Unilateral Effects and the EC Merger Regulation – How The Commission Had its Cake and Ate it Too

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I. Introduction:

On January 20, 2003, the European Council formally adopted Regulation 139/2004, the widely debated and long-awaited amendment to the European Commission Merger Regulation (ECMR). Both this regulation and the Commission's *Notice on Horizontal Mergers* (Merger Guidelines) - explaining the application of the ECMR - became effective on May 1, 2004, resulting in the greatest reform in EC merger control since the original ECMR was adopted in 1989.[1] The most conspicuous change in the new ECMR is the language of Article 2, Sec. 3, which changes the substantive test for merger prohibition. The old ECMR applied the 'dominance test' prevalent in many EU countries' national competition legislation had been used to assess the threshold for prohibition; the new ECMR changed this to the 'significant impediment to effective competition' (SIEC) test. In settling on this test, the Commission had to balance a number of policy objectives and member interests to come up with a test that allowed the Commission to 'have its cake and eat it too.' By framing the change as a clarification rather than a reform of the law, the new test expands the coverage of the law include mergers exhibiting unilateral effects, while allegedly maintaining legal continuity.

Despite the Commission's efforts to frame the reform as a clarification, the SIEC test differs conceptually from the dominance test. While the two tests would likely yield convergent results in most merger cases, the shift to the SIEC has definitively expanded the scope of coverage of EC merger control to the area known as unilateral effects – the anti-competitive effects resulting from mergers that eliminate competitive constraints, in markets with only a few large players.

This paper examines the transition process between the old and the new regime, and focuses on the substantive change from the dominance test to the SIEC test. Part II of the paper examines the application of the dominance test under the old ECMR, and illustrates that unilateral effects are a distinct form of competitive harm. Part III argues that despite the reticence to acknowledge a gap in coverage of the old ECMR, such a gap existed in the area of unilateral effects. Part IV examines the debate surrounding the reform of the substantive test in the ECMR, and argues that closing the gap of coverage for unilateral effects was the primary motivating factor in the reform. Part V examines the new ECMR and argues that while it has closed the gap in coverage for unilateral effects, the effect of the ECMR could be to push the Commission towards greater interventionism if its application is not disciplined. Part VI notes that the new test is only a trivial step towards

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[1] Monti, Mario, Address, 'Merger Control in the European Union: A Radical Reform' (European Commission/IBA Conference on EU Merger Control, Brussels, 7 November, 2002) [Monti Address].

convergence in the enforcement of global competition law, an area where grave challenges lie ahead.

II. Unilateral Effects: A Different Type of Competitive Harm

(1) The Old Dominance Test:

In order for a merger to be prohibited under the old ECMR, it had to lead to 'the strengthening or creation of a dominant position,' resulting in effective competition being 'significantly' impeded. This two-limbed test required that the Commission show that first, a dominant position was established or strengthened and second, this resulted in a significant impediment to competition. The extent to which the two limbs are independent of one another has been debated, with some arguing that each must be analyzed and proven separately and others suggesting that the second limb acts as a qualifier to the first limb's concept of dominance.[2] Regardless of which interpretation is preferred, establishing dominance was always a prerequisite to the prohibition of a merger by the Commission.

While in practice, the Commission applied the dominance test with great success, the test was recognized by many as insufficiently capable of meeting the goals of merger control. Focusing exclusively on dominance is sufficient if the goal of merger control is preventing future abuses of dominance.[3] But the purpose of merger control has been recognized to be broader by the ECJ:

> . . . the main objective in exercising control over Concentrations at the Community level is to ensure that the restructuring of undertakings does not result in the creation of positions of economic power which may significantly impede effective competition in the common market.[4]

It is thus apparent that the Commission is concerned with positions of economic power, rather than strictly those of dominance, raising early questions about the efficacy of the dominance test.

(2) The Evolution of Dominance to Include Coordinated Effects:

Many questioned the ability of the old ECMR to deal with anti-competitive mergers that do not result in the creation or strengthening of a dominant position, suggesting there was a 'gap' in coverage in the area of non-collusive oligopoly. Critics argued that merger control should be based on an understanding of competitive dynamics that accurately reflect the nature of competition in the post-merger market, rather than the static market shares generally associated with analysis under dominance.[5]

Others argued that the dominance test failed to ask the right question, namely whether consumer welfare would be harmed by the merger.[6] In the United States, merger control hinged on a 'substantial lessening of competition' test (SLC) in Sec. 7 of the *Clayton Act*.[7]

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[2] Fountoukakos, Kyriakos & Ryan, Stephen, 'A New Substantive Test for EU Merger Control' E.C.L.R. 2005, 26(5), 277, 280.
[3] Fountoukakos, *supra* note 2 at 280.
[4] Case T-102/96 *Gencor v Commission* [1999] E.C.R. II-753 at 106.
[5] Fountoukakos, *supra* note 2 at 284.
[6] Maudhuit, Sylvie & Soames, Trevor, 'Changes in EC Merger Control: Part 2' E.C.L.R. 2005, 26(2), 75, 75.
[7] *Clayton Act*, 15 U.S.C. §18 (1914).

Former Treasury Secretary Larry Summers indicated that in the United States, the ultimate goal is 'efficiency, not competition,'[8] with competition acting as the means to an end result of efficiency.
In contrast to his American counterpart, Mario Monti stated in 2001 that 'actually the goal of competition policy, in all its aspects, is to protect consumer welfare by maintaining a high degree of competition in the common market.'[9] This approach views price as an insufficient proxy for efficiency, taking the view that a merger that reduces competition, even if it brings efficiency gains, will be harmful to consumer welfare – making *competition* an end in itself.[10] Merger control in the EU is thus seen as susceptible to being uses as a tool of industrial policy, as the focus on injury to competitors can be seen as a strategy to favour existing competitors.[11]
The Commission's application of the dominance test in the 1990's, however, revealed sensitivity to the importance of dynamic analysis in merger control. The Commission indicated a willingness to shift the focus of its analysis from a purely market share analysis based understanding of dominance to a consideration of the removal of pre-merger competitive constraints. In *Alcatel/Telettra*, [12] the Commission authorized the creation of a firm with a post merger market share of 83 percent, primarily because of countervailing buyer power in the relevant markets and the ability of competitors to the merged firm to increase supply. Conversely, in cases such as *Carrefour/Promodes*[13] the Commission intervened to block mergers resulting in post merger market shares below the level generally associated with dominance, noting the merging firms were particularly close substitutes in an industry with high barriers to entry.[14] The Commission thus indicated its willingness to interpret the notion of dominance by considering factors beyond a basic market share analysis.
The Commission's recognition of the need to apply 'dominance' flexibly was evident in its willingness to extend the concept of dominance to mergers that did not create a particularly large market share but did create a market structure conducive to tacit collusion or coordinated effects. Through the doctrine of *collective dominance*, the Commission was able to prohibit mergers leading to coordinated effects using the dominance test, even if they did not result in particularly high market shares.
The notion of collective dominance was first recognized by the Commission in the 1992 *Nestle/Perrier* decision. The Commission stated that the fundamental objective of ensuring that competition in the internal market is not distorted could not be achieved if collectively dominant positions could not be addressed by Article 2 of the Merger Regulation.[15] Such an interpretation was confirmed in the late 1990s by both the Court of First Instance in

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[8] Summers, Lawrence, 'Perspectives on Competition: Competition Policy in the New Economy' (2001) 69 *Antitrust Law Review* 353.
[9] See Monti, M. 'The Future for Competition Policy in the European Union' Address, (Merchant Taylor's Hall, London, July 9, 2001).
[10] Akbar, Yusaf H., & Suder, Gabriele G. S., 'The New EU Merger Regulation: Implications for EU-U.S. Merger Strategies,' [Forthcoming in *Thunderbird International Business Review*, 2006].
[11] See Fox, Eleanor, (2003), 'We protect competition, you protect competitors' [2003] 26(2) World Comp 149.
[12] EC, *Commission Decision in Alcatel/Telettra*, M. 42*,* April 12, 1991 at para. 42.
[13] EC, *Commission Decision in Carrefour/Promodes*, M.1684, January 25, 2000 at para. 60, see also EC, *Commission Decision in Nestle/Ralston Purina*, M.2237, July 27, 2001.
[14] Fountoukakos, *supra* note 2 at 281.
[15] EC, Commission Decision in *Nestle/Perrier*, M. 190, July 17, 1992.

