globalization and DEEs lack resources and knowledge to deal with it. DEEs had financial difficulties due to the lack of resources because of the fact that they were not enough experienced and unable to deal with the budgetary issues on time. They never thought about the merger control as an issue with a central importance and often considered it together with the other concerns of cartel enforcement, competition support and abuse of dominance which was already experienced in Singapore. What I discussed already is that necessary knowledge is required on behalf of the competition authorities in many different areas of economy and law and closer look should be taken as to the international merger control transactions where supplementary knowledge different from the one already get is required both in law and economics does not matter that they thought as unnecessary to be involved in the cross-border merger. The thing that should be concern as well is that cross border merger is slightly different and requires deep assessment which involves certain time limits, necessitates greater communication between the authorities, between the merging companies and between all the parties involved and the

⁶² OECD Roundtable , ‘Competition Policy, Industrial Policy and National Champions’ (2009) DAF/COMP/GF 31.

⁶³ OECD Policy Roundtables (n 27) 29.

less attention which was paid made the process harder. The satisfactory resources and knowledge are ‘extremely important in order to effectively assess the cross-border merger in question and to interact with foreign competition officials involved in assessing this merger, possibly through bilateral links...and achieving economic development and international competitiveness.’⁶⁴ And changes already began when more and more students and professionals decided to focus and study competition law which led to more adequate specialists in the field with the expected capabilities which will fill the gap of the needed workforce in future and would battle the competition problems quickly and effectively even without the involvement of DEEs. The things slightly turn into a positive way and more and more competition authorities ‘invest significant efforts in recruiting, in maintaining their work force and in reducing the incentives for their young officials to leave for other career opportunities in the private or academic sectors.’⁶⁵ An examples of a competent authority which have enough background on the foreign affairs is the case Oded Lavie vs Director of Antitrust Authority in Israel⁶⁶ about an abuse of dominant position which brings to an end any chance of further involvement on international level and concerns the fact that the Israelian Antitrust Authority (IAA) already has a background on the foreign issues and affairs which help them to prevent the firm from unworthy foreign action. Some of the authorities favour the reliance on foreign actions that could escape possible future conflicts with the competition authorities but other do not want to consign to the foreign authorities because actually it will not give them the expected solution to the problems associated with the cross-border merger. The problem is with the fact that foreign authorities often do not share the same competition protecting aims and they have no interest in maintaining the local actions as the one which should be addressed by the national safeguarding groups to ensure the effective competition on the relevant domestic market. As it happened with the case of the African countries Kenya and Zimbabwe⁶⁷, cross-border merger was completed without the knowledge of the

⁶⁴ Ibid 29.

⁶⁵ Maher Dabbah, “Competition law and policy in developing countries: A critical assessment of the challenges to establishing an effective competition law regime” (2010) *World Competition: Law and Economics Review* 457.

⁶⁶ See Case 6623/03 Oded Lavie vs. Director of Antitrust Authority (2003) Israel Supreme Court

⁶⁷ Alexander Kububa, ‘Issues In Market Dominance: Merger Control In Zimbabwe’ (Regional Conference On Competition Policy, Competitiveness, And Investment In A Global Economy, Dar-es-Salaam, Tanzania, 10 – 12 May2004) 1-2

competition authority in the DEE and it is not a single case but ‘many other mergers occur without the awareness of the relevant competition authorities’⁶⁸, but such actions are limited by the effective merger control requirement for mandatory notification which made the system more reliable and effective than in the past.

5.2 Inadequate legal framework

When there is no appropriate competition law provided by DEEs the competition authorities face a serious problem in dealing with the mergers in law perspective. There should be something more than simple law rules to prohibit the occurrence of threats out of the merger and an example is the Egyptian competition law⁶⁹ which has whole well-structured and developed system of comprehensive regulations such as notification mechanism, co-operation between authorities and merging parties scheme, as well as a clear pattern of the powers of the competition authorities and obligations of the parties engaged. We already discussed that the slow process of implementation of the competition law regime in a DEEs often led to delays in the merger control as well.

5.2.1 Implementation problems

In addition, there is a problem with the implementation process of the competition law regime on behalf DEEs and this makes the cross-border control process really slow and unefficient, moreover when DEEs are not paying enough attention to such an important things as the necessary and reliable expertise and knowledge as well as maintaining the relationship between the parties (Commission, authorities and merging bodies). There are many examples of countries with a slow systems which enact its competition law and regulations for many years due to lack of certain body to proceed with them and such is the case with one of the competition declarations of China which came into force twenty years (2011) after the proposal. However, the difficulties could not be solved until there is a unified system for translation (the changes in Europe I already discussed above) or

<[http://www.ifc.org/ifcext/fias.nsf/AttachmentsByTitle/Conferences_CompetitionPolicyTanz_Alex+Kukuba.pdf/\\$FILE/Conferences_CompetitionPolicyTanz_Alex+Kukuba.pdf](http://www.ifc.org/ifcext/fias.nsf/AttachmentsByTitle/Conferences_CompetitionPolicyTanz_Alex+Kukuba.pdf/$FILE/Conferences_CompetitionPolicyTanz_Alex+Kukuba.pdf)>, accessed 7 July 2015; Maher Dabbah (n 52) 4.

⁶⁸ OECD Policy Roundtables (n 27) 29-30

⁶⁹ Egypt Law No 3 of 2005 on the Protection of Competition and the Prohibition of Monopolistic Practices, (June 2005) <http://www.wipo.int/wipolex/en/text.jsp?file_id=191565>, accessed 2 June 2015

certain regulations which could make the implementation process easier such as a new body or agency which will maintain the correspondation between the parties and will help as a the relevant process. Such body is the Competition Authority in Egypt which receives notifications and is empowered under the Egyptian law on the Protection of Competition.

5.2.2 Problems with foreign direct investments

The majore aim of the foreign direct investment (FDI) is to obtain non-mobile proficiencies. It is of a key importance for the growth in the global business. FDI provide firms with new opportunities, new markets, cheaper facilities, ability to develop their technology and programs as well as access to additional knowledge and professionals in order to develop their business.⁷⁰ Its internationalization aim was recognized by many countries and organisations such as the World Bank which is a key player trying to secure the fair competition on the market as a whole global process through monitoring, facilitating and restricting (if there is a need) the foreign investments. There are two main opinions that the foreign investments benefit both the home and host state and the opposite which follows the idea that out of the investments ‘multinational conglomerates are able to wield great power over smaller and weaker economies and can drive out much local competition.’⁷¹

FDI is accepted differently from all the countries but it is mostly argued that it gives opportunities to small firms to become more active in the international business. There are few options, first is a weak economy which allow the foreign firms to spread their business and develop it into the DEE. This firms use the FDI as an instrument to develop technologically and ensure their competitive position on the market. There are many examples of countries which implement a special competition procedure to attract more FDIs but on the other hand others forsee the FDIs as a threat and impose various regulations to control their presense on the market. However, this did not mean that the DEEs which are trying to attract FDIs don’t have regulations and measures such as taxes

