

“The substantive standard for merger control, and the treatment of efficiencies in merger analysis: an EU perspective”

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Ladies and Gentlemen,

It is a pleasure for me to be here,

Introduction - taking stock after a decade of merger control in Europe

In 1989, the EU's Council of Ministers - our "federal legislature", in a manner of speaking - adopted for the first time a legal instrument enabling the European Commission - a body which combines a number of functions but in the competition field is a law enforcement authority - to scrutinise contemplated large cross-border mergers in order to assess their impact on competition in the European Community. It was a bold step and had been a long time coming: there had been calls for the introduction of such a merger control law going back as far as the 1970's. There were many reasons why it took so long, including extensive discussion in the Council of Ministers about what substantive standard of review would be most appropriate. What ultimately emerged was a test in Article 2 of the ECMR which requires that mergers be prohibited if they create or strengthen a "dominant position" as a result of which competition would be significantly impeded.

In the twelve years that have elapsed since the entry into force of the Merger Regulation in September 1990, the Commission has taken over two thousand decisions in merger cases. A large body of caselaw (principally in the form of Commission decisions, but also in the form of Court judgments) has been built up. Despite a degree of uncertainty about what the precise scope of the substantive standard in the ECMR would be, it has proved to be a highly effective instrument for merger control, enabling the Commission to shape a credible, efficient, transparent and highly effective merger control policy. Moreover, I believe that - 12 years on - it is fair to say that the broad lines of the Commission's merger control policy are now clear.

Substantive standard in EU merger control under review

Now, for the first time since 1989, the Commission is undertaking a comprehensive review of the Merger Regulation. [In 1997, a limited revision of the regulation was made, resulting in largely technical adjustments, principally to the jurisdictional and timing provisions.] The Commission's Green Paper on the Review of the Merger Regulation adopted last December launched a discussion on the merits of the

substantive test enshrined in our merger control law. Now that the Merger Regulation has been in force for more than a decade, it was felt that the time was right to stand back and take a look at how effective the "dominance test" has been in dealing with the different kinds of competition problems that mergers can give rise to. The Paper in particular invited a discussion on how the effectiveness of this test compares with that used in many other jurisdictions, namely that mergers should not be allowed to proceed if they engender a "substantial lessening of competition".

We attempted to present the issue in the Green Paper in as neutral a way as possible, indicating that the dominance and "SLC" tests have produced broadly convergent outcomes, and that the dominance test is proving to be an instrument capable of being adapted to a wide variety of situations. I would like to stress at the outset that the Commission genuinely has an open mind about this. As Commissioner Monti has stressed repeatedly: what matters is the effectiveness of the legal instrument. Nor is there a monolithic Commission view on this: there are of course many personal views within our institution, and inevitably a lot of speculation about what a change might mean in practice, about how our courts might interpret a new test, and about what the Commission might do with it.

So what has the review thrown up? Well, we have - as you might expect - received numerous views on the subject. Both "camps" (those for and against moving to an SLC-type standard) have deployed respectable arguments to bolster their case for and against change. We have spent several months now examining the feedback, and assessing the various options available to us. We will very shortly be announcing the outcome of our deliberations. Let me now take a few minutes to give you an idea of some of the main arguments put forward by those who favour an abandoning of the current standard in favour of something resembling SLC, before turning to some of the main arguments put forward by those who favour retention of our dominance test.

Arguments for moving to an SLC-type standard

It is argued by proponents of an SLC-type test that it would be a more appropriate standard for taking economic factors into account, avoiding what is perceived in some quarters as the legal "strait-jacket" of establishing dominance. Some economists argue that the dominance test leads to a focus on static structural considerations such as corporate size or industry concentration, and doesn't allow for sufficient consideration of dynamic and behavioural factors.

In the same vein, there is a perception in some quarters that a "tortured" interpretation of the concept of dominance that would be necessary in order to accommodate certain types of competition scenarios, and notably oligopolistic dominance. Put another way, the view is that adopting an SLC-type standard would be a more principled approach, using more common-sense language to define the standard of scrutiny.