Gencor[16] and the European Court of Justice in *Kali und Salz*[17]. The Court in *Gencor* rejected arguments that because collective dominance did not specifically appear in the Regulation, as it did in national legislation in Germany and the UK, it could not be covered by the concept of dominance.[18] Collective dominance refers to the concept of tacit collusion, and was defined in *Gencor* to occur when:

> . . . effective competition in the relevant market is significantly impeded by the undertakings involved in the concentration and one or more other undertakings . . . together, in particular because of factors giving rise to a connection between them, are able to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers, and also of consumers.'[19]

The introduction of the concept of collective dominance allowed the Commission to prohibit a merger even if it would not result in the creation or strengthening of the position of a clear market leader, a significant departure from the plain language meaning of dominance. This interpretation was based in the notion that the members of an oligopoly could, by acting together, collectively occupy the requisite dominant position in the ECMR. In *Gencor,* the CFI confirmed the Commission's findings that high barriers to entry, stable demand, homogenous products, homogenous firms, low elasticity and transparent pricing are all factors that can facilitate a finding of collective dominance.[20] *Gencor* further indicated that a finding of collective dominance does not actually require structural links between the different market players to be proven; rather the existence of the economic conditions that lead to tacit collusion is sufficient to ground findings of collective dominance.[21] The evolution of the concept of collective dominance offered some hope that the slightly retooled dominance test under the old ECMR would continue to be an effective legal instrument for merger control, as it had been in the 1990s.

(3) The Distinct Nature of Unilateral Effects:

Despite the success of the dominance test, the question of whether it could be used to prohibit mergers resulting in unilateral or non-coordinated effects remained uncertain. Unilateral effects refer to the ability of post-merger firms to raise prices because of the removal of competitive constraints resulting from the merger, irrespective of the pricing decisions and actions of their competitors. Such anti-competitive effects can be pronounced when two significant competitors merge to create a large, but not dominant player on a market with only a few other competitors. In such a case, particularly when the two merging companies have highly substitutable products, it will be rational for the merged company to raise prices to some degree, because it will recapture some of the customers who would have switched away from the product in favour of what was previously a competing product. Such a price increase does not depend on the merged firm being the dominant player in the market. The likelihood and magnitude of such an increase will instead depend on the substitutability of the products in question – the closer the substitute,

[16] *Gencor*, *supra* note 4.
[17] Cases C-68/94 and 30/95 French Republic and Societe Commerciale es Potasses et de l'Azore (SCPA) and Enterprise miniere et Chimique (EMC) v Commission, [1998] E.C.R. I-1375 at 170 [*Kali & Salz*].
[18] *Gencor supra* note 4 para. 126.
[19] See *Kali & Salz*, *supra* note 17 para. 221, see also *Gencor*, *supra* note 4 para. 163, Case T-342/99, *Airtours v. Commission,* [2002] E.C.R. II-2585 para 59.
[20] See *Gencor*, *supra* note 4 para. 165.
[21] *Ibid*, para. 271, see also *Airtours*, *supra* note 19 para. 61.

the greater the unilateral effects.[22] A secondary anti-competitive effect arises when remaining firms in the market respond to the higher prices of the merged firm by raising their own prices.

If the only tool available for preventing such a merger is the traditional dominance test, a competition authority must define an artificially narrow market that excludes other competitors in the market. This ignores the real competitive dynamics of the market in question, which depend much more on the substitutability of the competitors' products than on their respective market shares or dominant position. Through the calculation of diversion ratios using detailed price scanner data and survey data, it becomes possible for a competition authority to assess the proportion of customers that will be lost based on a given price increase.[23] Understanding the unilateral effects implications of a merger therefore requires an analytical process that differs considerably from the market share analysis that forms the basis of the dominance test.

III. The Alleged Gap in Coverage of the Dominance Test

(1) Could Dominance Cover Unilateral Effects?

Given the conceptual difference between unilateral effects analysis and analysis under the traditional dominance test, many commentators began to question the Commission's ability to prevent mergers which did not result in cases of dominance or collective dominance but whose anti-competitive effects came in the form of unilateral effects. The United States Federal Trade Commission (FTC) had faced such a situation in the *FTC v H.J. Heinz*, the *Babyfoods* case.[24] In that decision, the FTC prohibited the merger between the second and third largest producers in the market for baby food, even through the resulting firm would not have been the dominant producer, but the second largest. The Court of Appeal agreed with the FTC's findings that the firms wishing to merge were consistently in competition for the second spot on grocery shelves, and that the merger would result in the removal of a significant competitive constraint and higher prices irrespective of the dominant firms pricing decisions.

The *LloydsTSB/Abbey National* merger in the UK is another case popularly cited as a case that would have fallen outside the scope of the dominance test. In *Lloyds*, the UK Competition Commissioner blocked a merger that would have resulted in a post-merger market share of 27 percent, where a further 50 percent of the market was controlled by three principal rivals.[25] In that case one of the merging firms was a 'maverick' firm, the removal of which would eliminate an important competitive force in the market.

Those in favour of maintaining the dominance test argued both of the above gap cases could have been blocked under the old ECMR. The UK Competition Commission's report in *Lloyd's* focused on the factors traditionally associated with a co-ordinated effects analysis such as homogeneity, stability and transparency to conclude that the market 'is

[22] Volcker, Sven, "Mind the Gap: Unilateral Effects Analysis Arrives in EC Merger Control" E.C.L.R. 2004, 25(7), 395, 396 ff.
[23] Lindsay, Alistair, *The EC Merger Regulation: Substantive Issues*, (London: Sweet & Maxwell, 2003), 3-30.
[24] *FTC v H.J. Heinz Co*, 246 F.3d 708 (D.C. Cir 2001).
[25] *Lloyds TSB Group Plc/Abbey National Plc*: Report on the proposed merger, U.K. Competition Commissioner, 2001.

vulnerable to tacit collusion in pricing.'[26] Arguably, therefore, the case could have been dealt with under collective dominance in the ECMR. Similarly, while the immediate competition concern in *Babyfoods* was the elimination of the number three rival and the FTC reached its decision with this in mind, the ultimate concern was a market with two remaining competitors, which might also have been dealt with under collective dominance or co-ordinated effects.[27] However, such an argument fails to recognize that the competitive concern expressed by the FTC was the elimination of the rivalry for the number two spot on grocery shelves. To mandate that such a concern be addressed through collective dominance, would require the Commission to seriously distort the notion of dominance. It is thus evident that conceptually, at least, a gap in coverage could exist.

