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Oh, for the love of Chrysler! Can we please ask someone for directions?

EU Competition Law in the Automotive Industry

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Contents

"I think there may be a perfect storm brewing around this industry today. I see a cold front…and a hurricane converging on us all at once".[1]

Title: Minny in Disney's Cars, 2006.

[1] Vlasic & Stertz (2001), p. 175. Bob Eaton, former CEO of Chrysler LLC quoted in a speech in front of his 400 top executives and managers and stated the quotation, as early as in 1997. The cold front corresponds to the general and severe overcapacity in the industry and the hurricane is a metaphor for the environmental concerns that is about to doom the internal combustion engine. See also the Commission (2009), (article).

Summary

The automotive industry is an oligopoly and the ten largest manufacturers account for close to 80% of the overall global production. The major markets of Europe, Japan and North America, have stagnated and remain stable and this has transformed the industry into a business of high costs and low margins. Somewhat ironically, as an attempt to increase the margins and adapt to the Japanese theory of lean production, car manufacturing suffers from severe overcapacity as a result of improved efficiency even though the barriers to entry are very high.[2] This combined with a lack of potential competition results in tie-ups, joint ventures and other alliances as well as the struggle to balance large-scale production with product diversity.[3] For this study, forms of cooperation above are gathered under the umbrella of mergers, the term used below.

Mergers appear to be successful compared to other forms of cooperation especially when it comes to trades condensed to geographical areas and also for establishment and penetration of new markets. [4] The former is predicted and the latter was one of the underlying motives behind the enormous Daimler-Chrysler merger.[5] So far, mergers appear to suite the automotive industry well. Or, do they?

On the other hand, research has shown that mergers often fail due to unclear or hidden motives behind the cooperation, lack of trust on the undertakings involved, opportunistic behaviour, and incorrect selection of form for the cooperation or miss-recruitment to the new organization.[6] The problem is not the concept of merger itself, but the later implementation on the following stages. This will be further elaborated below.

The overall purpose with mergers is to strengthen the competitive ability for the participating undertakings. Mergers are rarely aimed at general targets, but more frequently concentrated on specific parts of them. The cooperation is often directed towards an application, for example the development of a new car rather than the core competence itself.[7]

Economies of scale are good, but is merger the road to success? Minnie in Disney's cars asked for directions. The question is whether anyone knows where to go.

[2] Maloney & McLauglin (1999), p. 2
[3] Ibid.
[4] Bengtsson, Holmqvist & Larsson (1998), p. 131.
[5] Vlasic & Stertz (2000), p. 38.
[6] Bengtsson, Holmqvist & Larsson (1998), p. 131.
[7] Ibid., p. 28.

Sammanfattning

Bilindustrin är en oligopolmarknad där de tio största tillverkarna står för 80% av världens totala produktion. De stora marknaderna Europa, Japan och Nordamerika har stagnerat och stabiliserats, vilket har förändrat branschen till en med höga fasta kostnader och låga marginaler. Försöket att öka marginalerna och anpassa sig till den japanska teorin "lean production" med kort ledtider i fabriken leder till att bilindustrin lider av en kraftig överproduktion som ett direkt resultat av den ökade effektiviteten. Detta trots att möjligheterna till nyetablering i industrin anses små.[8]

I kombination med avsaknad av potentiell konkurrens resulterar det i att aktörerna knyter band genom samgåenden, uppköp och andra strategiska allianser för att nå volymer samtidigt som strävan att diversifiera de då alltmer lika produkterna inleds.[9] I den här studien samlas alla typer av samarbeten och allianser under termen samgåenden (mergers).

Samgåenden förefaller lyckade jämfört med andra former av samarbeten och då i synnerhet när det gäller riktade insatser mot en viss geografisk marknad eller etablering på nya marknader,[10] vilket var ett av de underliggande motiven i det stora samgåendet mellan Daimler och Chrysler.[11] Samgåenden verkar passa bilindustrin väl i dess jakt på volymer och reduktion av utvecklingskostnader, eller gör de?

Å andra sidan, har en närmare granskning visat att samgåenden ofta misslyckas som ett direkt resultat av oklara eller rentav dolda motiv, avsaknad av förtroende mellan parterna, alltför optimistiska visioner, felaktigt val av samarbetsform eller felrekryteringar i den nya organisationen.[12] Problemet är inte direkt relaterat till konceptet samgående i sak, utan hur det senare implementeras. Ämnet kommer att behandlas närmare nedan.

Det övergripande syftet med samgåenden är att stärka konkurrensförmågan för de inblandade parterna. Samgåenden är sällan inriktade på generella insatser utan ofta på en viss marknad eller utveckling av en specifik bil snarare än samgående av bolagens respektive kärnverksamheter.[13]

Skalfördelar är nödvändiga, men är samgåenden vägen till framgång? Minny i Disney's Bilar frågade om en vägbeskrivning, men frågan är om någon verkligen vet den bästa vägen till framgång.

[8] Maloney & McLauglin (1999), p. 2.
[9] Ibid.
[10] Bengtsson, Holmqvist & Larsson (1998), p. 131.
[11] Vlasic & Stertz (2000), p. 38.
[12] Bengtsson, Holmqvist & Larsson (1998), p. 131.
[13] Ibid, p. 28.

Preface

This paper originates in my previous career at the Volvo Car Corporation and my inherent great interest in cars.

The thought is to reconciling in between the field of excellent theoretical research and actual media, legal as well as non-legal and summarize the automotive industry, in the light of historical currents from the industry as well as the Community legislation. It is impossible to research in the future, but it is nevertheless reasonable to clarify a direction.