For some or all of these reasons, some commentators take the view that there are "gaps", or at least potential ones, in the scope of the dominance test. In other words, they feel that there are serious competition problems which mergers may engender, but which are not capable of being tackled using the current test. In particular, some have expressed the view that it may not be possible to extend the concept of collective dominance to controlling "unilateral" effects arising from such oligopolistic situations; they see a risk that the concept might only encompass collusive or "co-ordinated" effects. Examples given of scenarios that might not be caught by the current test include that of the merger of two firms producing differentiated or

branded products that are close substitutes within a broader relevant market, where these are the second and third largest firms in that market, but where the market does not exhibit characteristics normally associated with oligopolistic dominance. This scenario is close to that recently encountered in the *Heinz Babyfood* case here in the States.

It is also put forward by some proponents of SLC that an alignment towards a common global standard for merger assessment might be desirable, and that it would be more realistic for such alignment to be made toward an SLC-type test. It is pointed out that the SLC standard is one whose merits appear to be gaining wider acceptance internationally than the dominance test, pointing to the former's recent adoption in a number of leading jurisdictions (e.g. UK, Ireland, New Zealand). Some point out that it might, for example, facilitate merging parties' global assessment of possible competition issues arising from contemplated transactions, by obviating the current need to argue their case according to differently formulated tests. It is also pointed out that such an alignment would be facilitated by the wealth of US precedent regarding the interpretation of the SLC test, noting that this would be likely to have at least a persuasive impact in the EU. Others point out that having an identically worded standard would create "peer pressure" encouraging jurisdictions to interpret the wording in a convergent manner.

Finally, a number of respondents to our Green Paper supported a move away from the dominance test in the ECMR on the grounds that it would be desirable to separate the conceptual language used in the context of merger control from the dominance concept used in Article 82 of the Treaty (our law against "abuse of dominance", roughly analogous to the US section 2 of the Sherman Act which prohibits "monopolisation"). Some commentators consider that it is unwise for the two legal provisions to be based on an identical concept, given that each serves a different purpose. Some fear that pushing back the frontiers of the dominance concept in merger cases may be having an undesirable "spill-over" effect into that area of the law, a phenomenon sometimes referred to as the "cross-contamination" effect. Those who fear this phenomenon point to the risk that a broadening of the concept of dominance in merger cases is at the same time broadening the category of companies to whom the "special" rules in Article 82 apply, thereby potentially curtailing their ability to engage in certain types of commercial conduct. This concern applies particularly, but not exclusively, to collective dominance.

Arguments for retention of the current standard

Proponents of the retention of our current standard tend to conclude that a change to an SLC-type standard is unnecessary, by arguing essentially that the current test is proving to be an effective merger control instrument. This argument might be summarised in the phrase "If it ain't broke don't fix it"! According to this view, the two tests, while differently worded, mean more or less the same thing, at least in the way they have been interpreted in the EU and US in recent years. Both pursue the same objective, namely to ensure that industrial concentration does not produce serious adverse effects on competition. Dominance and "SLC" test have produced broadly convergent outcomes, and the dominance test is proving to be an instrument capable of being adapted to a wide variety of situations; it has, for example, been applied to deal with situations of oligopolistic dominance, and not just to single firm dominance.

Moreover, the test has been successfully used to assess the dynamic impact of mergers, and has not confined the Commission to making static market analyses. Indeed, it is often argued that what matters is not really the test itself, but the theories of competitive harm which are used in application of the test. If the dominance test can accommodate an analysis of those theories, then no change is needed. Some take the view that, while the dominance test may not be perfect in terms of its wording, (and this includes some who consider that the Commission's and Courts' interpretation of the dominance concept has been "tortured"), it has - at least so far - fulfilled its purpose. Many therefore view the dominance versus SLC debate as a mere matter of semantics.

While acknowledging the desirability of substantive merger control convergence world-wide, it is felt by many that having an identically-worded standard is not a necessary pre-requisite for international convergence in the approach to merger analysis. Rather, it is considered that the key to such convergence lies in reliance on the same micro-economic theories, econometric tools and standards of proof. Broadly speaking, I must say that I share this view. The remarkable convergence between the EU and US merger enforcement practice over the past few years is surely a testament to the fact that identical wording is not a *sine qua non* for convergence.