The language adopted by the Court of First Instance in *Kali und Salz*, supported the existence of such a gap in practice. The court held that collective dominance could apply to cases where a group of oligopolists could 'adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers and also their consumers.'[28] This allowed the concept of collective dominance to be applied in a manner consistent with the traditional definition of dominance as set out by the European Court of Justice.[29] Unilateral effects, however, by definition, exist without the 'common policy' identified by the Court in *Kali & Salz*, making it unlikely they could be targeted under the guise of collective dominance.

(2) The EC Did not have Experience with Unilateral Effects Analysis:

The Commission had considered factors beyond market share in some cases, which suggested to some that the unilateral effects analysis was already being applied under the dominance test.[30] While no cases in the EC had been decided exclusively on the basis of unilateral effects, the Commission has considered the presence of unilateral effects as an aggravating factor to support a finding of dominance and the absence of such effects as a factor militating against a finding of dominance. In *Volvo/Scania*, the Commission emphasized the fact that the merging parties were each others' closest substitutes.[31] In the *Barilla/BPL/Kamps* merger between makers of bread substitutes, the Commission circumvented the challenge of deciding whether the relevant market was bread substitutes or the narrower crisp bread segment by focussing on the close substitutability of the Barilla and Kamps products.[32] While the Commission did consider substitutability in both of the above cases, its conclusions on substitutability were drawn from historical market share data rather than any kind of meaningful econometric analysis. The Commission's approach indicates only a limited depth in unilateral effects analysis.[33] Similarly, in *GE/Instrumentarium*, the Commission analyzed bidding data supplied by competitors in the market and used the determination that GE was by far the most frequent runner up to

[26] *Ibid* para 2.64.
[27] Ridyard, Derek, 'The Commission's New Horizontal Merger Guidelines – An Economic Commentary' *The Global Competition Law Centre Working Papers Series*, GCLC Working Paper 02/05 (Brugge: College of Europe), 5.
[28] Kali & Salz, *supra* note 17 para. 221.
[29] See Case C-85/76 *Hoffman-La Roche v Commission* [1979] E.C.R. 461.
[30] See eg. Fountoukakos, *supra* note 2, 280.
[31] EC, *Commission Decision in Volvo/Scania,* M.1672, March 15, 2000 paras. 82, 107.
[32] EC, *Commission Decision in Barilla/BPS/Kamps,* M.2817, June 25, 2002 para. 34.
[33] Volcker, *supra* note 22, 399 ff.

Intrumentarium in several national markets to buttress a finding of dominance, yet did not base its decision in any meaningful way on unilateral effects.[34] In each of the above cases, unilateral effects-type analysis was cursory and ancillary to the finding of dominance.

Conversely, the Commission also considered the absence of unilateral effects in decisions where mergers resulting in high market shares were nonetheless allowed. In the *Volvo/Renault* merger, which was permitted following the prohibition of the *Volvo/Scania* merger, the Commission considered a pricing study indicating that Volvo price increases were not matched by competitors in France.[35] This study was the basis of finding that Scania and DAF were seen as better substitutes for Volvo that Renault, clearing the way for a merger resulting in a 49 percent combined market share in France. Conclusions based on the merging parties' lack of substitutability were also reached in the *Philips/Agilent Health Care Solutions*[36] and *Philips/Marconi Medical Systems*[37] cases, with both mergers allowed despite high market shares in the supply of medical diagnostic equipment.[38]

The above case law indicates that the Commission's experience with unilateral effects is much more limited than the extensive unilateral effects analysis undertaken by the FTC in *Babyfoods*. The Commission tended to apply unilateral effects analysis in cases where post-merger market share was already large enough to strongly support a finding of dominance. The analysis by the Commission in areas of unilateral effects has usually ignored dynamic factors such as the ability of remaining competitors to reposition their products.[39] The Commission's case law suggested that while it was aware of the significance of unilateral effects analysis, there was no definitive answer as to whether unilateral effects analysis could be extrapolated from the dominance test to close the alleged gap in the ECMR.

Prior to the ECMR reform, the Commission seemed to touch on unilateral effects where it supported its findings under the dominance test, rather than conducting a true unilateral effects analysis. While this did not exclude the possibility that the old dominance test might extend to unilateral effects, it certainly undermined claims that the Commission was well prepared to tackle unilateral effects under the old ECMR.

(3) Extending Dominance:

Conceptually, there are only a limited number of ways in which the ECMR could be interpreted to cover unilateral effects, each of which carries significant legal risks. The European Court of Justice (ECJ) defined a 'dominant position' in the context of Article 82 of the Rome Treaty as 'a position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to act to an appreciable extent independently of its competitors and customer and ultimately of consumers,' suggesting that unilateral effects were within the ambit of dominance. [40] The notion of collective dominance could thus be extended to include a market equilibrium where a number of independent oligopolists enjoy a dominant degree of

[34] EC, *Commission Decision in GE/Instrumentarium*, M.3083, September 2, 2003 paras 142-147.
[35] EC, *Commission Decision in Volvo/Renault*, M.1980, September 1, 2000 paras. 33-35.
[36] EC, *Commission Decision in Philips/Agilent Health Care*, M.2256, March 2, 2001 paras 33-35.
[37] EC, *Commission Decision in Philips/Marconi Medical Systems*, M.2537, October 17, 2001 paras. 31-34.
[38] Volcker, *supra* note 22, 403.
[39] *Ibid*, 401.
[40] Case C-322/81, *Michelin v Commission* [1983] E.C.R. I-3461 at para. 30 (in the Context of Art. 82). See also Case 85/76, *Hoffman-La Roche, supra* note 29 at para. 38, *Gencor, supra* note 4 at para. 200.

market power together. Alternatively, each of the oligopolists could be regarded as dominant - with the uncomfortable result of having multiple dominant firms in a given market. Both of these alternatives require a stretch of the plain meaning of the concept of dominance, carrying the legal uncertainty associated with a definition of dominance that could be stretched without limit. In either case, the lack of clarity surrounding the application of unilateral effects raised concern that the Commission could use such analysis in an opportunistic manner.

(4) Confirmation of the Gap: Airtours

The existence of the enforcement gap was confirmed by the *Airtours* judgement,[41] in which the CFI overturned the Commission's prohibition of a merger in the travel industry while limiting the scope of collective dominance and confirming that the concept cannot be extended to cover unilateral effects.

