THE IMPACT OF *AEROSPATIALE - ALENIA/DE HAVILLAND* AND *RYANAIR/AER LINGUS* CASES ON THE REFORM OF EUROPEAN MERGER CONTROL

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Abstract

From our beginning, the fight for resources and the human wish of growth and wealth leaded to a competitive behaviour of individuals and, by extension, that of their economic undertakings. While some developed an economic outlook on competition, there were some authors further adding the legal component as a governing principle of competition. In the spirit of a form-based approach, early EU competition law aimed to insure the economic freedom, missing openness towards certain practices. The founding Treaties, the modifying ones and the European acts in the field outlined the safeguarding of the internal market as a goal of competition law. Still, an important source of European competition law was offered to us by the case law. The shift towards the effects-based approach ensued the regulation as ex-post assessments of the merger impact on competition were undertaken. Different implications of Merger Control in EU competition law will be discussed in this paper, one which follows the spectacular evolution of the impact of different European Decisions on the change of competition law. The paper is a study on evolution of the Merger control and the analysis how much impacted two European Commission decisions prohibiting mergers the Single Market the reforms of each regulation development before each one of them.[2]

Keywords: *merger control, competition, horizontal merger, dominant position, dominance test,*

JEL Classification: K21, K22

1. Introduction

The European business environment is passing now another period of struggle and the companies are maybe the most affected by the restrictions imposed by the governments. Many of them try to sustain themselves by cutting costs, others take loans guaranteed by the states in order to pay salaries and other crucial expenses, but there are some who see in mergers the solution to bring necessary resources to overcome the obstacles. And there are others who initiate this kind of procedures just because they see an opportunity in gaining share market. Another issue in relation to control of mergers is related to those transactions which were undergoing before the pandemic period and there we may notice, in some cases, a delay, but many will continue and some of these will need to be completed with some urgency due to the financial distress. Who is supervising and intervening in the merger process, identifying the risk represented by those who may offer a dominant position and by that reduce competition? How should we apply the measures enacted in time for the control or mergers? Should the institutions, European and national, relax the procedures for sustaining concentrations or on the contrary?

The present article intends to answer the above questions by exploring the first steps in the development of European Merger Control mechanism, bringing in the current debates on quality of control of mergers in European Single Market the cases by which the Commission expressed in different ways leading, in time, to a deeper investigation and, ultimately, to the main provisions we are applying today, but, also offering us a perspective on the possible future development of the field.

In light of this, in the present paper are analysed two European Commission's decisions to prohibit concentrations. The European Commission decision on Aerospatiale-Alenia/de Havilland (case No. IV/M.053)[3] was the first one prohibiting a merger under the EEC Merger Regulation

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[2] The paper was presented by the author in the European Union Law. International Law section of the International Conference "Perspectives of Business Law in the Third Millenium, ninth edition, 8 November 2019, organised by the Law Department of the Bucharest University of Economic Studies": http://www.businesslawconference.ro/Section%20III%20EU%20law.%20International%20law.pdf and was updated for its publication in 2020.

[3] https://ec.europa.eu/competition/mergers/cases/decisions/m53_en.pdf [Accessed November 1, 2019].

4064/89[4], on which maintained still the form-based approaching and Ryanair/Aer Lingus[5] merger was prohibited based on the provisions of another Regulation, the one replacing the first one, especially by including the Monti's reform towards a more effects-based approach[6], EC Merger Regulation from 2004[7]

The choice of these particular cases accounts for their common features, helping the scope comparison, both being about horizontal mergers in relation to aviation, one in production of planes, the other in air transportation. The study will only overview the two milestone cases and not the list of similar European Decisions following them, nor it will analyse judgements of the European Court of Justice, as the focus was on analysing how the Commission explained its investigation and their effect on the development of quality assessment of the European Commission in applying the European Merger Control Regulations.

The paper uses as main criteria, for the comparative analysis, the "standard of proof" (to examine how substantial was the evidence presented by the Commission), the "assessment test" (the dominance test) and "efficiency" perspectives (the goal of efficiency analysis being to facilitate a definition and evaluation of specific advantages and disadvantages of a merger).

