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Introduction:

Undoubtably, assured competition between firms contributes to the stable growth and progress of the economy. Thus, today more than 130 competition regimes are in force worldwide, and at least 110 of these laws include merger control, ensuring effective governance of the multinational marketplace. Competition stimulates market participants to pursue efficiency, by reducing manufacturing prices, but at the same time increasing the quality of their products. This ultimately benefits the consumers by allowing them access to high quality, innovative products at a reduced price. Many governments realize that competition rules are an important element and play a key role within the society. Thus maintaining competition is vital for a healthy business climate, which in turn attracts foreign investments and propels the economy forward.

Over the last few decades, the world economy has been subject to a rapid globalization. Many companies now operate internationally. This globalization environment has brought not only a large economic benefits, but also large regulatory challenges.

As a result, the number, the size and the impact of cross-border mergers and acquisitions between globally active companies, is growing each year. Since a large amount of cross-border mergers and acquisitions may have cross-border dimension these activities are reviewable by a growing number of competition authorities around the world. This worldwide diffusion of mergering or acquiring parties entails an extensive distribution of multinational merger control regimes, which is deemed to be a positive development as it indicates that the competition culture is expanding around the globe and in the same fashion indicates for a stable economic growth. It may however increase burdens and cost not only for the governments examining the international mergers or acquisitions, but mostly some negativities as raised costs, different procedural and substantive laws, as well as among others the risk of inconsistent merger review outcomes are borne by the mergering parties. To illustrate this, any markable transaction, possessing an international dimension, may have to be notified to more than a bearable number of competition authorities, each with its own principles, time schedules and fees[1]. As to the firms, during the development of the merger control systems, it has been proven that the rules against

[1] See, for instance case *Staples/Office Depot* – reviewed by the European Commission /M 7555, Commission's decision 10.02.2016/; the US FTC; the Canadian Competition Bureau and the Australian Competition&Consumer Commission. For details, see 'Competition Merger Brief' 2/2016, Article 2, p 5-9. Available here: http://ec.europa.eu/competition/publications/cmb/2016/cmb2016_002_en.pdf

development of the merger control systems, it has been proven that the rules against cartels and abusive behaviour did not make such a great impact on the competitors, as did the merger control regimes[2]. There are many reasons, one may find regarding this phenomenon, but it is fact that the gaps, left with the laws prohibiting cartels and abusive behaviour, were filled with the merger control regulations, mainly because companies' transactions are often subject to obligatory pre-notification system.

Most of the mergers do not impede competition, some transactions, may however be seen as problematic by the competent authorities, for different reasons. If so, the transaction may be challenged, in order to preserve the competition. At the end of the day, this is to direct benefit not only to the economy and the competitors within the related market, but most to the consumers, who can continue to benefit a competitive price, quality and assortment.

At the present time some of the most powerful economics are those of United States of America and of the European Union as far as it performs like an internal market. Surely it is not surprising that there is a great amount of cross-border mergers and acquisitions that are reviewable by the competent authorities of these two massive economics[3]. Therefore, this paper aims to describe and analyze all the pros and cons of the both merger control regimes, to draw the similarities and to discuss the differences, by making a parallel comparison not only of the examination process that the authorities go through, but to outline the principles that they are following while accessing the impact of a merger or an acquisition. This work will also indicate the different approach that these two systems adopt in the structure of their competition authorities. The possibility of cooperation between them is also worthy to discuss, as it gave a good result in a number of cases, in other, however, in does not work, as may be seen in this research. At the end of this detailed analyze, the summary will contain the most important lessons that may be taken from the both systems and an attempt for a proposal for improvements for them will be made.

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[2] See, for instance the improvement made in the US system, by envisaging the Section 7 of the Clayton Act in 1914, for details see Chapter II, Subsections 1.1. and 1.2. latter in the text.

[3] For instance, case *Oracle/PeopleSoft* M 3216, Commission's decision of 26.10.2004, OJ L [2005] 218/6, see para 4 and the case General Electric/Honeywell M2220, Commission's decision of 03.07.2001, OJ L [2004] 48/1.

I. Legislative Development:

1. Merger Legislation of the USA

The trail of the merger control regimes in the observing jurisdictions may be traced to the end of the19th and begining of the 20th centuty[4]. At that time, the European Union does not exist, but over the Atlantic ocean, in the Unitet States an economic bloom is observed.

1.1. The Sherman Antitrust Act, 1890

For the very first time in 1890 federal legislation was enacted to regulate practices that were considered harmful for the consumers, with The Sherman Antitrust Act[5]. This was the begining of comptetition law and legeslative framework, that aims to restrain competotors from abusive behavior to consumers. Since the Sherman Antitrust Act aims to prohibit anticompetative conduct between competitors and monopolisation on the market, companies realised that they can simply merge into a single entity and to enjoy the same benefits of market power as from the persecuted creation of anticompetative 'contact' or 'combination'[6].

1.2. The Section 7 of the Clayton Act, 1914

The US government reacted swiftly to this wave of mergers and in 1914 the Clayton Act[7] was devised and later passed. Section 7 of the Clayton Act[8] filled the gaps left by The Sherman Antitrust Act regarding the mergers. At that time Section 7 of the Clayton Act had allowed the competition authorities to regulate mergers before they could harm

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[4] Section 2 of the Sherman Antitrust Act regulate the combination of persons 'to monopolize any part of the trade', see: 15 U.S.C., Chapter 1, § 2, available here: https://www.law.cornell.edu/uscode/text/15/2 and later Section 7 of Clayton Act regulate mergers and acquisitions of stock or capital, see 15 U.S.C., Chapter 1, § 18, available here: https://www.law.cornell.edu/uscode/text/15/18

[5] The Sherman Antitrust Act, codified in 15 U.S.C., Chapter 1.

[6] Ibid, 15 U.S.C., Chapter 1, § 1.

[7] The Clayton Antitrust Act, codified in 15 U.S.C., Chapter 1.

[8] Section 7 of the Clayton Antitrust Act, codified in 15 U.S.C., Chapter 1, § 18.

competition. It also gave the government a discretion to approve or not a proposed merger before it is completed.
The Clayton Act prohibits stock purchase mergers that may result in reduced competition or in increasing the possibility for creation a monopoly. However, it left a loophole that could be used by the companies, who would like to cooperate and to circumvent the legislative prohibition. There was still the possibility for an entity not to acquire the entire other company, but just to buy the assets of it.

1.3. The Celler-Kefauver Act, 1950

This legislative loophole was mended in 1950 by the Celler-Kefauver Act. Asset acquisitions that may result in decreased competition were prohibited by this legal act. This amendment paved the ground for prevention of both vertical and conglomerate mergers.
Section 7 of the Clayton Act is based on the consept of monopolisation, but the language used in the provisions assume broader interpretation. §7 Clayton Act, 15 U.S.C. § 18 states:

> *"No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. "*

With this act, the legislature focused on the effect that the proposed activity may have rather than requiring a piece of evidence of monopolisation. The onus is put on two scenarios. The bill prohibits aquisitions that may result in lessening competition or in increasing the possibility for creation a monopoly. The act presumes probabilities, not certainties, which is innovative approach for the competition legislatin at that time.

1.4. The Hart–Scott–Rodino Antitrust Improvements Act, 1976

In 1976 The Hart–Scott–Rodino Antitrust Improvements Act entered into force. This amendment found its place in Section 7A of the Clayton Act, codified in 15 U.S.C. Chapter 1, § 18a[9]. The Act provided the so-called Pre-Merger Notification System, which is still in force and is among the major principles in today's merger control. It provided that certain transactions could not be completed, until the parties to the transaction have made a detailed filing with the competition authorities, and moreover they were required to refrain from further actions, while the authorities deliberate on the proposed transaction. The law requires parties to a transaction that meets certain thresholds, to file HRS notification forms with the competition authorities[10] and to observe a statutory waiting period prior closing the transaction.

1.5. Other Substantive US Competition Law

Additionally, other substantive US competition laws may be applicable to certain transactions such as Section 5 of the Federal Trade Commission Act[11]. This provision prohibits unfair methods of competition.

As shall be discussed some transactions may also be reviewed by state attorneys general, this revision is not on a federal level, but on a state level. Such examinations typically focus on the competitive effects of the proposed transaction only within the state. Since this analysis is concentrated on the comparison of the federal legislation of the USA and the supreme legislation within EU regarding the field of merger control, the notification and the examination of transactions on a state level will not be discussed[12].

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[9] Available here: https://www.law.cornell.edu/uscode/text/15/18a

[10] Section 7A of the Clayton Antitrust Act, 15 U.S.C., Chapter 1, § 18a, (a).

[11] 15 U.S.C., Chapter 2, §45, available here: https://www.ftc.gov/enforcement/statutes/federal-trade-commission-act

[12] Although it will be briefly described in Chapter VI, Section 2 of this paper.

2. Merger Legislation of the European Union

2.1. The Treaty of Rome, 1957

While in the USA the creation of the merger legislation was led by the needs of the economy, on the European continent in 1957 the Treaty of Rome[13] created the European Economic Community and the beginning of the supreme European Union legislation was set. The Treaty of Rome, included articles prohibiting anticompetitive agreements among competitors that restrict, prevent or distort competition within the Common Market[14] and preventing undertakings from abusing their dominant position on the marketplace[15]. Merger control was not specifically stated with these articles and the need of establishing a merger control on a Community level was developed with the developing of the economic of the Common Market. Shortly before the US Congress enacted the Hart-Scott-Rodino Act - establishing the pre-notification regime, in 1973 the European Commission took first steps to control mergers through Article 86 of the Treaty of Rome, in the noteworhty case - *Continental Can*[16]. The European Court of Justice held that a merger that "strengthens" the dominant market position of a firm is an "abuse of dominant position" under Article 86[17]. The issue was that the Commission could declare as 'not valid' only a merger that has already taken place. Additionally, Article 86 of the Treaty of Rome was only applicable to undertakings that already possess dominant position on the market, thus the application of this Article was very limited. The necessity of Merger regulations has become sensible and the Commission has proposed its first merger control regulation in 1973[18]. However this proposal provoked vast discussions and controversial opinions

[13] The Treaty Establishing the European Economic Community, 25 March 1957, Rome, hereinafter The Treaty of Rome. Available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:11957E and also here: https://ec.europa.eu/romania/sites/romania/files/tratatul_de_la_roma.pdf

[14] The Treaty of Rome, March 25, 1957, Article 85.

[15] The Treaty of Rome, March 25, 1957, Article 86.

[16] Case *Continental Can*, Commission's decision of 09.12.1971, OJ [1972] L 7/25, English version is not available.

[17] Case 6-72 *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities*, Judgment of the Court of 21.02.1973, European Court Reports 1973 - 00215, among others see paras 12 and 13. Available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61972CJ0006

[18] Commission Proposal for a Regulation of the Council of Ministers on the Control of Concentrations between undertakings, OJ [1973] C 92/1, available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:1973:092:TOC

between the Member States. As a result it was postponed, and several amendments to this proposal were envisaged throughout the years[19].

Later in 1987 the Commission succeeded in applying Article 85 to stock acquisitions[20]. *British American Tobacco Company Ltd and R. J. Reynolds Industries Inc. v. Commission was* a remarkable case /indeed joint cases/, showing again the increasing need of merger control regulations. Due to the continuous attempts of the Commission to apply Article 85 and Article 86 of the Treaty of Rome Member Stated acquiesced the adoption of a new effective merger control regulation.

2.2. Council Regulation 4064/1989 on the control of concentrations between undertakings.

It was on the 21 December 1989 that the Council of Ministers adopted Regulation 4064/1989 on the control of concentrations between undertakings[21], which entered into force on 21 September 1990. This legislative act introduced 'Prior notification of concentrations'[22] and gave the European Commission the power to decide whether to approve a merger before the deal is closed. It also gave meaning in exact numbers to the term "Community dimension", as the legislation was applicable to all concentrations with Community dimension, according to Article 1 of the Regulation 4064/1989. The Regulation 4064/1989 was amended quite significantly in 1997 by Regulation 1310/1997[23], extending the scope of the Community merger control.

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[19] OJ [1982] C 36/3; OJ [1984] C 51/8; OJ [1986] C 324/5; OJ [1988] C 130/4.

[20] Joint cases 142 and 156/84 British American Tobacco Company Ltd and R. J. Reynolds Industries Inc. v. Commission [1987] ECR 4487, available here: http://curia.europa.eu/juris/showPdf.jsf?docid=93181&doclang=en

[21] Council Regulation 4064/1989 on the control of concentrations between undertakings, OJ [1989] L 395/1, available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.1989.395.01.0001.01.ENG&toc=OJ:L:1989:395:TOC

[22] Ibid, Article 4.

[23] Council Regulation 1310/1997 amending Regulation 4064/1989 on the control of concentrations between undertakings, OJ [1997] L 180/1, available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1528200122596&uri=CELEX:31997R1310

2.3. Council Regulation 139/2004 on the control of concentrations between undertakings.

The current Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) known as European Union Merger Regulation, hereinafter EUMR[24], repealed and replaced the previous Regulation 4064/1989. The EUMR, however, keeps the initial turnover thresholds indicating the competence of the Commission as they were set in Article 1.2 of the previous Regulation 4064/1989, and at the same time the new legislative act gives the Commission wider powers by including additional thresholds[25] for concentrations that do not meet the set thresholds in Article 1.2. EUMR and thus expands the scope of the Commission's Jurisdiction. In this way by stating more definitions about concentrations having a Community dimension the EUMR assures a broader Commission's competence and also a broader EUMR applicability. According to some authors[26] although the EUMR uses the expression "Community dimension", the post-Lisbon[27] term "Union dimension" is more appropriate today, since the text of Article 1.(2) (b) states that 'The Union shall replace and succeed the European Community.'[28] As far as these two terms tend to mean one and the same, they both will be used in this paper as interchangeable terms.

3. Summery of the legislative development within the both systems

As one may notice the legislative systems in the field of Merger Control within the concerned jurisdictions are trying to follow the economic demand, needs and dynamics. In most cases the legislator succeessfuly responds to the changes in the economic environment, but also one may recognise some omissions and laps in the system, that have often

24 Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings OJ [2004] L 24/1. Hereinafter The EURM. available here: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32004R0139

25 EUMR, Article 1.(3).

26 Richard Whish and David Bailey, see Whish, Bailey, "Competition law" (8th edition Oxford University press 2015) p. 873.

27 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13.12.2007, OJ [2007] C 306/1 available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:12007L/TXT

28 Ibid, Article 1.(2) (b), last sentence.

been used by the mergering parties, if they are trying to circumvent the applicable anti-competitive rules.

The following chapters will outline on high level, the examination and the procedures organised by the competent merger control authorities. The text also includes comments on some legislative laps and the possibilities accessible for the concerning parties.

II. The essence of the EU and the US merger control systems.

This chapter will describe the essence of the Merger Control Systems within the reviewed jurisdictions and will outline the decisive moments of the Merger Control Process, as it begins with the notification, goes through the assessment conducted by the competent authorities and may result in different outcomes within these two jurisdictions.

1. The EU system of Merger Control

Within the European Union mergers having Union Dimension must be notify to the Commission[29]. The European Commission is the competent authority empowered to review mergers[30], within the scope of Article 1(2) and 1(3) of the EUMR and once the merger has a Community Dimension the Commission has sole[31] jurisdiction to establish whether or not the proposed concentration is compatible with the common market[32]. This is the meaning of the principle of 'one-stop merger control', that is preferable by the parties to the transaction. On the other hand, mergers that do not fall into the scope of the EUMR shall be pre-notified to the competent authorities of the concerned Member States under the rules of their national legislation. European system of merger control also contains one exceptional opportunity of referral of jurisdiction, based on the 'one stop-merger control' principle. This rule states the possibility that one case, which is not otherwise within the scope of the EUMR, may be review by the European Commission. As it is considered that the examination of one transaction by only one authority is more

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29 EUMR, Article 4.(1)

30 Ibid, Article 2.

31 See in Chapter VI, Section 2 the possibility for 'Case referral', available under EUMR.

32 Ibid, Article 2.1.

effective than the assessment of one transaction by several national merger control authorities, under more or less different merger control legislations. The principle of 'one-stop merger control' became more popular among the mergering parties[33] and also among the Merger Control Authorities of the Member States. However, it is also possible for the Commission to refer a case to the concerned Member States and their competent authorities, regardless whether the case is within the scope of the EUMR[34]. Such a referral option is not available in the US merger control system.

2. The US system of Merger Control

Within the US, at federal level, there are two authorities that are competent to examine transactions before their implementation. They are the Federal Trade Commission, hereinafter FTC, and the Antitrust Division of the US Department of Justice, hereinafter AD of the DOJ[35]. Parties to the deal must notify both agencies about the transaction, but only one of them will review the proposed merger. The case distribution between these two competent authorities is on the basis of number of criteria, but mainly depends on the industry concerned. The filing is followed by a clearance process, during which both authorities consult and decide which of them have competence according to the subject matter. Once this matter is settled, the competent agency may start investigation by obtaining information for the proposed transaction not only from the parties to the deal, but also from their competitors.

[33] Case *Facebook/WhatsApp* was not within the scope of the EUMR, but nevertheless it was reviewed by the Commission, following a referral request by Facebook to benefit from the 'one-stop merger control', pursuant to Article 4(5) of the EUMR. See OJ [2014] C 297/13 'Prior notification of a concentration (Case M.7217 — Facebook / WhatsApp)', available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2014.297.01.0013.01.ENG&toc=OJ:C:2014:297:TOC

[34] EUMR, Article 9.

[35] Section 7A of the Clayton Antitrust Act, 15 U.S.C., Chapter 1, § 18a, (b).

3. The obligation to Notify a Transaction

Parties to the proposed transaction are obliged to notify the concentration, before they close the deal[36]. They shall notify the competent agencies, according their rules and it is parties' duty to follow all the applicable rules to the proposed deal.
Failure to notify is unlawful under the both legislative systems and there are considerable penalties for undertakings that fail to notify the competent agencies for the concentration and close the deal before this. There are some minor exceptions to this rule, but generally competent authorities in the EU and the USA are not afraid to impose penalties, resulting in millions of Euros or Dollars in cases when parties to the transaction omit to notify it[37] or in cases when parties implement the deal and violate their obligation to stand still within the waiting period, during which the competent agencies assess whether the proposed transaction may be harmful to the competition on the concerned market[38].

4. Assessment of the Proposed Transaction

While assessing the proposed transaction and under the rules of Article 2 of the EUMR the European Commission is examining whether the concentration may significantly impede effective competition in the market and particulary to result in a creation or in a strengthening a dominant position. On the other hand, under Section 7 of the Clayton Act, the competent Authority in US is assessing whether the effect of the proposed transaction may substantially lessen the competition or to tend to create a monopoly[39]. One may notice that while the EU approach is pointed to the prevention of dominant position on the market, the US one is to restrict the creation of monopolisation. This trend may be ex-

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[36] To the parties' obligation to notify the US authorities see: Section 7A of the Clayton Antitrust Act, 15 U.S.C., Chapter 1, § 18a, (a). Regarding the parties' duty to notify the European Commission see: EUMR, Article 4(1).

[37] For instance, see the Commission's Decision of 23.07.2014 addressed to Marine Harvest, imposing a fine for putting into effect a concentration in breach of Article 4(1) and Article 7(1) of the EUMR in case M 7184 *Marine Harvest/Morpol* (Art. 14(2) proc.). See European Commission Press Release: Mergers: 'Commission fines Marine Harvest 20 million euros for taking control of Morpol without prior EU merger clearance'. Available here: http://europa.eu/rapid/press-release_IP-14-862_en.htm

[38] Commission Decision in Case M 4994 *Electrabel/SNR* of 10.06.2009, see European Commission Press Release: Mergers: 'Commission fines Electrabel 20 million euros for acquiring control of Compagnie Nationale du Rhone without prior Commission approval'. Available here: http://europa.eu/rapid/press-release_IP-09-895_en.htm

[39] 15 U.S.C., Chapter 1, § 18.

plained with the foundation and the development process of both legislative frameworks while the Clayton Act is based on the consept of monopolisation the European legislation on this field was first created on the basis of the Treaty of Rome of 1957, where the onus is on the prohibition of anticompetitive agreements among competitors and on the prevention of the undertakings to abuse their dominant position on the marketplace.

5. Time Limits of the Assessment Process

Likewise, there are some differences in the main substantive laws leading the authorities in their assessment in the same fashion there are some differences in the timetable of this process that the both jurisdictions are following. There are generally two phases. The first phase under the EUMR should not exceed 25 working days of the notification. In US the term of the first phase starts when both parties of the proposed transaction notify the competent authorities and is up to 30 days, but may be shortened to 15 days in certain cases. The investigation within the both jurisdictions may conclude within Phase I, but once the second phase begins, the differences become more visible. While under the US legislation the reviewing agency may issue a Second Request at the end of the initial period and this starts an in-deep investigation that may take long time.

6. Outcomes of the Assessment

At the end this Second phase, the reviewing US federal agency may:

Close the investigation, which means that the deal may be unconditionally closed.

Allow the transaction to close subject to a settlement with the parties setting out specific remedies.

And most notably:

Challenge the transaction by seeking a preliminary injunction in US District Court to block the transaction[40].