In *Airtours* the CFI set out strict requirements for the application of the concept of collective dominance. The Court thus found that absent a material risk of tacit collusion in light of market characteristics, the concept of collective dominance cannot be invoked. At the time it was rendered, the decision was hailed as the most significant development in EC merger control since the adoption of the ECMR in 1989.[42]

The implication of the finding in *Airtours* is that the concept of collective dominance cannot be extended to unilateral effects-type analysis.[43] The Commission prohibited a merger in the travel industry between Airtours and First Choice that would have resulted in the three largest firms in the industry holding a collectively dominant position by controlling 80 percent of the market between them. The merger marked the first time that the Commission extended the concept of collective dominance from a simple 'merger to duopoly' to a 'four-to-three' merger. In its decision, the Commission took the view that the ability of firms to engage in tacit collusion was not essential to a finding of collective dominance.[44] Rather, it was found that collective dominance could apply to a merger that made it *rational* for firms to act independently of customers and competitors. In essence, it extended the boundaries of collective dominance by focussing on rational incentives.[45]

The Commission's decision in *Airtours* has been described as a 'forced fit,' as the Commission seemed to stray from the established criteria of collective dominance in order to apply the concept despite the fact that the conditions for tacit collusion were not readily apparent.[46] This indicated a willingness on the part of the Commission to extend collective dominance jurisprudence to achieve the desired results.[47] While effective in terms of allowing the Commission to block mergers, such an approach undermined the predictability of merger control. The decision was appealed to the Court of First Instance, which reversed

[41] *Airtours, supra* note 19.
[42] Cook, C.J. & Kerse, C.S., *EC Merger Control*, 3rd ed. (London: Sweet & Maxwell, 2000), 173.
[43] *Airtours*, *supra* note 19 para. 62.
[44] *Ibid* para. 94.
[45] Briones, Juan & Padilla, Atilano Jorge, 'The Complex Landscape of Oligopolies under EU Competition Policy. Is Collective Dominance Ripe for Guidelines?' (2001) 24(3) World Comp. 307, 312.
[46] Korah, Valentine, *Cases and Materials on EC Competition Law, 2nd ed.*, (Oxford: Hart Publishing, 2001), 609, see also Korah, Valentine, *An Introductory guide to EC Competition Law and Practice, 8th ed.,* (Oxford: Hart Publishing, 2004).
[47] Rodger, B. & MacCulloch, A., *Competition Law and Policy in the EC and UK, 2nd ed.,* (London: Cavendish Publishing Limited, 2001), 218.

the Commission's decision and imposed a limit on the malleability of the concept of collective dominance.

In its reasoning, the CFI set out three requisite elements in a finding of collective dominance. First, all members of the dominant oligopoly must have the capability of knowing the competitive actions of the other members, so as to monitor their adherence to the common policy. Second, the common policy must be sustainable, such that there is an adequate mechanism to discipline deviations from common behaviour. Third, the anti-competitive results must not be jeopardized by the ability of consumers or competitors to respond to the policy. [48] The CFI confirmed that the framework for collective dominance established in *Gencor* for a merger to duopoly could be applied to a four-to-three merger, but found that the economic analysis undertaken by the Commission in *Airtours* was insufficient.[49] More significantly, the CFI looked at the Commission's attempt to stretch the concept of collective dominance to cases of unilateral effects and refused to allow the concept to be so stretched. While the Commission found it sufficient that firms 'act – individually – in ways which will substantially reduce competition between them,'[50] the CFI required that for collective dominance to apply, each member of the dominant oligopoly must 'as it becomes aware of common interests, considers it possible, economically rational, and hence preferable to adopt on a lasting basis a common policy on the market . . . '.[51] The difference in language suggests that true collective dominance requires the kind of common policy that is by definition not included in unilateral effects.

It has been argued that the Airtours merger should have been blocked, precisely because of its unilateral effects. [52] But the CFI's decision considered only the argument of collective dominance, which the Commission failed to adequately prove. The CFI decision has thus been criticized by Kokkoris for failing to definitely answer whether collective dominance can be applied to unilateral effects.[53] Kokkoris's criticism is refuted by the plain language of the CFI judgement, which indicates that absent a material risk of tacit collusion in light of market characteristics, the concept of collective dominance cannot be invoked.[54]

(5) Cross Contamination and Dominance in Article 82:

In addition to Art. 2 of the ECMR, the concept of dominance also appears in Art. 82 of the Rome Treaty, and was interpreted in that context in abuse of dominance cases considered by the ECJ.[55] In determining how the dominance test is applied to merger control, it became necessary to consider whether the concept of dominance in Art. 82 could be distinguished from dominance in the ECMR. In *Kali und Salz*, the ECJ interpreted the EMCR as

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[48] *Airtours*, supra note 19 at para. 62.
[49] *Ibid* paras. 91 ff.
[50] *Ibid* para. 94.
[51] *Ibid* para. 62.
[52] See *E.g.* Motta, M., 'Economic Analysis and EC Merger Policy' (1999) European University Institute at 27, K.U., Kühn 'Closing Pandora's Box? Joint Dominance after the Airtours Judgment', in The Pros and Cons of Merger Control (2002), Swedish Competition Authority, cited in Ioannis Kokkorris, 'The Reform of the European Merger Regulation in the Aftermath of the Airtours Case – The Eagerly Expected Debate: SLC v. Dominance Test' E.C.L.R. 2005, 26(1), 37 at n. 35.
[53] Kokkorris, *supra* note 52, 41.
[54] *Airtours*, *supra* note 19 para. 62.
[55] Case 27/76 *United Brands Company and United Brands Continental BV v Commission*, [1978] 1 CMLR 429 ECJ at para. 65.

encompassing collective dominance by drawing a parallel between the concept of dominance in the merger regulation and the concept of dominance in Art. 82 of the EC agreement. The ECJ found that as collective dominance would fall within the abuse of dominance provision of Art. 82, it should fall under the ECMR concepts of dominance as well.[56] If such reasoning is extended to unilateral effects, they would escape the coverage of the ECMR - as firms exhibiting unilateral effects are clearly not the intended target of the abuse of dominacen provisions in Art. 82, they would fall outside the ambit of the merger regulation.[57]

Although it seems unlikely that the legislator could have intended 'dominance' to have different meanings within the same body of EU competition law, if the substantial impediment to effective competition is seen as a qualification on the concept of dominance under the old test, it becomes plausible that dominance under the ECMR and Art. 82 could be distinct concepts. The potential difference in the concepts becomes an even greater possibility if we consider that the Art. 82 concept is more concerned with a static analysis of market structure in order to determine whether 'abuse of dominance' can apply, while the ECMR use of the term should be rooted in a dynamic analysis of competitive conditions in a post-merger market structure.[58]

In practice, the Commission was able to use the analysis tools developed under the traditional definition of dominance related to Art. 82, and apply them in more dynamic fashion in the context of Art. 2 of the ECMR.[59] The application of an identically worded concept in different ways raises concerns beyond the obvious lack of legislative clarity. The need for effective merger control has already resulted in the stretching of the concept to apply to collective dominance, and until *Airtours*, there was concern regarding the uncertainty of whether dominance could be extended to unilateral effects. A further concern was the risk of cross-contamination, whereby a stretched concept of dominance in the ECMR context would then serve as guidance for the application of Art. 82, potentially expanding the application of abuse of dominance provisions to unintended cases. This could make each member of a non-collusive oligopoly, if covered by the concept of dominance under the ECMR, also subject to the special restrictions placed on dominant firms by Art. 82.[60]

The risk of cross-contamination proved a serious concern in the Commission's reform of the ECMR. In the *Explanatory Memorandum* regarding the proposed reform, the Commission noted that the adopted approach 'has the additional advantage of not linking the definition of dominance under the Merger Regulation to any future interpretations given by the ECJ to the concept of dominance under Article 82 of the Treaty.'[61] In practice, it remains to be seen whether there has been a true separation of the two concepts.

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[56] Kali & Salz, *supra* note 17 para. 165.
[57] Volcker, *supra* note 22, 408.
[58] Fountoukakos, *supra* note 2, 280.
[59] See *e.g.* Alcatel/Telettra, where several dynamic factors were considered, *supra* note 12 para. 40 ff.
[60] Fountoukakos, *supra* note 2, 284.
[61] See EC, *Explanatory Memorandum to Council Regulation 139/2004*, para. 55.