⁷⁰ Luiz Reis De Mello, ‘Foreign Direct Investment in Developing Countries and Growth: A Selective Survey’ [1997] Journal of Development Studies ISSN 0022-0388 1-34, 1

⁷¹ Jeffrey P Graham and Barry Spaulding, ‘Understanding Foreign Direct Investments’ (2005) Citibank International Business Portal <http://www.going-global.com/articles/understanding_foreign_direct_investment.htm>, accessed 10 July 2015

in form of customs levies to control them. There is a certain need of regulation in such case of encouraging FDIs and as much as they as less is the ability of the government to control the whole cross-border process effectively. Nevertheless, the FDI aim at encouraging the economic and technological development, high quality products and services, better prices as well more work places created but it should be made by carefully imposing certain regulations not to allow to one specific firm to gain the benefits and establish itself as a monopoly on the relevant market. One of the forms in which FDI operate is when new foreign firm is established and has operation on the domestic economy of the firm which is before that acquired by another foreign firm which did not mean that before that the old foreign firm (acquirer) had no operation in the DEE. There are merger cases like this when there is no possibility for the government to take decisions about the investment made and cannot stop the acquirer from acquiring a domestic firm. In such situation the competition authority is the one who has grounds to impose measures or limitations on the merger and both with the government could decide to raise an issue or not in dealing with foreign firms. The existence of effective merger control regimes and effective competition in DEEs cannot bar the FDI or stop it from further operation. Moreover it ensures a well-established secured business area with regulations which can work as a help to the FDI. An example is the case of Coca-Cola and Schweppes Zimbabwe where a renovated plan for bottles had been developed and transferred to a local firm as a part of the conditional clearance merger of the Zimbabwe Competition Authority.⁷² It is well established believe that things are interconnected and using instead which mean that the economy will not develop further if there is no FDI and FDIs need certain DEEs in which markets to operate and with certain authorities to correspond. ‘Nonetheless, there is a prevailing view that the lack of such control or enforcement can prove to be particularly attractive to such firms as a good environment to invest in.’⁷³

6. Problems and solutions in Co-operation, jurisdiction and remedies areas

⁷² Alexander J Kububa, ‘Issues In Market Dominance: Merger Control In Zimbabwe’ (Regional Conference On Competition Policy, Competitiveness, And Investment In A Global Economy, Dar-es-Salaam, Tanzania, 10 – 12 May2004) 1-2

⁷³ Hiau Looi Kee and Bernard Hoekman, ‘Imports, entry and competition law as market disciplines’ (Centre for Economic Policy Research 3031, 2003)

However, the discussion went, the co-operation between the Authorities, the commission and the merging parties, the jurisdiction in which DEEs belong and remedies which they are able or not able to impose are very important issues that I should take a look at this matters into the merger control more closely now because DEEs are confronted with various different obstacles. First, DEEs should stare at the merger control as an important issue of high practical significance in the area of regulation, notification for the merger both voluntary and mandatory (jurisdiction) and the remedies.

6.1 Co-operation between competition authorities –multilateral, regional, bilateral

6.1.1 Multilateral co-operation

I already said that there are three main types of co-operation between authorities: **multilateral**, regional and bilateral (as the key one) which are of a high importance to the DEEs. I would say that the multilateral co-operation dated back first in the competition law regime with the idea and creation of the first ineffective international trade organization WTO⁷⁴ in 1990s with the aim to supervise the international relations on the market, restrict the anti-competitive behavior and create obligations between the authorities as a sort of co-operation under the multilateral agreement which I found out as a difficult in practice co-operation in law. This way of multilateral co-operation is known since the UN adopted its Set on Multilaterally Agreed Rules and Principles⁷⁵. But there is another sort of co-operation under the ‘soft law’ without concluding any form and binding agreements between the parties which became more popular and efficient because it lacks the formalities required for the hard-law multilateral co-operation and that is why it become more beneficial after the founding of the International Competition Network. Soft-law is really helpful and important for the DEEs in order to overcome the problems when there are major differences between the findings of more and less developed DEEs especially when there is a need of an authority of less developed country to be engaged in a cross-border merger control actions and process together with an

⁷⁴ United Nations, ‘Final Act of the United Nations Conference on Trade and Employment’ (United Nations Conference on Trade and Employment, Havana, Cuba, March 1948)

⁷⁵ United Nations, ‘Set of Principles and Rules on Competition’ (United Nations Conference on Trade and Development, Geneva 2000) 5 <<http://unctad.org/en/docs/tdrbpconf10r2.en.pdf>>, accessed 3 July 2015

authority of highly developed economy.⁷⁶ In such kind of co-operation a clear plan should be created in order to effectively investigate the area of the merger and a lot was done in this area which led to positive results in the end of 90s with OECD and the ICN. This particular type of co-operation has some clear advantages especially when compared with other forms, notably bilateral co-operation because it maintain all of the interests of the players in the cross-border merger with simple principles and ideas of harmonization and without imposing cumbersome rules or standards on DEEs and on the competition authorities but allowing them to implement and developed the best practices and take the positive experience only through recommendations.⁷⁷ As a good example of gaining the best practice is the notification system in Brazil where the country use efficiently the help of the authority.

6.1.2 Regional co-operation

We could say that the multilateral co-operation system is not the best from each three systems but it is the most experienced and free waive one. On the other hand the **regional co-operation** was a new types of dealing between the authorities but was not that effective as the old known multilateral one and was mostly used by the countries which were not only with regional existence such as the Association of South East Asian Nations (ASEAN); the Southern Common Market (MERCOSUR); the Common Market for Eastern and Southern Africa (COMESA); and the West Africa Economic and Monetary Union (WAEMU). However, this regime of regional co-operation was still important for the DEEs for various reasons. An example of such regional co-operation was the merger cases Gillette/Wilkinson merger and the Coats Viyella/Tootal in 1989 which deal in competition grounds and were described in the OECD Whish and Wood study on Merger Control Procedures(1994)⁷⁸. Dealing with the regional co-operation often led to the discussion of three major models.⁷⁹ First, the co-operation can be organized as a consultaion and experience sharing between the countries where everyone

⁷⁶ OECD, 'Recommendations and Best Practices on Cooperation between Member Countries and on Anticompetitive Practices affecting International Trade (Paris, September 1995) C (95) 130, 3; ICN Merger Working Group, 'ICN Merger Guidelines Workbook' (5th Annual ICN Conference, Cape Town, April 2006) 6

⁷⁷ Ibid 6.

⁷⁸ OECD Policy Roundtables (n 27) 14.