A considerable number of respondents to our Green Paper viewed the SLC test as being an inherently more vague, flexible, and therefore uncertain, standard. It is pointed out by some that this flexibility is demonstrated by the widely varying interpretation of the US Clayton Act test since 1914, in both the Federal Courts and by successive US administrations/enforcement agencies. There is some speculation about what a change might mean in practice, and in particular about how the Commission and the European courts might interpret a new test. Some fear that this flexibility and uncertainty might give rise to an unacceptable degree of unpredictability about which mergers would or would not be likely to be cleared under an SLC-type standard. Similarly, the SLC test is often characterised as an inherently "lower threshold", which would allow the Commission unacceptably broad discretion in analysing merger cases. Some fear that this could be a "dangerous weapon" in the hands of the Commission, allowing it to become unacceptably interventionist. Particular concern is expressed about how the word "substantial" might be interpreted.

It has also been pointed out that, even if it was felt that some suspect mergers are "falling through the net" because of a "too high" *ex ante* threshold (the dominance test), it would be more appropriate to strengthen *ex-post* legal instruments (e.g. by providing for the possibility of breaking up a company or "re-visiting" a cleared merger) than to move to a "lower" *ex ante* standard (the SLC test).

More practical matters have also to be taken into consideration, and these weigh heavily in the minds of some interested parties. According to this view, a change to the test in the Merger Regulation, irrespective of how it is worded, would necessarily involve some serious practical drawbacks, for industry and for legal practitioners as well as for the Commission and the European courts. It is feared in particular that any such change could give rise to a degree of uncertainty or unpredictability about how exactly the new standard would be interpreted, at least for an initial period. It is noted that the considerable body of precedent/case-law, emanating from both the Commission and the courts, which has been built up over the past decade or more regarding the application of the Regulation's dominance test might become, at least to

some extent, redundant - and that it would take some time for a comparable body of precedent to be built up regarding the application of a new test.

It has also to be borne in mind that many of our Member States, and most of the EU accession candidate countries, have aligned their substantive merger control provisions with the dominance test. In this regard, it should be pointed out that, while a change to an SLC-type standard might facilitate convergence with some jurisdictions, this might be at the expense of divergence from many of the EU's national regimes.

Conclusion

As you can see, it has been an interesting and stimulating time for us. And, as I said, we will soon be announcing what proposal we intend to make to the Commission before the end of this year regarding the substantive standard.

Perhaps I would venture to make one further remark before leaving this topic. As you know, our test is a "2-limb" one, and some commentators feel that the Commission has tended to ignore the so-called 2nd limb (significant impediment to competition), or to subsume it into the 1st limb (creation or strengthening of dominance). The Court of First Instance, in its two recent judgments in *Tetra Laval/Sidel* and *Schneider/Legrand*, has moreover been at pains to point out the existence of the two limbs, describing them as distinct conditions that require to be fulfilled. We are acutely conscious of this aspect of our current standard, and the relationship between its two limbs is indeed something which we have been studying carefully in recent months. The distinction between the two limbs also has an impact on how we deal with the issue of efficiencies, a subject I will turn to in more detail shortly.

I wish I could be more forthcoming with you today about the substantive test, but it would not be appropriate for me to pre-judge the final outcome of our internal deliberations. Suffice it to say that I am fully confident that the new Merger Regulation which the Council of Ministers will hopefully adopt during the course of next year will be equipped with a substantive standard which is fully capable of facilitating the continued pursuit of our policy with regard to merger control.

The need for enforcement Guidelines

That leads me to a brief discussion of how our merger control policy should be articulated. Substantive standards do not exist in a vacuum: they are merely legal instruments, a means to an end. The end in question is the pursuit of an economically-sound enforcement policy. After 12 years of merger control, I think we can confidently say that the objectives which the Commission is pursuing in the area of merger control are clear. That is why we have also now reached the view that the time has come for the Commission to spell out comprehensively our enforcement policy in relation to merger control generally and the application of the substantive test specifically.

As Commissioner Monti has made clear on numerous recent occasions, we intend that the Commission should soon promulgate merger control enforcement guidelines (in the form of Commission Notices). It is therefore our intention to submit to the Commission a draft Commission Notice on the assessment of "horizontal" mergers. This Notice will contain a clear set of guidelines on the interpretation and practical application of the substantive test in horizontal merger cases. It is also our intention that the Commission should adopt further guidance on the assessment of "vertical" and "conglomerate" mergers as soon as possible thereafter.