2. Evolution of European Merger Control

Before advancing in the research of the selected cases and conclude which was their impact on the European Merger Control, it is required to review the evolution of this specific field, not only for unveiling the provisions on which were grounded the actions of the Commission, but for the understanding of its continuous reforms.

Mergers of companies represent an area of high preoccupation, for both scholars and practitioners in competition law as they lead, next to undoubtable positive effects on the business, to major changes on the market. The European market had continuously developed after the second world war and it started sensing a need for a clear legislation in the field of concentrations following the establishment of the Single Market, mainly due to the tendency of undertakings to collaborate with the goal to benefit from the new market opportunities and, furthermore, hold the pressure coming from the American and Japanese companies[8] very active at that time on the European market, mainly stimulated by the globalisation.[9]

The roots of European Merger provisions are in the first founding treaty, Articles 65 and 66 from Treaty establishing the European Community of Steel and Coal[10], as from the beginning the member states were thinking not only to shift supervising control to the High Authority, but to stimulate competition.[11] The aim of the ECSC Treaty[12], as stated in Article 2, was to contribute, through the common market for coal and steel, to economic expansion, growth of employment, and

[4] https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:31989R4064 [Accessed November 1, 2019].
[5] https://ec.europa.eu/competition/mergers/cases/decisions/m4439_20070627_20610_en.pdf [Accessed November 1, 2019].
[6] Monti, M. (2002b). Merger control in the European Union: a radical reform. (SPEECH/02/545), European Commission IBA Conference on EU merger control, Bruxelles, 7 November 2002: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_02_545 [Accessed November 1, 2019].
[7] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation): https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32004R0139 [Accessed November 1, 2019].
[8] Scwartz E., *Politics as Usual, The History of the European Community Merger Control*, Yale Journal of International Law, Vol. 18:607, 1993, p. 608
[9] Narayan-Fourmet H., *L'approche concurentielle et contractuelle de la détermination du prix (dans les ventes commerciales et les contrats-cadre)*, Presses Universitaitres d'Aix-Marseille, PUAM, Aix-en-Provence, 2003, p. 502.
[10] https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11951K:EN:PDF [Accessed November 1, 2019].
[11] J. Fairhurst, *Law of the European Union*, 6th edition, Pearson Longman, 2010, p. 6
[12] The ECSC Treaty expired on 23 July 2002. Thus, the coal and steel sectors are now subject to Articles 101 TFEU and 102 TFEU, former 81 and 82 EC Treaty. The consequences of this expiry are explained in the Commission's document Communication from the Commission concerning certain aspects of the treatment of competition cases resulting from the expiry of the ECSC Treaty, OJ [2002] C152/5, [2002] 5 CMLR 1036, Section 2: http://europa.eu.int/eur-lex/pri/ en/oj/dat/2002/c_152/c_15220020626en 00050012.pdf [Accessed November 1, 2019].

a rising standard of living.[13] As a proof of the importance of the first provisions stands the European Commission Communication in which has explicitly stated that "articles 81 and 82 of the EC Treaty are clearly inspired by the corresponding Articles 65 and 66(7) of the ECSC Treaty"[14]. We may easily accept that, having essentially the same substance, both art. 65 and art. 81 prohibited the agreements, decisions or concerted practices which have as object or effect practices encompassed, just the evolution towards the common market differentiated the second. It has to be noticed that Article 66 expressly dealt with merger control and Article 66(7) was based on dominance, as an effect of the influence of German competition.[15]

The founding members continued their movement towards European integration, providing in the following treaty, Treaty establishing the European Economic Community (EEC Treaty)[16], the common market, which was to be established over transitional periods[17], by that expanding the application of the internal market from coal and steel common governance to removal of trade barriers between Members States.