The second phase under the EUMR is going under other schedule. In a small percentage of the cases, the Commission finds that at the end on the investigation of the first phase,

[40] See 'Hart-Scott-Rodino Annual Report' for the Fiscal year 2017, issued by the FTC and the AD of the DOJ, available here: https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014_fy_2017_hsr_report_final_april_2018.pdf

there is a serious doubt as to the compatibility of the merger with the internal market and proceeds to an in-depth Phase II investigation. This phase may take up to 90 working days and this period may be extended if needed. At the end of the Second Phase the Commission may decide that:

The proposed transaction is compatible with the internal market and may be unconditionally closed.

The proposed transaction may be closed subject to some modifications or remedies.

And

The proposed transaction is incompatible with the common market and as such may not be closed.

The European Commission has this exclusive power solely to prohibit a merger in its entirety. However it is a very rare case, as there have been only 27 prohibitions[41] within the second phase for the period between 21.09.1990 and 30.04.2018[42].

A detailed analysis of these procedures will be conducted in the following chapters. Later the text will be dedicated to the parallel comparison of the leading principles and definitions in the both merger control systems. The functions and the structure of the competent authorities will also be explained. Subsequently in the paper the different thresholds set in both systems and the founding in the EU merger legislation term 'Union Dimension' will be described. The Jurisdiction of the merger authorities will also be an object of a discussion and the specific possibility of case referral in the EU system will be discussed. The paper will also describe major relevant cases, some of which pretty recent and other that are notewothry for this field of the legislation.

III. The Notifiable Event.

This section provides an overview of the transactions covered by the merger control regimes within the concerned legislations and the jurisdictional test that they pass through the assessment process. The following information provides answers to questions like

[41] Within the meaning of Article 8(3) of the EUMR.

[42] See Annex I 'Table of EUMR statistic'. Source: http://ec.europa.eu/competition/mergers/statistics.pdf

'What is the type of the transaction, that is subject to authorisation?'; 'When and which authority is in charge to asses the deal?' and 'What, if any, would be the cooperation between the competent authorities in Multi-Jurisdictional cases?'.

1. The type of the Notifiable Transaction

1.1. Notifiable transaction under the EU Merger Control Legislation

EUMR uses the term "Concentrations" to describe the type of the notifiable transaction. This term is defined in Article 3 of the EUMR and further explained in the case law of the EU Courts and in the Commission's Consolidated Jurisdictional Notice, hereinafter *'Jurisdictional Notice'*[43]. Article 3 (1) of the EUMR provides that:

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

1.2. Notifiable transaction under the US Merger Control Legislation

Pursuant to Section 7 of the Clayton Act[44] the notifiable event is either direct or indirect[45] acquisition of of the stock or shared capital or assets if the parties to this transaction are 'engaged in commerce or in any activity affecting commerce'[46].

While the EU legislation defines the notifiable transaction as a change of control[47], the US approach is targeted to a purchase agreement, with object stock, shares or assets of another undertaking[48].

[43] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings OJ [2008] C 95/1. Hereinafter the Jurisdictional Notice. Available at
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:095:0001:0048:EN:PDF

[44] 15 U.S.C., Chapter 1, § 18, para 1.

[45] Ibid.

[46] Ibid.

[47] See Annex II 'EU: Merger Notification'. Source:
https://content.next.westlaw.com/Link/Document/Blob/I5b5514911ef511e38578f7ccc38dcbee.pdf?targetType=PLC-

The usual merger, irrespectively legal or *de facto* merger, between two or more previously independent entities into one new single economic unit does not rise many questions, as the new entity is created under a permanent single economic management and gain internal profit and loss. There is no doubt that it will fall within the meaning of the term 'Concentration' given in the Article 3 of the EUMR.

1.3. The Decisive concept of the Acquisition of Control

As to the Acquisition of control, there are much more details to discus. The legal text speaks about direct or indirect control of the whole or parts of an undertaking. The concept of control is defined in Article 3 (2) of the EUMR and from paragraphs 11 to 123 of the *'Jurisdictional Notice'* and has a very broad meaning. However the concerned legislative regimes of the EU and the US put different meanings in this concept, as will be seen. The definition of the term of *'control'* is decisive as it determines whether there is a concentration. The EUMR defines 'control' under the possibility of exercising a decisive influence on the undertaking, Article 3(2) of the EUMR says:

> *"Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:*
>
> *(a) ownership or the right to use all or part of the assets of an undertaking;*
>
> *(b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking."*

Unlike the US merger legislation, the EUMR does not limit the term decisive influence with certain percentage of the owned shared or voting rights. A decisive influence may be exercised *de jure* if the acquiring shares or assets represent more than 50% of the voting rights in the general meeting. In this case the acquiring party surely will have voting po-

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[48] See Annex III 'United States: Merger Notification'. Source: https://content.next.westlaw.com/Document/Ieb49d8761cb511e38578f7ccc38dcbee/View/FullText.html?navigation-Path=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad73aa5000001653d2d5b74851848c8%3FNav%3DKNOWHOW%26fragmentIdentifier%3DIeb49d8761cb511e38578f7ccc38dcbee%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=f36f9d67a5fd12ee498153901f4b488a&list=ALL&rank=1&sessionScopeId=e42de9801315a69158dc6a039c4a75152f9761b9fbffac76ba420460c112bee5&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29

wer to take independently important decisions of the organs of the undertaking or of its assets. However, there are number of cases where even with less than 50% of the voting rights decisive decisions may be taken. In these situations the acquiring party may exercise *de fecto* decisive influence on the important decisions. All these cases shall be take into account by the Commission while assessing a proposed deal[49].

On the other hand Hart–Scott–Rodino Antitrust Improvements Act, hereinafter HSR Act sets a different approach on the term acquisition of control[50]. USC, Chapter 15, Title 1, §18a (a) states:

> *"[…] no person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons (or in the case of a tender offer, the acquiring person) file notification pursuant to rules under subsection (d)(1) and the waiting period described in subsection (b)(1) has expired […]. "*

The US merger regime regards the acquisition of voting securities or assets as a decisive factor of the deal. Later in the legislative act the term 'voting securities' is described. US Code, Chapter 15, Title 1, §18a (b), 3; (A) gives the following explanation:

> *"The term "voting securities" means any securities which at present or upon conversion entitle the owner or holder thereof to vote for the election of directors of the issuer or, with respect to unincorporated issuers, persons exercising similar functions."*

The important right to vote for the election of director positions is determined as decisive under the US merger regime. Moreover, it sets one more limitation to be more precise in adjusting the scope of the application of the law. The acquisition is reviewable by the competent US authorities if it is acquisition of at least 50% of the control. The term 'control' is defined in the Code of Federal Regulations, Title 16, Chapter I, Subchapter H, Part 801, Section 801.1, Rule 801.1(b)[51]. According to the definition, control is estab-

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49 See 'The Jurisdictional Notice', among others paras: 10, 16 and 20.

50 US Code, Chapter 15, Title 1, §18a.

51 Code of Federal Regulations, Title 16, Chapter I, Subchapter H, Part 801, Section 801.1, available at: https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/most-frequently-asked-hsr-questions/sec-1 and also here: https://www.law.cornell.edu/cfr/text/16/801.1

lished by the holding /in the means of beneficiary ownership/ of 50% or more of the outstanding voting securities of an issuer. In the case of an entity that has no outstanding voting securities, control is established by the right to 50 percent or more of the profits or of the assets of the entity.
Among other criteria, the competent Authorities must first identify the proposed event and to determine reportability of the proposed transaction.
Evidently, the US competent authorities have accurate and clear system to determine whether the proposed deal is notifiable or not. They just have to follow the set process of assessing the deal and the rules regarding the meaning of the term 'control', but in the first place the transaction is reportable if either of the parties is engaged in commerce or in any activity affecting commerce[52].
On the other hand, the European Commission shall investigate whether the acquiring party may exercise a decisive influence in taking the decisions on the shareholders meeting or by other means, and as it follows from the text of the Jurisdictional Notice[53], the percentage of the acquiring voting rights is not enough to determine whether the influence in question is decisive or not.

1.4. The Notifiability of Joint Ventures

The competent authorities are also in charge if the proposed transaction is a Joint Venture, but under the EUMR only fully function Joint Venture is a concentration that may be reviewed. The rules of the EUMR are applicable only to the creation of a Joint Venture performing on a lasting basis all the function of an independent economic unit, as far as it is defined as a 'concentration' in Article 3 (4) of the EUMR[54].
On the other hand, US legislation and case law indicate mitigate control when examining Joint Ventures. Under the US Merger legislation, while assessing a Joint Venture, the competent authority shall apply the same criteria as when assessing a merger, but with a consideration that with the creation of a Joint Venture a new entity is also created. While

[52] US Code, Chapter 15, Title 1, §18.
[53] See paras 10, 16, 20, regarding the *de facto* control, of the 'The Jurisdictional Notice'.
[54] See also Recitals 20 and 27 and furthermore Article 2(4) of the EUMR.

the merger eliminates at least one participant, who is also a competitor on the market, the Joint Venture creates a new competitive force therein[55].

2. Jurisdiction of the Competent Authorities

When it is clear what type of a transaction is subject to authorisation it is time for the competent authority to answer the next question: 'Is the informed agency authorised to examine the proposed 'concentration'?'

2.1. The Exclusive Jurisdiction of the European Commission

Under the EUMR only a concentration with a 'Community dimension' falls within the exclusive Commission's jurisdiction. Member States may not apply their merger regimes to such transactions, except in cases where the Commission refers such transactions to Member State authorities, under the circumstances set in Article 9[56] of the EUMR. These conditions will be discussed later in the text including the conditions under which the Member State authorities may refer case to the Commission, pursuant to Article 22[57] of the EUMR. But first of all the term 'Community dimension' shall be clarified.
Community dimension is defined in Article 1 of the EUMR by worldwide and EU-wide turnover of the undertakings concerned. Turnovers within the meaning of the EUMR are the turnovers gain by the undertakings concerned during the preceding financial year, pursuant to Article 5 of the EUMR.
Concentration is of a Community dimension if:

- The combined worldwide turnover of the mergering parties is more than €5 billions; each of them or at least two of them realise more than €250 million EU-wide turnover; unless each of the concerned parties obtains more that 2/3 of its EU-wide turnover in one Member State,

[55] United States v. PennOlin Chemical Co., p. 378 US 158 (1964), available here: https://supreme.justia.com/cases/federal/us/378/158/case.html
[56] See also Article 4(4) of the EUMR for the Pre-Notification case referral request for referral the case to a Member State.
[57] See also Article 4(5) of the EUMR for the Pre-Notification case referral request for referral the case to the Commission.

Or

- The combined worldwide turnover of the mergering parties is more than €2.5 billions; in each of at least three Member States the combined turnover of the parties concerned is more than €100 million and in each of those three Member States, the individual turnover of at least two of the mergering parties is more than €25 million and also the EU-wide turnover of each of at least two of the mergering parties is more than €100 million; unless each of the mergering parties obtains more that 2/3 of its EU-wide turnover in one Member State.

This is the unchangeable formula stated in the EUMR.

2.2. The jurisdiction of the US Competent Authorities

On the other hand, US legislation revises the thresholds every year. The EU jurisdictional thresholds are based on the size and the location of the undertaking's turnover. Unlike as prescribed by the HRS Act, the emphasis is not on the size or the location of the assets, but on the size of the parties and the size of the transaction. Each year, the FTC adjusts the dollar thresholds based on the changes in the US gross national product. The current thresholds were implemented on 28 February 2018[58] and are as follows:

- Size of transaction threshold – Unless otherwise exempt acquisition of assets or voting securities of at least US $84.4 million may be subject to examination by the US authorities, but subject to the size of person threshold. However if the transaction exceeds US $337.6 million it is within the scope of US federal authorities irrespectively to the size of person threshold, unless otherwise exempted
- Size of person thresholds – Transactions valued between US $84.4 million and US $337.6 million will be subject to the HRS Act if the parties also meet the size of person thresholds. This thresholds is generally met where a person with annual net

[58] The current thresholds as updated to 28 February 2018 are Available here: https://www.ftc.gov/system/files/documents/federal_register_notices/2018/01/revised_jurisdiction_7a_1-29-18.pdf

sales or total assets of at least US $168.8 million acquires a person with annual net sales or total assets of at least US $16.9 million, or vice versa[59]

As one may notice under the EUMR thresholds are based on the parties' turnover and also they are significantly higher than the thresholds provided by the HSR Act. On the other hand, the thresholds set in US Code, Chapter 15, Title 1, §18a, (a) (2) are different from the EU approach. The threshold in US is based on the size of the transaction and also on the size of the undertakings concerned. This distinction may be justified by the fact that if a proposed transaction does not meet criteria set by the US legislation it will not be examined by the Federal Merger Control Authorities. On the contrary, in EU if a transaction is not within the scope of the EUMR, there is a strong possibility to be within the scope of the Merger Control regimes of the Member States. Almost each Member State develops merger legislation, except Luxemburg. In some cases more than one Member State's authorities are capable to examine a transaction, which entails difficulties for the parties concerned and also uncertainty of the outcome of the investigations.

2.3. Contemporary Adequacy of the Thresholds System

As the economy today moves rapidly, especially in some sectors, one may wonder whether those systems of evaluation of the proposed transaction by measuring the turnover gained by the undertakings concerned or by assessing the size of the transaction itself, are adequate enough to address the current trends. One case recently posed a number of questions and sparked discussions about the value of the turnover thresholds system set in EUMR. On 3 October 2014, the Commission unconditionally approved in first phase the acquisition of WhatsApp by Facebook[60]. The transaction size was US $19 billion and this payment was offered for a company with a turnover of around €10 million[61]. This transaction surely was examined in US, but within the European Union it raised a lot of questions. First of all, undoubtedly this transaction constitutes a concentration within the meaning of Article 3(1)(b) of the EUMR, as according to the proposed deal and plan of

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[59] US Code, Chapter 15, Title 1, §18a, (a) (2) (A) and (B) (i) (ii)

[60] Case M.7217 – *Facebook/WhatsApp*, Commission decision of 3 October 2014, available at: http://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf

[61] see also 'Competition Merger Brief' 1/2015, 'What's Up with the Merger Control in the Digital Sector? Lessons from the Facebook/WhatsApp EU merger case' p. 1-7. Available here: http://ec.europa.eu/competition/publications/cmb/2015/cmb2015_001_en.pdf

merger WhatsApp was to merge with and into wholly owned subsidiaries of Facebook and as a result of this transaction Facebook was to solely control the entity into which WhatsApp would have merged[62]. But the EUMR relays on the 'Union Dimension' test based on turnover thresholds to identify the transactions that must be reviewed by the Commission. However the acquisition of WhatsApp by Facebook did not meet the thresholds of the EUMR, due to WhatsApp's turnover of around €10 million[63]. As it is stated transactions involving two parties, one of which generates less than €100 million in the EU will fall outside the scope of the Commission's Jurisdiction. So transactions that involve products that are offered for free or quasi-free to the consumers, generating little or no revenues, as is the case with WhatsApp, will typically fall outside the scope of EUMR, unless the parties generate turnover in other ways to meet the EU merger thresholds. In the light of growing importance of digital services for the EU economy, the large user bases[64] of mergering parties across the EU and the scope of the relevant market being at least EU – wide, an investigation of the Facebook/WhatsApp transaction by the Commission appeared appropriate. Although the transaction does not meet the turnover thresholds, it fulfils the two conditions set out in the EUMR, since it is a concentration and it is capable of being reviewed under the national competent laws of three Member States[65]. So the Commission was able to review the transaction following the pre-notification referral request, under Article 4 (5) of the EUMR, made by the acquiring party Facebook to benefit from the 'one-stop merger control' principle. In this case the mechanism of case referral was used to refer a significant case to the Commission, which otherwise would not be within the scope of the EUMR, but the case referral mechanism depends on a number of criteria, that may not be met in all cases. As a result of this situation discussions arose, whether turnover-based threshold is still the most appropriate yardstick for identifying the 'Community dimension' of a proposed concentration in the light of the digital sector, as opposed to the thresholds based on the value of the transaction, as it is stated in the US legislation. The IT sector is very fast moving and developing sector, but it gains more and more importance for the economy these days, and as such it

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[62] Case M.7217 – *Facebook/WhatsApp*, Commission decision of 3 October 2014, at paras (4) and (5)

[63] Ibid para (9)

[64] At the time of the Commission's decision, Facebook's social networking platform had 1.3 billion users worldwide, 250-350 of which were also users of Facebook Messenger app. WhatsApp had 600 million users worldwide and 50-150 million users in the EEA. See Case M.7217, Commission's Decision 3.10.2014 at para (84).

[65] Case M.7217 *Facebook/WhatsApp,* Commission's Decision 3.10.2014 at para (10).

is important for the merger authorities to be able to examine the deals between IT companies. The issue is that turnover-based thresholds do not properly reflect the future market potential of an IT company, which may not have significant revenue today, but may be expected to expand quickly. Another criticism to the turnover-based thresholds, in the light of the contemporary IT technologies is the fact that the personal data become a type of currency used by the consumers to 'pay' for the otherwise 'free' services of the companies like Facebook. This issue still remains open and new alternatives to the current turnover-based thresholds within the EU for transactions in the digital sectors are expected with great interest. These alternatives may be based on the size of the transaction or on the size of the parties concerned, as indicators of the significance of the concentration. Merger control regime requires a prospective analysis of future market events. Apparently it become even more challenging in the fast moving and developing IT sector, where services are often offered for 'free'. The discussed case shows that the EUMR fits to deal with such a specific cases, but subject to many criteria, which may not be met in all cases[66].

3. Multi-Jurisdictional Notifiable Events

Multi-jurisdictional mergers, like the case described above, become more frequent as the companies increasingly operate globally. As a result a large number of cross-border mergers and acquisitions between transcontinental companies are reviewable by a significant number of merger authorities. This globalisation become a challenge for the parties and for the competent authorities as the outcome of each investigation is uncertain. This calls for International enforcement cooperation in mergers for effective inter-agency collaboration and most importantly - for effective protection of the competition and business climate. The development of such cooperation may reduce duplication of work for the authorities, delays and burden for the mergering parties and thus to increase the investigative efficiency. The European Commission has actively engaged in bilateral and multilateral cooperation with many authorities in many countries outside the European Union in a large number of cases. One of these bilateral agreements is the one with the United

[66] Examples of transactions in the IT sector that did not met the turnover thresholds set in EURM and were not referred to the Commission include among others the Facebook's acquisition of Instagram /transaction size – US $1 billion/.

States[67]. The US - EU Merger Working Group Best Practices on Cooperation in Merger Investigations, hereinafter US-EU Best Practices, which were initially concluded between the commission and the two US competition agencies – FTC and DOJ, in 2002 and updated in 2011 in order to reflect the experience gained in a significant number of cooperation cases in the meantime.

3.1. Cooperation between the Competent Authorities

The cooperation between agencies is voluntary and does not limit them to take their own decisions independently. For example in *Holcim/Lafarge*[68], the Commission cooperated with several agencies, but most extensively with the US FTC and Canadian Competition Bureau. The collaboration was characterised mainly by regular tri-party calls discussions and exchange of remedy proposals[69]. Another good example for the close cooperation between US FTC and the Commission is the case *NXP/Freescale*[70]. The Commission cleared the proposed concentration, where NXP acquired Freescale, both manufacturers of electronic components, namely semiconductor. The transaction was cleared but subject to conditions, that were set as a result of the parallel review of the case by European Commission, the US FTC and several other authorities from China, Japan, Korea and Mexico. The cooperation in this case among agencies was essential to ensure a consistent outcome, subject to the same remedies in almost all jurisdictions in question[71]. Despite the good cooperation between the authorities, there are some special conditions in each case, which make sometimes cooperation not so successful. For instance, such case is the acquisition of Office Depot by its rival Staples, both US-based companies[72]. The Commission conditionally approved this concentration, but the US FTC, the Australian and the Canadian competent authorities reviewed the deal, apart from the Commission. Al-

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[67] US – EU Merger Working Group, 'Best Practices on Cooperation in Merger Investigations'. Available here: http://ec.europa.eu/competition/mergers/legislation/best_practices_2011_en.pdf

[68] Case M.7252 *Holcim/Lafarge*, Commission decision of 15 December 2012, available at: http://ec.europa.eu/competition/mergers/cases/decisions/m7252_20141215_20212_4126522_EN.pdf

[69] European Commission – Press release: Mergers: 'Commission approves acquisition of Lafarge by Holcim, subject to conditions'. Available at: http://europa.eu/rapid/press-release_IP-14-2683_en.htm

[70] Case M.7585 *NXP/Freescale*, Commission decision of 17 September 2015, available at: http://ec.europa.eu/competition/mergers/cases/decisions/m7585_925_3.pdf

[71] Competition Merger Brief 1/2016, '*NXP/Freescale:* global remedies in a 3 to 3 semiconductor merger' p.15-17, available at: http://ec.europa.eu/competition/publications/cmb/2016/cmb2016_001_en.pdf

[72] Case M.7585 *Staples/Office Depot*, Commission decision of 10 February 2016, available at: http://ec.europa.eu/competition/mergers/cases/decisions/m7555_5720_3.pdf

though the agencies had the opportunity to work together the outcome of the proposed transaction was different within the listed jurisdictions. Whereas the Australian agency approved the deal unconditionally, the US and the Canadian authorities decided to go to court to block the transaction. The different final outcomes in this case are not a result of misunderstanding between the authorities, but are due to the different market structures within the examined jurisdictions and diverging remedies offered in the respective territories. The outcome in US and Canada is also a result from the fact that the parties are the only two players within the US and the Canadian market and the transaction would have led a monopoly[73]. Thus in spite of the international cooperation among the competent authorities, the different market dynamics induce different outcomes. As can be seen the need for cooperation in multijurisdictional mergers is very specific for each case and can take different forms, from phone calls – discussions to remedy synchronisation. This collaboration is important, because it may reduce burdens and risks and to promote consistent outcomes. The cases described above attest to the potential benefits and the importance of the authorities' attempts for cooperation.