IV. The Debate Over Reform:

In the months following *Airtours*, the CFI overturned Commission prohibitions of two other significant mergers: *Schneider/LeGrand*[62] and *Tetra-Laval*.[63] As in *Airtours*, both of the above CFI decisions were characterised by direct criticism of the Commission's lack of sound economic methodology and analysis prior to blocking the mergers.[64] The Commissioner of Competition made it clear that the significant criticism of the Commission strengthened the need for reform of the ECMR.[65] In 2001 the Commission tabled its Green Paper on the reform of the merger regulation, significantly raising the profile of the debate surrounding reform.

Three broad groups emerged in the debate on reform. The first group favoured the retention of the dominance test and contained many countries that had already enshrined dominance in their national legislation. The second group, led by the UK, favoured convergence with the U.S. through a move to the SLC test. The third group opted for hybrid-type language such as that already present in the national legislation of France and Spain. The fact that the Commission itself had initiated the reform process through the Green Paper was particularly significant, in that it acknowledged that there were serious questions about the efficacy of the dominance test. The proposed reform was relatively high-risk, because if reform efforts faltered, especially following the *Airtours* judgement, the Commission would be ill prepared to challenge any future cases of unilateral effects, having implicitly acknowledged a flawed merger law.[66]

(1) Need for a New Test:

Supporters of the reform process argued that in addition to the need to cover the enforcement gap and strengthen legal certainty, the Commission should adopt language directly reflecting the underlying purpose of merger control by focussing on dynamic, rather than static market effects. Because it focuses on changes to competition rather than changes to market structure, the SLC test was recognized as ideally suited to such a task and an escape from the draconian interpretation that any attempt to control more market power be characterised as a form of dominance.[67] In particular, the SLC test was better suited to the kind of sophisticated econometric and empirical analysis that had become widely used in the United States to assess dynamic competitive factors. The United Kingdom emphasized this position in its response to the Commission's 2001 *Green Paper*, which first raised the possibility of moving to a new substantive test on merger control. The UK argued that the SLC test is better suited for merger control, particularly in oligopolistic

[62] Case T-310/01 *Schneider Electric v Commission* [2002] ECR II-4071.
[63] Case T-5/02 *Tetra Laval v Commission* [2002] ECR II - 4381.
[64] See eg. *ibid,* para. 131 ' . . . the Court finds that the Commission made a manifest error of assessment in so far as it relied on the horizontal effects of the modified merger to support its finding that a dominant position on those PET markets would be created,' see also para. 160.
[65] Monti Address, *supra* note 1.
[66] Fountoukakos, *supra* note 2, 286.
[67] Kokkorris, *supra* note 52, 43.

markets, because it is directly grounded on an economic analysis of competition in a way that dominance is not.[68]

The desire to facilitate trans-national mergers was also cited as a motivation for reform, and was particularly relevant following the divergent outcomes of the *GE/Honeywell* merger review in the United States and the EU.[69] In that case, the Commission prohibited a merger that had already been cleared by authorities in the United States based on economic analysis that was criticised by American authorities as deeply flawed. The Commission focussed on theories of competitive harm that had been rejected by U.S. antitrust authorities – including bundling, conglomerate effects and monopoly leveraging – and failed to consider efficiencies sufficiently.[70] Critics argued that the EC applied the dominance standard, which was itself ill-suited to the lack of significant horizontal overlaps in the GE/Honeywell merger, and reached its decision without demonstrating dominance, as was required under the old ECMR.[71]

(2) Objections to Reform:

Early calls for reform to the ECMR regime were met with strong opposition. Business interests, not surprisingly, were unconcerned by the existence of the gap and saw the dominance requirement as an important constraint on an activist Commission. The inherently vague language of the SLC test was a source of uncertainty that made many reticent to shift away from the dominance requirement. Many suggested that it was the application of the test rather then the test itself that mattered, and that the results-oriented application of the dominance test had proven its ability to yield results that were broadly convergent with those of an SLC test. Even those who recognized the existence of a gap argued that the possibility of clearing a relatively rare gap case was of much less concern than the danger of increasing the scope of coverage of the merger law by lowering the threshold of intervention, potentially blocking many mergers that would have been cleared under the old ECMR.

Strong objections to reform were also made on the grounds that a reform process would render the expansive body of jurisprudence that had emerged under the dominance test obsolete, resulting in renewed uncertainty in European merger control. Further objections were put forth as many national competition authorities had been applying the dominance test, many of which had already reformed national legislation to match the 1989 ECMR. In addition, it was argued that trans-national mergers would still be subject to review by different competition authorities applying differing methodology, thus limiting the correlation between legislative harmonization and actual convergence.[72]

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[68] UK Response to the Commission Green Paper on the Review of Council Regulation 4064/89, online: <www.dti.gov.uk/ccp/topics2/pdf2/ukresponsetoecmegersgp.pdf> at 9.

[69] EC, *Commission Decision in General Electric/Honeywell*, M.2220, March 7, 2001.

[70] Department of Justice Press Release, 'Justice Department Requires Divestitures in Merger Between General Electric and Honeywell,' May 2, 2001, see also Calzado, Javier Ruiz, 'The Road Less Travelled: Arbitrating Antitrust Claim Special Feature: Development in International Competition Law, (2004) 19-Fall Antitrust 37, 38.

[71] Schnell, Douglas K., 'All Bundled Up: Bringing the Failed GE/Honeywell Merger in from the Cold' [2004] 37 Cornell Int'l L.J. 217, 243.

[72] Kokkoris, *supra* note 52, 44.

V. The New ECMR: The Best of Both Worlds

The result of the extensive reform deliberations was the agreement on a new substantive test that preserves not only the dominance test itself, but the language of the test. The new test inverts the concepts of dominance and significant impediment to effective competition as they appeared in the old test, so that dominance now appears as the primary, but not the only, example of a significant impediment to effective competition. Article 2(3) of the new ECMR reads:

> A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.

The creation or strengthening of a dominant position is now subordinated to the principal test of whether the merger is a significant impediment to effective competition.[73] In maintaining the same language of the previous test, the Council indicated its determination to maximise continuity with the previous test while refrain from copying the language of tests in other jurisdictions in order to preserve a distinctly 'European' approach to merger control.[74] Art. 2(3) is accompanied by explanatory recitals in the preamble, and the Horizontal Merger Guidelines, to effectively addresses the three concerns which emerged through the reform process: the closing of the gap, the preservation of legal certainty, and convergence with U.S. merger control.

(1) The Closing of the Gap:

An extensive preamble to the ECMR facilitates stability throughout the reform process by indicating the change to the ECMR specifically targeted the alleged gap. Recital 25 provides that the only function of the new test—beyond the traditional notion of dominance—is to close the gap in coverage that arguably existed in the old regulation:

> The notion of 'significant impediment to effective competition' in Article 2(2) and (3) should be interpreted as extending, beyond the concept of dominance, only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned.