Thus, competition provisions had to be again introduced, in the new format under the configuration of two pillars – firstly, antitrust consisting in restrictive agreements regulated by art. 85 (now article 101) and abuse of dominant position prohibited by art. 86 (now article 102) and secondly, state aid regulated by art. 92 to 94 (now articles 107 to 109). Articles 85 and 86 of the EEC Treaty were the twin provisions providing the European Commission the authority over competition[18], both articles enumerating actions by which they could control or prohibit, but the use of the phrase "in particular" in both cases suggests that the lists are not meant to be exclusive[19]

Differing from ECSC Treaty, the European Economic Community Treaty does mention anything concerning concentrations, some authors[20] suggesting a change of will from the members states. There must be a clarification in relation to the comparative analysis of the texts, as ECSC Treaty was concluded in a politically and economically vulnerable Europe, with the underlying objectives of preventing another war and rebuild the countries and governing only the coal and steel industry, historically dominated by mergers[21], where explicit merger control was imperative, on the other hand, according to authors[22], the original EC member states sought to encourage, rather than restrict, concentration of European industry, having greater objectives in relation to entire market, cross-border mergers being seen as means of fulfilling the integration and growth within the internal market and undertaking developing and strengthening their European position and gain global competitiveness.[23] However, the above mentioned reasons may not fully explain the failure to include merger control, its absence in the Treaty provisions suggesting that maybe some additional factors influenced the final text, one being a divergence of strategic interests between governments[24]. On the other hand, the Court of

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[13] Sauter, W., *Coherence in EU Competition Law*. 1st edn. Oxford: Oxford University Press, 2016, p. 27.

[14] Communication from the Commission concerning certain aspects of the treatment of competition cases resulting from the expiry of the ECSC Treaty, OJ [2002] C152/5, [2002] 5 CMLR 1036, Section 2: http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/c_152/c_15220 20626en 00050012.pdf [Accessed November 1, 2019], p. 5.

[15] Kokkoris, Ioannis, *Merger Control in Europe, Routledge Research in Competition Law*, Taylor and Francis, 2012, p. 12.

[16] Treaty establishing the European Economic Community (EEC Treaty): https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:xy0023&from=EN.

[17] C. Barnard & S. Peers, *European Union Law*, Oxford University Press, 2014, p. 15.

[18] Scwartz E., *Politics as Usual, The History of the European Community Merger Control*, Yale Journal of International Law, Vol. 18:607, 1993, p. 610.

[19] Goyder, D.G., EEC Competition Law, Oxford: Claremont Press, 1993, p. 14.

[20] Joliet, R., *Monopolization and abuse of dominant position - A Comparative Study of the American and European Approaches to the Control of Economic Power*, La Haye, Liège, 1970, p. 269.

[21] Hurwitz, J. D., *The Impact of the Continental Can Case on Combinations and Concentrations within the Common Market*, Hastings Law Journal, 25(3), 1974, p. 486.

[22] Aurelio Pappalardo, *Le Reglement CEE sur le controle ses concentrations*, 1 Revue Internationale De Droit Economique, 1990, p. 3, 4; Bulmer, S., *Institutions and Policy Change in the European Union: The Case of Merger Control*, Public Administration, Vol. 72, Autumn, 1994, p. 427.

[23] Damro, C. and Guay, T. R., *European Competition Policy and Globalization*. 1st edition., Basingstoke: Palgrave Macmillan, 2016.

[24] Scwartz E., *Politics as Usual, The History of the European Community Merger Control*, Yale Journal of International Law, Vol. 18:607, 1993, p. 613.

Justice recognised, in a later case[25], that article 85 could apply to "agreements between undertakings entailing a structural modification of an undertaking".

The European Commission started, together with assigned experts, a campaign to clarify the provision applicable on merger control and, as a result of its activity, was launched, in 1966, Memorandum on Concentrations though which mergers were officially acknowledged as beneficial for the EU integration objective acknowledging that article 86 from the Treaty could apply to "a concentration in which participated an undertaking having a dominant position"[26], view confirmed by the Court of justice in Continental Can case[27].

In the memorandum from 1966, the European Commission indicated that Article 85 of the EEC Treaty was not applicable to concentrations as its objective was to govern agreements between independent undertakings. The Memorandum on Concentrations was a first cornerstone in the evolution of merger control legal framework, since it clarified the applicability in the field of mergers of both article 85 (now art. 101) and article 86 (now art. 102) for the first article considering it may not apply to the field, mainly due its text configuration and because it opposed to agreements concerning market behaviour, mergers cannot be subject to ex-ante verification, they, by definition, affect market structure, eliminating competitors, which would have automatically rendered them incompatible with the exemption prospect.