IV. The Substantive Test

Having addressed the notifiable events and the jurisdiction of the competent authorities, this work now seeks to clarify what will be observed by the competent agencies. Merger Control legislation aims to prevent possibilities in which a certain transaction, merger of acquisition, may by harmful to the market and to the possibilities to make it less competitive than it currently is, because such situation may lead to adverse effect not only for the market climate but also for the consumers. The main concerns are that the transaction may have adverse horizontal effect, but it may also have vertical and conglomerate effect. Moreover, it is also possible that one case give rise to more that one type of harmful effect on the competition as will see in the following sections.

[73] Competition Merger Brief 2/2016, 'Staples/Office Depot: House of Paper' p. 5-9, available at: http://ec.europa.eu/competition/publications/cmb/2016/cmb2016_002_en.pdf

1. The EU and the US approach of Assessment Horizontal Mergers

1.1. The applicable substantive test and the burden of proof

Once the European Commission has jurisdiction in relation to the proposed transaction, under the above rules, the authority has to determine whether the deal is 'compatible with the common market'[74]. '[T]he common market'[75] is the internal market of the EU[76] and the concentration is compatible if it 'would not significantly impede effective competition'.[77] The test, which was provided by the previous Merger Regulation of 1989,[78] was almost the same, as it used the same words, but the revised test stated with the new EUMR of 2004 posses a 'significant' innovation. The EU merger control originally was based on the prohibition of any abuse of Dominant position, as the Commission firstly succeed to exercise merger control under this rule.[79] The previous standard stated in the text of the first Merger Regulation asked whether the proposed concentration would create or strengthen a dominant position before determining whether the merger would significantly impede effective competition.[80] This formula was applicable to a numerous case, but it also was noticed that this formula left a gap. The test was applicable if there is dominance, but it was inapplicable to some mergers that could be harmful to the competition and to 'significantly impede it' but not be challengeable, because of the lack of dominance.[81]

While preparing the text of the new EUMR of 2004, the EU legislator has to solve this 'gap' and to decide whether the 'dominance test' would be still the best choice. An alternative was the stated principle in US Clayton Act, Section 7,[82] test called 'substantially lessen competition', which in its essence is asking whether 'the effect of such acquisition

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74 EUMR, Article 2(2) and Article 2(3).

75 Ibid.

76 See EUMR, Recitals 2 and 3.

77 EUMR, Article 2(2)

78 Council Regulation 4064/1989 on the control of concentrations between undertakings, OJ [1989] L 395/1

79 See Chapter II, Section 2, Subsection 2.1 on p. 6, see also: case Case *Continental Can*, Commission's decision of 09.12.1971, OJ [1972] L 7/25. /Case 6/72 Europemballage and Continental Can v Commission [1973] ECR 215.

80 Article 2(2) and Article 2(3) of the Council Regulation 4064/1989 /No longer in force/.

81 See for example Case M1524 Airtours/First Choice, decision of 22 September 1999, OJ [2000] L 93/1 and the appeal Case T-342/99 Airtours plc v Commission [2002] ECR II-5761.

82 §7 Clayton Act, 15 U.S.C. § 18.

may be substantially to lessen competition…'[83]. It turns out that the solution was very simple, the Council in the EUMR of 2004 retains the vocabulary of the cancelled Regulation of 1990 and thus retains the rule of dominance and at the same time fills the 'gap'. The revised test now is whether the concentration 'would significantly impede effective competition in the market, … in particular as a result of the creation or strengthening of dominant position'[84]. The lawmaker of the EUMR retains the basis of the 'dominance' as a particular way in which effective competition may be impeded by a proposed merger and, thus, preserves the guidance that was created by the case law of the Commission and the European courts under the rules of the Merger Regulation of 1989[85]. At the same time it gave clear statement that the EUMR of 2004 prohibits as incompatible with the common market any concentration which would significantly impede effective competition, in the common market, and that this rule exists beyond the concept of dominance[86]. Thus the jurisprudence was kept and the 'gap' was felt.

If the Commission decides to block a proposed concentration, it has to produce convincing evidence that this concentration is incompatible with the internal market. There is no presumption that the merger is compatible with or incompatible with the internal market[87].

The burden of proof is also on the competent authority in the US, although the substantive test stated with Clayton Act, Section 7 emphasises on the effect that the proposed deal may have on the competition. The original text of the Act, which is still in force today prohibits mergers 'in any line of commerce or in any activity affecting commerce in any section of the country' where 'the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly'[88]. In the course of answering the key question 'whether the merger under review is likely substantially to lessen competition' the US authorities shall run a 'competitive effect analysis'. While doing so the agencies examine whether the merger is likely to affect the competitive process, in such way that it may result in higher prices, lower quality, or reduced innovation. Since the authorities

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83 Ibid.

84 EUMR, art. 2(2) and art 2(3).

85 See Recital 26 of the EUMR.

86 See Recital 25 of the EUMR.

87 See for example: case C-413/06 *Bertelsmann and Sony Corporation of America v Impala* [2008] Judgement of the Court of 10.07.2008, European Court Reports 2008 I-04951, see para 48, available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62006CJ0413

88 §7 Clayton Act, 15 U.S.C. § 18.

shall predict the situation after the transaction they need an analytical framework for assessing the effect that the merger may have. Competent US authorities are required to ask whether the merger may increase market power of the parties concerned and thus to enable them to increase prices or otherwise to exercise market power[89]. The FCT and DOJ have issued 'Horizontal Merger Guidelines', issued first in 1992 and most resent in 2010 (hereinafter the US Guidelines) that outline the main analytical questions, practices and enforcement policies, which the authorities may use to evaluate mergers and acquisitions involving actual or potential competitors[90].

1.2. Defining the Relevant Market

Competent authorities within both Merger regimes shall start the substantive assessment of the deal defining the market and more specific the relevant product and geographical market. It is important to identify the competitive situation of the parties concerned and to determine their positions within the affected market[91]. In some cases parties may argue that the affected relevant marker is broader than the authority has determined, so that additional participants are included in the market and the mergering parties' market share is smaller and thus also their competitive significance is lower. A good example is one of the attempts for acquisition of Office Depot by Stables in USA, specifically the one in 1997. At that time there were three major office suppliers superstore chains in US prior to the proposed merger. The merger was challenged before the competent District Court by the FTC[92]. The mergering parties argued before the court that FTC did not determine correctly the product market and that it was broader. They claimed that they face competence from the mass stores that sold among other things also office supplies, like Wal-Mart, K-mart and Target. But the court found that those stores were mainly in a different

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[89] See 'Commentary on the Horizontal Merger Guidelines' [2006] pages 2-3, available here: https://www.ftc.gov/sites/default/files/attachments/merger-review/commentaryonthehorizontalmergerguidelinesmarch2006.pdf

[90] 'Horizontal Merger Guidelines', issued by the FTC and the DOJ, 19.08.2010, hereinafter US Guidelines. Available here: https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf

[91] 'Commission Notice on the definition of relevant market for the purposes of Community competition law' OJ [1997] C 372/5, see para 2, available here: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31997Y1209(01)

[92] Fed.Trade Comm. V. Staples Inc., 970 F.Supp. 1066, 1093 (D.D.C. 1997) United States District Court, District of Columbia, decision on June 30, 1997, available here: https://law.justia.com/cases/federal/district-courts/FSupp/970/1066/1639260/

market, because their presence did not significantly affect the pricing of office supply superstores. This case is a good example that it is decisively important to determine correctly the relevant marker. However the market definition is a starting point for a merger analysis, but could not be binding for the authorities in their further in-deep investigation or for the courts while review each case, because each case shall be reviewed according to the particular facts and circumstances[93].

To provide legal certainty to the mergering parties the reviewing authorities within the concerned legislative systems adopt Guidelines, as was stated above. The Commission's Guidelines on the assessment of horizontal mergers[94], issued most recently in 2004, (hereinafter the EC Guidelines) defines similarly to the US Guideline, how the agency in charge assess a deal, outline the techniques and practices used by them at this process, when the parties concerned are actual or potential competitors on the same relevant market[95]. One of the first examinations that the authorities shall undertake is to determine the market shares of the undertakings and to define the concentration of the affected market.

1.3. HHI Test

In the course of determining the market shares of the parties to a proposed concentration, the reviewing agencies make one other determination. They need to clarify the overall concentration level of the concerned market, in order to decide what would be the competative post-merger situacion in the relevant market. In order measure the level of concentration of the market and to make a prediction regarding the post-merger situacion, the competent authorities within the both jurisdictions use the HHI[96] test. This is a simple formula that sums up the squares of the individual market shares of all the competitors on the relevant market and the higher the total, the more concentrated the market is. So if the total is higher this would indicate that the transaction would impide the copmetition on

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93 See US 'Horizontal Merger Guidelines' [2010], point 4, page 7, and also Joint Cases *Coca-cola Co v Commission* T-125/97 and T-127/97 [2000] Judgement of the Court of First Instance of 22.03.2000 ECR 2000 II-01733, among others see para 48**.** Court Decision is available here: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A61997TJ0125

94 Guidelines on the assessment of horizontal mergers under the Council Regulation on the Control of Concentrations between Undertakings, hereinafter EC Guidelines. OJ [2004] C 31/5, available here: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:031:0005:0018:en:PDF

95 EU Guidelines para 5 and US Guidelines §1 Overview.

96 Herfindahl-Hirschman Index

the relevant market, as it will make the market more concentrated[97]. The concentration levels, as set within the jurisdiction of the EUMR[98] will be low if the total is below 1000, it will be moderated if the total is between 1000 and 1800 and it will be high if the total is more than 1800. The US legislation set relatively higher levels for the total amount. Pursuant to the US Guidelines the concentration on the market is low if the total of the HHI is below 1500, it is moderated if the total HHI is between 1500 and 2500 and the concetration is high if the total is more than 2500[99]. The application of this test shows that market where the competitors are many and each of them has relative small market share, this would be market with low level of concentration, offer more competative environment. This is simple, but effective way to determine the situacion on the relevant market. The results of the HHI test give the reviewing authorities an initial indicator about the competative situacion on the relevant ayket, but may not serve as a presumption of the existance or the absence of the impediment of the competition on the market.

1.4. SSNIP Test

The US agencies give an answer to the question what constitutes the actual relevant market by relaying to what is known as the 'hypothetical monopolist test' to define a market structure[100]. This test is designed to evaluate whether two or more products or a groups of products are within the same market and more specifically whether these products are interchangeable. The authority is doing so by measuring whether a significant number of customers would choose an alternative product if the seller increased the price. The test is examining whether

> *"[A] hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products ("hypothetical monopolist") likely would impose at least a small but significant and non-transitory increase in price ("SSNIP") on at least one product in the market"*[101]

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97 EC Guidelines, para 14 and para 16.
98 EC Guidelines, para 19 and para 20.
99 see US Guidelines §5.3.
100 US Guidelines §4.1.1.
101 Ibid.

In order to be useful the SSNIP test the price increase shall be considered 5% - 10% and the business should still be profitable.
The Commission adopts similar ‘hypothetical monopolist test’ as the one described in the US Guidelines[102] and use a similar test in the course of defining the relevant market[103]. The test is a part of the initial investigation and helps to the authorities to clarify the picture of the transaction, but recently this test is attracting criticism. The test is designed to assess the extend to which products and services are currently substitutable with one another, but it is unlikely to help in determination of the interchangeability of the technological developments that may occur in the foreseeable future. The essence of the test is to determine the behaviour of the consumers if the product or the service become more expensive, but the test is useless if the product is offered for free to the users, as the products in the Commission’s merge case *Facebook/WhatsApp*[104].

1.5. Theories for Possible Harm for the Competition

Since the Authorities determine the affected market they shall assess the possible anti-competitive effect that the concentration may have. The authorities have identified several theories of competitive harm. The Guidelines adopted by the both legislations divide the possible harm into two main categories: ‘Unilateral effects’[105] or as it also known ‘Non-Coordinated effects’[106] and ‘Coordinated effects’[107].

1.5.1. Unilaterial Effects or Non-Coordinated Effects

‘Unilateral effects’ as defined in US Guidelines refers to a lessening of competition caused by the disappearance of a competitor in the market. This single fact may constitute

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[102] Whish; Bailey, Competition law, 8th edition [2015] (Oxford University Press), ch. 1 (A), p. 27.
[103] Commission Notice on the definition of relevant market for the purposes of Community competition law, see para 40.
[104] Case M.7217 – *Facebook/WhatsApp*, Commission’s decision of 3 October 2014. See also ‘Competition Merger Brief’ 1/2015, ‘What’s Up with the Merger Control in the Digital Sector? Lessons from the Facebook/WhatsApp EU merger case’, Section 3.
[105] US Guidelines §6
[106] EU Guidelines, para 24-38.
[107] EU Guidelines, para 39-57 and US Guidelines 7.

a substantial lessening of competition[108]. If the agency finds that before the merger direct competition between the mergering parties led to lower prices, increased output or innovation, or other benefits to the consumers, the agency is likely to find the merger anti-competitive.
EU Guidelines name this 'Unilateral Effect' as 'Non-coordinated effect'[109]. And the rule emphasises not on the removal of one competitor, but on the removal of important competitive constraints on one or more sellers, which may lead to increasing the market power of these sellers. Para 24 of the EU Guidelines outlines as the most direct recognisable 'Non – Coordinated' effect, the loss of competition between the mergering parties. In the same fashion as the US authorities, would find such merger to be anticompetitive, the Commission would find it incompatible with the internal market, because it may result in 'significant price increase in the relevant market'[110].

1.5.2. Coordinated Effects

'Coordinated effects' as described in the both guidelines refer to a situation where the proposed merger may create very few substantial competitors within the market and thus to enable them to coordinate their prices or otherwise to impede competition. According to the guidelines[111] a merger in already concentrated marked increases the ability of the competitors to coordinate their behaviour even without entering into any agreement or resorting to a concerted practice contrary to Article 101 TFEU.

1.5.3. Potential Harm

The above-described theories of competitive harm are not the only outlined harms in the guidelines. The EU Guidelines state a specific potential harm where a 'Merger with a potential competitor'[112] may significantly impede effective competition. This is a situation where an undertaking that is already active on the relevant marker merges with a potential competitor, that is still not a part of the relevant market, but there is a strong

[108] US Guidelines §6.
[109] EU Guidelines, paras 24 – 38.
[110] EU Guidelines, para 24.
[111] EU Guidelines, para 39 and US Guidelines §7.
[112] Ibid, para 58-60.

likelihood that this potential competitor will enter the market. A concentration of this type may lead to non-coordinated, or coordinated, effects where the potential competitor significantly constrains the behaviour of the undertakings active on the market. There are two basic conditions that shall be fulfilled, thus the Commission may find that the proposed merger has a significant anti-competitive effect. First of all the potential competitor shall exercise a constraining influence on the market or an evidence that its competitive force will grow, like for example a proof that the potential competitor will enter the market in a significant way. Secondly, there should not be a sufficient number of potential competitors, that would be able after the proposed merger to exercise a competitive pressure and thus to ensure the effective competition.

A similar competitive harm is described also in the US Guidelines, point 5.3, the section concerning the Market Concentration. The text states that while examining a merger between incumbent or active on the relevant market undertaking and a recent or potential entrant, the competent authority shall evaluate the competitive effect or the possible competitive harm by using the change in the market concentration. It says that merger with a potential competitor may 'raise significant competitive concerns'[113]. It also says that the harm effect is more likely to be significant, the larger is the market share of the active entity on the relevant market, the greater is the competitive significance of the potential entrant, and the greater is the competitive force of the potential entrant and also the more certain is its potential entrance on the market.

It is clear that the competent authorities within the concerned jurisdictions are looking for similar competitive harms and once the relevant market has been defined, the agencies are determining in a similar way, lead by similar rules, all the possible competitive constraints that the examined deal may cause to the effective competition.

1.6. Countervailing Factors

On the other hand the parties of the transaction may not stay indifferently while the investigation is going and can alleviate the authorities and courts in their concerns with some of the arguments described below.

[113] US Guidelines §5.3.

1.6.1. 'Buyer Power'

One very interesting figure is that of the 'Powerful buyer'[114]. The agencies consider the possibility that powerful buyers may constrain the ability of the mergering parties to raise prices. This may be, for example if a powerful buyer has the ability and incentive to vertically integrate upstream or downstream entity. This is the ability of consumers to counter the increase in the market power that the proposed merger may create. The buyer power may be countervailing if it is strong enough due to its size, commercial significance and the ability to switch to other suppliers, or to negotiate prices of output with the seller.

The EU Guidelines contain also some additional rules concerning the buyer power, through a different perspective. It is the section 'Mergers creating or strengthening buyer power in upstream markets'[115]. The essence of this is that the Commission may examine to what extend the new mergered entity will increase its 'Buyer power'. If the merger would create or strengthens the market power of the buyer this may significantly impede effective competition. The commission shall examine very carefully the position of the buyer and its market power, because despite fact that it may be harmful for the competition, buyer power may also be beneficial for competition. If the increased buyer power may decrease input costs without restricting downstream competition or total output. In this case these cost reductions may be passed on the consumers in the form of lower price and thus to be beneficial for the effective competition. So it is a delicate element of the assessment process for the competent authorities.

1.6.2. The 'Entry' Factor

Other statutorily mandated factor that the competent authorities in both jurisdictions are obliged to take into account and that constitutes an important element of the overall competitive assessment is 'the Entry' factor. This factor indicates that the proposed merger is unlikely to entail significant impediment in effective competition if entry into a market by a new competitor is sufficiently easy. EU Guidelines[116] and US Guidelines[117] contain

[114] EU Guidelines, para 64 - 67 and US Guidelines §8

[115] EU Guidelines, para 6a - 63.

[116] Ibid, paras 68 – 75.

very similar rules in this field. The essence of this rule is that the proposed transaction may induce other undertakings to enter the relevant market and thereby to eliminate or to alleviate the supposed harm to the competition posed by the merger. Section 9 in the US Guidelines refers to the figure of future market participants[118] and future market shares[119], stated earlier in the act. It says that undertakings that would easily enter the market, as a result of the merger, shall be considered by the authorities as market participants, as described in section 5.1 of the US Guidelines, and their suggested market share shall be taken into account when the agency assess the result of the merger for the relevant market. The entry is only considered as effective and sufficient competitive constraint for the mergering parties and as a counteraction to the possible anticompetitive harm by the merger, if the entry of new one or more undertakings would be timely, likely to occur and sufficient to overcome the anti-competitive effect of the merger. Such arguments are most effective in industries with a history of entry and low switching costs for customers.

1.6.3. The 'Efficiency Theory

The proposed transaction may create pro-competitive effect and thereby to counteract the adverse effect on the competition, which may otherwise cause. The 'Efficiency' theory is stated in both jurisdictions[120]. One of the benefits of the effective competition is that it stimulates undertakings to achieve efficiency within their field. A merger may generate efficiencies for the mergering parties, enabling them to compete more effectively within the relevant market and thereby to reduce prices or to increase output, which result in benefit also for the customers. These possibilities shall be taken into account by the competent authorities while appraise a proposed deal. The agencies in EU and US may conclude on the basis of sufficient evidence that the efficiency generated by the merger is likely to overcome the adverse effect on competition, which the merger may otherwise have. However the efficiency is not the ultimate 'defence'. If the merger would lead to significant impediment of the effective competition it will not be saved on the efficiency grounds, even when the efficiency significantly enhance the firm's ability for effective

[117] US Guidelines §9

[118] US Guidelines §5.1.

[119] US Guidelines §5.2.

[120] EU Guidelines para 76 – 88 and US Guidelines §10, see also Recital 29 of the EUMR.

competition, it may have other effects that lessen competition and thus make the merger anti-competitive.

The Authorities shall take into account any possible efficiency into the overall assessment and it is not enough that the efficiency is beneficial to the customers. It also need to be reasonably verifiable in such way that the authority will be reasonably sure that the efficiency will be realised and this efficiency should be merger specific, it shall be a direct result of the reviewed transaction and the effect is not possible to be achieved by other way. Speculative efficiencies or efficiencies that could come without the transaction will not be credited by the examinatinging authority. Although the efficiency is given extensive consideration and is assessed carefully in each case, in many cases the authorities, despite the number of efficiencies, prohibit or challenge, depends on the jurisdiction, the proposed transaction. A good example is the case *UPS/TNT Express*[121], where the Commission gave a wide attention to the efficiencies noted by the parties, but nevertheless prohibited the transaction[122]. In other cases the agencies conclude that the deal would lead to efficiencies and thus clear the transaction. A good example is the case *Nynas/Shell/Harburg Refinery*[123]. In this case the efficiency was not the only incentive of the Commission to accept the acquisition of Shell's refinery at Harburg by Nynas, but also because without the acquisition the Refinery would be closed[124]. This context partly leads to the 'Failing firm defence'.