⁷⁹ Maher Dabbah, *International and Comparative Competition Law* (Cambridge, 2010) 34

could provide a help to the one which have no jurisdiction on the relevant grounds and could establish more certain and effective competition merger control through unified procedure in all the countries. Second is the European model for regional co-operation which establish a network of combined practices of all the authorities together from the domestic competition agencies the same as the system of the European Competition Network (ECN). Next, it led to different arguments on behalf of the authorities as to it enforcement and development into the competition cross-border merger control system of DEEs, also aim at achieving procedural and essential law approximation and harmonisation among the countries by a compilation of their law regimes. As we know all the DEEs have their single exclusive system and this system could fit to each of them in order to achieve greater co-operation and transparency as a help to the trade development and economy as a leading purpose for the co-operation. Moreover, a central upcoming stream of harmonization at a regional level helps to improve the competition law locally within the countries. This can assist with facilitating the provision of technical assistance between the participating competition authorities to build domestic competition capacity. Such a harmonization of the rules on national level with a principles like one-stop shop⁸⁰ (principle for transactions regulated on higher national level excluded from the lower national level regulation by the authorities), could be beneficial for the business, 'which interested in reducing costs, having greater legal certainty and operating in similar regulatory environments.'⁸¹ The next method which was confirmed by the experience of the EU as an effective enforcement is the co-operation as a system when there are no jurisdictional grounds on the competition law in one country in cases of cross-border merger.⁸² Most of the problems which arose out of the competition law were solved after the issues were addressed to the EU models and interpreted in a global way. I could say that the regional co-operation actually many times impose more effective measures than the domestic one in case of cross-border merger cases but still no one from the systems is efficient enough to say that it works in a perfect way to achieve the goals. Whatever, competition law itself also play its role and should develop parallels with the co-operation system a strong competition law and merger control presence is needed in at least one of the countries involved in the merging. But

⁸⁰ Council Regulation (n 20) 3.

⁸¹ OECD Policy Roundtables (n 27) 35.

⁸² Michal Gal, 'Regional competition law agreements: an important step for antitrust enforcement' (2010) University of Toronto Law Journal 239.

moreover it is really difficult to foresee whether establishing a workable merger control system for co-operation in the countries would work the same way for the DEEs which do not have such an effective regime. But such a regime bear in mind that the most powerful countries could overflow a live force to the domestic regimes of less authoritative countries as to that they will reach a harmonization of their regimes. But again there are many doubts because of the fact that competition law is purely lacking or not enforced in some of the countries concerned. Achieving harmonization through well established and defined relationship between regional and domestic players, and between the countries and the domestic regimes is of a vibrant importance for the domestic regimes in order to allow them to effectively co-operate. With some kind of harmonization achieved within the region the relevant DEEs could come to a success but still there are many challenges which are based on the legal, political and economic gaps in the regimes and different conditions in the different countries such as the members of the regional organisation in the globalized areas who have major difficulties in trying to reach unification because all the groups did not start from the same level of economic development but from various such. Always when there is a need of unification of the systems and groups there is one leader with dominant position because of the higher level of his growth which often led to dissatisfaction of the weaker parties. ‘Alternatively, this may result in a lowest-common denominator approach resulting in a mechanism of little practical value.’⁸³ The aim of DEEs is to establish a widespread regional co-operation in the merger control sphere. But a fully developed regional merger control framework is not working without an appropriate steps to fulfill which include removal of serious political obstacles which DEEs face. The successful evolution of the competition law on the scheme of the country will depend on domestic successes by the countries in the competition law enforcement and economic integration process where its multifaceted nature meet the political divergences and the ‘functional’ restrictions and it has negative impact on the field of competition law and subsequently on the merger control and cause specific problems. Different countries have different grounds of operation in the area of merger control and that is why the regional co-operation is important in the way to introduce and enforce effective stable merger control which will fight the internal limits. This will bring the countries to a same level of development with equal chances if they take the basic rule and design it in a personalized way to be unique for them but on the

⁸³OECD Policy Roundtables (n 27) 35.

other hand in harmonization with the other countries. This is a reasonable way in achieving effective co-operation at regional level which is better than doing nothing in theating the problems which arise out of the exercise of jurisdiction by regional authorities.⁸⁴ However, it is really important for the authorities to know how to operate with the jurisdiction, how to use their powers and strengths, to know the differences between the ‘community’ level and ‘national’ levels and whether they can get access to certain information when it is from center importance for the case (both internationally and regionally) and have a basic knowledge of the safeguards which could be useful for them in such a case when the national competition authority should minimize a burden on the regional authority for example.⁸⁵ The problem is not that DEEs did not belong to any such community but when they have grounds in more than one as an example with the African cases because usually one is bearing a risk to be discriminated when other gain the benefit. Sometimes we see that taking the example from the EU and implementing the scheme into the DEEs led to problems as in this case with the multi-membership DEEs which were motivated by the EU model and occasionally it is better to put a limit on such a transposition because countries did not calculate that to reach the harmonization of its competition law EU go through many difficulties in the merger control area and they should be ensured that demanding work begin for DEEs once they are ready to develop the competition system to reach the same result. Many DEEs are trying to develop this system through putting many efforts but the work goes only on purely discussional grounds for now, ‘but implementation at the domestic level of regional rules or principles in many cases is crucial for this purpose.’⁸⁶ As an example where domestic merger control regime involve and implement important competition law regimes is the MERCOSUR Protocol⁸⁷ in Uruguay and Paraguay which mean that establishment of an authority or agency as part of the proper institutional system on the domestic level with competent staff and enough knowledge is really beneficial for the right implementation. But still there are some problems which the regional co-operation face such as

⁸⁴ United Nations Trade and Development Board, ‘The Attribution of Competence to Community and National Competition Authorities in the Application of Competition Rules (United Nations Conference on Trade and Development, Geneva, 15-18 July 2008) TD B COM.2 CLP 69, 2

⁸⁵ OECD Policy Roundtables (n 27) 41.

⁸⁶ Ibid 41.

⁸⁷ Geraldo Vidigal, ‘Enforcing Democracy at the Regional Level: Paraguay’s Suspension before the Mercosur Court’, (2013) Cambridge Journal of International and Comparative Law (2) 2, 337-339

uncertainty of the economic outcomes. The further struggle is that the merger control is mostly looked at from economic and political perspective and the relevant bodies forget that the major point which led to the effects is the law but it should depend on all these issues together and not only to focus on few circumstances. The last thing I will discuss is the knowledge and capacity that regional authorities should have in order to deal with the developments of the merging economies and mostly members of this groups are the small economies which usually even lack the necessary resources to establish a domestic effective merger control regimes and there is no possibility then to establish effective regional merger control regime without being in co-operation with others. Moreover some of these countries are so poor in the organisational issues and never have in mind to consider as part of the governmental policy the merger control resources question.⁸⁸