On the other hand, the Commission concluded that article 86 (now art. 102) could applied to mergers, following the results of a comparative reasoning which highlighted that the obstacles impeding article 85 (now art. 101) from being applied were not true for the other, as it did not consider the means through which the dominant position has been acquired, but its effect, meaning the abuse itself[28]. Even so, the Commission considered that article 86 (now art. 102) was only applicable "under certain conditions" like when at least one of the business involved had a pre-merger dominant position, a reasoning which was challenged by some authors[29] who identified two major abuse theories, concluding that the behavioural one was the most appropriate for interpretation article 86 (now art. 102).

The next important step regarding the control of mergers within the European market is the judgement of the Court of Justice in the *Continental Can* case, a Court review validating the Commission's opinion that mergers could fall, although under a conditionality, within the scope of the treaty provisions Moreover, article 86 (now art. 102) covering behavioural abuses of the undertakings, the Court extended it to the merger-specific structural approach. In conclusion, 85 (now art. 101) was declared inapplicable to mergers and article 86 (now art. 102) remained the only legal instrument available, the case secured an apparent compromise for merger control in an EU without formal legislation.[30]

Whilst, at first, the Commission had the approach as Article 85 (now art. 101) could not be used to control mergers, later, by the mid-80s it changed the view on this issue and begun to see a role of the respective provision, considering that where an agreement on a proposed merger appears between undertakings, it may allow the Commission to influence or determine the outcome[31], one case proving the new vision was Schmalbach-Lubeca AG v Carnaud SA from 1988, when the Commission concluded that the sale would infringe Article 85, as it would result in two competitors on the can market jointly controlling a third.

As an effect of the caselaw bringing a reposition of the Commission, there was identified a need for a uniform regulation of European merger control, but took more than 15 years of negotiations to

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[25] Joined Cases 142 and 156/84, *British-American Tobacco Company Ltd and R. J. Reynolds Industries Inc. v Commission of the European Communities:* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61984CJ0142 [Accessed November 1, 2019].

[26] The Commission *Memorandum on the Problem of Concentrations in the Common Market,* Brussels, 1966, p. 7–8.

[27] Case 6/72, *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61972CJ0006* [Accessed November 1, 2019].

[28] The Commission *Memorandum on the Problem of Concentrations in the Common Market,* Brussels, 1966, p. 27-28.

[29] Joliet, R., *Monopolization and abuse of dominant position - A Comparative Study of the American and European Approaches to the Control of Economic Power,* La Haye, Liège, 1970, pp. 247–250.

[30] Hurwitz, J. D., *The Impact of the Continental Can Case on Combinations and Concentrations within the Common Market,* Hastings Law Journal, 25(3), 1974, p. 517.

[31] Byrne, N., *Control of Mergers in the European Community,* European Management Journal, Vol. 10, No. 4, 1992, p. 450.

achieve a consensus between the main actors, France U.K. and Germany[32], with the latter two having strong positions mainly due to their own national sub-units of merger control[33], but only Germany had a national regulation which was more restrictive than Commissions's proposal from April 1988, mainly because it was based on pure competition criterion.[34]

As an effect of the continuous struggle to get to a compromise, the thresholds, which ultimately set the number of transactions under the Commission's exclusive competence, were politically motivated giving authority to European institution only to a fraction of the transcontinental mergers.[35] The proposal used as legal basis not only art. 103 but also art. 308, by that requiring unanimous vote of the Council, reason for further difficulty in reaching a consensus.

The Council adopted, finally, on December 21 1989, Regulation 4064/89 (amended later in 1997), and, due the favourable context, a period following a short recession in which member states were open to integration and fulfilment of completion of the Single European Market[36], competition policy was a tool for the achievement of the internal market[37]

European Merger Control Regulation from 1989 provided that a concentration is relative to the acquisition of control, meaning the ability to exert decisive influence on another undertaking, resulting in a substantial and durable change in the structure of the respective undertakings. Also, the regulation distinguished between the possible operations of achieving a concentration, when independent undertakings merge into a new one and cease to exist separately, and case of acquisition of direct/indirect control of whole/parts of other undertaking(s).