1.6.4. The 'Failing Firm' Defence

'Failing firm defence' is available within the both jurisdictions[125]. In its essence this principle means that without the proposed merger one of the mergering parties will fail. This is a kind of 'rescue merger', because otherwise one of the parties will exit the market, which entails other negative effects to the market. Thus the competent agency may decide that otherwise problematic merger is capable of being found compatible with the market for the purpose of rescue the failing firm. There are some relevant criteria, which are

[121] Case M 6570 *UPS/TNT Express*, Commission's decision of 30.01.2013, available here: http://ec.europa.eu/competition/mergers/cases/decisions/m6570_20130130_20610_4241141_EN.pdf

[122] Ibid, paras 807 - 922

[123] Case M 6360 *Nynas/Shell/Harburg Refinery*, Commission'sdecision on 02.09.2013, paras 443-474, available here: http://ec.europa.eu/competition/mergers/cases/decisions/m6360_5463_2.pdf

[124] Ibid, paras 326-327, see also paras 454 and 472.

[125] EU Guidelines paras 89 – 91 and US Guidelines §11.

slightly different in EU and US legislation. Under the EU Guidelines the relevant criteria are as follows:

> First, the allegedly failing firm would in the near future be forced out of the market because of financial difficulties if not taken over by another undertaking.
> Second, there is no less anti-competitive alternative purchase than the notified merger.
> Third, in the absence of a merger, the assets of the failing firm would inevitably exit the market[126]

Under the US Guidelines there are also three criteria, which are slightly different, due to the different legislative structure in EU and US and they are close to the US concept of Bankruptcy. The criteria are as follows[127]:

> (1) the allegedly failing firm would be unable to meet its financial obligations in the near future;
> (2) it would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act;
> And
> (3) it has made unsuccessful good-faith efforts to elicit reasonable alternative offers that would keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger.

EU legislation does not make a distinction if it is a failing undertaking or a division of it, as seen in the case *Nynas/Shell/Harburg Refinery*. However, the US legislator takes a different approach. It is stated in the US Guidelines that the agencies do not usually credit claims that the assets of a division would exit the relevant market in the near future, unless the proposed merger is allowed[128]. The legal text states two criteria, under which a claim for failing division would be taken into account. The first is that the division has a persistent negative cash flow and the second is that the owner of the failing division has already made unsuccessful efforts to attract alternative less anti-competitive offers.

[126] EU Guidelines para 90.
[127] US Guidelines §11, see second paragraph.
[128] US Guidelines §11, see third paragraph.

In cases where the parties claim the 'Failing Firm' defence the competent authorities shall very carefully examine the proposed mergers and any possible alternative solutions and to assess correctly the importance and the veracity of the claims made by the parties.
The substantive tests, that the authorities conduct and the theories that they shall take into account in the course of the assessment of a proposed transaction, that were described above concern the Horizontal Mergers, transactions between competitors within the same relevant market. There are also transactions between undertakings operating within different, but complementary levels of the market that are described as Non-Horizontal or Vertical Mergers. The investigation of non-horizontal mergers by the competent authorities will be discussed in the following lines.

2. The EU and the US approach of Assessment Vertical Mergers

Generally vertical mergers are not expected to have harmful effect on the competition, however there is a possibility that vertical integration may impede the effective competition, either because it could prohibit other potential competitors from entering the relevant market or it may lead to collusion between the merged entity and third parties. So because Non-horizontal mergers are less likely to impede the competition than the Horizontal ones, they have been of less concern to legislators. For the period from 1996 to 2011 FTC issued a second request for information in 264 Horizontal mergers and only 28 Vertical mergers, out of the total number of 464 transactions[129]. The first US Merger Guidelines were issued in 1968[130] and were amended many times, but the last Guidelines that included Non-Horizontal Mergers rules were the Guidelines issued in 1984[131] in its Fourth Section named *'Horizontal effect from non-horizontal mergers'* which is still in force, although the Guidelines from 1984 were amended many times, but in these amendments Vertical Mergers Rules were not included and they concern only Horizontal Mergers. The rules regarding the Vertical Mergers stated in the Guidelines from 1984 refer to foreclo-

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[129] Federal Trade Commission, Horizontal Merger Investigation Data, Fiscal years 1996-2011, issued January 2013, p. 7, available here: https://www.ftc.gov/sites/default/files/documents/reports/horizontal-merger-investigation-data-fiscal-years-1996-2011/130104horizontalmergerreport.pdf
[130] DOJ 1968 Merger Guidelines, available here: https://www.justice.gov/archives/atr/1968-merger-guidelines
[131] DOJ 1984 Merger Guidelines, available here: https://www.justice.gov/archives/atr/1984-merger-guidelines

sure entry for potential competitor into a market[132], facilitate collusion between suppliers to increase prices in the market[133] or enabling a monopoly public utility to circumvent rate regulations by buying a supplier[134].

The concept of foreclosure entry is that a non-horizontal merger, by preventing a competitor to enter one market, would harm or lessen the competition. The act envisages the requirement of 'two-level entry'[135], which sense is that the proposed vertical transaction is more likely to be harmful if the potential competitor can not enter only to the primary market, but in order to be able to compete profitably shall enter simultaneously a downstream and upstream market.

A good example of Vertical Merger analyse is the acquisition of *ITA Software by Google*[136]. Within the USA, Google was the leading search engine provider in the US and ITA Software was leading independent provider of travel airfare searches, by certain criteria as price, schedule, airline and others. The Antitrust Division of the Department of Justice claimed that although Google is not a participant in the 'travel market', by acquiring ITA and using its software to power Google flight search results may significantly harm competition, because it would impede companies that are currently using ITA's software to provide airfare search results, as they would depend on Google, who is their rival within the same market of search engine providers[137]. In order to diminish the potential harm on the competition Google was required, among other things, to continue licensing ITA' software to competitors for a certain period of time on 'fare, reasonable and non-discriminatory terms which includes the right to use ordinary course upgrades' to the software at no additional charge[138].

On the other hand, EU jurisdiction treats the Vertical mergers different than the US jurisdiction treats it, for several reasons. At first place, EU legislation in the field is much younger than the US and the approach that the Commission has taken is based on many reports and researches, on a solid case law examples and well-known economic practices

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[132] DOJ 1984 Merger Guidelines, section 4.1.

[133] DOJ 1984 Merger Guidelines, section 4.22.

[134] DOJ 1984 Merger Guidelines, section 4.23.

[135] DOJ 1984 Merger Guidelines, section 4.211, see also in this Guidelines footnote 31.

[136] United States v. Google Inc. and ITA Software Inc., Case № 1:11-cv-00688, available at: https://www.justice.gov/atr/case-document/file/497686/download

[137] Ibid, para 38.

[138] Final Judgment, United States v. Google Inc. and ITA Software Inc., Case № 1:11-cv-00688, Section IV, Decision of 05 October 2011 available at: https://www.justice.gov/atr/case-document/file/497636/download

and analysis[139]. In its Final Report of 2004, *The Impact of Vertical and Conglomerate Mergers on Competition,* the author based the research, among others, on the US findings on the topics, and more specific, on learning associated with the famous Chicago Law School, that the problem that may occur with Vertical mergers is the potential for a monopolist on the upstream market to exercise its market power downstream by vertically integration[140]. As was shown earlier in this work, US merger regulations are mainly based on the harm that the monopolisation on the market may create. However, the EU merger regulations were not based on the theory of monopoly. The Commission's approach on Vertical Mergers was based on a solid ground of researches and in 2007 the Commission published *Guidelines on the assessment of non-horizontal mergers*[141], hereinafter 'The EU Non-Horizontal Guidelines'. This act develops guidelines regarding concentrations of undertakings that are active on different relevant markets[142]. According to the rules of this act, the Commission assess much broadly Vertical Mergers than the competent authorities in the US. The Commission shall measure the Market Shares of the parties concerned and to assess the concentration levels of the relevant markets. However the Commission is not likely to find concerns if the market share of the new merged entity in each of the relevant markets is below 30% and the post-merger HHI of the relevant market is below 2 000[143]. As while assessing a horizontal merger, the measuring of market shares and of the concentration levels is a useful initial tool of assessing the market power of the parties concerned[144]. Although non-horizontal mergers are believed to be less likely to impede effective competition, the Commission is looking for possible non-coordinated and coordinated effects of such[145].

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[139] See Church and Department of Economy, University of Calgary for the DG COMP, *The Impact of Vertical and Conglomerate Mergers on Competition*, Final Report (2004), available here: https://publications.europa.eu/en/publication-detail/-/publication/d95d239c-2844-4c95-80a4-2181e85e8329/language-en

[140] Ibid, Section 5, p. 4.

[141] 'Guidelines on the assessment of non-horizontal mergers' OJ [2008] C 265/6, available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52008XC1018%2803%29

[142] Ibid, para 2.

[143] Ibid, para 25, see also para 26, containing some exceptions of this rule.

[144] Ibid, para 27.

[145] Ibid, para 17.

2.1. Non-Coordinated Effects

The non-coordinated effect is stated in the EU Non-Horizontal Guidelines as *Foreclosure.* This term describes the foreclosure that is a result of the proposed merger, of actual or potential competitors of access to the relevant market. This, as set in the text, may discourage any rivals for entry the relevant market or to encourage them to exit it[146]. This theory reminds the US approach in the Guidelines from 1984, Section 4.1, regarding the foreclosure entry for potential competitor into a market. However, the EU Non-Horizontal Guidelines distinguishes two forms of foreclosure.

2.1.1. Input Foreclosure

The first is 'Input foreclosure'[147]. It is where the merged entity is likely to restrict the access to important input for its rivals on the downstream market and thus raise their costs and make it more difficult to compete.

2.1.2. Customer Foreclosure

The second one is 'Customer foreclosure'[148]. This is the case where one of the parties of the proposed merger is an important customer in the downstream market. Such merger is likely to foreclosure the upstream rival of one of the parties by restricting their access to their important customer.

In all the cases the Commission shall investigate the ability and the incentive of the parties concern to foreclose the access of their competitors and the overall impact on the effective competition of the proposed transaction.

2.1.3. Access to Commercially Sensitive Information

146 Ibid, para 29.
147 Ibid, para 31.
148 Ibid, para 58.

The EU Non-Horizontal Guidelines briefly state another type of non-coordinated effect by the Vertical Merger[149]. It is the case where as a result of a vertical integration a competitor gains access to commercially sensitive information about its rivals in upstream or downstream market. This may be harm to the competition because it may put the competitors 'at a competitive disadvantage'[150].

2.2. Coordinated Effects

Based on the EU Non-Horizontal Guidelines, other effects that Vertical Mergers may have are 'Coordinated effects'. This is described in paras 79 – 90 of the EU Non-Horizontal Guidelines and is the possibility where, similarly like the horizontal merger, the proposed transaction may enable the coordination between the competitors on the market or if it is already possible, to make it easier, than it previously was. The legislative act describes four issues that the Commission shall take into account while examining such situation, namely: Reaching terms of coordination[151]; Monitoring deviations[152]; Deterrent mechanisms[153] and Reactions of outsiders[154]. One interesting case regarding this matter and some other aspects that are worthy to mention is the case *Google/DoubleClick*[155], both parties are based in USA. On the first place, from the competition policy prospective this is a good example and an interesting issue, because this case was the first attempt of the Commission to assess non-horizontal effects under the rules of the EU Non-Horizontal Guidelines. This case is interesting for many other reasons. For instance it covers not only vertical, but also horizontal aspects, and there were data protection issues, as well as an example of cooperation between the Commission and the competent US authority.. However, regarding the vertical aspect of the proposed acquisition in this particular case the Commission was examining non-coordinated effects, types of foreclosure. The case was within the jurisdiction of EU and USA authorities at

149 Ibid, para 78.
150 Ibid.
151 Ibid, paras 82 – 85.
152 Ibid, paras 86 – 87.
153 Ibid, para 88.
154 Ibid, paras 89 – 90.
155 Case M 4731 *Google/DoubleClick*, Commission's decision on 11 March 2008, available here: http://ec.europa.eu/competition/mergers/cases/decisions/m4731_20080311_20682_en.pdf

the same time[156]. They cooperated closely for the investigation of the case, but the both agencies made their independent assessment of the transaction. However, they assessed the transaction very similarly and reached also close conclusions, that the proposed acquisition would not be harmful for the competition under the respective merger control rules[157]. This case, among other things, illustrates how the EU Non-Horizontal Guidelines was applied for the first time.

3. Assessment of Conglomerate Mergers

The EU Non-Horizontal Guidelines covers also the notion of 'Conglomerate mergers'. These mergers are not horizontal, nor vertical, between undertakings that are active within closely related markets[158]. The text underlines that this type of mergers are unlikely to result in a harm for the competition, but it also specifies some cases, where conglomerate mergers may result in competition problems[159]. The act divides the effects that conglomerate mergers may have into two types: Non-coordinated effects and Coordinated effects.
The Non-coordinated effects are, as was with the vertical mergers, explained with the foreclosure effect that they may have. The combination of products in related markets may enable the merged entity to use its strong market position by means of terms like 'tying' or 'bundling'[160]. Tying is a term used to illustrate a situation when one product – the tying product, may be bought, for example, only if the buyer also buys the second product – tied product. Bundling is a situation where two products are sold as a single package at one price. These are common practices that may not have anticompetitive effect. However, in some cases these practices may result in decrease of the ability or the incentive of competitors to compete, which shall be find as a harm to the competition by the Commission. In the course of its investigation in this field, the Commission will also assess the

156 For the conclusions on the same case made by the US authority FTC, see: https://www.ftc.gov/news-events/press-releases/2007/12/federal-trade-commission-closes-googledoubleclick-investigation

157 see also: 'Google/DoubleClick: The first test for the Commission's non-horizontal merger guidelines', Competition Policy Newsletter, [2008] issue 2, p. 53, available here: http://ec.europa.eu/competition/publications/cpn/cpn_2008_2.html and the article here: http://ec.europa.eu/competition/publications/cpn/2008_2_53.pdf

158 EU Non-Horizontal Guidelines, para 91.

159 Ibid, para 92.

160 Ibid, para 93.

ability and the incentive of the parties to foreclose their competitors and also the overall impact on the competition.

The possibility that conglomerate mergers may have Coordinated effects is stated in paras 119 – 121 of the EU Non-Horizontal Guidelines. It may be, for example the case where by reducing the number of effective competitors, the tacit coordination between a small numbers of competitors may be easier[161].

The Conglomerate Merger policy of the European Commission differs in many lines from the general lack of concern with conglomerate mergers by the US merger regulations. Conglomerate mergers, as non-horizontal mergers, were last regulated with the 1984 Merger Guidelines[162]. One early case reflects the attitude that the Merger legislation first had through the conglomerate mergers. It was the leading case *FTC v. Procter&Gamble* in 1967[163], known also as *the Clorox case*. Procter&Gamble and Clorox were two undertakings, both based in US and operating in close, but different relative markets. Procter&Gamble – a manufacturer of household products, excluding blench, proposed to acquire Clorox – the largest manufacturer of a blench. Blench was the only product manufactured by Clorox. The court find that the transaction will eliminate the *potential competition* between the parties, that may occur if Procter&Gambre enter the market of blench, without the acquisition of the largest blench producer. Years after this case, the Merger Guidelines of 1984 reflected some of the *Clorox case* conclusions, and distinguished two possibilities for challenging a conglomerate merger. Section 4.11 of the Merger Guidelines of 1984, stated that conglomerate merger[164] with a potential entrant of the relevant market may be harmful to the competition, by eliminating a significant present constraint, that keeps the competition in the market[165] or by eliminating the possibility of the acquiring party to enter the market in a more precompetitive manner[166].

One of the grounds on which the acquisition Procter&Gamble/Clorox was blocked in 1967 was that the dominant firm in one market will be able to dominant also a complementary market if it acquire a significant participant in the complementary market and this

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161 Ibid, para 120.

162 DOJ 1984 Merger Guidelines.

163 FTC v. Procter&Gamble Co., 386 US 568, (1967), U.S. Supreme Court, Decision 11 April 1967, available here: https://supreme.justia.com/cases/federal/us/386/568/case.html#578

164 see: DOJ 1984 Merger Guidelines, footnote 25 explains that the text of this article does not make difference between the labels 'non-horizontal' of 'conglomerate' merger.

165 DOJ 1984 Merger Guidelines, §4.111.

166 DOJ 1984 Merger Guidelines, §4.112.

may result in a barriers for new competitor to enter the market. The court at that time refused to consider efficiency as a mitigating factor, by stating: 'Possible economics cannot be used as a defence to illegality. Congress was aware that some mergers which lessen competition may also result in economics, but it struck the balance in favour of protecting competition.'[167] Later in the development of the legislation in this field the legislator consider the efficiency as a stronger defence for a proposed merger[168]. The change in the importance of these principles regarding conglomerate merger, may be recognised also in the letter case *General Electric/Honeywell*. The case was reviewed by the US regulators and also by the European Commission. The authorities, based on the principles in their legislations, took different approach through this merger. Both parties were US companies, active in close markets. The Antitrust Division of the Department of Justice cleared the merger after they reached an agreement with the parties on the competitive constrains, regarding the transaction and allowed the merger to proceed. The attitude taken by the European Commission faced a vast critics within the US[169] for its decision to block the transaction as 'incompatible with the common market'[170]. The Commission blocked the merger on the basis on the theory that the dominant firm in one market will be able to dominant also a complementary market if it acquire a significant participant in the complementary market and this may result in a barriers for new competitor to enter the market.

In this case and in their legislative attitude the US and the EU merger control authorities took different decisions, regarding the control of conglomerate mergers. The US authorities do not indicate any interest in the field, as may be noted in the Guidelines issued during the last decades, where the rules regarding conglomerate mergers are omitted. The European Commission considers that conglomerate mergers are not likely to lead to any competition problems in most of the cases, but it also keep its methods and principles to investigate critically them, if find it necessary.

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[167] FTC v. Procter&Gamble Co., 386 US 568, (1967), U.S. Supreme Court, Decision 11 April 1967, at para 580.

[168] DOJ 1984 Merger Guidelines, §4.135.

[169] for the US comments see 'Remarks of Majoras Deborah, Deputy Ass Att Gen, AD DOJ, on the case General Electrics/Honeywell, before the Antitrust Law Section, State Bar of Georgia, 29 November 2001', available here: https://www.justice.gov/atr/speech/ge-honeywell-us-decision

[170] Case M 2220, *General Electrics/Honeywell*, decision on 03 July 2001, available here: http://ec.europa.eu/competition/mergers/cases/decisions/m2220_en.pdf

V. Competent Authorities:

This chapter aims to describe the work of the competent authorities in the concerned jurisdictions. It will discuss the structure of the agencies, the appointment of their members, and will highlight the difficulties, and also the assistance that the authorities face in the course of their work. The aim of this chapter is to outline the differences and the similarities between the US merger control institutions and the relatively younger EU merger control regulator.

1. The Structure of the Competent Authorities

One of the major differences between the US and the EU approach through the merger control is the structure of the competent authorities. While in the EU there is only one enforcement institution – European Commission, under the EUMR, in the US, there are two federal competent Authorities – the Antitrust Division of the Department of Justice (herein AD of the DOJ), and the Federal Trade Commission (herein FTC).

1.1. US federal Merger Control Authorities

Moreover, the both US authorities as two different institutions differ in their structures. While the AD of the DOJ is heated by a single Assistant Attorney General for Antitrust, appointed by the President, the FTC is headed by a board of five members – no more than three of whom may be members of the same political party. And while the AD of the DOJ is responsible only for the antitrust law and policy, the FTC has three distinct policy mandates: antitrust, consumer protection and privacy[171].

These two US federal agencies have also some similarities concerning their structure. They both consist mainly of two groups of employees: economists and attorneys. These two groups bring balance in the different points of view of the law and the economic prospective of one transaction.

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[171] see Kovacic W., Mivroidis P. and Neven D., 'Merger Control Procedures and institutions: A comparison of the EU and US practice, see p.11. Available here: http://cadmus.eui.eu/bitstream/handle/1814/29938/RSCAS_2014_20.pdf?sequence=1&isAllowed=y

The structure of the FTC may cause some obstacles to the merger assessment process, as it requires the vote of the majority of the board of five members, by contrast the decisions in AD of the DOJ are taken by a single decision maker. Moreover the engagement of five individuals in the procedure of the transaction investigation may take more time. The majority requirement may lead to deadlocked outcome, where there are available four of the five members and they vote 2-2 over the assessment of the transaction[172]. In this case the deal shall proceed without the investigation of the agency. Despite these drawbacks of the multi-member administrative structure of the FTC it has one significant advantage, the political variety of the members serves as a prerequisite for agency's independence in the decision making, unlike the AD of the DOJ head, who is appointed directly by the president, and dependant on the presidency mandate and change.

Another difference between the FTC and the AD of the DOJ is that the multi-policy functions of the FTC, namely – antitrust, privacy and consumer protection. This enables the FTC to create full impression of the proposed transaction and the parties involved, as they may be objects not only to the antitrust part of FTC, but also of the consumer protection or the privacy domain.

1.2. The Single European Union Authority

By contrast, in EU the Commission is the only authority in charge to enforce the EUMR, excluding the possibility of case referral, when a case, having Union dimension may be referred to the competent Member State's agency.