6.1.3 Bilateral Co-operation

The bilateral co-operation is the key used type of co-operation by the authorities in relation to various different cases. Same as the multilateral co-operation could under an agreement (formal) or not (informal) which in any way do not mean that the co-operation did not exist because it could exist only as meetings and discussions on informal grounds between the countries and the parties. Bilateral co-operation is really beneficial for the competition authorities and unsurprisingly many critics say that it is the key one from the whole three types. Some of the advantages of the co-operation which should lead to positive evolution of the markets and are the basic aim of the competition authorities are these that they improve effectiveness in enforcement and research; safeguard the interests of the state without a risk to injure the interest of the other parties to the relevant merger; help both the merging parties and competition authorities to establish a strong relationship and discuss with each other without even a need to provide them with authorization to access the confidential information. All these benefits for the DEEs could be found in the OECD Recommendations 1995.⁸⁹ But there are not only advantages but some challenges which are met in the process of dealing with the bilateral co-operation in the course of a cross-border merger. I will look at that issues later in the discussion of the problems and differences between the formal (which became more and

⁸⁸ Stewart, Taimoon, 'Is flexibility needed when designing competition law for small open economies? A view from the Caribbean' (2004) *Journal of World Trade* 725

⁸⁹ OECD (n 76) 3.

more after the 90s nevertheless but still they are unsatisfactory number bearing in mind the large number of established authorities) and informal bilateral co-operation including free trade agreements and memoranda of understanding which often contain all of the required sets of competition policy and the law but did not operate in the same effective way as in the competition law itself. The problem with the limited number of bilateral agreements concluded is again the lapse of required knowledge and evidence for the fact the only better experienced organizations are mostly those who choose to enter into such an agreement. The problem is that DEEs should develop a system to encourage and help such kind of specific co-operation agreements because then it led to better regional relationships between the countries. As an excuse for the absence of such agreements is the fact that the competition law issue especially in the merger control field is something brand new for most of the countries and they are not simply familiar with the system of entering into co-operation groups and agreements. The possibility of effective cross-border merger transactions as a result of the transnational firms which are working in different countries is visible and reasonable and I could say that the fact these firms have no background of relationships and knowledge with or/ and about the authorities is justifiable. And the fact that more experienced authorities are trying to implement and enforce their rules on the less developed authorities once they start a bilateral co-operation or in the process of creating an agreement this may not be compatible with the aim of ensuring efficiency in the investigation by DEEs. All bilateral trade agreements have those concerns and it is really difficult to achieve a harmonisation for bilateral co-operation in the areas of merger control when there is such a big difference between the countries within one area. What I said above is that there are other issues in contrast to the advantages of the bilateral co-operation such as that there is a serious obstacle for DEEs to give an effect on the efficient co-operation in merger control area. And often it is impossible DEEs competition authorities to establish a co-operation with the more experienced once but not impossible when in DEEs there is a well-established competition rules and merger control scheme necessary for meeting the political and economic circumstances. This would lead to a possibility of establishment of bilateral co-operation agreement which will be beneficial for the both groups and it will be easier for the lesser DEEs because the basis for such agreement already exist in the policy of the relevant DEE. An example of such co-operation established with agreements are the

cases with Australia-New Zealand⁹⁰ where really strong relationship was developed through the years which undergird their positions and similar is the EU-US⁹¹ where I could say that the only conclusion is that only workable competition systems with well-established jurisdiction between each other with some sort of an overlap in the merger procedures could enter into such an agreement. Even where it is really difficult for the DEEs to establish a good co-operation agreement and relationship with any of the highly developed economies they simply could continue trying to find a solution and even if they find it only for a specific enforcement action or just for some technical development it could still be beneficial for the both parties to have this link as an example is the Coca-Cola case again where there were some grounds of formal co-operation agreement.⁹² The formal agreement is needed in a case to ensure the transmission of adequate proficiency and means as well as harmonization of the both practices.

6.2 Jurisdictional problems and solutions

The main power of the merger is the jurisdiction. ‘As a process, merger control begins with the question of jurisdiction: i.e. whether a particular transaction falls within the scope of the relevant regime and whether the relevant jurisdictional requirements are satisfied.’⁹³ Not all of the time the authority is caring effectively the jurisdiction and if so then there is no further need from notification.⁹⁴ As it is not the case with the COMESA Regulations where a voluntary notification system exist and the authority is able to exercise the cross-border merger review which shows how important is the existence of a jurisdiction issue where all the actions should be notified. Whether the foreign authority or the domestic one should rule on the jurisdiction is a further challenge and this is important issue on which DEE should decide. In some jurisdictions which are engaged in

⁹⁰ Ibid 3.

⁹¹ Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws (1991) OJ L95 47; Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws (1998) OJ L173 29

⁹² Alexander J Kububa (n 72) 1-2

⁹³ OECD Policy Roundtables (n 27) 44.

⁹⁴ Ibid 44.

transnational merger the authorities could decide to act under the local merger rules for example.

6.2.1 System of notification

We already discussed above the notification system which is developed by many countries and could be two types - voluntary and mandatory. As voluntary systems are these in the United Kingdom, Chile, Australia and New Zealand. But when it is a matter of choice of DEE careful attention should be paid because many issues could come to place such as how big and developed is the economy and bear in mind the interests of the companies engaged in the merger. What is the link between the mergers and the jurisdiction and how high should be the competence and if it is too high could it led to the risk that some problematic mergers would escape the control in some kind if there is a wrong calculation of the material reasons? Yes, they could escape that but on the other hand increase in a merger notification could be made by setting low threshold limits and this could seriously implicate over the competition authorities in the DEEs.⁹⁵ These standards again are unnecessary burden to the merging parties and usually did not raise to competition problems and what it is more problematic for OECD and ICN is to find the right set of rules and relationship in which to define the notification threshold and ICN confirm that it has serious doubts on this ground because the only known thing is that there should be clear and understandable objective criteria (turnover figures and assets) as the one found in the OECD Recommendation on Merger Review⁹⁶ 2005 and no subjective factors for example market shares should be involved. Moreover, the basis that ‘countries should assert jurisdiction only where a merger operation has an appropriate nexus with their jurisdiction and where the criteria for jurisdiction is clear and objective is by an interest to reduce the cost and burden on merging firms and third parties.’⁹⁷

6.2.2 Exchange of information between authorities

Something more that I should concern is the obtaining and transmission of information by the competition authorities provided by the merging parties as part of the notification

⁹⁵ Lorenz, Moritz, ‘Legislative comment: the new Chinese competition act’ (2008) European Competition Law Review 257, 97

⁹⁶ OECD Council Recommendation (n 76) 3.