The Regulation stipulated that a concentration had a Community dimension, and by that offering exclusive competence to the Commission when (i) the combined worldwide turnover of all the undertakings concerned was more than 5 billion ECU and (ii) each of at least two of the undertakings concerned achieves more than 250 million ECU turnover in the Community, unless each undertaking concerned achieves more than two-thirds of its turnover within one and the same Member State of the Community (one-stop shop principle)[38].

Any merger or acquisition concluded having a Community dimension had to be notified to the Commission, in advance, and the transaction could not be implemented before notification or within the first three weeks following notification. The Regulation also mentioned procedural steps regarding referrals to the Commission or national authorities, time limits for proceedings initiation, scope of the Commission's investigative powers and request for information, fines and periodical penalty payments applied for non-observance of Commission's decisions.

As in most jurisdictions, ECMR was based on the principle of ex-ante control, assessing and preventing mergers before their implementation[39]. However, ECMR also granted some ex-post control tools as the Commission was entitled to undertake all the necessary measures to restore effective competition, such as divestiture of an unlawful merger.

Nowadays, the main legislative act for European merger control is the Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings which represents a reformation Regulation No. 4064/89, consequence of an increasing need to address the new challenges coming from the completion of the single market and of the economic and monetary union, the enlargement of the European Union and the lowering of international barriers to trade and investment

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[32] Scwartz E., *Politics as Usual, The History of the European Community Merger Control*, Yale Journal of International Law, Vol. 18:607, 1993, p. 638-651.
[33] Sturm, R., *The German Cartel Office in a Hostile Environment, Comparative Competition Policy,* Oxford: Clarendon Press, 1996.
[34] Buch-Hansen, H., *Rethinking the History of European Level Merger Control. A Critical Political Economy Perspective*, CBS, Copenhagen, 2008, p. 177.
[35] Scwartz E., *Politics as Usual, The History of the European Community Merger Control*, Yale Journal of International Law, Vol. 18:607, 1993, p. 653.
[36] Damro, C. and Guay, T. R., *European Competition Policy and Globalization*. 1st edition., Basingstoke: Palgrave Macmillan, 2016.
[37] Patel, K. K. and Schweitzer, *The Historical Foundations of EU Competition Law*. 1st edition. Oxford University Press, 2013.
[38] Scwartz E., *Politics as Usual, The History of the European Community Merger Control*, Yale Journal of International Law, Vol. 18:607, 1993, p. 655.
[39] Monti, G. *EC Competition Law*. New York: Cambridge University Press, 2007.

which continue to result in major corporate reorganisations, particularly in the form of concentrations.[40] The main purpose for developing of a new merger control regulation was to simply and clarify the concentrations system, as well, as the procedural aspects, to clarify and adapt the communication between the institution investigating the concentration and the undertaking involved in the transaction.[41]

The project for the regulation on control or mergers did not intend to amend the basic principles, but some significant provisions were introduced and we may refer mainly to: simplification of referral for decreasing the number or notifications and ensuring an optimal repartition of the cases; inserting the mechanism by which the states not responding within a period are presumed to have joined the referral and that the parties are authorised to request a referral at the pre-notification period.

Merger control presumes, in most of the jurisdictions, a two stage procedure, having first the notification and collection of information needed for the competitive assessment which will lead to a clearance of the transaction or transfer into a second phase when a deeper analysis will be conducted.[42] The European provisions in Merger Control[43] provide the same two phase procedure entitling the Commission to decide wether that the proposed concentration does not raise serious doubts regarding its compatibility with EU Law or the concentration raises serious doubts regarding its compatibility and initiate Phase II.