The European Commission consists of 28 commissioners – one from each Member State. The Commission is headed by a President. The Commission is appointed for a term of five years and the current Commission term is 2014 – 2019. The current Competition Commissioner is – Margrethe Vestager[173]. The Commission is organised into policy departments, responsible for different policy areas – Directorates General (DG). The Competition department is Directorates General for Competition (hereinafter DG COMP). It also has several Deputy Director General, responsible for Mergers, Antitrust and State Aid sectors. The Merger Deputy General is divided into five economic areas, for instance, energy and environment sector, financial services and other described in details in the

[172] Ibid, see p. 13.

[173] https://ec.europa.eu/commission/commissioners/2014-2019/vestager_en

Table 'European Commission – Directorate - General for Competition'[174]. The Commission and particularly the DG - COMP is a complex structure, divided into sectors to ensure the competence of the examining team. The Merger Investigation is operated by these specific economic teams and they are preparing weekly reports for their work for the Merger Deputy General, he reports the outcome of the research to the Commissioner, but the decisions are taken by the Commission, who convene on a weekly basis for discussions. There are some interesting institutions within the Commission that do not have analogue in the US agencies' structures.

One such is the Hearing Officer[175]. It was established to ensure the fair and unprejudiced competition proceedings before the Commission, including merger proceedings. Hearing officer[176] is an independent party, although it is appointed by the Commission[177] and it is responsible to organise the oral hearings within the proceedings and to ensure the effective exercise of procedural rights of the parties involved. It may also act as an arbiter, if there is a procedural conflict between the Commission and the parties. An institution like the Hearing Officer in the EU, is not available under the US Merger control legislation, because in the US the hearing itself is before the competent Districts Court who is in charge of ensuring fair and unprejudiced proceedings. Within the EU the Commission is at the same time prosecutor and judge and this institutional difference requires an agency that serves as a guarantor of the fairness of the proceedings.

Another position that does not have an equivalent in the US merger control agencies' structure is that of the Chief Economist and his team[178]. Although in the structure of the both commissions FTA and AD of the DOJ there are not only jurists, but also economists, the figure of the EU Chief Economist is diferent, as he is relatively independent, and he is also a temporary agent with his team, whose main function is not only to improve the

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[174] See Annex IV 'EUROPEAN COMMISSION – DIRECTORATE - GENERAL FOR COMPETITION' - Sourse: https://ec.europa.eu/info/sites/info/files/organisation_charts/organisation-chart-dg-comp_en.pdf

[175] The Hearing Officer was created in 1982. Its functions are stated with Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, OJ L 275, 20.10.2011, p. 29, available here: http://ec.europa.eu/competition/hearing_officers/legislation.html

[176] Currently the post of Hearing Officer for competition proceedings is held by Joos Stragier and Wouter Wils. The Hearing Officer's team, available here:
http://ec.europa.eu/competition/hearing_officers/hearing_officers.html

[177] Art. 2.1 of the Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, OJ L 275, 20.10.2011.

[178] see: http://ec.europa.eu/dgs/competition/economist/role_en.html

economic analysis, but also to check and balance the work of the Commission, by providing it with independent weekly advice on the cases. The Chief Economist also prepares final advice on the decision for individual case. This agency provides the Commission, and more specific the Directorate General – Competition, with guidelines on methodological issues of economics in the application of the EU competition rules.
These are the main points on the structure of the competent authorities, with their similarities and different elements. Their competence to enforce the merger legislation is set by the legal acts, but their competence is not purely exclusive.

2. Competence of the Authorities and Additional Merger Control Authorities:

It is not only the two federal agencies – FTC and AD of DOJ, that may enforce the federal merger legislation, but also State Governments have jurisdiction over a transaction, where the parties are related to a particular state. European legislation has similar rules, as far as the competence is separate between the Commission and the Member States' national authorities, under certain circumstances. Whereas in the EU, the Commission and the National Competent Authorities would not usually share competency, in the US competency may by shared between the federal authorities and the state governments. This means that a decision of the federal agency to challenge a transaction or to clear it does not preclude the jurisdiction of the concerned state to challenge it before the competent court. This practice may be useful for the process, as the states may bring information about local conditions and relations for the parties, in cases where the state government join the federal agency in the lawsuit as a plaintiff. On the other hand, where the federal agency and the state government are on different positions, where for instance, the federal agency decide to approve the transaction, as it finds the transaction non-problematic, the state may find it anticompetitive, the multiple prosecutions may complicate the case not only for the parties to the transaction, but also for the administrative agencies and the courts.
The system developed in US for the competence of the authorities on merger regulations is quite different from the one established within the EU, under the EUMR. One of the leading principles of the EU merger control is the one of 'one-stop merger control'. Designed to avoid administrative inefficiency and conflicts, expenses and delay. Under Art. 1 of the EUMR, a concentration having a Union dimension is under the exclusive compe-

tence of the Commission. The exclusivity of the Commission's jurisdiction is stated also in Art. 21(2) and (3), providing that only the commission may take decisions on concentrations that have Union Dimension, and no Member State shall apply their legislation to such concentrations. Moreover, the EUMR provides a possibility for the Commission to examine even concentrations, that do not have Union dimension, by stating the case referral option. Case referral, under the rules of EUMR is pre- or post-notification possibility. In certain cases concentration that is under the jurisdiction of the Commission may be referred to the National Competition Authorities, hereinafter NCA, in the Member States that are concerned by the transaction, under the provisions of Article 4 (4) and Article 9 on the EUMR. In case that the proposed concentration will significantly affect the competition in a market in a Member State, the parties of the transaction may make a 'reasonable submission'[179] to the Commission to refer the case to the NCA of the concerned Member State, on the pre-notification phase[180]. And post-notification, the Member State itself may request the case from the Commission[181]. Moreover, if the Commission refuse to refer the case to the requiring Member State, the Member State may appeal the refusal before the Court of Justice of the European Union[182].

Based on the principle of 'one-stop merger control' the EUMR states also case referral methods from the Member States to the Commission for concentrations that do not have a Union Dimension. There is also a possibility the request to be made during the pre-notification period[183] by the parties concerned if the transaction is going to be reviewed by the NCA of at least three Member States, as was the case Facebook/WhatsApp[184], discussed earlier in the text[185], and at the post-notification phase[186] by the Member States[187]. A recent case, involving a full case referral is the acquisition of Shuzam by Apple[188]. The transaction does not meet the turnover thresholds under the Article 1 of the EUMR and does not have a Union Dimension, according to the Regulation. The deal is notified in

179 EUMR, Art. 4(4)
180 EUMR, Article 4(4)
181 Ibid, Article 9
182 Ibid, Article 9(9)
183 Ibid, Article 4(5).
184 Case M.7217 – Facebook/WhatsApp, Commission decision of 3 October 2014.
185 See Chapter IV, Section 2.3.
186 EUMR, Article 22.
187 The proposed transaction must affect the trade between Member States and is likely to affect significantly the competition within the Member State or States, making the request.
188 Case M.8788 – *Apple/Shazam*, not yet decided.

Austria, where it meets the notification thresholds. On 21.12.2017 Austria submitted a case referral request to the Commission to examine the proposed transaction, under Article 22 of the EUMR. Other Member States also joined the request[189]. Recently the Commission opens in-deep investigation for this transaction[190], this, as a number of other cases, shows that the case referral possibility is an important tool for assessing mergers, that may have significant impact on the internal market, but at the same time do not meet the criteria set by the EUMR for Union Dimension.

One may find a small similarity between the shared competence of the US federal authorities and the state governments and one of the options under the EUMR, where after one or more Member States make a request to the Commission to assess a deal, one or more Member States may decide not to join the request. In this case they retain their right to apply their own law in the field, despite the decision of the Commission to accept the request. In this case both the Commission and the NCA of the concerned Member State or States may assess the case at the same time. One such case was the case *Cemex/Holcim Assets*[191], where Spain made a request to the Commission to assess the case, but Chez Republic did not join the request and decided to retain its right to examine the case in the Chez Republic[192]. However the transaction was cleared by the Commission and also by the Chez NCA[193]. This, if noted as a similarity, may by outlined between the US and the EU systems, regarding the exclusive competence of the EU commission and the shared competence in US between the federal authorities and the state governments.

The multijurisdictional competence between the US authorities may by confusing in some cases and entails more complex investigation procedures, but it also ensures important for the state issues, as for instance the employment effect of a transaction within the state, factors that are not likely to be taken into account by the federal agency. EU mechanism is

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189 See European Commission – Press release, Mergers: 'Commission to assess the acquisition of Shazam by Apple', 06.02.2018, available here: http://europa.eu/rapid/press-release_IP-18-664_en.htm

190 For more information see: European Commission – Press release, Mergers: 'Commission opens in-depth investigation into Apple's proposed acquisition of Shazam', 23.04.2018, available here: http://europa.eu/rapid/press-release_IP-18-3505_en.htm

191 Case M.7054 – *Cemex/Holcim Assets*, Commission decision of 9 September 2014, available here: http://ec.europa.eu/competition/mergers/cases/decisions/m7054_20140909_20682_4001455_EN.pdf

192 For more information on the case see: European Commission – Press release, Mergers 'Commission accepts to assess acquisition of Holcim's Spanish cement operations by rival Cemex at Spain's request', 18.10.2013, available here: http://europa.eu/rapid/press-release_IP-13-977_en.htm

193 see also: European Commission – Press release, Mergers 'Commission approves acquisition of Holcim assets by Cemex in the building materials sector', 09.09.2014, available here: http://europa.eu/rapid/press-release_IP-14-985_en.htm

more comprehensive and predictable, and notwithstanding the fact that it is blamed to be old fashioned for the transactions concerning modern technologies[194], as the turnover thresholds are too high for otherwise significant transactions within the technology sector, the EU system still finds ways to be applicable, even in case when it is not.

Since the structure of the competent authorities is clear, the next chapter of the text will clarify the stages and the process of merger control itself. Following in the text it will be described what are the possibilities for the parties within the pre-notification period, the mandatory obligation for notification by the parties of the transaction, all the stages through which the investigation is going and all the possible outcomes of it. The rights and the obligations of the parties and of the competent authorities will also be discussed.

VI. Merger Assessment Procedure:

1. Pre-Notification Stage

Usually parties to the transaction would be relieved if they have opportunity to consult the details of the proposed transaction with the competent authority before the official notification. This would be beneficial for the parties to prepare better the deal for the assessing and for the authorities to collect the necessary information in advance and to create a full overview of the deal.

1.1. Pre-Notification Stage under the Jurisdiction of the European Commission

In fact preliminary, not official, but confidential consultations between the parties to the proposed deal and the Director General - Competition, are recommended by the Commission and stated in Section 3 of the 'Best Practices on the Conduct of the EC Merger Control Proceedings'[195]. During this consultations the 'case team' and the parties to the deal

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[194] For example, among others: Case M.8788 – *Apple/Shazam* and also Case M.7217 *Facebook/WhatsApp*, see also 'Competition Merger Brief' 1/2015, 'What's Up with the Merger Control in the Digital Sector? Lessons from the Facebook/WhatsApp EU merger case' p. 1-7.

[195] DG Competition 'Best Practices on the conduct of EC merger proceedings', 20/01/2004, available here: http://ec.europa.eu/competition/mergers/legislation/proceedings.pdf

may hold meetings, to discuss on the jurisdiction or other legal questions to the case, to make oral or written comments and also may discuss the filling of the actual notification form[196]. All this comments are 'held in strict confidence'[197]. Under the jurisdiction of the Commission the pre-notification consultations appear to be clear, but within the US Merger Control pre-notification stage looks different.

1.2. Pre-Notification Stage under the Jurisdiction of the US Federal Merger Control Authorities

Although there are special divisions, responsible for pre-merger notifications within the US authorities structure, namely – Premerger Notification Office within the FTC and the Antitrust Division's Premerger Unit within the DOJ[198], it is not typical for the parties to hold consultations with the agencies before the actual notification. Since the HSR Act provides that a transaction may be carried out by one agency[199], and at the same time there are two competent federal enforcement authorities, certain difficulties occur for the parties in the prediction of the reviewing agency, at this early stage of pre-notification. As the HSR Arc requires the parties to file the notification with the both agencies[200], and they decide which of them will examine the deal, the only way to exercise pre-notification consultations seems to be to discuss the transaction with the both agencies - Premerger Notification Office within the FTC and the Antitrust Division's Premerger Unit within the DOJ.

This is a significant difference between the systems in US and EU. The unpredictability of the case distribution between the FTC and the Antitrust Division of DOJ may consist a constraint for the mergering parties within the US. On the other hand, the regime under the jurisdiction of the Commission seems to be understandable, predictable and useful for the parties and for the authority. From the prospective of the mergering parties, this confusion in the US Merger Control system may be find as a gap, that needs to be fill, in order

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[196] Ibid, Section 3, points 12, 13 and the following.

[197] Ibid, Section 3, point 8.

[198] See also: https://www.ftc.gov/enforcement/premerger-notification-program/contact-information

[199] Clayton Act 7A, codified in 15 USC §18a - Premerger notification and waiting period, see letters (d) and (e), available here: http://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title15-section18a&edition=prelim

[200] Clayton Act 7A, codified in 15 USC §18a, (b)(1)(A).

to support the preparing of the merger notification, the assessment itself and to enable the engaged parties to avoid possible procedural delays and difficulties.

2. Notification and Waiting Period

After the conclusion of a deal[201], having a Union Dimension, but before closing it, parties to the agreement are obliged to notify the Commission,[202] to assess the transaction, and more specific to assess whether the proposed transaction is 'compatible with the common market'[203]. Within the US regime, the HSR Act of 1976, provides an obligation for the parties to the proposed merger[204], that is notifiable according to certain thresholds based on the size of the deal and on the size of the parties[205], to notify both authorities – FTC and the Antitrust Division of the DOJ.

If the parties of the transaction did not comply with their obligation to notify the competent authorities about the concentration, they are subject to fines within the both jurisdictions – EU and US.

2.1. US Notification Form

Pursuant to Clayton Act 7A, codified in 15 USC §18a, (a), both persons to the transaction shall file notification forms and to submit all the required documents. The notification form[206] requires business information and obliges the parties to attach all the relevant to the deal documents, analyzes, surveys and other that may be relevant[207].

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201 The term 'deal' is used in the sense of all the transactions covered by Article 4 (1) of the EUMR, as follow: '…the agreement, the announcement of the public bid, or the acquisition of a controlling interest.'

202 EUMR, Article 4 (1).

203 EUMR, Article 2 (1).

204 The term 'merger' is used in the sense of all the transactions covered by Clayton Act 7A, codified in 15 USC §18a, (a).

205 See Clayton Act 7A, codified in 15 USC §18a, (a).

206 See the HSR Notification Form here: https://www.ftc.gov/enforcement/premerger-notification-program/form-instructions

207 See Ibid all the subsections in section 4 of the HSR Notification Form.

2.2. EU Notification Form

Within the jurisdiction of the Commission the notification form looks more like instructions, than as a form to fill. It is stated as a part of the 'The Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, hereinafter the Implementing Regulation, and its annexes (Form CO, Short Form CO, Form RS and Form RM), as Annex I[208]. The Notification Form to the Commission requires supporting the transaction documents, descriptions and details, as the HSR Notification Form, but it also requires the parties to make product and geographic market definitions and also to identify the affected markets. This information includes an estimate total size of the market, the parties' market shares, the structure of the supply and demand on the market and many others reports and surveys, that may cost efforts and time to collect such substantial information. The purpose of this requirement is that the Commission has a short time to analyze the proposed concentration and it would not be enough if it had to collect all this data. This is way the pre-notification stage is so important under the Commission jurisdiction. There is no possibility for the Commission for a 'second request' of information if the submitted is not exhaustive, as this possibility is envisaged for the federal examining authority in US in Clayton Act 7A, codified in 15 USC §18a, (e). Although the Commission has an opportunity to declare the notification to be incomplete, in which case, the time limits for assessing the transaction will not have begun to run, until the missing information is delivered[209]. The time that the Commission has to examine the transaction starts to run[210] only when the Commission finds that the notification is complete.

208 The Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, hereinafter the Implementing Regulation and its annexes (Form CO, Short Form CO, Form RS and Form RM), OJ L 133, 30.04.2004, p. 1-39, as amended by Commission Regulation (EC) No 1033/2008 OJ L 279, 22.10.2008, p.3-12 and by Commission Implementing Regulation (EU) No 1269/2013 of 5 December 2013, hereinafter Implementing Regulation, OJ L 336, 14.12.2013, p. 1-36. Consolidated version available here: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02004R0802-20140101

209 EUMR, Article 10 (1).

210 The term starts on the following working day, see Article 10 (1) of the EUMR.

The obligation for notifying the Commission is for all the persons of the transaction, when it is a merger[211] or acquisition of joint control[212], in all the other cases, the obligation for notification is for the acquiring person[213].

2.3. US Filling fee

There is no filing fee within the Jurisdiction of the Commission for filing the Notification Form. By contrast, US authorities impose a notifying fee, the range of which is determined by the size of the transaction[214]. The current fees are between US$45,000 and US$280,000 and the acquiring person is responsible for the payment. The exact current filing fees, for 2018, are as follow[215]:

- $ 45,000 – For transactions greater than $84.4 million but less than $168.8 million
- $ 125,000 - For transactions greater than $168.8 million but less than $843.9 million
- $ 280,000 - For transactions of $843.9 million or greater.

2.4. EU Publication of the Notification v. US full Confidentiality

When the competent authorities receive the notification forms, and determine their competence, the substantive assessing begins. The Commission publishes a notice of concentrations that have a Community Dimension in the Official Journal of the European Union. The notice consists of 'the names of the undertakings concerned, their country of origin, the nature of the concentration and the economic sectors involved'[216].
By contrast HSR notifications are confidential, not only the information consisting in the form regarding the parties, but the mere fact of the notification is also confidential[217].

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[211] Within the meaning of Article 3(1)(a) of the EUMR.
[212] Within the meaning of Article 3(1)(b) of the EUMR.
[213] EUMR, Article 4 (2).
[214] Size-of-Transaction, as described by FTC, in its official web site /cited in the next footnote/, is 'equal to the aggregate total amount of voting securities, assets, or non-corporate interests being acquired'.
[215] See the current information on the FTC official web site, available here: https://www.ftc.gov/enforcement/premerger-notification-program/filing-fee-information
[216] EUMR, Article 4 (3).
[217] Clayton Act 7A, codified in 15 USC §18a, (h).

The Commission will also distribute the notification to all the NCA of the Member States, to express their opinion on the case referral opportunity. By contrast the US federal agencies, that are competent to assess the proposed transaction have no obligation to inform about it the state governments.

Since the authorities are notified about the transaction and it is within their competence and jurisdiction, they have to follow a punctual timetable for the examining process.

3. Phase I of the Examination

The period between notification of the proposed transaction and the final decision whether the concentration may be harmful for the competition on the market, is time that requires suspension of all the actions regarding the deal. Parties may not close the agreement before the final decision of the agencies. As this may be a burden for the vibrant business environment, the competent agencies follow tight schedule of their investigation.

3.1. Time Schedules for the Phase I of the examination

Although there are some differences in the preparation of the assessment in the pre-notification period, the agencies within both jurisdictions have relatively similar time to examine a proposed transaction. And while the Commission may have already discussed and may be familiar with the transaction in question, there is a strong possibility that the US federal agencies see the proposed deal for the first time. Under the provisions of the EUMR, the Commission has a time laps of 25 working days[218], to assess whether the concentration rise serious doubts to have anticompetitive effect on the common market. On the other side, the US federal authorities have 30 days, to determine two things. First of all, which of them has jurisdiction to review the transaction and second the competent agency shall assess whether the transaction in question may create a potential competitive constraints and if so to initiate a second-phase inquiry or to clear it as non-problematic deal.

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[218] In case that the mergering parties offer remedies, upon Article 6 (2) of the EUMR or in case that some Member State seeks case referral, upon Article 9 of the EUMR, the time period is extended with 10 working days, so that the Phase I decision must be issued within 35 working days. See Article 10 (1) of the EUMR.

3.2. Phase I Proceedings under the EUMR

'Best Practices on the conduct of EC merger control proceedings', published by the DG – COMP[219], clarifies the day-to-day work of the Commission, DG – COMP and the case teams, on the proceedings under the EUMR[220]. Within the weekly DG Competition's Merger Management Meetings, the officials discuss and allocate new cases to a particular case team[221]. The schedule of the formal 25-days investigation in Phase I, conducted by the Commission is as follows:

Within 3 working days, after the notification[222] - The first thing is to publish the notification in the Official Journal of European Union[223] and to distribute copies of the notification to the NCA of the Member States[224].

Member States, on their own, have 15 working days, after they have received the notification from the Commission, to determine whether they want to request a case referral, under the rule of Article 9 (2) EUMR[225].

Within 15 working days after notification, the Commission may offer a 'State of play' meeting[226] between the parties to the transaction and the officials from Directore General - Competition. This is organised, if the concentration raises a 'serious doubts' and on this meeting parties and the DG – COMP or the 'case team' discuss the concerns with the proposed deal.

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219 See footnote 195, on page 53.

220 See *'Best Practices on the conduct of EC merger control proceedings',* Section 1, (1).

221 Ibid, Section 3 (11).

222 When the Commission finds that the notification is complete and the time starts from the next working day, see Article 10 (1) of the EUMR.