⁹⁷ Ibid 4.

process and there are many challenges that the DEEs authorities face when they should get the information. To understand the issue some considerations should be 'placed in the wider context of extraterritorial assertion of jurisdiction by competition authorities (especially those of DEEs) over these operations'⁹⁸. The doctrine of extraterritoriality led to various problems in the competition and merger control as it restricts the bilateral co-operation but on the other hand it plays a leading role when there is no effective multilateral scheme developed in the countries. 'Extraterritoriality refers to a situation where a competition authority or court asserts jurisdiction over a situation involving foreign elements (such as behaviour, conduct or transactions of foreign firms). This may be done on the basis of 'effects' produced on competition in local markets, or on the basis of 'implementation' of the behaviour, conduct or transaction in the relevant jurisdiction, or (in some cases) on the basis of the 'single economic group' doctrine (where although the firm(s) concerned may be foreign, nonetheless they may own a local subsidiary). The 'effects' and 'implementation' doctrines are the main scenarios for asserting jurisdiction extraterritorially. The former is used in the USA (and many other) regimes whereas the latter is used in the EU.'⁹⁹ Extraterritoriality is typical for the merger control but competition authorities in DEES are still unable to use it in the cross border cases because first they need to obtain the required information to further proceed with the review and a challenge to them would be if the information that is important for the relevant case is not located in the internal DEEs and when the company situated in the foreign DEE do not want to provide that information to the authority an example is the Coca-Cola merger case¹⁰⁰. The problem here is with the mandatory and voluntary notification where the mandatory override the voluntary one and what cause the problem here is the place of the bilateral co-operation need which supports the exchange of information between the authorities where the US – EU model is an example. There are some countries which introduce a blocking mechanisms such as United Kingdom, Africa and Australia in relation to the extraterritoriality by the US and even if the competition authority is able to obtain the necessary information and reach a conclusion then the relevant merger could be blocked or could be forced to resign which is difficult when there are no assets belonging to the firm(s) in the relevant market and there is a little possibility for the party

⁹⁸ OECD Policy Roundtables (n 29) 26.

⁹⁹ Maher Dabbah (n 65) ch 8.

¹⁰⁰ Alexander J Kububa (n 72) 2.

to succeed. Such is the case with Rabies and Vaccines merger¹⁰¹ in US where French firm had no assets in the US and co-operation was required by FTC of the Canadian Competition Bureau. There is real difficulty when there are too many key differences between the two jurisdictions where the one could allow criminal or civil penalty but the other not. In the end we could say that complete recognition of the doctrine of extraterritoriality was made by the US Supreme Court and ECJ in the case *Gencor v. Commission*.¹⁰²

6.3 Remedies framework – consultations and enforcement

I already discussed above the remedies which are really important for the merger control because without them the merger then will be better to be invalid rather than to be concluded if there is any challenge to the remedies to be imposed. But now I will take a closer look at the categories of remedies itself. Remedies are the instruments by which the merger problems are faced and eliminated in order to secure the emerging of the parties. Merger remedies are the same group of dealing together with the other possibilities: conditional or non-conditional clearance. OECD Roundtable on Merger Remedies (2003) and the ICN principles on remedies have a wide discussion on the merger circumstances. There are many types of remedies discussed by the UK Office of Fair Trading and UK Competition Commission¹⁰³ that are involved in their merger control such as structural (include transfer or sale, yielding access to facilities of infrastructure or intellectual property rights) and behavioural (licensing of intellectual property rights, removal of exclusivity clauses in contracts with customers or price regulation measures) remedies which are two major groups. And there are other type of remedies which may include references by the competition authority to the government or proposal for change in the law which impose challenges for the competition enforcement in the relevant market. Competition authorities favour structural remedies over behavioural ones because they have much more effective outcome when addressing any problem but behavioural ones do not need to be monitored. But in the end when remedies should be imposed all the competition authorities in the DEEs face the problem to design and enforce them effectively. Most often they prefer the structural remedies but a problem is with the fact

¹⁰¹ Case 891 0098 Rabies and Vaccines [1990] Fed Reg 1614 US, 55

¹⁰² Case T-102/96 *Gencor v Commission* [1999] ECR II-753, 54

¹⁰³ National Audit Office, 'The Office of Fair Trading Enforcing Competition in Markets' (London, November 2005) HC 593, 1 1.7- 1.10

that sometimes the parties to the merger do not have relevant assets in the jurisdiction of the DEEs and DEEs lack a necessary knowledge and resources and often have difficulties with implementation when the merging parties are the forcing power in their relationship with the authority. In such cases when companies want to exercise wider control and power switch from one jurisdiction to other. Moreover, the structural remedies could be ineffective and inappropriate when the competition concerns are related to behavioural issues such as contracts between customers and merging companies concluded under the exclusivity clause but the DEE in such cases do not have the needed experience to comply with these remedies as the case with the Mexico mergers¹⁰⁴ where exclusivity clause cause a problem in different sectors of DEEs but there is no other chance and DEEs should operate under this behavioural remedies then. The Korea example is the one where the Korean Fair Trade Commission relied in such remedies as a part for the merger clearance in the majority of cases it reviewed.¹⁰⁵ This case confirmed to me the fact that DEEs cannot exclude the behavioural remedies because they allow them variety of choices due to their flexibility and this is relevant for the investigation of the merger. Moreover, when there is no other options and the structural remedies are not available this is the only elucidation for the authorities in DEEs to solve the case. This would also encourage the merging parties to comply with the ‘conditions and obligations imposed on them as part of the merger clearance.’¹⁰⁶ Usually the types of remedies which DEEs should impose are based on the type of the relevant market and they could be designed to point out issues of vertical limitations as to the exclusivity clause discussed above. They could be also really costly remedies which requires more careful monitoring such as the actions which obligate the merging parties to license or establish intellectual property relationships, or grant access to facilities that makes the process too complicated for the competition authorities and that is the reason DEEs often prefer to escape to rely on the behavioural remedies. Especially when both authorities and DEEs lack enough resources to comply it is not beneficial for them to choose to rely on the behavioural remedies but if it is the other way around they can calculate the costs and sometimes this could be more

¹⁰⁴ OECD Policy Roundtables (n 27) 49.

¹⁰⁵ Ibid 29.

¹⁰⁶ Ibid 29.

beneficial for them to take into account all these conditions before designing their strategy on merger remedies.¹⁰⁷

Serious problems and difficulties in conflict considerations where remedies are concerned could arise if there is no appropriate relationship between the authorities in the area of merger control. Moreover, the jurisdictions often choose different conflicting view to proceed with the merger cases and if one decide not to deal with the merger cases and allow it even if there are some doubts other jurisdiction may take opposite deiction to treat with it and progress with the investigation and review and carefully impose remedies if necessary. As many are the jurisdiction as many are the different ways of dealing with the merger operation and if some remedies match the expectations of the one it is not obligatory to do it with the other. The bilateral co-operation is the one which encourages the effective implementation of the remedies and lead to many positive benefits to the both merging parties and competition authorities in administrative sphere as well.¹⁰⁸ It is difficult on the other hand to establish a well governed system for discussion and negotiation between the well-experiences and less-developed authorities in DEEs but it is only for the purpose to ensure the reliability between the authorities because co-operation in this area could be of a precarious importance for them. As an important this issue was discussed various times and OECD discussion bring the idea of ‘work sharing arrangements’ between the competition authorities first reported by the comments of Report of the US International Competition Policy Advisory Committee (ICPAC)¹⁰⁹ jointly with the Business and Industry Advisory Committee to the OECD (BIAC) in the beginning of 20th century which actually stress the aim for greater co-operation necessity and it proposed two main ways for such joint negotiations through which every authority will be able to express its concerns over the transaction and the remedies that should be imposed to be considered jointly by the both parties to the transaction. And the other proposal was for creating a unified jurisdiction which will help the parties to assign, discuss and design the remedies in the merging cases. The system is not yet clear because it was only left on discussion ground and a harmonized agreement which model will

¹⁰⁷ Ibid 49.