The standard of proof in Stage II is not provided by the regulation, but it was clarified Court of Justice in its caselaw[44]. The Commission, in second phase, based on the standard of proof showing or not a incompatibility with the common market, has either to clear or to prohibit the transaction. The standard of proof is provided in terms of ”balance of probabilities”, meaning that it applies to both prohibition and clearance, and any of the decisions can pe appealed in court.[45] In phase I, the Commission can allow mergers if they it considers they are compatible with the common market, the standard of proof being the lack of ”serious doubts”, representing a more rigorous manner of clearance, still the Court provided[46] that standards of proof are the same in both stages.

3. Overview of the cases

3.1. Case *Aerospatiale-Alenia/de Havilland*[47]

Two years after the adoption of European Merger Control Regulation in 1989, the Commission prohibited, for the first time, under the new regulation, a merger occurring in the aerospace industry. The French undertaking Aerospatiale SNI and Italy-based Alenia-Aeritalia e Selenia Spa intended to acquire, under their joint venture ATR, the assets of de Havilland (the Canadian division of Boeing). Both ATR and de Havilland were prominent manufacturers of regional aircrafts of 20 to 70 seats used in regional transportation on commuter markets.

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[40] Laskowska, M., *The Control of Community Concentrations under Regulation 139/2004*, Warsaw University, 2007.

[41] Aubanel R., *Commentaire du livre vert de la Commission sur la revision du règlement de contrôle des concentrations*, RMCUE, No. 456, 2002, p. 155.

[42] Langus, G., Lipton, V., Neven, D.J., *Standards of proofs in sequential merger control procedures*, Graduate Institute of International and Development Studies, Working Papers Series, Geneva, Switzerland, 2018, p. 2.

[43] Article 6 of the Merger Control Regulation nr. 139/2004.

[44] T-5/02 - Tetra Laval v Commission: http://curia.europa.eu/juris/showPdf.jsf?text=&docid=47829&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=5879725 [Accessed November 1, 2019], Case C-12/03 P, Commission v Tetra Laval: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62003CJ0012 [Accessed November 1, 2019], Case T-285/04 IMPALA v Commission: https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=uriserv%3AOJ.C_.2006.224.01.0039.01.ENG [Accessed November 1, 2019], C-413/06 P - *Bertelsmann and Sony Corporation of America v Impala*: http://curia.europa.eu/juris/celex.jsf?celex=62006CJ0413&lang1=en&type=TXT&ancre [Accessed November 1, 2019].

[45] Versterdor, B., *Standard of Proof in Merger Cases: Reflections in the Light of Recent Case Law of the Community Courts*, European Competition Journal, volume 1, issue 1, 2005, p. 3-33

[46]Case T-79/12 *Cisco Systems, Inc. and Messagenet SpA v European Commission:* http://curia.europa.eu/juris/document/document.jsf?text=&docid=145461&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=5881717[Accessed November 1, 2019].

[47] European Commission, Decision of 2 October 1991, declaring the incompatibility with the common market of a concentration (Case No. IV/M053 - Aerospatiale-Alenia/de Havilland) Council Regulation (EEC) No. 4064/89: https://ec.europa.eu/competition/mergers/cases/decisions/m53_en.pdf [Accessed November 1, 2019].

The Commission believed that the new structure would become so strong that it would have destroyed its competition, mainly British Aerospace and Fokker, who were the main critics of the merger[48], so it decided for this concentration to be the first one to be prohibited under the Merger Control regulation from 1989, attracting frustration from French and Italian governments[49] and even the President Delors, who was in favour of the transaction[50], leading to a conclusion in the doctrine that the long negotiated Regulation was "not an industrial policy instrument"[51]

But how did the Commission reach to such a decision to change fundamentally the view on the new merger control regulation? Firstly, we have to say that in order to reach its decision, the Commission conducted just a qualitative analysis, examining the statements provided by the parties involved, competitors and customers, at the expense of a sound economic analysis.