The treatment of efficiencies

And now let me turn to the issue of efficiencies. As you may know, the Commission's Green Paper also dealt with this issue, inviting views as to the proper role and scope of efficiency consideration in merger control. And Commissioner Monti made it clear in June of this year that he is personally committed to clarifying the extent to which such considerations are taken into account in the Commission's merger analysis. I fully share this approach. Indeed, as an economist, I feel very comfortable with the notion that the Commission should look both at the creation of market power as a result of a proposed merger, and at the possible efficiencies that mergers can bring about. The horizontal merger guidelines that we will be publishing for public consultation before the end of this year will deal with the issue of efficiencies, setting out the broad analytical approach that we intend to take.

There are, however, some issues to carefully reflect upon before deciding how precisely to deal explicitly with efficiency considerations in our merger review. One needs to have a clear view of what one wants to achieve in economic terms; one needs to proceed within a legal framework which provides clarity and therefore legal certainty. And dealing fully and properly with efficiencies may have implications for the conduct of merger investigations, and for staffing in the competition agencies who must review proposed mergers.

What role is there for efficiencies?

As I already have pointed out, the main purpose of merger control is to protect consumers from the potentially negative impact of mergers on the competitive process. The main social cost associated with mergers arises from their potential to impede competition and, as a result, to enhance the ability of a firm or a small group of firms to exercise market power, leading to price increases, output restrictions, reductions in the quality of the products supplied or reduced incentives to innovate and introduce new products.

And while it is evident that a merger control system which seeks to prevent mergers which impede competition brings important benefits to society, one should also recognise the potential drawback of focusing exclusively, or in what I might refer to as a "one-dimensional" manner, on the perceived potential of mergers to impede competition. We should bear in mind that many - if not most - mergers bring about substantial efficiencies in terms of the production process, the process of innovation, or in other forms. Whether or not a merger will have anticompetitive effects will, in reality, also depend on whether such efficiencies will be attained by the merging firms or not.

By not taking such efficiencies explicitly into account as a possible positive impact of the merger on economic welfare, one risks not only to block the occasional merger which might ultimately have pro-competitive effects once these efficiencies are taken into account, but one also risks that some efficiency-enhancing mergers might not be pursued in the first place. In this sense, increasing the transparency and accuracy of the merger review process by routinely and explicitly looking at efficiencies should be seen as a net improvement.

In order to better appreciate a merger's likelihood of resulting in efficiencies, I would also add that it is often instructive for competition enforcers to better understand the rationale and motives underlying a particular merger. As we all know, there is often a

certain "judgment call" to be made when it comes to interpreting the various facts of a complex merger case. In some instances, therefore, a better understanding of the rationale underlying mergers would add to the quality of the analysis of the impact that merger is likely to have on markets.

Why have we been less explicit about efficiencies in the past?

When I say that it is desirable and legally possible to introduce explicit efficiency considerations in EU merger review, this begs an obvious question: why hasn't the European Commission been explicit in its treatment efficiency considerations until now ? Well, in my view, the prospect of the Commission taking efficiencies into account more explicitly in the future than it has done in the past is a natural development. Why is that so?

One should not forget that the Commission is still a relative new-comer to merger control: our merger control instrument dates from 1990. In the early days of our enforcement, it was important to convey the message that EU merger control was about applying a competition test, not some kind of broad industrial policy or public interest test. Seen in this light, it is perhaps not surprising that the Commission has been cautious, even reluctant, to pay too much attention - at least explicitly - to efficiency claims.

However, 12 years on, I think it is fair to say that we have now reached a stage where we can confidently say that there is a consensus regarding the purpose of merger control. Furthermore, I believe it is fair to say that the Commission now has sufficient experience and know-how to confidently make its merger review process more sophisticated and finetuned to specific merger cases involving efficiencies.

Moreover, I would add that our development in this respect is fully in line with the Commission's endeavour to enhance its economics based analysis in competition cases generally and of mergers specifically. An increased focus on the actual impact that mergers are likely to have, in conjunction with an analysis of the structural aspects of a market, naturally makes the case for explicitly considering the efficiencies that a merger can bring about more pertinent.