In Sec. 22(a) of the Merger Guidelines, the Commission specifically recognized non-coordinated or unilateral effects as a new category of cases beyond the concepts of traditional dominance and collective dominance to which the ECMR is intended to apply, thus confirming the closure of the gap. Mergers that the Commission previously sought to force into the category of collective dominance, such as *Airtours* could now be dealt with directly under unilateral effects.[75]

It has been argued that the threshold for a finding of unilateral effects is lower than that of a finding of collective dominance.[76] A finding of collective dominance, following *Airtours*, requires the Commission to demonstrate through effective economic analysis that the three conditions identified by the CFI exist in aggregate. In contrast, the Merger Guidelines

[73] Weitbrecht, Andreas, 'EU Merger Control in 2004 – An Overview' E.C.L.R. 2005, 26(2) 67, 70.
[74] Fountoukakos, *supra* note 2, 288.
[75] Ridyard, *supra* note 27, 7.
[76] Dethmers, Francis, 'Collective Dominance Under EC Merger Control – After Airtours and the Introduction of Unilateral Effects is There Still a Future for Collective Dominance' E.C.L.R. 2005, 26(11) [Dethmers], 638, 642 ff.

provided a non-exhaustive list of factors which could be indicative of unilateral effects, including large market shares, the degree of substitutability of competitors' products, limited switching possibilities, limited possibilities of increased supply, barriers to entry and the elimination of a competitive constraint.[77] Furthermore, the Guidelines provide that 'Not all of these factors need to be present for such effects to be likely . . . [and they should not] be considered an exhaustive list.'[78]These factors are a far more flexible framework than that set out in *Airtours* for collective dominance.[79]

Francis Dethmers argues convincingly that the lower standard of proof for unilateral effects will result in collective dominance analysis being largely subsumed by unilateral effects analysis.[80] Her observation about the decline of collective dominance is more of an intellectual exercise than a concern however, as the task of a competition authority should be to concentrate on the overall competitive impact of a proposed concentration rather than to distinguish between unilateral and coordinated effects.[81] The more pressing question concerns the degree to which the scope of the regulation has been expanded, thus determining how many cases that escaped scrutiny under the dominance test will now be prohibited under the SIEC test.

(2) Preservation of Legal Certainty:

(i) The Commission Claims to Avoid a Lower Threshold:

The Commission has been clear that it does not seek a lower intervention threshold,[82] and the change to the SIEC has been described as a widening of the scope of coverage rather than a lowering of the threshold of intervention.[83] The degree to which the move to a SIEC test represents a change is largely dependent on what view one takes of the application of the old ECMR.

Mario Monti, Commissioner of Competition stated that 'In the Commission's view, the dominance test, if properly interpreted, is capable of dealing with the full range of anti-competitive scenarios that mergers may engender.'[84] For parties adopting this view, the SIEC test truly is a clarification, rather than a change. Director-General of Competition Philip Lowe indicated the Commission's view that 'the SIEC test already constitutes the base-line threshold for assessing the compatibility of mergers with a dominant position.'[85] Such reasoning is supported by the existence of the 'significance' concept as part of the second limb of the old dominance test. Recital 5 of the old regulation specifies that

[77] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03) paras. 27-37.
[78] *Ibid*, para. 26.
[79] *Airtours*, *supra* note 19 para. 62.
[80] Dethmers, *supra* note 76, 643.
[81] Ivaldi, Marc *et al.,* 'The Economics of Unilateral Effects' November Interim Report for DG Competition, European Commission, (2003) Institut D'Economime Industrielle, Toulouse.
[82] See Commission Press Release of January 20, 2004 stating 'The Commission regards this change in the wording of the test as a clarification of, rather than an addition to, its power. This provides legal certainty for the business community by making it clear that the test enshrined in the regulation covers all those categories of anti-competitive mergers'.
[83]Fountoukakos, *supra* note 2, 292.
[84] Monti Address, *supra* note 1.
[85] Lowe, Philip, Address, EU Competition Day, Rome, December 9, 2003 online: http://europa.eu.int/comm.competition.speeches.test.sp2003_67_en.pdf.

concentrations that 'significantly impede effective competition' will be incompatible with the common market, while making no mention of the concept of dominance.[86]

Courts have also applied language closer to the SIEC test than the dominance test, even when applying dominance under the old ECMR. The CFI in *Airtours* cites cases noting that 'if there is no substantial alteration to competition as it stands, the merger must be approved,'[87] while in *Kali & Salz*, the ECJ stressed the need to assess 'whether the concentration which has been referred to it leads to a situation in which effective competition in the relevant market is significantly impeded.'[88]

Each of the above point to a new test which does not alter the threshold of intervention, at least in practice.

(ii) A Limited Increase in Scope, with a Potentially Lower Threshold:

In implementing the new ECMR, the Commission sought to reassure critics that the reform was a clarification rather than a redefinition of the threshold for merger control in order to limit concerns about the increased scope of coverage. [89] Despite such efforts, a recent decision under the new guidelines the Commission alluded to a presumption of illegality for three-to-two mergers.[90] This marks a contrast with the past practice of cases of three-to-two mergers under collective dominance, 74 percent of which were cleared unconditionally, in many cases due to the inability to fulfil the necessary elements of prohibition under collective dominance.[91] A shift by the Commission to target three-to-two mergers even in the absence of collective dominance therefore seems likely, supporting claims that the ECMR is paving the way for a more interventionist Commission. In its attempt to close an alleged gap in the old dominance test, many argue the SIEC test has widened the scope of EC merger control below the traditional threshold associated with findings of single-firm dominance.[92]

Although the Commission developed the merger Guidelines with the hope that they would preserve legal certainty and limit an unpredictable extension of the SIEC test to new cases, Baxter identifies market share presumptions, Herfindahl-Hirschmann-Index (HHI) guidelines, and market definition as three factors all likely to lower the threshold for intervention.[93] The Commission has typically applied a market share threshold indicative of dominance near 40-50 percent, despite the fact that both the old merger test and the new Guidelines refer to a threshold of 25 percent as indicative of potential dominance. However, in *Syngenta CP/Advanta* and *Carrefour/Promodes*, the Commission found competitive concerns in markets where the merger resulted in market shares well below the traditional

[86] Fountoukakos, *supra* note 2, 293.

[87] *Airtours*, *supra* note 19 para. 58 citing Case T-2/93 *Air France v Commission,* [1994] E.C.R. II-323 at 78 ff, see also *Gencor, supra* note 4 paras. 170, 180 and 193.

[88] Kali & Salz, *supra* note 17 para. 221.

[89] See Explanatory Memorandum, *supra* note 61 para. 55.

[90] EC, Commission Decision in *VNU/WPP/JV*, M.3512, September 15 2004, para. 29.

[91] See Dethmers, *supra* note 76 at n. 32, see *e.g.* EC, *Commission Decision in Repsol YPF/Shell Portugal*, M.3516 September 19, 2004, EC, *Commission Decision in Candoven/Cinven/BertelsmannSpringer*, M.3216, July 29, 2003.

[92] Ridyard, *supra* note 27, 2.

[93] Baxter, Simon & Dethmers, Francis, Unilateral Effects in the European Merger Regulation: How Big is the Gap, E.C.L.R. 2005, 26(7), 380, 383 ff [Baxter].