In Aerospatiale-Alenia/de Havilland, the Commission applied the dominance test (which was to be reformed after this case)[52] focused on quantifying market power through market shares, relevant market definition and entry barriers assessments, having as an objective to demonstrate the dominant position of the merged entity. The relevant market was defined as that of regional turboprop aircraft justified by its description by consistency with "the overwhelming majority of customers and competitors". In light of the merged entity's estimated market share of 50% worldwide and 65% in the EU, the Commission concluded that ATR's position in the overall commuter markets would strengthen significantly, but the Commission decided to eliminate Havilland as a competitor which would have changed the view on the market as customers, for cost saving reasons, prefer to acquire different aircraft types from the same manufacturer, in our case the new entity.

The Commission limited the investigation to basic principles of market structure and market share, identifying few competitors and possible high market share of the new merged entity, sufficient to justify impediment of effective competition whereas arguments regarding cost savings were declined and some products (like jet aircrafts)[53] and competitors excluded from the analysis of market[54].

In Aerospatiale-Alenia/de Havilland, efficiencies were approached only as other general considerations and, by no means, explicitly in the sense introduced by the amended European Control Merger Regulation and the Horizontal Merger Guidelines. The parties have invoked cost savings generated by management of procurement, marketing and product support which could transferred in lower prices for custumors, but the Commission dismissed them.

Aerospatiale/de Havilland is considered a case raising questions about the objectives of the merger control and the ways the Commission deals with it, with two main schools of thought, one leaning towards the consumers` protection and other advocating for more factors such as industrial, social and regional policy in merger assessments. The case represented a milestone in the reformation of the merger control, following the first European Merger Control Regulation and although it did not attracted noted criticism at that moment for economic analysis, its aftermath constituted a reference step in the overall evolution of the merger control though raising awareness of the necessity of conducting a more thorough assessment.

3.2. Case *Ryanair/Aer Lingus*[55]

Ryanair intended to acquire the control of Aer Lingus though obtaining all of its shares by public bid. Subsequently to gradually acquiring shares of Aer Lingus which, by November 2006,

[48] Ross, G., *Jaques Delors and European Integration*, Oxford University Press, 1995, p. 177.
[49] McGowan L., *Competition Policy*, Policy-Making in the European Union, 3rd edition, Oxford University Press, 2000, p. 138.
[50] Ross, G., *Jaques Delors and European Integration*, Oxford University Press, 1995, p. 178.
[51] Hawkes, L., *The EC Merger Control Regulation: Not an Industrial Policy Instrument: The Havilland Decision*, European Competition Law Review, Vol. 13, no. 1, pp. 34-38.
[52] Strohm, A., *Efficiencies in Merger Control: All you Always Wanted to Know and Were Afraid to Ask*, Directorate-General for Competition. European Commission., 2004, p. 10.
[53] Monti, G. *EC Competition Law*. New York: Cambridge University Press, 2007.
[54] Utton, M. A., *Market Dominance and Antitrust Policy*. 2nd editionn. Cheltenham: Edward Elgar Publishing, 2003.
[55] European Commission Commission Decision of 27/06/2007 declaring a concentration to be incompatible with the common market and the EEA Agreement (Case No COMP/M.4439 – Ryanair/Aer Lingus): https://ec.europa.eu/competition/mergers/cases/decisions/m4439_20070627_20610_en.pdf [Accessed November 1, 2019].

amounted to 25.17% of its share capital, Ryanair finally made an offer to Aer Lingus' management for the entire share capital. Ryanair and Aer Lingus were by far two of the largest airlines serving the Irish aviation, having around 80 per cent of intra-Europe flights from and to Ireland. This was the first time the Commission had to assess a proposed merger of the two main airlines in a single country, with both operating from the same "home" airport – Dublin. It was also the first time the Commission had to assess a merger of two "low-cost" airlines, operating on a "point-to-point" basis.

The Commission decided that the merger would have harmed consumers by creating a monopoly or a dominant position on 35 routes where Aer Lingus and Ryanair competed against each other. This would had reduced choice and, most likely, would have led to price increases for consumers travelling on these routes. During the investigation, Ryanair offered remedies. The Commission assessed them thoroughly and carried out several market tests. However, the remedies proposed fell short of addressing the competition concerns raised by the Commission.