Legal basis for the treatment of efficiencies in the ECMR

In my view, it is legally possible to introduce an explicit treatment of efficiencies into EU merger control without changing the substantive test or even the present wording of the Merger Regulation, a view which - incidentally - was also shared by many respondents to our Green Paper. For a start, Article 2(1)(b) of the ECMR provides a legal basis by stating that the Commission shall take account, *inter alia*, of "the development of technical and economic progress provided it is to consumers' advantage and does not form an obstacle to competition". The Commission can therefore already consider efficiency claims by the merging parties in assessing the notion of technical and economic progress, and take them into account if they fulfill the two conditions set out in this provision.

Turning then to our main substantive test in Article 2(3) of the ECMR, there are essentially two legal options, not necessarily exclusive of each other, to be considered as avenues for the exact treatment of efficiency considerations put forward by the merging parties.

Under a first option (so-called "integrated approach"), efficiencies would be taken into account in order to assess whether or not the concentration would lead to the

creation or the strengthening of a dominant position. In that perspective, pro-competitive efficiencies would be balanced against other elements indicative of a dominant position. Efficiencies may have such a positive effect on rivalry that the overall effect of the transaction is no reduction in rivalry in the market via the loss of a competitor - hence no dominant position would be created or strengthened.

This approach might seem to leave a somewhat limited scope for taking into account efficiencies. Under the current concept of dominance in EU law, which focuses on the ability to act on the market without being effectively constrained by others, or, similarly, on the ability to appreciably influence prices, production, distribution or innovation, it would seem to be conceptually difficult for the merging parties to argue that efficiencies would limit their ability to act in such ways.

Decisions about the treatment of efficiencies in merger cases should also be seen in light of the need to ensure coherence with other policy areas, and in particular Articles 81 and 82. On the face of it, resorting to an integrated approach in the application of Articles 81 and 82 seems less desirable. Under Article 81, an efficiency defence is only conceivable as a formal defence where the finding of a restriction of competition under Article 81 (1) is balanced against efficiencies under Article 81 (3). The same is true under Article 82, where efficiencies would not be taken into account in the assessment of dominance but in determining whether a particular conduct constitutes an abuse. Under the current policy, efficiencies are not taken into account in the assessment of abuse under Article 82 unless it constitutes an objective justification. One might counter to this, however, that merger analysis is inherently different from *ex-post* intervention. Whereas Article 82 focuses on the question of whether or not there is a dominant position in a market, the Merger Regulation is concerned with the question of whether there will be a creation of a dominant position in a market, which is a much more dynamic perspective. We are currently weighing up these considerations before deciding on how exactly to frame any "integrated approach" to efficiencies under the ECMR.

Under a second option (so-called "efficiency defence"), the parties could also rely on the efficiencies the merger is meant to bring about in order to "rebut" a finding of dominance. In other words, parties could demonstrate that their merger would produce efficiencies of such a magnitude that they would outweigh or render unlikely the normally negative effect of a dominant position, which is to significantly impede competition.

Such an "efficiency defence" could conceivably be based on the second limb of Article 2(3) of the ECMR which refers to a "significant impediment to effective competition". Under that approach, the parties would have to show that, despite their ability to act in a certain way on the market (dominance), they would have the incentive to act pro-competitively because of the claimed efficiencies, as a result of which effective competition would not be significantly impeded. If these efficiencies are sufficiently demonstrated and sufficiently outweigh any negative effects of the merger or render them unlikely, then there would be no significant impediment to competition and therefore "no obstacle to competition" within the meaning of Article 2(1)(b) (a so-called "sliding scale" approach).

This approach to an efficiency defence would be fairly consistent with the approach taken for Articles 81 and 82. Both the ECMR and Articles 81 could then be interpreted as allowing a formal defence against the finding of a dominant position provided certain conditions are met. Insofar as Article 82 is concerned, an efficiency

defence could be put forward in order to show that a practice normally considered as an abuse is objectively justified by pro-competitive efficiency considerations.