40 percent floor.[94] Baxter cites such examples as indicative of a trend towards a lower intervention threshold through the new ECMR.[95]

The Commission has also adopted HHI guidelines, commonly used in United States merger control, in an attempt to bring a degree of certainty to the Commission's new powers in merger control. The Guidelines specify that mergers will be reviewed on the basis of non-coordinated effects only when the aggregate (HHI) is between 1000-2000 and rises by at least 250 points or when the aggregate HHI is above 2000 and rises at least 150 points.[96] The HHI guidelines have been criticised for doing little to alleviate concerns of a more interventionist commission, as the guidelines adopted correspond with market shares far lower that those traditionally associated with dominance.[97]

While the Commission could defend its choice of HHI ranges by indicating that they offer a higher threshold than the U.S. guidelines' 'highly concentrated' threshold of 1800, in practice U.S. agencies have generally sought enforcement against concentrations with much higher HHI levels, with 2000 generally regarded as the lowest HHI which could elicit enforcement.[98] As such, U.S. Guidelines are not in line with U.S. enforcement practice, and rather adopting realistic HHI Guidelines, the Commission seems to have chosen to adopt unreasonably low thresholds of intervention. This leaves the Commission with the discretion to enforce cases based on either the Guidelines or past practice, undermining rather than reinforcing legal certainty.[99]

Baxter further argues that because unilateral effects analysis focuses on the closeness of substitutes rather than the relevant product market, there is a risk that market definition will move to more narrowly defined 'nodes' of competition, thus creating larger market shares within those nodes.[100] Such an approach was evident in the *Oracle/PeopleSoft* decision, where the EC analyzed bid date to determine that Oracle, PeopleSoft and SAP were particularly close competitors.[101] Such a methodology would also allow intervention in previously unchallenged mergers.

It is thus evident that the coverage of the new regulation has the potential to be broader than the old regulation. Whether this leads to a more interventionist commission will depend on the how the Commission chooses to exercise its powers and the evidentiary requirements required by courts. While Notice 25 indicates that the SIEC concepts should be extended beyond dominance only to non-coordinated effects, it has been argued that 'this sentence places no meaningful boundary on the substantive test.'[102] To the 'gap' school of thinking, the SIEC represents a greater field of coverage which is perceived by some as a remedy and by others as threat.

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[94] EC, *Commission Decision in Syngenta CP/Advanta*, M.3465, August 17, 2004, *Carrefour*, *supra* note 13.
[95] Baxter, *supra* note 93, 384.
[96] Merger Guidelines, supra note 77 at 20.
[97] Maudhuit, *supra* note 6, 78.
[98] See Scheffman, Coate & Silva, '20 Years of Merger Guidelines Enforcement at the FTC: An Economic Perspective,' cited in Ridyard, *supra* note 27, 8.
[99] Ridyard, *supra* note 27, 9.
[100] Baxter, *supra* note 93, 385.
[101] EC, *Commission Decision in Oracle/PeopleSoft,* M.3216, 26 October 2004 para. 136.
[102] Fountakakos, *supra* note 2, 290.

(iii) A Lack of Consistency on Unilateral Effects:

Legal uncertainty was a significant concern throughout the reform process, as both prior to the new ECMR and since its introduction, the Commission seems to be applying dominance and unilateral effect simultaneously and in an opportunistic manner.[103] For example, in the *Syngenta/Advanta* decision the Commission considered dominance in some of the relevant markets while focussing on unilateral effects when dominance was not apparent:

> The proposed concentration raises serious doubt as to its compatibility with the common market since it may significantly impeded effective competition in the common market or in a substantial part thereof by the creation of a dominant position of the merged entity in the market for sugar beet seeds in Finland, the Netherlands, Portugal, Spain, Austria, Ireland and Italy; and by the creation of non co-ordinated effects in an oligopolistic market for sugar beet seeds in Belgium and France.'[104]

The lack of clarity or consistency to the application of unilateral effects raises concerns that while the Commission will continue to target mergers using the traditional dominance test, it will introduce a unilateral effects analysis with a lesser evidentiary burden for mergers it seeks to prohibit but is unable to do on grounds of dominance alone.

The Commission has been criticized for offering only limited criteria for the review of mergers in the category of unilateral effects, and the novelty of the category and the void in case law dealing with unilateral effects makes some uncertainty inevitable. The manner in which the Commission applies its analysis and the evidentiary requirements demanded by courts will ultimately determine the degree to which the scope of EC merger control changes.[105]

Although there is an increased scope for Commission intervention, it will be limited to a narrow group of cases. In markets that already have an active dominant player or near monopolist, little will change and the traditional dominance test will be applied. In highly fragmented markets, little will change, barring the application of narrower market definition based on 'nodes' of competition. However, in oligopolistic markets the Commission may be tempted to apply unilateral effects analysis below the level of individual dominance. While the Guidelines indicate that the EC now has such power by recognizing the role of unilateral effects, in practice there is limited case law in this area, opening the door for the EC to exercise its power in an *ad hoc* fashion.

(iv) The Preservation of Jurisprudence:

The primary motivation for retaining the language of the old dominance test in the new ECMR was to ensure legal continuity and certainty and to preserve to the greatest degree possible the case law that had been developed under the old dominance test. This purpose is made clear by Recital 25, which indicates that the purpose of the new test is to extend the coverage of dominance only to unilateral effects. Recital 26 further provides that the SIEC test has been formulated 'with a view to preserving the guidance that may be drawn from past judgments of the European courts and Commission decisions pursuant to Regulation

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[103] Baxter, *supra* note 93 at 382.
[104] EC, *Commission Decision in Syngenta CP/Advanta*, M. 3465, August 17, 2004.
[105] Riesenkampff, Alexander, 'The new E.C. Merger Control Test under Article 2 of the Merger Control Regulation' [2004] 24 Nw. J. Int'l L & Bus. 715, 724.

(EEC) No. 4064/89,' and the explanatory memorandum links the newly clarified test with existing jurisprudence to preserve 'the sizable body of case law and case practice that has been built up over the years.'[106] The adopted approach preserves the concept of dominance and associated case law as the primary basis of merger control, with the Guidelines specifying that 'it is expected that most cases of incompatibility of a concentration with the common market will continue to be based on a finding of dominance.'[107]

The Commission's insistence on preserving jurisprudence while altering the scope of the law is the clearest example of its attempt to 'have its cake and eat it too.' The reform essentially extends the coverage of merger control to new areas in which the Commission's experience is limited while insisting that prior jurisprudence applies in much the same way. The motivation for such a position is understandable, as the last thing the Commission would want to do is acknowledge the existence of the gap lest the reform effort fail and the need to challenge a 'gap' cases subsequently arises. Nonetheless, the goal of legal certainty would be best served if the Commission would acknowledge that the reform has created a new gap rather than maintain that its body of case law will be seamlessly applicable to enforcement under the new regulation.

The new gap refers to the void in the body of case law regarding the control of mergers exhibiting unilateral effects analysis without creating market shares indicative of dominance.[108] The Guidelines offer examples of the kind of evidence indicative of such anti-competitive effects, but the evidentiary requirements for the prevention of mergers through unilateral effects analysis remain to be determined by the Courts. The EC would thus be wise to be restrained in its use of unilateral effects analysis until case law emerges that clarifies the scope of the new ECMR.

Commissioner Monti had hoped that a clarification of the notion of dominance would have the advantage of severing the concept of dominance in the ECMR from that of Art. 82, eliminating cross-contamination risk completely.[109] What seems more likely is that traditional dominance under the new ECMR will continue to be interpreted as analogous to dominance under Art 82, while collective dominance and unilateral effects cases will be pursued with the knowledge that dominance must not necessarily be proven for a merger to be deemed anti-competitive. An interesting consequence of the fact that dominance concept has remained unchanged and thus analogous to dominance under Art. 82, is that merging parties themselves might seek to steer the Commission away from applying the dominance test in favour of applying the unilateral effects analysis embodied in the SIEC. Such an effort could be expected where merging parties are concerned that a finding of dominance under the ECMR could have prejudicial effects for one of the merging parties under Art. 82.[110] This portion of the cross contamination risk has not successfully been address by the new ECMR, and clarification on whether the choice of the Commission to apply unilateral effects can bear on the parties' position with respect to Art. 82 would be welcome.