223 EUMR, Article 4 (3).

224 EUMR, Article 19 (1).

225 See footnote 218, on page 58.

226 See *'Best Practices on the conduct of EC merger control proceedings'*, Section 5, Subsection 5.1.

Within 20 working days after notification, the parties to the transaction may, offer commitments or modifications, hereinafter referred as 'remedies'[227], if they believe that following these remedies the notified concentration will 'no longer rise serious doubts'[228], regarding the deal's compatibility with the common market[229]. In case that the undertakings concerned offer remedies, the deadline for the Phase I decision is extended with 10 more days[230]. When this term expires, the Commission shall either clear the transaction, subject or not to the proposed remedies, or to initiate 'in-deep investigation' through Phase II[231].

In case that no remedies are offered, within 25 working days after notification, the Commission shall issue a decision upon its Phase I investigation, pursuant to Article 6 (1) of the EUMR. Within this term, the DG COMP will determine whether the concentration meets the jurisdictional thresholds, set by the EUMR[232], may make requests to interested third parties or will consider submissions, if any, by interested third parties[233] and will have to decide whether the concentration 'raises serious doubts as to its compatibility with the common market'[234].

The Commission shall issue a Phase I decision according to the following possibilities:

- The Concentration is outside the scope of EUMR, under its Article 6 (1) (a).
- The Concentration is within the jurisdictional scope of the Commission and it is compatible with the common market, upon Article 6 (1) (b) of the EUMR.
- The Concentration is within the jurisdictional scope of the Commission and it is compatible with the common market but subject to remedies, under Article 6 (2) of the EUMR.

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227 Implementing Regulation, Article 19 (1). Implementing Regulation Consolidated version is available here: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02004R0802-20140101
228 EUMR, Article 6 (2).
229 See also EUMR, Recital 30.
230 See footnote 218, on page 58.
231 EUMR, Article 6(1)(c).
232 EUMR, Article 1.
233 EUMR, Article 18, and also ibid, Recital 37.
234 EUMR, Article 6.

- The Concentration 'raises serious doubts as to its compatibility with the common market'[235] and in this case, the Commission initiate the Phase II investigation.

The decisions issued by the Commission are subject to judicial review by EU Courts[236], with some exceptions. Within the Phase I Commission's decisions that the concentration is not under the scope of EUMR[237] may be revoked as the decision that the concentration is within the scope of the EUMR and it is compatible with the Common Market[238]. The Commission revokes such decision, when it has been based on incorrect information for which one of the parties concerned is responsible or the decision has been obtained by deceit[239]. The question whether the decisions under Article 6 (2), EUMR are challenging, is arguable. A Commission's decision approving a concentration, subject to remedies, may be revoked by the Commission upon Article 6 (3) (b), if the undertakings do not commit their obligation for remedies. Since the proposal of remedies is voluntary, so that parties may hardly argue that the Commission force them for the obligation for remedies, but on the other hand, if the parties are trying to preserve, what they could from the deal, within the tight schedule of 25-days-investigation, they may be deemed to be forced to offer remedies to the transaction. However, the General Court rejected an appeal of this kind in the case *Cementbouw Handel Industrie BV v Commission*[240]. Parties were seeking annulment of the Commission's decision[241] that declared the proposed concentration compatible with the common market subject to a number of remedies. In this case, the challenging party claims, among other things, that the Commission forced it to offer rem-

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235 EUMR, Article 6(1)(c).

236 Commission's decisions are subject to judicial review by the Court of Justice of the European Union, under the rules of Article 263 TFEU, 'on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers', according to Paragraph 2 to the same Article. See also TFEU, Article 256, 'The General Court shall have jurisdiction to hear and determine at first instance actions or proceedings referred to in Articles 263…', TFEU, OJ C 326, 26.10.2012, p. 001 – 390. Consolidated version is available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:12012E/TXT

237 This is the decision under Article 6 (1) (a) of the EUMR.

238 This is the decision under Article 6 (1) (b) of the EUMR.

239 EUMR, Article 6 (3) (a).

240 Case T-282/02 [2006] ECR II-319, paras 293-321, upheld on appeal Case C-202/06 [2007] ECR I-12129, OJ [2006] C 96/10. Judgement of the Court of the First Instance of 23.02.2006 is available here: http://curia.europa.eu/juris/showPdf.jsf?text=&docid=56207&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=142569

241 Commission Decision of 26 June 2002, on case M.2650 — *Haniel/Cementbouw/JV (CVK)* OJ [2003] L282/1. Available here:
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2003.282.01.0001.01.ENG&toc=OJ:L:2003:282:TOC

edies that are not proportional to the restoration of the effective competition[242]. The Court rejected these claims, stated that:

> '…[T]he Commission has power to accept only such commitments as are capable of rendering the notified transaction compatible with the common market In other words, the commitments offered by the undertakings concerned must enable the Commission to conclude that the concentration at issue would not create or strengthen a dominant position…'[243]

So that it is unreliable for the parties to challenge Commission's decision, on Article 6 (2) of the EUMR, claiming that they have been forced by the Commission to offer certain remedies[244].
On the other hand, Commission's decisions to initiate Phase II investigation, according to Article 6 (1) (c) of the EUMR, may not be challenged before the EU Courts, as such an application shall be inadmissible[245].

If the Commission has jurisdiction over the proposed concentration and does not clear it as non-problematic, the following step for the Commission is to open in-deep investigation, unless the undertakings concerned demonstrate that they have abandoned the concentration.

3.3. Phase I Proceedings under the US Legislation

Phase I on the examining procedure in US is going through a similar, but still different procedural timetable. The observation-waiting period that the federal merger agencies have to examine the transaction according to the notified information ends[246] on the 30th

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[242] Case T-282/02 [2006], Judgement of the Court of the First Instance of 23.02.2006, see para 22.
[243] Ibid, para 294.
[244] See also ibid, para 320.
[245] Case T-48/03 *Schneider Electric v Commission*, Order of the Court of First Instance of 31.01.2006, OJ [2006] C 86/27. See paras: 79; 84; 91 and the final orders. Case is available here: http://curia.europa.eu/juris/showPdf.jsf?text=&docid=85383&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=150312
[246] Unlike the EU legislation, on that field (see footnote 222, on page 58), the examination period under the HSR Act starts on the date, on which FTC and Antitrust Division of DOJ receive a complete notifica-

day, after the notification is received by the Authorities, and in case of cash tender offer on the 15th day[247].

The assessment procedure shall begin right after the complete and correct notification is filed with the both agencies and the filing fee is paid[248].

FTC Premerger Notification Office has issued an 'Introductory Guide I'[249] and 'Introductory Guide II'[250], describing in details the course of investigation taken by the competent authorities. According to the stated in the text of the 'Introductory Guide I', at the beginning of he assessing process both federal agencies are reviewing the transaction, at the same time, to determine effect that the transaction may have on the competition[251]. In the course of seeking the answer of this question, the agencies may analyse the filed documents and they may engage industry experts to help in the evaluating process. If, as a result of this preliminary review, one or both agencies conclude that the transaction may be harmful to the competition and thus needs a 'closer examination'[252], the competent authorities shell decide which one of them will undertake the responsibility of this investigation. Only one of the agencies may conduct the assessment of the transaction[253].

Once when the agencies clear the question of competence one of them is exclusively competent to continue the assessment of the proposed transaction. In case that within the initial 30-days period the federal agency does not take any actions and does not issue a request to the parties, they may proceed with closing the deal unconditionally. The reviewing agency shall not send a letter or any notice to the parties that the waiting period has expired or that it will not take any further actions regarding the proposed transac-

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tion form. Complete notification form includes paid notification fee. Pursuant to Clayton Act 7A, codified in 15 USC §18a, b, (1).

[247] Clayton Act 7A, codified in 15 USC §18a, b, (1), (B). For US 'Running of time rules see also "Premerger Notification Rules", Code of Federal Regulations, Title 16, Chapter I, Subchapter H, Part 803, Section 803.10, available here: https://www.law.cornell.edu/cfr/text/16/803.10

[248] See Annex V, 'HRS Timeline', Source – The official FTC web site, available here: https://www.ftc.gov/news-events/blogs/competition-matters/2017/08/getting-sync-hsr-timing-considerations

[249] FTC, Premerger Notification Office, 'Introductory Guide I', Revised March 2009 version is available here: https://www.ftc.gov/sites/default/files/attachments/premerger-introductory-guides/guide1.pdf

[250] FTC, Premerger Notification Office, 'Introductory Guide II', Revised September 2008 version is available here: https://www.ftc.gov/sites/default/files/attachments/premerger-introductory-guides/guide2.pdf

[251] 'Introductory Guide I', Section VII 'Antitrust Review of the Transaction'.

[252] Ibid.

[253] Clayton Act 7A, codified in 15 USC §18a, d.

tion[254]. The competent agency is not obliged to issue a clearance decision and the decision to take no action is of the exclusive competence of the reviewing authority[255] and it is not subject to a judicial challenge.

In case that the parties to the transaction does not want to wait for the 30-days period to expire, they may seek for 'early termination' of the waiting period[256]. Federal agencies may grand 'early termination' if they both decided not to take any further actions and to request any additional information about the transaction. The parties to the deal will be informed if 'early termination' is granted to them[257]. This will be granted, if granted at all, by the both agencies – FTC and Antitrust Division of the DOJ[258]. Parties to the transaction shall bear in mind that FTC will publish a notice in the Federal Register for the grand of early termination[259], containing details about the proposed deal[260] and it will be no more kept confidential.

As the EU merger legislation allows the parties to the deal to propose certain remedies, the US federal agencies may accept appropriate remedies, offered by the parties, during this stage of the investigation. Although remedies may be offered in any stage of the assessing process, since there are no timing requirements or guidelines for this.

So that during this initial 30-days period[261] the examining agencies[262] have the following possibilities:

To grant 'early termination', if required by the parties, or at least by one of the parties;

To take no actions and to allow the waiting period to expire;

To issue a second request for information, to require a submission of additional information or documents by the parties[263].

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[254] FTC, Premerger Notification Office Staff, Bureau of Competition, 31.08.2017, 'Getting in Sync with HSR Timing Considerations', available here: https://www.ftc.gov/news-events/blogs/competition-matters/2017/08/getting-sync-hsr-timing-considerations

[255] The Federal Agencies' Decision to take no further actions, regarding a proposed transaction does not preclude a state government from challenging the same transaction.

[256] Clayton Act 7A, codified in 15 USC §18a, b (2).

[257] 'Introductory Guide I', Section V 'The Waiting Period', Subsection B 'Early Termination'.

[258] FTC, Premerger Notification Office Staff, Bureau of Competition, 31.08.2017, 'Getting in Sync with HSR Timing Considerations', available here: https://www.ftc.gov/news-events/blogs/competition-matters/2017/08/getting-sync-hsr-timing-considerations

[259] A notice about the grant 'early terminations' is also published on the FTC's website at https://www.ftc.gov/enforcement/premerger-notification-program/early-termination-notices

[260] Clayton Act 7A, codified in 15 USC §18a, b (2).

[261] 15 days in some cases, see footnote 191, on page 50.

[262] FTC and Antitrust Division of DOJ, still both agencies are competent at that time of the assessment.

However, within these 30 days, that are prescribed for the initial examination, the both competent at that time agencies, may agree that the transaction must be examined in details through 'Second Request' Procedure, but may not agree which one of them is exclusively competent to conduct this second stage of the transaction's assessment. While the competence dispute between the federal agencies is running the 30-days period is also running. This peculiarity of the US merger control regime is often pointed as a gap, following from this system, where two equal federal agencies are competent to enforce Merger Control Rules. However, the system has also developed a 'cure' for this gap. In case where an additional time is required for the initial investigation, there is the 'pull and refile' system[264], where the parties to the transaction prefer to give extra 30 days[265] to the reviewing agencies to make a decision, instead of entering into the 'second request' procedure[266], by withdrawing the notification form and resubmitting it again[267] within the original 30-days period[268]. Generally there is a filling fee for the notification procedure, but in case that the 'pull and refile' procedure is done upon an agency request, there is not filling fee, so that this 'extension' of the initial investigation may not be a financial burden for the parties to the deal[269].

At the end of the initial period, extended or not, the competent agency shall decide whether the assessment of the transaction requires a submission of additional information or documents by the parties and thus to issue a 'Second Request' for additional information, pursuant to Clayton Act 7A, codified in 15 USC §18a, e. This stage of 'Second Request' of the US Merger Control examination may be compared with the Phase II of the EU Merger Control under the articled of the EUMR.

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[263] Clayton Act 7A, codified in 15 USC §18a, e.

[264] Code of Federal Regulations, Title 16, Chapter I, Subchapter H, Part 803, Section 803.12, 'Withdrow and Refile Notification. Available here: https://www.law.cornell.edu/cfr/text/16/803.12

[265] 15 days in some cases, see footnote 247, on page 62.

[266] The 'second request' procedure terms are more extensive, in compare with the initial 30-days investigation. This will be explained in details in the following.

[267] See also: FTC 'Tips on Withdrawing and Refiling an HSR Premerger Notification Filing' Issued on 21.03.2014 and updated on 15.09.2017, available here: https://www.ftc.gov/system/files/attachments/hsr-resources/withdraw_and_refile_procedures_tip_sheet_updated_091517.pdf

[268] The 'pull and refile' procedure is available only once and if there is no change in the notification file.

[269] Code of Federal Regulations, Title 16, Chapter I, Subchapter H, Part 803, Section 803.12, (c).

If the European Commission finds serious and reasonable doubts to the compatibility of the proposed transaction with the common market[270] within the term of the Phase I investigation, it must initiate a Phase II Investigation. This is a period of in-deep investigation, requiring meetings and hearings, conclusions and statements and its flow within both jurisdictions will be explained in the next Section.

4. Phase II of the Examination under the EUMR

The second stage procedure under the jurisdiction of the Commission may take 90 working days[271], subject to extensions by the parties[272] or by the Commission[273]. Pursuant to Article 10 (3) of the EUMR the time limits of Phase II may be extended with 15 working days to the term of 105 working days, in case that the parties to the deal offer remedies. This extension of the term is possible, if the remedies are offered after the 55th working day from the initiation of the second phase, but not latter than[274] the 65th working day[275]. The other option for adding more time for Phase II investigation is stated also in Article 10 (3), second subparagraph, of the EUMR and allows the parties of the deal to require an extension, but this shall be done until the 15th day of the initiation of the 'in-deep investigation' and may be done only once within this process. Under the same article, the Commission, on its discretion, may also extend the time, subject to agreement with the notifying parties. However, in both cases stated in Article 10 (3), second subparagraph, of the EUMR this extension shall not exceed 20 working days.

One more exceptional possibility for increasing the time period for the Phase II of the investigation within the jurisdiction of the Commission is 'stop the clock possibility'. Article 10 (4) of the EUMR provides that the set term shall be suspended (stopped) if the Commission needs to request information or to order an inspection. This provision is in-

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270 Pursuant to Article 6 (1) (c) of the EUMR.

271 EUMR, Article 10 (3), first subparagraph.

272 Ibid.

273 EUMR, Article 10 (3), second subparagraph.

274 Pursuant to the Implementing Regulation, Article 19 (2), fourth subparagraph: 'In exceptional circumstances, the Commission may accept commitments offered after the expiry of the time limit for their submission'.

275 Implementing Regulation, Article 19 (2).

voked in some cases like for instance: *Oracle/PeopleSoft*[276], where the Commission required additional information by one of the parties (Oragcle Corporation, US) and since it did not respond to the Commission's request, the Commission issued a decision and suspend the time limits, set in Article 10 (1) and 10 (3) of the EUMR. The proceeding was resumed after around 6 months, when the Commission's request for information was satisfied by Oracle[277]. This case is a good example how much time 'stop the clock' provision may take.
The time period for Phase II starts on the date of which the proceedings are initiated by the Commission's formal, written decision, describing its 'serious doubts' that the proposed concentration may be incompatible with the common market. From this day the procedure of in-deep investigation starts and it may include:

Within 10 working days of the initiation of the Phase II proceeding, a 'State of Play'[278] meeting may be convened. This shall be the first opportunity for the notifying parties to discuss with the Commission the decision under Article 6 (1) (c) of the EUMR and to present their comments and any appropriate documents. This early meeting may also serve as a meeting to discuss the procedural timetable and the need of increasing the investigation time[279]. There will be several other occasions for a 'State of Play' meeting between the notifying parties and the Commission, which will be discussed latter.

'As early in the investigation as possible'[280] may be held a 'Triangular' meeting of the notifying parties, the Commission and third parties[281]. The aim of such meeting is to enable the DG Competition[282] to create a wider fact-based view and to reach a more informed conclusion about the transaction, the concerned market and the effect that the con-

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[276] Case M 3216 *Oracle/PeopleSoft*, Commission's decision of 26.10.2004, OJ [2005] L 218/6. Available here:
http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2005.218.01.0006.01.ENG&toc=OJ:L:2005:218:TOC

[277] Ibid, para 3.

[278] See *'Best Practices on the conduct of EC merger control proceedings'*, Section 5, Subsection 5.1, para 33, (b).

[279] Ibid.

[280] Ibid, Section 5, Subsection 5.3, para 39

[281] Ibid, Section 5, Subsection 5.3.

[282] Senior DG – COMP management would normally chair a 'Triangular' meeting, see *'Best Practices on the conduct of EC merger control proceedings'*, Section 5, Subsection 5.3, para 39.

centration may have on the competition on this concerned market. Such meeting is preferable to be held before the issuance of the 'Statement of Objections' by the Commission.

Before issuing a 'Statement of Objections' the Commission may initiate one more 'State of Play' meeting[283]. Its aim is to inform the notifying parties about the objections that the Commission has and the meeting may be used by the parties to clarify issues and facts that may be decisive for the final Commission's decision.

Issuing 'Statement of Objections' – DG COMP concludes its investigation with the issuance of the 'Statement of Objections' and it shall contain all the competitive concerns that the Commission has regarding the concentration. Anything concern on which the Commission may based its final decision must be included in the 'Statement of Objections'[284]. This follows of the aim of this issuance, which is to inform the parties about the objections against them[285], in order to ensure their right to defence[286]. There is no deadline or Best Practices regarding the issuance of the 'Statement of Objections', but the Commission shall bear in mind the following steps, after this issuance and to provide enough time for them within the time limits of the Phase II. This issuance shall be sent to the parties concerned and the Commission shall invite them to give their written reply on the Objections[287].
The issuance of 'Statement of Objections' also unlocks the parties' right of 'access to the file'[288]. This right is granted to the parties concerned, to whom the 'Statement of Objections' is addressed and is a right to access the investigative file, including submissions made by third parties, but it is a version with eliminated business secrets and other confidential information[289].

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[283] *'Best Practices on the conduct of EC merger control proceedings'*, Section 5, Subsection 5.1, para 33, (c).
[284] EUMR, Article 18 (3).
[285] EUMR, Article 18 (1).
[286] Implementing Regulation, recital 12.
[287] Ibid, see also Ibid, Article 13 (2).
[288] EUMR, Article 18 (3), see also Implementing Regulation, Article 17.
[289] Ibid, Article 17.3, see also Section 3, Subsection 3.2, para 17 of the 'Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004', OJ [2005] C 325/7, available here: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52005XC1222(03)

After the issuance of the 'Statement of Objections', DG COMP shall hear the parties pursuant to Article 18.1 of the EUMR regarding whom the Commission intends to take a final decision[290].

Oral Hearings are conducted by Hearing Officer[291] in 'full independence'[292]. Through this procedure unsworn testimonies are taken by the parties to the concentration and other interested third parties[293]. The Hearing Officer chairs the hearing and he is only responsible for the fairness of the process, but has no decision-making rights.

At this stage another 'State of Play' meeting may be held[294]. Following the issuance of the 'Statement of Objections', the replays by the parties and the 'Oral Hearings', this meeting may help the parties and the DG COMP to understand their views after the last several stages, may serve to discuss the time limits and possible remedies[295].

At this time, within 65 working days after the initiation of Phase II[296], the parties must submit any proposals for remedies, since they are aware of the Commission's concerns regarding the concentration.

After this term, if remedies are offered, the DG COMP may organise one last 'State of Play' meeting to discuss with the notifying parties the proposed remedies and the opportunity to improve the proposed remedies, before the formulation of the final Commission's decision[297].

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[290] Implementing Regulation, Article 13.4 and also Article 14.
[291] Regarding the 'Hearing Officer' see Chapter VI, Section 1.2 on page 48.
[292] Implementing Regulation, Article 15.1.
[293] Ibid, Article 16.
[294] *'Best Practices on the conduct of EC merger control proceedings'*, Section 5, Subsection 5.1, para 33, (d).
[295] Ibid.
[296] Implementing Regulation, Article 19.2.
[297] *'Best Practices on the conduct of EC merger control proceedings'*, Section 5, Subsection 5.1, para 33, (e).

After all these steps, an Advisory Comity shall be organised to consult the preliminary draft of the final decision[298]. This body consists of one or two representatives of the NCA of the Member States and it gives its opinion on the draft final decision. The Commission shall take into account this opinion while preparing its final decision. The Commission shall make this opinion public together with its decision[299].

At the end of this Phase II procedure the Commission shall take its final decision whether the concentration is compatible with the common market pursuant Article 8 of the EUMR. The decision of the second phase of the investigation must be taken by the full college of the Commission, all the commissioners.
If by any reason, the Commission fails to issue a decision within the time limits, the deal may be closed and it is deemed to be compatible with the common market[300].