¹⁰⁸ OECD Policy Roundtables , ‘Remedies in Cross-Border Merger’ (2013) DAF/COMP/28 < http://www.oecd.org/daf/competition/Remedies_Merger_Cases_2013.pdf> , accessed 28 June 2015

¹⁰⁹ See ICC Commission and BIAC Comments on report of the US International Competition Policy Advisory Committee (5 June 2000) Document 225/554 Rev

work better is not agreed yet. The idea behind the lead jurisdiction is ‘of a multilevel lead jurisdiction model where a leading agency investigates and handles a given case on behalf of the other affected jurisdictions – and with their support – and decides a case while recognizing the legitimate interests of all affected jurisdictions. This ambitious idea combine the concepts of lead jurisdictions and multilevel governance and poses a number of crucial questions as to its institutional design and working properties.’¹¹⁰ The extended version of the old standard comity principle is the new advanced comity principle that fast gaining the attention of the authorities and became a leading one. But how it works? If in the merger control investigation and review are engaged more than one jurisdiction then the most developed and experienced one is chosen to be the main coordinator in the agency as stated in Campbell and Trebilcock’s Statement 1993. Its powers are wide enough to collect and share information between the organizations, provide them with assistance and encourage the process by ensuring that none of the interests of the mutual community are violated as well as it has no power to proceed with the review by its own and interrupt it in such way. There are expectations that the outcome of the process of discussion will lead to the creation of an effective and practicable system of ‘lead jurisdiction’ idea which will be accepted and beneficial for the both parties.¹¹¹

6.3.1 Monitoring and Enforcement

Both the behavioral and structural remedies required to be an effective compliance with the enforcement through monitoring by the relevant authorities as well as in the cases of clearance of a merger. Moreover the role of such monitoring is to check that the clearance is done following the agreement made between the authorities and the merging parties. The same issues arise as to the enforcement when the authorities should have necessary grounds to act if the merging parties did not fulfill the circumstances or its duties in the performing of remedies. There should be enough expertise and resources in competition law area to deal with the monitoring and enforcement because it is a cumbersome process. The two problems which the competition authorities face as to the monitoring and enforcement in cross-border merger cases is due to the fact that they have no access to the relevant information and have no resources to enforce the action when merging

¹¹⁰ Oliver Budzinski, ‘Towards Rationalising Multiple Competition Policy Enforcement Procedures: The Role of the Lead Jurisdiction Problems’ (Working Party Meeting No 3, 17 June 2004) 3

¹¹¹ Ibid 4.

parties did not fulfill their obligations. These problems can be battled only in two possible ways: by enforcing an action against a domestic branch of the merging parties but usually there is no such branch and the second that usually lead to more positive results is to rely on the co-operation. 'In some cases, achieving success in enforcement actions by one competition authority in cross-border merger cases requires the assistance of foreign competition authorities also involved in the transaction.'¹¹² Such a co-operation does not work in cases with jurisdictions with too dissimilar ground but is mostly possible when the operation of the authorities share similar ideas. This is difficult to say for DEEs because they simply lack any competition frameworks that are so well developed that could help them to be engaged in an effective enforcement action in cross-border merger case together with the share-competence of other authorities. The other things that should be considered are the direct foreign investments, industrial policy and the non-competition which I already discussed above in the previous sections because the authority may have them in mind as a good direction in the process of monitoring and enforcement of remedies which could be a flooded water and cause a problem in the relationships with the companies which are not happy with this considerations. Moreover, differences in the findings could arise between the authority which should look after the relevant considerations and the government which favors certain domestic markets.

6.4 Conclusion

I would say that the merger control is really necessary for an emerging economy nevermind that it faces some difficulties in the implementation of the different theories among all the other branches of the competition law and policy this is the most important one. But what was did already should be developed further because otherwise this favorite system could be left long after the others which were almost well developed. Much more effective regimes should be established for the control of mergers both in international and regional grounds which should be based on already existed competition basis. There are no doubts that the soft law instruments are the one which are happily synchronized and approximated as well as the development of the regional relationships such as the bilateral co-operations both formally and informally which significantly grew up in the merger control area and have an impact over the transnational relationships also. The fact that some countries do not have well established effective competition law

¹¹² Case 891 0098 (n 103) 55.

regimes led to the fact that they are unable to enter into a bilateral or multilateral co-operation with the authorities from other jurisdictions. But some of the countries which have efficient regimes and having a powerful regional framework were trying to dominate in this kind of relationships as having co-operation together with agencies such as OECD, the ICN and UNCTAD. Competition authorities decide to deal with these agencies because they expect to gain some benefits in the merger control process such as wider knowledge and offer them important understandings as well as help them to develop a harmonization with the other authorities and especially those who are more knowledgeable. Then they were more experienced and were lecturing the competition issues more commonly. In the end it was visible that none of the regional efforts lead to an effect then the problems goes to DEEs and how they will build their plan for cross-border merger control. They should establish a clear path which will be according to the cross-border considerations in the particular market and these circumstances shall be with no disregard to the competition rules of the DEEs. And here is the role of the competition authorities which again will be maintain regionally, bilaterally and multilaterally the relationships in such way as to have no negative effect on the economies' interests. The co-operation may be helpful because it will give the authorities a significant power in dealing with various of different merger cases assisting them with technical and knowledgeable support in cases which include more than one regional group and various countries as in the past it was not possible and there are not many examples if even any where competition authorities in DEEs were engaged in a bilateral co-operation with most experienced ones. The DEEs should decide over an effective system for control of the mergers internally with any satisfactory provisions, guidance, regulations and advisory body which will assist the merging parties as well as competent independent authority to handle with the cases. But first they should look at the establishment of effective competition law which will actually evolve into an effective merger control regime. Simply it is easy because when we have the stones and bricks we could build the house. If there is one other possibility of an effective competition scheme in the DEE then the country's merger control system should be based on sectoral basis and as an example are all the Chinese authoritative cases. Once all these conditions are fulfilled there will be no challenge which will bar the DEEs to be involved in the different types of co-operation multilateral, regional or bilateral in the case of cross-border merger.