It is, however, important to recognize that the two options are not necessarily exclusive of each other. Some efficiencies would arguably lead us to conclude that a dominant position would not be created or strengthened, others would allow conclude that they would outweigh or render unlikely the normal negative effect of a dominant position, which is to significantly impede competition.

So you can see that we have a number of crucially important policy choices to make. It is accordingly our ambition that the Guidelines which we are working on should set out the extent to which efficiencies should be taken into account, and in doing so should describe with some precision exactly how to proceed analytically and on what precise legal basis.

Types of efficiencies

So what types of efficiencies should be admissible, either as factors leading to a conclusion that efficiencies vitiate any possible reduction in competition, or off-set the negative effects on economic welfare of any such reduction?

From an economic point of view, it makes sense to characterise efficiencies as including anything that is likely to result in lower prices, lower costs, expanded output, improved quality, enhanced service, or greater innovation. More specifically, economists generally distinguish between two broad types of efficiencies, both of which are relevant for the analysis of competition and welfare: static efficiencies and dynamic efficiencies.

Static efficiencies are those, which allow a company to produce a given level of output at lower cost. They allow an undertaking to produce more output from the same amount of input. Static efficiencies may result from the rationalisation of production or a better exploitation of economies of scale and scope. They may not only arise in the area of production, but in all elements of the value chain (e.g. distribution). They could also be created through purchasing economics or savings in factor prices such as intermediate goods or the cost of capital.

Dynamic efficiencies take the form of innovation and improvements in products and processes. They may result from research and development (R&D) or other means such as learning by doing or entrepreneurial creativity. They may also be the result of synergies which are brought about when the parties to an agreement or merger attain a cost/output configuration through the combination of their respective assets that would not otherwise be possible. Agreements or mergers may stimulate technological progress, for instance by promoting the diffusion of know-how or by increasing the incentives for R&D activities (through the internalisation of the benefits of R&D).

Both static and dynamic efficiencies should be taken into account in a full and proper analysis of a merger's impact on welfare. Legally, this approach also seems to be correct, if you look at the language of the ECMR, which refers to "technical progress". There is no need to emphasize static efficiencies (for instance cost reductions) to the exclusion of dynamic efficiencies (improved R&D, introduction of new products) or vice versa. However, it is usually considered by economists that the latter category of efficiencies are, in reality, often much more important to the competitive process than static efficiencies. Dynamic efficiencies may, on the other hand, be more difficult to verify, an issue to which I will return in a moment.

Where static efficiencies are concerned, in line with the need to ascertain whether efficiencies will be passed on to consumers, I would say it is safe to assume that cost efficiencies that lead to reductions in variable or marginal costs are in many cases more likely to meet this requirement than reductions in fixed costs. This is because variable cost savings are more likely to have a direct impact on short-run pricing decisions. However, we should recognize that fixed cost savings may lower the long-run incremental costs, thus leading to lower prices in the longer term. Finally, it should be recalled that fixed costs savings can be used to finance investments in new products, R&D, promotion, etc., thus leading to dynamic efficiencies.

Scope of efficiency considerations: the interest of the consumer

In principle, the choice as to what type of efficiency claims should be recognised depends to a large extent on the precise objective of merger control, in other words, on the welfare test to be applied. One commonly distinguishes between two broad categories of welfare standards: a “total welfare” standard and a “consumer welfare”-type of standard.

Under a “total welfare” standard, an enforcement authority (or Court) would have to take account of the alleged benefits the merger may bring to consumers and producers. Theoretically, efficiencies could be invoked if the merger creates more wealth for producers than it destroys for consumers. Under a “consumer-welfare”-type of standard, the focus would exclusively be on the consumer benefits resulting from the merger.

The choice of welfare standard affects the ease with which an efficiency defence can be relied upon. Under a total welfare standard, relatively small cost savings could lead to an increase in producers’ surplus that outweighs a reduction in consumers’ surplus. Consequently, efficiencies could be invoked even to justify mergers that would result in negative consequences for consumer choice, service and price (see e.g. the Canadian Propane case).

A consumer welfare standard, on the other hand, normally requires relatively large cost savings or other, more dynamic efficiencies in order to off-set the increase in market power that is brought about by the creation or strengthening of a dominant position. If one looks at the US experience, its consumer welfare standard appears to limit the number of cases where an efficiency defence can be successfully recognised.