However, the Commission shall reach a Phase II decision according to the following possibilities:

- The Concentration is compatible with the common market, upon Article 8 (1) of the EUMR.
- The Concentration is compatible with the common market but subject to remedies, under Article 8 (2) of the EUMR.
- The Concentration is incompatible with the common market, under Article 8 (3) of the EUMR and as such may not be closed by the parties. This decision obliges the parties to abound the deal.
- If the Commission finds that a concentration, that is declared incompatible, has already been implemented by the parties, or a concentration has been implemented, but in breach to the remedies agreed by the parties, the Commission have the right, under Article 8 (4) of the EUMR to impose any appropriate measures to ensure that the parties will follow the Commission's decisions and will implement the

[298] EUMR, Articles 19.3 – 19.7.
[299] The confidential information and the reviled trade secrets will be protected. See EUMR, Article 19.7, second sentence.
[300] EUMR, Article 10 (6).

remedies agreed, or that the parties will dissolve the deal in a way to restore the situation before the closing of the deal.

Similarly to Phase I, here the Commission may also revoke its decision[301], if it has been taken on the basis of incorrect information, for which one of the parties is responsible, or where the decision has been obtained by deceit[302].

The Commission may also issue decisions to impose fines to the parties of the deal in several cases, set in Articles 14 and 15 of the EUMR. The commission may impose fines up to 1% of the aggregate turnover of the party[303], in case that they provide the Commission, in any stage of the investigation, with incorrect or misleading information, under Article 14 (1) of the EUMR[304].

Moreover the Commission may also impose fines up to 10% of the aggregate turnover of the party[305], by issuing a decision, in case that[306]:

- The parties to the deal fail to notify the concentration to the Commission[307].
- The parties close the deal within the investigation time[308].
- The parties implement a concentration that has been found incompatible with the common marked by the Commission.
- The parties fail to comply with the remedies agreed.

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301 Regarding the possibility of the Commission to revoke its Phase I decision, see EUMR, Article 6 (3) (a).

302 EUMR, Article 8 (6).

303 The turnover is calculated under the rules of Article 5 of the EUMR.

304 See case *Facebook/WhatsApp* M 8228, where the Commission fined Facebook €110 million /under Article 14 (1) EUMR/ for providing incorrect or misleading information during the Commission's 2014 investigation under the EU Merger Regulation of Facebook's acquisition of WhatsApp. See European Commission Press Release on 18.05.2017 on Mergers, available here: http://europa.eu/rapid/press-release_IP-17-1369_en.htm

305 The turnover is calculated under the rules of Article 5 of the EUMR.

306 EUMR, Article 14 (2).

307 See, for instance, the Commission's Decision of 23.07.2014 addressed to Marine Harvest, imposing a fine for putting into effect a concentration in breach of Article 4(1) and Article 7(1) of the EUMR in case M 7184 *Marine Harvest/Morpol* (Art. 14(2) proc.)

308 See Case *Altice/PT Portugal* M 7993, where the Commission imposed a €124.5 million fine /under Article 14 EUMR/ on Altice, the multinational cable and telecommunications company based in the Netherlands, for implementing its acquisition of the Portuguese telecommunications operator PT Portugal before notification or approval by the Commission. See European Commission Press Release on 24.04.2018 on Mergers, available here: http://europa.eu/rapid/press-release_IP-18-3522_en.htm

The Commission may also impose periodic penalty payments under Article 15 of the EUMR in certain cases, when the parties do not comply with their obligations or do not comply with the Commission's requirements. These periodic penalty payments may not exceed 5% of the average daily turnover of the party[309] and the penalty may be imposed for each day of delay.

The acts that produce legal binding effects issued by the Commission are subject to judicial review by EU Courts[310]. The decisions imposing penalties are also subject to judicial review under the Article 261 TFEU and also under Article 16 EUMR, by the Court of Justice of the European Union. The Court of Justice of the European Union may cancel, reduce or even increase[311] the fine[312] or periodic penalty payment[313] imposed by the Commission.

Third parties also have right to challenge some of the Commission's decisions. It is possible, for instance third parties to appeal a decision clearing unconditionally a concentration. A good example is the case *Impala v Commission*[314], where Impala, a third party[315] to the case *Sony/Bertelsmann*[316], challenged the Commission decision that the concentration is compatible with the common market and seeking its annulment[317], before the General Court and the Court annulled the Commission decision, so the Commission had to reasses the case. Finally the Commission concluded, that the concentration is compatible

309 The turnover is calculated under the rules of Article 5 of the EUMR.

310 Commission's decisions are subject to judicial review by the Court of Justice of the European Union, under the rules of Article 263 TFEU, 'on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers', according to Paragraph 2 to the same Article. See also TFEU, Article 256, 'The General Court shall have jurisdiction to hear and determine at first instance actions or proceedings referred to in Articles 263…', TFEU, OJ C 326, 26.10.2012, p. 001 – 390. Consolidated version is available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:12012E/TXT

311 See EUMR, Article 16.

312 Fine, imposed by the Commission within the meaning of EUMR, Article 14.

313 Periodic Penalty Payment, imposed by the Commission within the meaning of EUMR, Article 15.

314 Case *Impala v Commission,* T-464/04 [2006] ECR II-2289, OJ [2006] C 224/39, court decision is available here: http://curia.europa.eu/juris/showPdf.jsf?text=&docid=56489&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=28745

315 See para 7 of the Case *Impala v Commission,* T-464/04 [2006] ECR II-2289.

316 Case *Sony/Bertelsmann,* M 3333, Commission decision of 19.07.2004, OJ [2005] L 62/30.

317 See para 29 of the Case *Impala v Commission,* T-464/04 [2006] ECR II-2289.

with the common market and cleared the concentration, after a second in-deep investigation[318].

In fact most of the transactions are approved unconditionally by the Commission during the Phase I as compatible with the common market under Article 6 (1) (a) and (b) or compatible under remedies pursuant to Article 6 (2). Only in a small percentage of cases the Commission opens in-deep investigation under Article 6 (1) (c) of the EUMR. During the Second Phase of its investigation, the Commission asses most of the proposed concentration as non-problematic, subject to remedies or not, it is very rear to issue a prohibition decision under Article 8 (3) of the EUMR[319].

5. Phase II of the Examination under the US Legislation

One of the major differences between the two merger systems, discussed in this paper is the 'Second phase' of their investigation procedures[320]. While the Commission is in the role of prosecutor and in the same time a decision-maker, the US competent authorities enjoy only the prosecutor rights, to asses all the relevant data and if reasonable to challenge the proposed transaction before the competent US District Court.
Generally it is very rare the transactions notified to FTC and DOJ to result in the Second Phase investigation, as the percentage of all the notified transactions in the period of 2008 – 2017 is between 2.5 % - 4.5%[321].
The Second Phase in the US system begins if the reviewing agency issues a Second Request for additional information before the end of the Initial First Phase of its assessment[322]. The issuance of this request stops the waiting period, until the parties to the transaction comply with this request. This principle is similar to the Commission's 'stop

318 See Commission Press Release IP/07/1437, 03.10.2007, available here: http://europa.eu/rapid/press-release_IP-07-1437_en.htm
319 See also the detailed statistic for the period 21.09.1990 – 30.04.2018, issued by the Commission, in Annex I, source: http://ec.europa.eu/competition/mergers/statistics.pdf
320 For more details see Annex V 'HRS Timeline'. Source: https://www.ftc.gov/news-events/blogs/competition-matters/2017/08/getting-sync-hsr-timing-considerations
321 See figure 2 'Percentage of Transactions Resulting in Second Request Fiscal Years 2008 – 2017', on page 6 of the HSR Annual Report. Most recent for the Fiscal Year 2017, available here: https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014_fy_2017_hsr_report_final_april_2018.pdf
322 Clayton Act 7A, codified in 15 USC §18a, e (1) (A).

the clock' possibility, when requiring additional information from the parties. Pursuant to the tight time limits that the reviewing agencies have within the investigation and because the compliance with the request may take even months, time for which the agencies may not be responsible so 'stop the clock' principle is envisaged within both jurisdictions. Under the US legislation the required information shall be 'supplied within a reasonable time'[323], but there is no set deadline, thus the parties and the examining agency may negotiate a timing agreement for compliance with the procedure[324]. This possibility to negotiate time limits is also one difference from the EU merger system, where the time limits of the Phase II investigation are set in the EUMR as are also the limited possibilities for its extension. Once the period of Phase II expires, including the possible extensions, and the Commission fails to issue a decision within this period, the concentration is deemed to be approved[325]. On the other hand the US authorities have the opportunity to negotiate with the parties the deadline, which does not extend the time limits set by HSR Act, but refrains the parties from closing the deal. And moreover upon application to the competent US District Court the reviewing authority may request the court to extend the time limits set by HSR Act[326].

Once the parties comply with the request of information and provide the reviewing agency with complete data, the final 30-days[327] period[328] starts. Within this time, the authority must decide whether to challenge the transaction or not. The information provided within this second phase of the investigation is confidential and no third parties may access it, unlike the procedural rules under the EUMR, where third parties may request an access of information on a certain step of the investigation[329].

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[323] Code of Federal Regulations, Title 16, Chapter I, Subchapter H, Part 803, Section 803.21, 'Additional information shall be supplied within reasonable time'. Available here: https://www.law.cornell.edu/cfr/text/16/803.21

[324] See Section 3, last Subsection 'Timing Agreement' of 'Best Practices for Merger Investigations' issued by the Bureau of Competition of FTC, in August 2015, available here: https://www.ftc.gov/system/files/attachments/merger-review/best_practices_for_merger_investigations_august_2015.pdf

[325] Excluding 'stop the clock possibility'.

[326] Clayton Act 7A, codified in 15 USC §18a, g (2).

[327] Or 10 days for some cases. See Code of Federal Regulations, Title 16, Chapter I, Subchapter H, Part 803, Section 803.10, b (2) (i), 'Running of time'. Available here: https://www.law.cornell.edu/cfr/text/16/803.10

[328] Code of Federal Regulations, Title 16, Chapter I, Subchapter H, Part 803, Section 803.10, b (2) (i), 'Running of time'.

[329] See Article 18 (3) of the EUMR.

The reviewing agency shall designate an official that does not have a decision-making power, but shall ‘hear’[330] any submission filed by the parties as an answer to the ‘Second Request’.

Case teams, handling the proposed deal, as under the jurisdiction of the Commission, exercise analyse of the case, all the facts and the documents provided. Within the structures of DOJ and FTC these case teams consist of economists and lawyers, who prepare their reports on the case. The DOJ team, prepare the case, but the final decision is taken by the Assistant Attorney General for Antitrust[331], supported by his own team of advisors. At the FTC the case may be prepared by the case teams, but the final decision is taken by voting of the five commissioners, heading the agency[332]. The presence of economists in the case team ensures that the transactions will be assessed from more possible point of views, not only the legal perspective. As a similar role has the Chef Economist and his team within the structure of the Commission[333].

The competent authority has relatively tight time limits to assess the possible consequences of the case and to decide whether to challenge it before the US District Court or to approve the transaction. During this time, in conducting its investigation FTC may organise meetings with the parties to the transaction to clarify its concerns to the deal and to discuss the competitive issued that the deal raises and the required information regarding these issues[334].

The competent agency may issue one of the following decisions:

To close the investigation and to clear the transaction, as non-problematic. If the agency finds that the transaction does not violate Clayton Act 7, codified in 15 USC §18, it may even decide to take no action and to let the time limits to expire. This would mean that the parties may close and implement the deal. Such a decision of the agency is not subject to court appeals.

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330 Clayton Act 7A, codified in 15 USC §18a, e (1) (B) (i).

331 See Chapter VI Section 1.1.

332 Ibid.

333 See Chapter VI Section 1.2.

334 ‘Best Practices for Merger Investigations’ issued by the Bureau of Competition of FTC, in August 2015, see Section 3 of it, available here: https://www.ftc.gov/system/files/attachments/merger-review/best_practices_for_merger_investigations_august_2015.pdf

To allow the transaction to close subject to remedies, included in a settlement between the agency and the parties. Here are some specifics regarding the agency negotiating the remedies. In case that the settlement is concluded between the parties and the FTC, it shall be presented for public comments, but the authority is not obliged to take into account the comments submitted, if any. Thus it is relatively independent in negotiating the remedies with the parties to the deal. On the other hand, when the reviewing agency is the Antitrust Division of the DOJ, settlements are subject to Tunney Act[335] review. The purpose of this law is to ensure a court review of the DOJ decisions regarding the merger control. According to these provisions interested parties may participate in a proceeding before competent District Court and the Court has power to approve or not the proposed settlement.

There are no time requirements for the parties to offer remedies, unlike the time limits set within the jurisdiction of the Commission. Settlements are usually negotiated in the Second Phase and most of the cases are agreed by settlement[336].

In case that the competent authority finds that the proposed transaction violate Clayton Act 7, codified in 15 USC §18[337], then in order to stop the deal it should prepare a submission to the competent District Court of the US to seek a temporary restraining order and preliminary injunction[338]. The reviewing agencies have no power to block the transaction or to issue any decision, by which to oblige the parties to abound the deal, unlike the Commission. The federal merger control authorities participate in the Court proceedings, by presenting their findings, conclusions and reports, but have no decision-making power.

In the same fashion as the Commission, the US competent authorities may also impose fines to the parties in certain cases. Violations of the Clayton Act 7A /codified in 15 USC §18a/, may result in daily penalty payments, imposed by the agencies or by the

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335 Codified in 15 USC, Chapter 1, §16, available here: https://www.law.cornell.edu/uscode/text/15/16?qt-us_code_temp_noupdates=0#qt-us_code_temp_noupdates

336 See HSR Annual Report. Most recent for the Fiscal Year 2017, available here: https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014_fy_2017_hsr_report_final_april_2018.pdf

337 Clayton Act 7A, codified in 15 USC §18a, f.

338 Ibid.

court[339]. Failure to notify the agencies about the transaction can result in penalty, calculated on daily basis, from the date of closing the notifiable deal for the duration of the violation[340]. The amount of the daily penalty is adjustable according to inflation, and when the rule of Clayton Act 7A, codified in 15 USC §18a, g (1) was enacted it was a US$ 10 000 for each day violation, for 2018 it is updated, according to the Code of Federal Regulations, Title 16, Chapter 1, Subchapter A, Part 1, Subpart L, Section 1.98, the daily amount of the penalties imposed may not exceed US$ 41 484[341]. Same penalty may be imposed if the transaction is implemented before the expiration of the HSR waiting period of the investigation or after a prohibition of the deal by the court[342].

Addressees to the court or agencies' decisions may appeal all aspects of the orders made by FTC or orders made by a District Court, in some cases that are reviewed by DOJ. There is a slight difference in the appeals against decisions issued by the two competent agencies. Appeals to the FTC issuances shall be made before the US Court of Appeals for the District of Columbia. Appeals regarding cases reviewed by the DOJ and thus orders issued by a District Court may be challenged before the US Court of Appeals in the relevant district

339 Clayton Act 7A, codified in 15 USC §18a, g (1).

340 See for instance case *United States v Duke Energy Corp.*, Civil No 1:17-cv-00116 (D.D.C. filed 18.01.2017), available here: https://www.justice.gov/atr/case/us-v-duke-energy-coporation

341 CFR, Title 16, Ch 1, Subch A, Part 1, Subpart L, § 1.98, (a), available here: https://www.law.cornell.edu/cfr/text/16/1.98

342 See for instance case *United States v Flakeboard America Limited et al.*, Civil No 3:14-cv-4949 (N.D.Cal. filed 7.11.2014), available here: https://www.justice.gov/atr/case/us-v-flakeboard-america-limited-et-al

Conclusion

Merger Control legal systems of the concerned jurisdictions on the both sides of the Atlantic have a lot of similar outlines, but they also differ in some of the principles, based on the development of these two systems, as the US Merger Legislation is much older than the EU law in the field. On one hand within the EU there is only one agency responsible for the assessment and the first-instance decision regarding a transaction and on the other hand within the USA there are two competent agencies, responsible only for the examining process, but these two competent agencies are operating under the decision making powers of the US District Court in case that the transaction must be challenged or a settlement is agreed with the parties. So the US competent agencies are not responsible for the final decision whether the proposed transaction may be harmful for the competition or not, which is within the competence of the US District Court. This multi competence system developed by the US legislation may cause difficulties for the parties to notify the transaction and to wait for the agencies to decide which of them to review the cases, as there is no rule regarding the division of the shared competence. The US legislator is still looking for a solution for this peculiarity of the multi competence system within the USA.

Following of these structural differences there are some procedural features within these two jurisdictions. EUMR grants extensive rights to the parties in the assessment process, in order to ensure fair and equitable process, as the Commission is not only an investigator and prosecutor, but also a decision maker. At the same time under the US jurisdiction, parties to the transaction do not have so many formal rights and do not take extensive participation in the investigation process, mostly because their rights are ensured within the litigation by credible court tribunal.

Overall these two different systems have similar understanding about the assessment process and they often use similar tests and tools to evaluate transactions. It is s common case when these two jurisdictions assess one and the same transaction, as multi-jurisdictional mergers are more common. This poses also a potential risk for the mergering parties of increased costs and uncertain outcomes. Fortunately the US and the EU jurisdictions have developed a great cooperation among them in a number of cases. This cooperative work gives positive practical and economic consequences, which stimulates

the vibrant business exchange between the USA and the EU. Surely inter-agency cooperation is challenging and complex procedure, as the agencies have different time schedules and more or less they follow different principles, but at the end of the day, the potential benefits for the competition on the relevant market are obvious, even in cases where the agencies take different decisions. One, among many benefits of this collaboration is that it may inspire many jurisdictions, while developing their competition law, to seek for interaction among them in the process of Merger Control.

To conclude, it is fair to say, that the EU and the US Merger Control systems follow the development needs of the economics and the markets concerned and they are adjusting to them successfully. The discussed systems achieve the goals set with the legal acts, namely to protect the competition on the market and take care of the welfare not only of the competitors but also of the consumers.

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21 September 1990 to 31 May 2018

I.) NOTIFICATIONS

	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07	08	09	10	11	12	13	14	15	16	17	May 18	Total
Number of notified cases	11	64	59	59	95	110	131	168	224	276	330	335	277	211	247	318	356	402	348	259	274	309	283	277	303	337	362	380	148	6953
Cases withdrawn - Phase 1	0	0	3	1	6	4	5	9	5	7	8	8	3	0	3	6	7	5	10	6	4	9	4	1	6	6	8	7	3	144
Cases withdrawn - Phase 2	0	0	0	1	0	0	1	0	4	5	5	4	1	0	2	3	2	2	3	2	0	1	1	0	0	2	1	2	1	43

II.) REFERRALS

	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07	08	09	10	11	12	13	14	15	16	17	May 18	Total
Art 4(4) request (Form RS)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	14	13	5	9	8	6	10	13	11	16	13	16	13	1	150
Art 4(4) referral to Member State	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	11	13	5	9	6	7	10	12	9	14	12	11	14	0	135
Art 4(4) partial referral to Member State	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	1	0	2	0	2	4	1	0	11
Art 4(4) refusal of referral	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Art 4(5) request (Form RS)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	20	28	38	51	23	23	26	18	22	13	19	20	23	15	4	343
Art 4(5) referral accepted	0	0	0	0	0	0	0	0	0	0	0	0	0	0	16	24	39	50	22	25	24	17	22	11	19	19	22	15	6	331
Art 4(5) refusal of referral	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	0	0	2	0	0	1	0	1	0	0	1	0	0	0	7
Art 22 request	0	0	0	1	0	1	1	1	0	0	0	0	2	1	1	4	4	3	2	1	3	1	3	1	1	1	0	2	2	36
Art 22(3) referral (Art 22. 4 taken in conjunction with article 6 or 8 under Reg. 4064/89)	0	0	0	1	0	1	1	1	0	0	0	0	2	1	1	3	3	2	3	1	2	2	2	1	1	1	0	1	3	33
Art 22(3) refusal of referral																1	1	0	0	0	1	0	1	0	0	0	0	0	0	4
Art 9 request	0	1	1	1	1	0	3	7	4	9	4	9	8	10	4	7	6	3	5	3	11	2	2	2	2	3	3	2	2	115
Art 9.3 partial referral to Member State	0	0	1	0	1	0	0	6	3	2	3	6	7	1	1	3	1	1	2	0	3	0	1	0	0	1	1	0	1	45
Art 9.3 full referral	0	0	0	1	0	0	3	1	1	3	2	1	4	8	2	3	1	1	2	1	4	2	1	0	0	0	0	0	1	42
Art 9.3 refusal of referral	0	1	0	0	0	0	0	0	0	1	0	0	0	1	0	0	0	1	0	1	1	0	0	0	3	3	1	1	1	15

III.) FIRST PHASE DECISIONS

	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07	08	09	10	11	12	13	14	15	16	17	May 18	Total
Art 6.1 (a) out of scope Merger Regulation	2	5	9	4	5	9	6	4	4	1	1	1	1	0	0	0	0	0	0	0	0	0	0	0	1	1	1	0	0	55
Art 6.1 (b) compatible	5	47	43	49	78	90	109	118	196	225	278	299	238	203	220	276	323	368	307	225	253	299	254	252	280	297	327	353	123	6135
Art 6.1(b) compatible, under simplified procedure (figures included in 6.1(b) compatible above)	0	0	0	0	0	0	0	0	0	0	41	141	103	110	138	169	211	238	190	143	143	191	171	166	207	222	246	280	108	3218
Art 6.1 (b) in conjunction with Art 6.2 (compatible w. commitments)	0	3	4	0	2	3	0	2	12	16	26	11	10	11	12	15	13	18	19	13	14	5	9	11	12	13	19	18	5	296