7. Liberalisation

We really widely discuss the process of the merger control in cross-border mergers as a consequence which lead to different outcomes and which is closely related to the competition development and policy. But not only mergers and cartels are controlled by the public authorities but also all the actions involved in the competition market such as liberalization of part or whole of the essential services in the countries and the state aid approach in energy, telecommunications, transport, water and etc. I will discuss what is the role of the state aid in empowering certain private companies to operate with these services and what is the impact on the competition as continuity of the state aid point concerned above. This action is mostly known as ‘liberalisation’ and could be defined as such: ‘EU governments can entrust specific public service functions to a company, conferring on it duties, specific rights and financial compensation and they should follow the state aid rules and recommendations with which they should comply’¹¹³.

Liberalisation is the process which open tenders in public services for which the private companies could start internal competition. The Commission and the relevant authorities are the agencies which monitor the process and could grant certain powers under the government supervision where there is available place in the country region. They are the one which should ensure that there is no unfair practice and there is no monopoly enjoyed by any of the members to the auction. Only when there is no abuse of dominant position and unfair dealing liberalization could be granted. Moreover, I could say that liberalization allow the openness of the competition on the market. What are the benefits for consumers in such case? Liberalisation is mostly favored for the consumers because in the way to be more competitive the providers would introduce in the domestic market high variety of goods and services on lower prices with new and innovative specifications. This is absolutely ‘buyer’s friendly approach’¹¹⁴. But in such case as to railways, electricity, networks and others strong monitoring on behalf of the relevant authorities is required in order to maintain the fair competition and give the consumers fair access to the network and choose the supplier they want.¹¹⁵ The Commission is the one that should ensure through its regulations that the public services are provided and consumers will not be harmed and no party will benefit from the monopoly position both as a result of the state aid and/ or liberalization. These special obligations and regulations

¹¹³ European Commission (n 1) 9.

¹¹⁴ Ibid 9.

¹¹⁵ European Commission, ‘Liberalisation: Overview’ 17 April 2012, 1

<http://ec.europa.eu/competition/liberalisation/overview_en.html>, accessed 10 June 2015

could be found in the Commission's 2000 Communication of services of general interest¹¹⁶. Moreover it was states that there a general need from clarification between the relationship between methods of funding services of general economic interest and application of the rules on State Aid.¹¹⁷ These regulations and consultations were followed by a Report¹¹⁸ to the Leaken European Council in 2001 where two proposals were made. First a specific framework to regulate when and in what conditions state aid grants and compensation should be given, what obligations these parties should have according to the service of a general public interest as well as a regulation which will exempt certain aids from obligations of prior notification as to these services.¹¹⁹

7.1 Public service delivery

And here it comes the question how the private organizations will fulfill their obligations without imposing threat to the competition. Commission have power to control and may agree to grant a monopoly only in certain limited cases where for example it is important to guarantee the public service and acting otherwise could cause an interruption of the provision of the service and or when 'natural monopoly' is involved. But in the end the monopoly shall not be harmful for the other companies, the natural monopoly shall give them access to the infrastructure and the income from the public service shall not be used to finance any other trade tasks which could lead to 'potentially undercutting competitors' prices'¹²⁰.

7.2 Benefits to consumers and Commission investigation

To see why it is beneficial for both consumers and competitors to have a well-developed system of monitors and enforcement of the liberalization I will give an example with Denmark¹²¹. As the question of liberalization and monopoly evolved highly through the years after 1990s three years after the start of the evolution of this process DSB a state-

116 Communication from the Commission, 'Services of General Interest in Europe', COM (2000) 580.

117 European Council, 'Conclusions of the Presidency' (Nice, 7-10 December 2000)

118 European Commission, 'Report to the Leaken European Council: Services of General Interest', COM (2001) 598.

119 Fiona G Wishlade, 'Competition and cohesion – cohesence or conflict? EU Regional State Aid Reform Post (2010) 10 < <https://hal.archives-ouvertes.fr/hal-00514671/document>> , accessed 12 July 2015

120 European Commission (n 1) 9.

¹²¹ European Commission (n 115) 1.

owned company which maintained the railways at that time in Denmark was forced to stop his operation when the government took a decision to allow other competitors to use the facilities or construct new ones even around the Danish port of Rodby. Knowing the fact that more investments are necessary this led to the decision to separate the provisions of the network in order to maintain the fair competitiveness in the country. In other circumstances it could lead to competition of prices when there is variety of choice consumers could easily switch from one to another service using that network in the port. What benefits actually consumers enjoy out of the liberalization process? First shown were the benefits in the air transport and telecommunication sector where the average prices have dropped substantially because of the higher competition. Long time after that influenced were the electricity, gas, other transports such as rail ways and postal services where prices have remained unchanged. 'Some of these sectors depend on different factors such as the oil price and other consequences and that is why they remain the same longer.'¹²² But it is understandable and proved that consumers favor the lowering of the prices. Furthermore, all these games with the prices cannot be played without the interference of the Commission because if there is no monitoring over the price reduction this could lead to violation and harm to the other competitors. Commission is the one who through investigation in order to safeguard the competition on the market 'can decide to prohibit a certain conduct, require remedial action or impose a fine, depending on the situation.'¹²³ It is compulsory for the national authorities in the EU member states to apply the EU competition law together with its domestic competition law and if there is any anticompetitive practice Commission could act against the authority or the relevant company. The EU competition law as a whole includes a macroeconomic policy which tries to follow the aim for stability and growth of the market. This policy is combined with the liberalization policy which purpose is 'to reduce the public expenditure with significant implications on the infrastructure development and public service provisions'¹²⁴. This is mostly a policy concerning the public sectors which should be encouraged to follow the regional planning and development process and maintain the public private relationships. All these considerations would lead to a positive effect on the stability of the market as well as will bring together the regional and territorial unity.

¹²² European Commission (n 1) 9.

¹²³ European Commission (n 115) 1.

¹²⁴ Stefanie Dühr, Claire Colomb, Vincent Nadin, *European Spatial Planning and Territorial Cooperation* (1st edn Routledge 2010) 260

In the end I would say that the liberalization policy aim was to invest into well-experience agents and reduce the unemployment, poverty and eliminate the demographic weakening. The employees rights become a central issue in Brussels after the British example with poor employee relationships in the postal sector as a result of the liberalization and the Commission was desperate to introduce to all the European service sectors the ‘Country of origin principal’¹²⁵ which applies in cross-border cases where services has no founding and first this principle introduced in 2004 ‘Bolestein’ draft of the Services Directive (2006) to battle the negative effects which occur. Its aim was ‘to allow firms carrying out contracts or business in another member state (not include origine of the company) to only have to observe to the labour regulations of their homed state and not the state they were operating. Trade unions demanded, successfully, this clause be removed due to fears it could trigger ‘social dumping’. The threat of its backdoor inclusion still hangs over many Commission initiatives and is in fact enforced by the European Court of Justice.’¹²⁶ All these consideration were developed by the EU competition policy in particular the EU regulation in state aid and liberalization of networks and public services.’¹²⁷