A consumer welfare standard would seem to be consistent with the legal wording of Article 2(1)(b) of the ECMR, which explicitly refers to “the interests of intermediate and ultimate consumers” and to the condition that technological and economic progress must be to the “consumers’ advantage” in order to be taken into account. Furthermore, it would also be consistent with the assumption that EC competition law aims at promoting consumer welfare, as is also expressed in Article 81(3) EC which makes exemptions subject to the condition that consumers receive a “fair share of the resulting benefit”.

In my view, the efficiencies accepted must in principle benefit consumers in the same markets where a dominant position is likely to be created or strengthened. An interesting question which is relevant in this respect is whether we should ever go further and, in exceptional cases, also consider efficiencies in other markets? This might seem inconsistent with our current practice. For example, the Commission never trades off pro-competitive effects in Germany with anti-competitive affects in Denmark. It might make sense, however, to permit such a “balancing” where products

are, for instance, complementary, and where efficiencies would, therefore, benefit the same group of consumers.

Another interesting policy question in this respect is whether a focus on consumer welfare necessarily implies that e.g. prices must decrease or at least stay on their present level following an agreement/merger. That seems too narrow a view of consumer benefit: non-price efficiencies, e.g. in the form of new products, should, in my view, surely also be permitted to outweigh even short-term price increases in the overall balance.

Merger-specificity

Another important policy choice to be made concerns the question as to whether it should be required that efficiencies must be specific to the merger, which means that they should come as a direct result of the merger and that they could not be effectively achieved through other means. In my view, placing such a requirement in the Guidelines would constitute a safeguard against unnecessary anti-competitive effects, and would be consistent with the general Community law principle of proportionality. In other words, if the benefit in question can be achieved by means posing less of a risk to competition than a merger, for example by the licensing of technology, then the merger should not be allowed to proceed. It is worth noting that this condition is also enshrined in Article 81(3) which provides that any restriction of competition must be indispensable to the attainment of the economic benefits claimed, as well as in the US Guidelines.

Verifiability and burden of proof

One part of the exercise also consists in defining the principles along which evidence of efficiency claims should be provided to the Commission. Much, if not most, of the relevant information which could allow us to assess whether the merger will bring about the sort of efficiencies that would allow a merger to be cleared, is uniquely in the possession of the merging parties. It makes sense, therefore, to make it incumbent upon the notifying parties to provide all relevant information and to demonstrate that the efficiencies are merger specific, substantial, timely, and verifiable. Similarly, it would seem natural that it is for the notifying parties to set out in detail why the efficiencies will outweigh any adverse effects on consumers or make these effects unlikely.

Furthermore, a choice has also to be made regarding the overall standard of proof when it comes to deciding upon the verifiability of efficiencies claimed by the parties. In particular, it should in my view be made clear that the Commission must be reasonably certain that the claimed efficiencies will indeed materialize. This would require in many instances that the Commission be in a position, on the basis of the evidence provided by the parties, to “quantify” in some way the magnitude of the efficiencies as well as their timing.

While, both static and dynamic efficiencies would need to be verifiable, it would often be the case that the former would be easier to verify than the latter. Where dynamic efficiencies are concerned, it would therefore make sense to put most weight on those efficiencies that seem demonstrably likely to lead to new or improved products as a verifiable benefit to consumers.

It should, however, not be forgotten that regulators must, as a practical matter, be capable of making a reasonably certain prognosis about the likelihood of efficiencies being realised: it is, after all, a prospective analysis that we are carrying out.

Limits to efficiency considerations

A cautious approach would also entail setting limits to when efficiencies can mitigate very serious competition concerns. Efficiencies are most likely to make a difference when they are substantial and the potentially adverse effects are small. The greater the potential negative effects on competition, the more the Commission has to be sure that the claimed efficiencies are substantial, certain to be realised, and benefiting the consumer. This is comparable to a sliding scale approach.

In that regard, it seems to me important to ask whether the merged entity will have the incentive to continue becoming more efficient. After all, what is the sense of clearing a merger on the basis of one-off efficiencies when there is every reason to doubt that future efforts to become more efficient are unlikely in view of the resulting market structure ? For that reason, it is unlikely that the creation or strengthening of a dominant position involving a monopoly or a quasi-monopoly could ever be declared compatible with the common market (i.e. lawful under our Merger Regulation) on efficiency grounds.