IV.) PHASE II PROCEEDINGS INITIATED

	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07	08	09	10	11	12	13	14	15	16	17	May 18	Total
Art 6.1 (c)	0	6	4	4	6	7	6	11	11	20	18	21	7	9	8	10	13	15	10	5	4	8	10	6	8	11	8	7	2	255

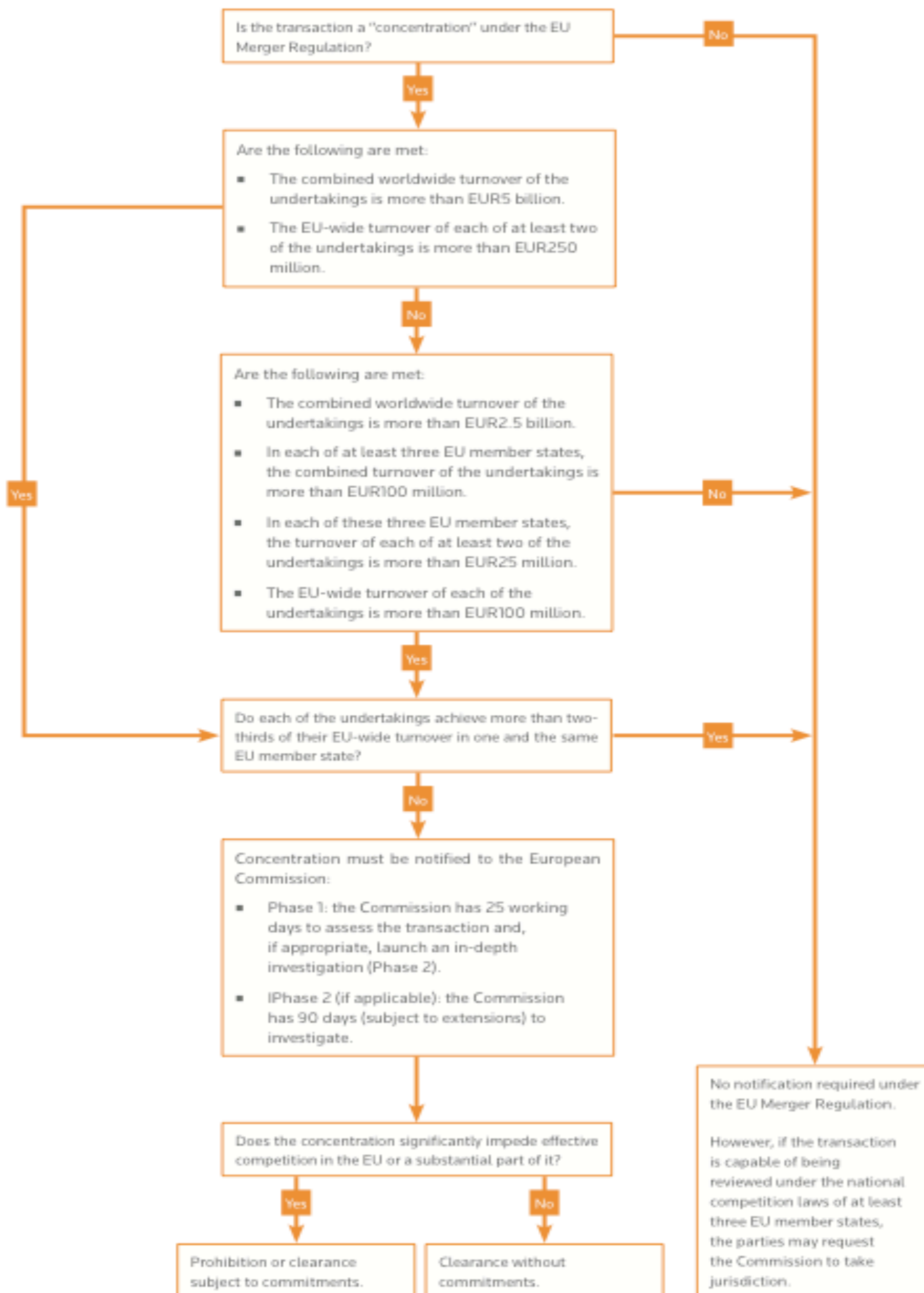
V.) SECOND PHASE DECISIONS

	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07	08	09	10	11	12	13	14	15	16	17	May 18	Total
Art 8.1 compatible (8.2 under Reg. 4064/89)	0	1	1	1	2	2	1	1	3	0	3	5	2	2	2	2	4	5	9	0	1	4	1	2	2	1	1	0	1	59
Art 8.2 compatible with commitments	0	3	3	2	2	3	3	7	4	7	12	9	5	6	4	3	6	4	5	3	2	1	6	2	5	7	6	2	3	125
Art 8.3 prohibition	0	1	0	0	1	2	3	1	2	1	2	5	0	0	1	0	0	1	0	0	0	1	1	2	0	0	1	2	0	27
Art 8.4 restore effective competition	0	0	0	0	0	0	0	2	0	0	0	0	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	4

VI.) OTHER DECISIONS

	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07	08	09	10	11	12	13	14	15	16	17	May 18	Total
Art 6.3 decision revoked	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
Art 8.6 decision revoked	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Art 14 decision imposing fines	0	0	0	0	0	0	0	0	1	4	1	0	1	0	1	0	0	0	0	1	0	0	0	0	1	0	0	1	1	12
Art 7.3 derogation from suspension (7.4 under Reg. 4064/89)	1	1	2	3	3	2	4	5	13	7	4	7	14	8	10	6	2	3	6	5	1	3	2	1	1	1	0	5	3	123
Art 21	0	0	0	0	0	1	0	1	0	1	1	0	1	0	0	0	2	1	0	0	0	0	0	0	0	0	0	0	0	8

Annex I ‘Table of EUMR statistic’. Source: http://ec.europa.eu/competition/mergers/statistics.pdf



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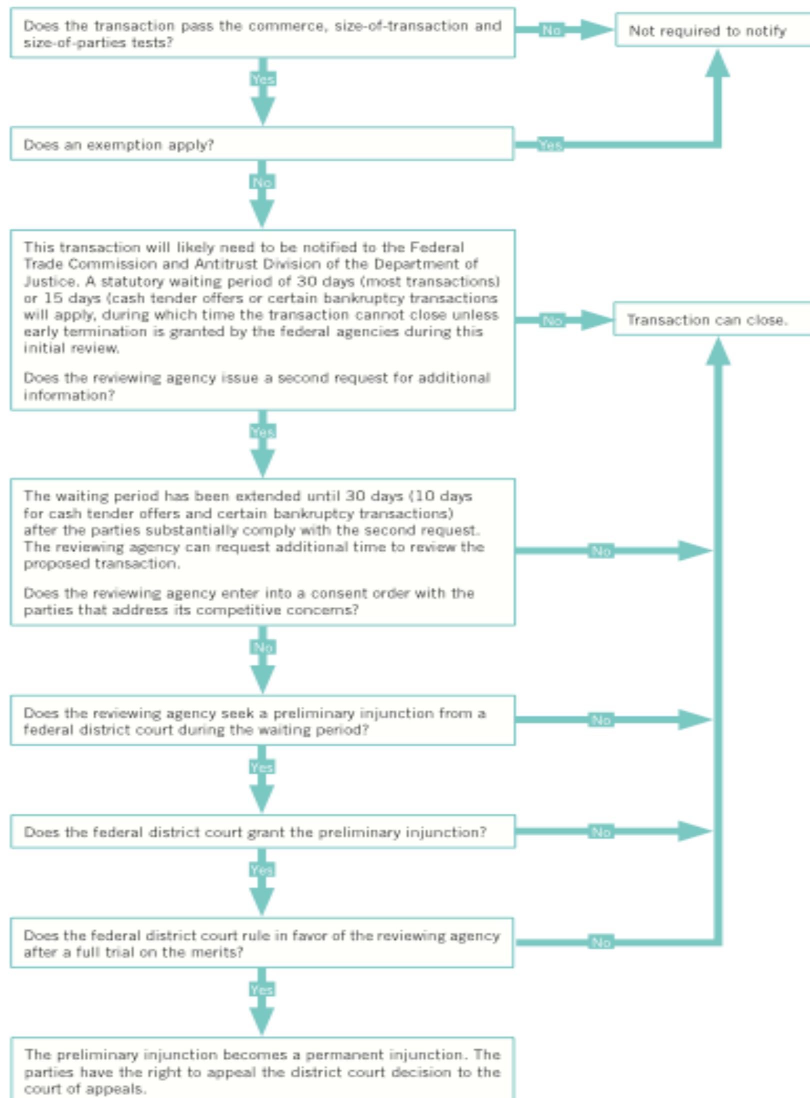
Annex II 'EU: Merger Notification'. Source: https://content.next.westlaw.com/Link/Document/Blob/I5b5514911ef511e38578f7ccc38dcbee.pdf?targetType=PLC-multimedia&originationContext=document&transitionType=DocumentImage&uniqueId=2fd98dde-a257-451f-bfea-5d90ecd6c952&contextData=(sc.Default)&firstPage=true&bhcp=1



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Annex III 'United States: Merger Notification'. Source: https://content.next.westlaw.com/Document/Ieb49d8761cb511e38578f7ccc38dcbee/View/FullText.html?navigation-Path=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad73aa5000001653d2d5b74851848c8%3FNav%3DKNOWHOW%26fragmentIdentifier%3DIeb49d8761cb511e38578f7ccc38dcbee%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSear-chItem&listSource=Search&listPageSource=f36f9d67a5fd12ee498153901f4b488a&list=ALL&rank=1&sessionScopeId=e42de9801315a69158dc6a039c4a75152f9761b9fbffac76ba420460c112bee5&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29

EUROPEAN COMMISSION – DIRECTORATE-GENERAL FOR COMPETITION

16/03/2018

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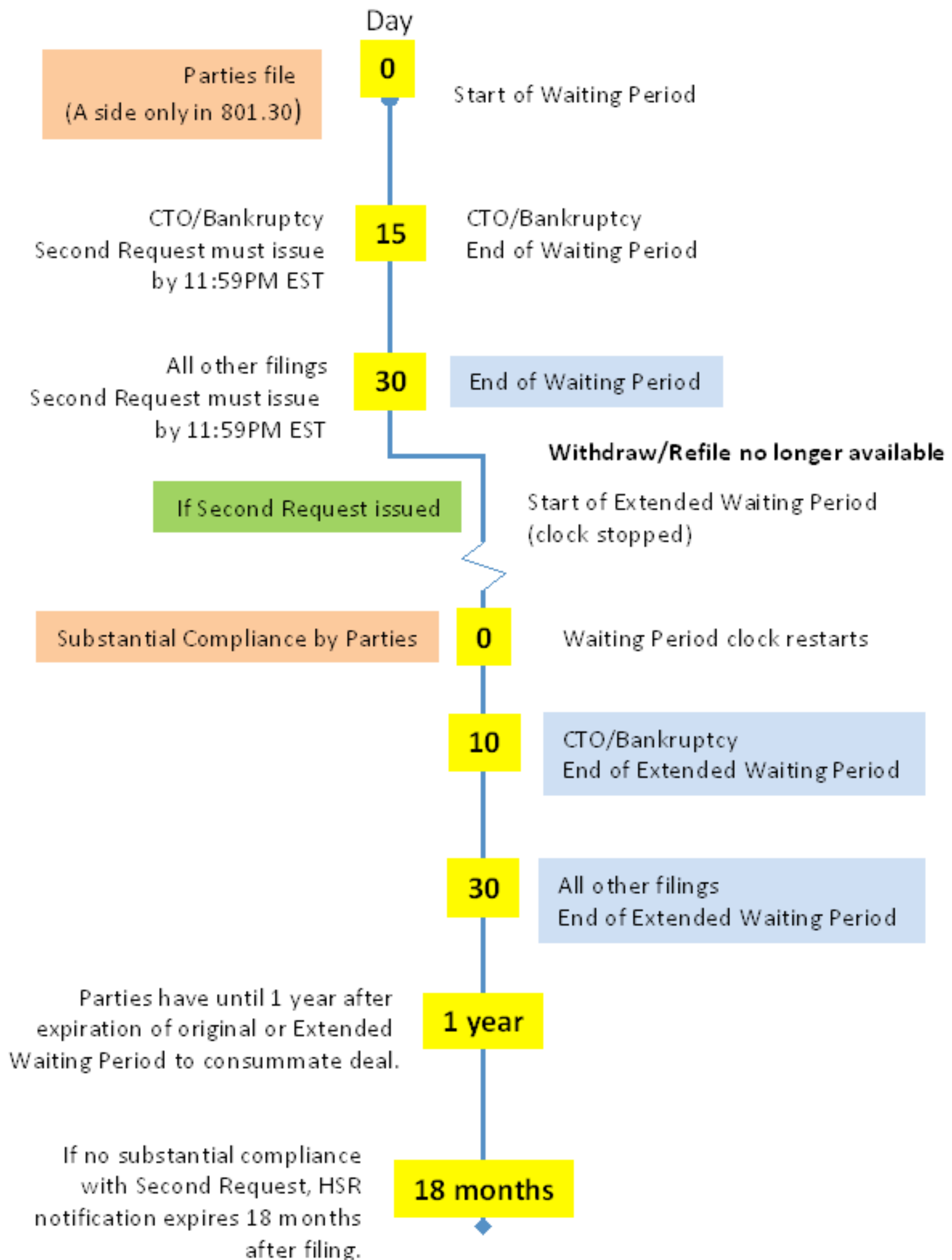
Annex IV 'EUROPEAN COMMISSION – DIRECTORATE - GENERAL FOR COMPETITION' - Sourse: https://ec.europa.eu/info/sites/info/files/organisation_charts/organisation-chart-dg-comp_en.pdf



Annex V, 'HRS Timeline', Source – The official FTC web site, available here: https://www.ftc.gov/news-events/blogs/competition-matters/2017/08/getting-sync-hsr-timing-considerations

ABSTRACT

Undoubtably, assured competition between firms contributes for the stable growth and progress of the economy. Thus, today more than 130 competition regimes are in force worldwide, and at least 110 of these laws include merger control, ensuring effective governance of the multinational marketplace. Competition stimulates market participants to pursue efficiency, by reducing manufacturing prices, but at the same time increasing the quality of their products. This ultimately benefits the consumers by allowing them access to high quality, innovative products at a reduced price. Many governments realize that competition rules are an important element and play a key role within the society. Thus maintaining competition is vital for a healthy business climate, which in turn attracts foreign investments and propels the economy forward.

Over the last few decades, the world economy has been subject to a rapid globalization. Many companies now operate internationally. This globalization environment has brought not only a large economic benefits, but also large regulatory challenges.

As a result the number, the size and the impact of cross-border mergers and acquisitions between globally active companies are growing each year. Since a large amount of cross-border mergers and acquisitions may have cross-border dimension these activities are reviewable by a growing number of competition authorities around the world. This worldwide diffusion of mergering or acquiring parties entails an extensive distribution of multinational merger control regimes, which is deemed to be a positive development as it indicates that the competition culture is expanding around the globe and in the same fashion indicates for a stable economic growth. It may however increase burdens and cost not only for the governments examining the international mergers or acquisitions, but mostly some negativities as raised costs, different procedural and substantive laws, as well as among others the risk of inconsistent merger review outcomes are borne by the mergering parties. To illustrate it, any markable transaction, possessing an international dimension, may have to be notified to more than a bearable number of competition authorities, each with its own principles, time schedules and fees.

However, most of the mergers do not impede competition, but some transactions may be seen as a problematic by the competent authorities, for different reasons. If so, the transaction may be challenged, in order to preserve the competition. At the end of the day, this is to direct benefit not only to the economy and the competitors within the related

market, but most to the consumers, who can continue to benefit a competitive prices, quality and assortment.

At the present time some of the most powerful economics are those of the United States of America and of the European Union as far as it performs like an internal market. Surely it is not surprising that there is a great amount of cross-border mergers and acquisitions that are reviewable by the competent authorities of these two massive economics. Therefore the proposed Thesis will aim to describe and analyze all the pros and cons of both merger control regimes, to draw the similarities and to discuss the differences, to make a parallel comparison not only of the examination process that the authorities go through, but to outline the principles that they are following while accessing the impact of a merger or acquisition. This work will also indicate the different approach that the both systems adopt in the structure of the competition authorities. The possibility of cooperation between them will also be discussed, as it gave a good result in a number of cases, in other however, in does not work, as will be seen in this research. At the end of this detailed analyze, the summary will contain the most important lessons that may be taken from the both systems and an attempt for a proposal for improvements for them will be made.

ABSTRAKT

Der Wettbewerb zwischen den Unternehmen trägt zum stabilen Wachstum und Fortschritt der Wirtschaft bei. Deswegen sind heute weltweit mehr als 130 Wettbewerbsregime in Kraft, und mindestens 110 dieser Gesetze beinhalten die Fusionskontrolle, die eine effektive Steuerung des multinationalen Marktes gewährleistet. Der Wettbewerb regt die Marktteilnehmer zu Effizienzsteigerung an, indem die Herstellungskosten senken und gleichzeitig die Qualität der Produkte erhöht wird. Dies kommt letztlich den Verbrauchern zugute, indem ihnen Zugang zu hochwertigen, innovativen Produkten zu einem reduzierten Preis ermöglicht wird. Viele Regierungen erkennen, dass Wettbewerbsregeln ein wichtiges Element sind und eine Schlüsselrolle innerhalb der Gesellschaft spielen. Daher ist die Aufrechterhaltung des Wettbewerbs von entscheidender Bedeutung für ein gesundes Geschäftsklima, das ausländische Investitionen anzieht und die Wirtschaft vorantreibt.

In den letzten Jahrzehnten war die Weltwirtschaft einer raschen Globalisierung unterworfen. Viele Unternehmen sind heute international tätig. Diese Globalisierung hat nicht nur große wirtschaftlichen Vorteile, sondern auch große regulatorischen Herausforderungen mit sich gebracht.

Das führt dazu, dass die Anzahl, die Größe und die Auswirkungen von grenzüberschreitenden Fusionen und Übernahmen zwischen global tätigen Unternehmen jedes Jahr wachsen. Da eine große Anzahl Fusionen und Übernahmen grenzüberschreitende Ausmaße annehmen kann, sind diese Aktivitäten von einer wachsenden Zahl von Wettbewerbsbehörden auf der ganzen Welt überprüfbar. Diese weltweite Verbreitung von Fusions- oder Übernahmeparteien bringt eine umfassende Verteilung multinationaler Fusionskontrollregime mit sich, was als positive Entwicklung gewertet wird, da sie zeigt, dass sich die Wettbewerbskultur rund um den Globus ausdehnt und in gleicher Weise für ein stabiles Wirtschaftswachstum spricht. Dies kann jedoch nicht nur die Kosten für die Regierungen, die internationale Fusionen oder Übernahmen untersuchen, erhöhen, sondern vor allem Negativitäten wie unterschiedliche Verfahrens- und Sachgesetze sowie das Risiko inkonsistenter Ergebnisse der Fusionskontrolle. Diesbezüglich muss jede bemerkenswerte Transaktion, die eine internationale Dimension hat, mehr als einer erträglichen Anzahl von Wettbewerbsbehörden mitgeteilt werden, jede mit ihren eigenen Prinzipien, Zeitplänen und Gebühren.

Die meisten Fusionen behindern jedoch nicht den Wettbewerb, aber einige Transaktionen können von den zuständigen Behörden aus verschiedenen Gründen als problematisch angesehen werden. Wenn dies der Fall ist, kann die Transaktion angefochten werden, um den Wettbewerb zu erhalten. Letzten Endes dient dies nicht nur der Wirtschaft und den Wettbewerbern auf dem verbundenen Markt, sondern vor allem den Verbrauchern, die weiterhin wettbewerbsfähige Preise, Qualität und Sortiment erhalten können.
Gegenwärtig sind die Vereinigten Staaten von Amerika und der Europäischen Union einige der mächtigsten Wirtschaftszweige, soweit sie sich wie ein Binnenmarkt verhält. Sicherlich ist es nicht verwunderlich, dass es eine große Anzahl grenzüberschreitender Fusionen und Übernahmen gibt, die von den zuständigen Behörden dieser beiden großen Wirtschaftszweige überprüft werden können. Daher wird die vorgeschlagene These darauf abzielen, alle Vor- und Nachteile beider Fusionskontrollsystemen zu beschreiben und zu analysieren, die Gemeinsamkeiten zu ziehen und die Unterschiede zu diskutieren. Diese Arbeit wird auch auf den unterschiedlichen Ansatz hinweisen, den beide Systemen in der Struktur der Wettbewerbsbehörden verfolgen. Die Möglichkeit der Zusammenarbeit zwischen ihnen wird ebenfalls diskutiert, da sie in einigen Fällen ein gutes Ergebnis liefert, in anderen jedoch nicht funktioniert, wie aus dieser Untersuchung hervorgeht. Am Ende dieser detaillierten Analyse wird die Zusammenfassung die wichtigsten Lehren enthalten, die aus den beiden Systemen gezogen werden können, und es wird ein Versuch für einen Verbesserungsvorschlag für sie gemacht.