7.3 Results from the liberalisaion

What are then the results from the liberalization? The benefits are mostly turn into a monetary value which came from benefits for the consumers in cases where Commission prohibit cartels or money from fines which are not included in the EU budget but are beneficial for the countries. One of the most beneficial cases for consumers is the Microsoft case¹²⁸ where European Commission acts against the abuse of the dominant position in requiring the customers to switch only to their products as a result of the system which is made in such a way not to operate with those of different packages. This measure taken by the most prospective US computer firm was contrary to the EU competition policy and unable the consumers to make their own choice or choose product

125 Michael Hellner, ‘The country of origin principles in the E-commerce Directive :A conflict with conflicts of law’ , (RGSL Working papers 6, Riga 2003) ISSN 1407 8372, 15

126 Andy Motran, European Union Competition Policy and the Liberalisation of the Postal Services (European Service Strategy Unit January 2011) 7

127 Dühr (n 125) 260.

128 Case T-201/04 Microsoft Corp. v Commission of the European Communities [2007] CFI 51

with lower price. This simply led to closed market and Microsoft had been unfair to consumers by depriving them of choice

Another example is the case in 2012 with fined producers of Asian LCD TVs¹²⁹ and computer monitor tubes €1.47 billion for extremely long lasting cartel - for more than ten years. The Commission ruled on a basis that there was anticompetitive behavior which directly influence the consumers as to the fact the parties to the cartel were fixing high prices and exchange sensitive information for TV and computer applications. Similar was the case when in 2006 and 2012 Ryanair¹³⁰ wanted to merge with Irish national carrier Aer Lingus which was prohibited by the Commission under the EU merger regulation because such leading airlines carrying one of the most important airroutes will give them a monopoly power and will lead to no variety of choice to consumers if they combine the two major companies in Ireland and United Kingdom.

7.3.1 Impact the financial crisis

As the financial crisis came many governments decided to subsidies different companies and putting others in such way in a unfavourable position. This lead to various problems which the European Commission is trying to fix in order to secure the competition on the market. The governmental support should be well dicussed and calculated and the Commission encourages the countries to take certain actions and develop certain rules in the financial and banking sector where the parties who will gain the benefit should strike the problems themselves first. Moreover to provide the EU governements with certain paths the Commission has adopted temporary rules such as remarks on access to finance, state gurantees for loans, export credit insurance and subsidies loans which the government can use in preferable cases.¹³¹ All these measures aim to ensure that the competition will not be disordered because of the liberalization, state aid or other actions as mergers and cartels.

8. Conclusion

To sum up what we dicussed already in the paper I will start with the purpose of the competition policy. What competition policy is about? It is the instrument which is trying

¹²⁹ European Commission (n 1) 10.

¹³⁰ Case COMP/M 4439 Ryanair /Aer Lingus; Regulation (EC) 139/2004 on merger procedure Art 8 (3) C (2007) 3104

¹³¹ European Commission (n 115) 11.

to promote the competitiveness on the market, as well as ensuring the sustainable development in the globalizing market. Its role is to create equitable playing field for all the businesses through meeting the challenges imposed by the government and all European and international competition organisations. We already discussed the role and cooperation of the international authorities such as UNCTAD, ICN and others in creating a closer network and connection in dealing with the different global cases and often such concerning cartels, cross-border mergers and foreign direct investments. I already discussed that there is a need from one multilateral system in competition policy that could possibly emerge from an agreement and this unified framework would lead to consumer welfare and encouraging the competition policy and law implementations in the DEEs. This framework should also meet the interest of both countries and authorities as well as consumers and focus should be put on the assessment of the relevant knowledge that they need to have. I also covered in the paper all the direct investments issues, cartels, parallel imports, anticompetitive agreement and megers. All these measures are established to increase the transparency in the actions and provide the competition authorities with clear and easy access to information in order to safeguard the market oriented structure. The specific developments that UNCTAD developed in order to assist embryonic and emerging countries to implement and integrate the competition policy in the merger cases for example in cooperation with the authorities was of a key importance. Large benefit for the regional and domestic economies were the foregin direct investments for which specific scheme was deveped to help the globalization work in consumer welfare and growth of innovations and technology transfer. On the other hand the concern goes to the global mergers which had no major impact because only few countries had adopted the competition policy in the sphere. Later on there had been a more centralized focus on the issues leading to awareness on effectiveness on welfare, economic and market power, as well market openness and short costs necessary both nationally and internationally. But the national agencies were really unexperienced and strong involvement and co-operation with the international authorities was necessary because many DEEs were faced with the problem of cartels, mergers and the abuse of dominance. They were able to enter into various co-operation agreements- multilateral, regional and key one bilateral (either in formal or informal way). These forms of cooperation allowed the effective adoption and enforcement of the competition rules when problems arising in the interference between the traders and the national authorities. Only in such way competition authorities were able to gain (without proper authorization

required), share and exchange information which is from a leading importance for solving the cases. The WTO, GATTs and TRIPs Agreements were really helpful models for such purposes because any even if limited unification will be effective. Moreover, the discussion went through the notification system which is important for both authorities and businesses and it is as we stated two types voluntary and mandatory. Various problems arise in the mandatory system and the voluntary one was mostly favoured by the parties. Remedies as well are a certain issue that requires further attention where the authorities, the Commission and the government should co-operate together when there is a lack of certain knowledge in the development of a certain remedy scheme and there were a necessity of effectively enforcement for which the OECD Roundtable on Merger Remedies (2003) and the ICN principles help because they propose particular changes in the law and the encouraged the co-operation between the agencies under the behavioural remedies which were less important than the most favoured structural remedies which include transfer or sale, yielding access to facilities of infrastructure or intellectual property rights and were used in the case of merger clearance for example. In a case that the remedies in merger control cases concern more than one jurisdiction I looked at the proposal for 'lead jurisdiction' which confirms to be an effective system for fighting with those jurisdictions which want to gain benefits from the monopoly they have because they had been more experienced in the process. Then it was found that the 'lead jurisdiction' could unify the considerations. I should state that monitoring and enforcement of the remedies is a substantial and relevant process that careful attention should be paid by both the Commission and the relevant competition authorities in DEEs. To sum up all stated above I will finish with the fact that the liberalization bring a new era establishing the movement for breaking a long standing public monopolies. This was the aim of the Commission to open the market for competitiveness and justice as well as ensuring the consumers and employees rights. Moreover, the aim was to ensure that the private companies will not benefit from their dominant position and impose anticompetitive practices to the competitors which would lead to closing the market as the same was the case with ineffective state aid subsidies which lead to a danger for the domestic markets as the government did not take the necessary measures to calculate and maintain the situation. But in the end the liberalization aim at achieving improvements in the living standards and the foreign investments likewise are the major engine for the growth of the economies which all is in customers benefit. Trade and investment liberalization is a leading part of the country's plans to maintain and strengthen its future

stability and competitiveness and protect it against certain future shocks. The reform introduced by the WTO with the various internationally agreed rules was in interest of the national security, stability, welfare as it is the basic aim of the whole European world and partially purpose of the European competition policy.

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