[106] Explanatory Memorandum, *supra* note 61 para. 55.
[107] Merger Guidelines, *supra* note 77 para 4.
[108] Baxter, *supra* note 93, 389.
[109] See Monti Address, *supra* note 1.
[110] Volcker, *supra* note 22, 405.

(3) Convergence with the United States:

EC and U.S. merger policy has been largely convergent in recent years, making the likelihood of divergent outcomes very small.[111] However as witnessed in the *Boeing/McDonnell Douglas* and *GE/Honeywell* decisions, the political fallout when divergent decisions are reached is immense.[112] The EU merger reform was seen as major opportunity to move towards convergence with the U.S. The outcry over the divergent decisions in GE/Honeywell highlighted the tremendous costs associated with independent regulatory schemes for merger control in an age where the effects of mergers are increasingly trans-national.

In adopting the new ECMR, the Commission made a deliberate decision not to adopt the SLC which would have led to full convergence, at least on paper, with the United States. Instead, the Commission has adopted a distinctly European approach with the SIEC test. While a comparative discussion is beyond the scope of this paper, the resulting reforms has been characterised as offering only limited substantive convergence, albeit with the potential for greater convergence on methodologies and procedure.[113]

In particular, with respect to efficiencies, the Commission appears to be moving to a consumer welfare based standard used in the U.S.

> It is possible that the efficiencies brought about by the concentration counteract the effects on competition, and in particular the potential harm to consumers, that it might otherwise have and that, as a consequence, the concentration would not significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.'[114]

Furthermore, Section 7 of the Merger Guidelines details conditions under which efficiencies will be applied, indicating that countervailing efficiencies must be verifiable, provide a benefit to consumers, and be directly attributable to the merger. Such conditions are based directly on comparable provisions in the U.S. merger guidelines.[115]

Despite the use of similar language, divergent outcomes remain a possibility. Mergers can have differing effects in the U.S. and EU, and the effects of complicated mergers can be evaluated differently even if the same language and facts are used.[116] The change shows a marked shift in the Commission's thinking, however, to a point where consumer welfare based merger control can now be said to be shared by the two most important jurisdictions in global competition law.

VI. Potential Global Convergence:

Compliance with multiple regulatory regimes imposes great costs on corporations seeking to merge and serves as a *de facto* tax on transactions.[117] The fact that several national

[111] See eg. Fountoukakos, *supra* note 2, 282, Reisenkampff, *supra* note 105, 726.
[112] Fountakakos, *supra* note 2 at n. 46.
[113] Akbar, *supra* note 10.
[114] Council Regulation (EC) No 139/2004, Recital 29.
[115] See Revised Section 4, Horizontal Merger Guidelines Issued by the U.S. Department of Justice and the Federal Trade Commission April 8, 1997.
[116] Riesenkampff, *supra* note 105, 725.
[117] Monti, Mario, 'European Community Competition Law: European Competition for the 21st Century' 24 Fordham Int'l L.J. 1602, at 1612, see. *e.g.* Iritani Evelyn, 'Global Mergers Pushing the Boundaries of Antitrust Law' L.A. Times, (Nov. 5, 2000) C1 (reporting Alcan Aluminium made sixteen separate filings in eight

authorities exercise jurisdiction over the same transaction can also increase political discord, resulting in a legal framework that fosters international discord as nations pursue potentially opposed interests.[118] A further danger of parallel merger review systems is that competitors and other opponents of a proposed merger can make objections in multiple jurisdictions, resulting in forum shopping by opponents to a merger.[119]

The most efficient future of merger control from the perspective of the global business community would a 'one-stop shop,' where firms intending to merge could have their merger cleared in a single, integrated process. The formation of the International Competition Network in the aftermath of the *GE/Honeywell* fiasco is indicative of the pressing need for convergence. In addition to administrative costs, the 'strategic risk' of having a merger reviewed by multiple authorities is significantly greater.[120] In addition, a common global merger control regime would reduce uncertainty for companies and eliminate the administrative burden of filing applications tailored to the processes of analysis of different jurisdictions. The development of such a 'global merger code' would be the 'best of all possible worlds' for companies.[121]

Advocates of such a regime have suggested that the WTO or the OECD could each serve as an effective forum for such cooperation. The WTO in particular seems suited for such a task, given the linkages between competition and trade law and the in,stitution's experience with dispute settlement.[122] Beyond its efficiency for business, such a regime would have the dual benefit of avoiding the biased application of competition policy based on national interest, and avoiding the political strife that oft emerges following divergent decisions.[123]

Such a global competition scheme seems unlikely however, given the difficulties associated with such pooling of sovereignty.[124] The challenges in reforming the ECMR are indicative of the difficulties involved in formulating a common policy at the European level, which entails balancing the interests of 25 nations with relatively similar approaches to competition law. These challenges would be compounded if such harmonization is sought outside of the EU. The fact that antitrust statutes are inherently vague and thus subject to application and interpretation based on culture, experience and history mean that even in the event of substantive convergence, agreement on common application would be extremely difficult if not impossible on an international level.[125] The chilling effect on merger activity caused by divergent outcomes and blocked mergers is making the need for convergence pressing, but the lack of desire on either side of the Atlantic has made harmonization in the short-to-medium term highly unlikely.[126]

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languages, incurring costs of $ 100,000 when conducting a deal with a French and Swiss company), cited in Franker, Matthew C., 'Restoration: International Merger Review in the Wake of General Electric/Honeywell and the Triumphant Return of Negative Comity', *36 Geo. Wash. Int'l L. Rev. 877* at n. 20.

[118] Franker, Matthew C., 'Restoration: International Merger Review in the Wake of General Electric/Honeywell and the Triumphant Return of Negative Comity', *36 Geo. Wash. Int'l L. Rev. 877*, *880.*

[119] *Ibid* at *881-2.*

[120] Akbar, *supra* note 10 at 16.

[121] See Todino, Mario, 'International Competition Network – The State of Play after Naples', [2003] 26 (2) World Comp. 283.

[122] Schnell *supra* note 71, 251 ff.

[123] Franker, *supra* note 118, 903.

[124] Akbar, *supra* note 10, 18.

[125] Franker, *supra* note 118, 903 ff.

[126] Schnell, *supra* note 71, 253 ff.

VII. Conclusion:

Throughout the reform process, the Commission proved adept at 'having its cake and eating it too.' The Commission claimed no gap in the law existed yet built support for a successful reform. The Commission sought to preserve the jurisprudence and experience with dominance, while extending coverage to unilateral effects. And the Commission sought to avoid trans-Atlantic discord while preserving a distinctly European merger test. The resulting ECMR reflects each of these priorities, and successfully closes the gap while offering some hope for further convergence.

Ultimately, the effects of the reform remain to be seen based on how that SIEC test is applied by the Commission and interpreted by Courts. The Commission has been clear that it seeks no lowering of the intervention threshold, and if the SIEC is applied with restraint through disciplined economic analysis, concerns about an interventionist Commission will prove to have been unfounded. This has the potential to bring Commission practice closer to that of the US while building stability in legal consistency in EC merger control.