Timing of efficiency claims

The timing of efficiency claims needs also to be considered. As a practical matter, we need time to assess their impact. For example, until which point in the merger investigation would it make sense to accept the submission of efficiency claims ? For me it is obvious that efficiency claims should preferably be made early in the process and certainly not at a stage where it is no longer possible for the Commission to have a reasonably careful look at them.

Staffing implications

Another dimension to the introduction of explicit efficiency considerations is that it may have repercussions on the internal organisation and manpower of the Commission's merger control staffing. It may require the recruitment of additional expert economists and accountants in order to be able to satisfactorily cope with efficiency claims made by the parties. I know that the US agencies devote a considerable proportion of merger investigation time to analysing efficiency claims.

Wrapping up: the main policy choices

Although it is not yet the time for definitive answers, I would like to conclude with summarizing the main policy choices we are facing at present.

An important question concerns how cautious we should be - at least initially - towards efficiency considerations, in particular whether we should already from the outset be willing to consider efficiencies in a wide range of circumstances.

A restrictive approach has the obvious advantage for a competition authority that it is not swamped with a large number of claims that are difficult to assess. Furthermore, it limits the risk that non-competition arguments can be hidden behind vague efficiency arguments from the side of the deciding competition authority. We need to bear in mind that the Commission's approach to efficiency considerations will likely influence our Member States and national courts. A overly broad approach might therefore carry a risk of reopening the Pandora's box of industrial policy considerations being taken into consideration in merger control, even in countries, which have recently moved away from a broader public interest test towards a pure competition-based test.

At the same time, a narrow approach entails the risk that the authority might be accused of being so demanding that the standards in reality are impossible to meet. This criticism has, for instance, been made against the way efficiency claims are being dealt with in the United States, where the US Merger Guidelines take a relatively "strict" approach.

So you can see that the choices we are facing involve finely balanced considerations. I am confident, however, that the Guidelines we will soon be publishing for consultation will get that balance more or less right. We will then await with interest the no doubt stimulating public discussion that will follow.

ICN - managing the worldwide proliferation of merger control

Before concluding my remarks, let me cast the net a bit beyond the EU. I believe the greatest long-term challenge in terms of antitrust convergence will be the task of "managing" the worldwide proliferation of antitrust regimes, and of merger control regimes in particular. Many of these regimes are very new, and we need - I think - to be advocating that competition policy should be used to foster competition, and not as a protectionist instrument, as an instrument of industrial policy, as an instrument of social policy, or whatever. This is crucial to the proper functioning of these countries' economies. But it is also crucial to the health of the global economy, to facilitating trade, ensuring that conditions for business can be optimised: sound antitrust policies should not only mean open markets, but should also mean legal certainty, consistency, predictability, and an absence of regulatory arbitrariness.

That is why I am so proud of our efforts towards the building of an International Competition Network. As you know, this consensus-based initiative has only recently come off the drawing board, and was formally "launched" exactly one year here in New York. Its purpose is to serve as a forum in which antitrust agencies, from developed and developing countries alike, can discuss the whole range of practical competition enforcement and policy issues.

Initially, the International Competition Network is focusing on merger control regimes worldwide, particularly as they apply to multinational mergers, and on the competition advocacy role of antitrust agencies. Soon it will also turn its hand to the vitally important task of capacity-building for emerging antitrust agencies: I am proud that the ICN will serve to encourage the dissemination of antitrust expertise, experience and best practices, as well as facilitating further international cooperation.

Real work has already got off the ground: at the first annual conference in Naples in September, we agreed a set of guiding principles for merger control procedures. Soon we will also be looking at several of the very topics I have dealt with in this paper: the issue of substantive standards in merger control, the proper treatment of efficiency considerations, and an in-depth study of enforcement guidelines worldwide. Who knows? Perhaps some day we might even be able to reach global agreement on a set of model enforcement guidelines! For the time being, that may seem ambitious, but I am personally convinced that the ICN will serve to facilitate an ever-greater worldwide convergence of competition policy and enforcement practice.

Thank you very much