The Commission presented in the beginning of the decision its sources of investigation, comprising of the traditional qualitative ones like questionnaires/surveys addressed to competitors, corporate customers and airports, as well as written and oral interviews with other third parties such as civil aviation authorities. Next to qualitative methods, the Commission used quantitative ones, with econometric and statistical tools which changed fundamentally the quality of its standard of proof, compared to the other decision presented above.

The Commission applied the SIEC test allowing for a more dynamic analysis and despite a first conclusion of dominant position identified, it still "has carefully analyzed"[56] other factors to see if the position is ameliorated or aggravated. As in the previous case, the investigation started by conducting an analysis of the market shares, but, more in-depth this time. The European Commission's analysis indicated that their merger would have created a monopoly on 22 of the 35 overlap routes while the merged entity would have had a combined market share of more than 60 per cent on further 13 routes. On those 22 of the routes, the merger would have left customers with a monopoly. According to SIEC test, dominant position is not sufficient to demonstrate market power, so the Commission also paid attention to the behavioural implications, like the ability and the incentive of the merged entity to engage in the anticompetitive practices set out by the Horizontal Merger Guidelines.

The Commission identified a series of important barriers of entry on all overlapping routes which deemed the entry of potential competitors "unlikely". These included high entry costs given the Ryanair's and Aer Lingus' strongest brand and experience on the concerned routes, as well as the high risk of merging parties' aggressive retaliation relative to new entrants. Most airlines were unlikely to enter into direct competition against a merged Ryanair/Aer Lingus in Ireland. The likelihood of entry is further reduced by peak-time congestion at Dublin airport and other airports on overlap routes. The Commission prohibited the proposed merger because it "would significantly impede effective competition (…) in particular as a result of the creation of a dominant position"[57]

In Ryanair/Aer Lingus, efficiencies have been carefully evaluated in a separate section of the assessment. The Commission commenced by reiterating the principle set out in both European Control Merger Regulation and the Horizontal Merger Guidelines according to which it was possible for the efficiencies generated by the merger to offset its harm on competition and, in particular, on consumers.

In terms of benefit to consumers, the investigation showed that Ryanair has increased, in the past, the prices for a higher margin, so it is unlikely that it will use its new improved position on the market for the benefits of the customers, especially if we think at the principle set out in the Horizontal Merger Guidelines.

In the notification, Ryanair claims that the merger would bring cost savings from the

[56] European Commission Commission Decision of 27/06/2007 declaring a concentration to be incompatible with the common market and the EEA Agreement (Case No COMP/M.4439 – Ryanair/Aer Lingus): https://ec.europa.eu/competition/ mergers/cases/decisions/ m4439_20070627_20610_en.pdf, [Accessed November 1, 2019], par. 351.
[57] Ibid., par. 1240.

unification of administrative staff, common group operations, aircraft ownership, or maintenance, a result of economies of scale and rationalisation within the merging parties' business model[58], but the reductions in fixed costs are not immediate, so the benefits in terms of fares for consumers would materialise only if Ryanair would increase the frequencies on existing routes/opened a new route. Moreover, the Commission questions whether the change of business model would not imply some new costs. Based on all of these arguments, the Commission dismissed the efficiency claims.

4. Conclusion

The comparative analysis these two merger prohibitions, coming from different times, one just after the European Merger Control Regulation in 1989 and the other after the reformed one from 2004, fairly prove that not only the specific European provisions adapted to the development of the common market, but there can be noticed a clear reformation in the investigation activity of the European Commission.

The studied cases were fundamental for the change of view they brought in the assessment of concentrations and we can, undoubtedly, express that they were, at different moments, the seeds of reform of European merger control

By reviewing the decisions of the European Commission prohibiting the two mergers and analysing the quality of assessment we observed that in Aerospatiale-Alenia/de Havilland, the Commission's investigation was limited to analysing the qualitative evidence based on which factual assumptions were generated, but in Ryanair/Aer Lingus, the "more economic approach" was implemented so that the assumptions generated based on the qualitative evidence were tested through quantitative tools and this comparison can be useful not only for the understanding of merger control evolution, especially in relation with the process of straightening the gap between economics and law, but as a tool for the professionals in competition law today.

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