Most of this paper is somewhat ironically created on a train, moving north and south, south and north along the Swedish west coast. Love is irrational and so is the automotive industry.

Speaking of railroads, the road of this paper is mainly chronological and presents the facts and prerequisites, followed by a complete analysis and concluding remarks.

I wish to aim my warm thanks to Henrik Norinder and the "Norinder Library". Tomas T. Stallcamp stated that "you have to have fun…If you are not having fun at the end of the day, then things just are not right"[14]. With Henrik in the backseat, the road is always fun as well as constructive. His distinctions when it comes to well-appreciated pedagogy and methods are more than a matter of coincidence.

[14] Stallkamp quoted in Vlasic & Stertz (2000), p. 166.

1 Introduction

The latest years have been turbulent in the automotive industry. Rumors as well as actual mergers, acquisitions and full-function joint ventures[15] (hereinafter mergers) have taken great place. Ever since the car was born, history has shown us that undertakings continue to merge, but the great Daimler-Chrysler merger has proven that bigger is not always better. In what direction is the industry turning its wheels? What consequences does this development confer on the competition itself?

The automotive industry experienced its golden days up until the seventies. Cars were built and stored at the backyard of the manufacturer[16] in this first phase. Ever since, in the second phase, each manufactured car has a contracted, pending customer already. The third phase begins with a severe crisis, resulting in global consolidation[17].

The comprehensive thought is that car manufacturers in general need to merge in order to survive this highly competitive environment where margins are low and volume is crucial. This is proven by a historical development in the car industry[18] as well as recently mirrored in the heavy truck industries.[19]

1.1 Economic Assessments

The industry suffers from increasing costs for research and development. Modern cars are simply more sophisticated when it comes to complying with governmental demands as well as consumer preferences and this requires more technical research.

It is too early to conclude that the limits are reached in the Western World and that the industry as such does not grow anymore. In fact, the automotive

[15] Article 3, EU Merger Regulation.
[16] Elsässer (1995), p. 279.
[17] See for example; IHS Global Insight (2009) (article).
[18] The difference between the market structure within the EU in comparison to the USA and Japan becomes obvious thus it requires only three manufacturers to reach 65-75% of the production, compared to seven in the EU. (Andera, (2007), p. 50-51.) This merging theory is further supported by Sergio Marchionne, the CEO of the Fiat group. Amongst other factors, he states that a yearly production of between 5.5 and 6 million cars is necessary for a manufacturer to have a chance to be profitable. (Marchionne quoted by Ciferri in Automotive News (2009) (article). Momentarily only three manufacturers reaches the target set by Marchionne, namely Toyota, GM and Volkswagen. (Organisation Internationale des Constructeurs d'Automobiles (OICA) (2008) (production statistics)). See also relevant case law in chapter three and four below.)
[19] A brief outlook in a similar business, the one of heavy trucks provides the following comparison. In the middle of the 1960's, there were somewhat 25 to 30 manufacturers of heavy trucks in Western Europe. This number was clearly diminished during the 1980's to seven big ones in the beginning of the 1990's (Elsässer (1995), p. 20).

industry almost mirrors the curve of GDP (gross domestic product).[20] Nevertheless, the passenger cars of today create a large footprint when it comes to resources needed in terms of space, noise and pollution.[21]

To reach out further to the rest of the world that needs to be motorized, cooperation appears to be a reasonable risk and cost sharing solution to create a network of retailers and finally keeping the prices low whilst designing and manufacturing cheap cars by sharing know-how. Only by offering a wide range of products, a large manufacturer or a group can reach the volumes and fulfil the different laws and preferences all over the world.

It is important to underline that the economies of scale within the automotive industry are significant. Initially this theory focused on manufacturing and in this rather primitive stage, it is a matter of simple mathematics.

The automotive industry as such has low margins and high fixed costs, which include for example labour and enormous investments in new eco-friendly technologies.[22] The key to survive is volume.

The wider range of models or variants produced per amount of expenses, such as research and development in general and engines, platforms and bodies in particular, the lower are the costs per produced unit. It is also both complex and expensive to change over from one model to another. The prevailing idea is therefore to manufacture different cars with a high level of common standard and at the same time avoiding separate production lines with doublets of the production equipment, since similar cars allows to be manufactured in the same production environment.[23] This is exemplified by the so-called A4 platform by Volkswagen, which supported eight separate models and four different brands. Already in 1999, no less than 1.9 million vehicles were produced on this platform alone.[24]

The combined or even alternative way of achieving this is to outsource production on subcontractors who deliver larger ready-made units, which reduce the time and thereby the costs in the production line.[25]

This view has evolved during the years and the focus has shifted from manufacturing to purchasing and most of all, to development. The main reasons for this change is first of all the break through for a new generation of production equipment based on automation and electronics that has given flexibility and diminished the manufacturing costs.

[20] European Automobile Manufacturers’ Association (ACEA) (2010), p. 12.
[21] See for example Apel & Henckel (1997), (article). Näringsdepartementet (2008), p. 40, p. 41, p. 80, p. 99, p. 122-, p. 136.
[22] IHS Global Insight (2009) p. 1 (article).
[23] Elsässer (1995), p. 46.
[24] Andera (2007), p. 88.
[25] Elsässer (1995), p. 46.

Secondly, production has become less complex and cheaper by usage of more integrated subcontractors. In a well-integrated process, supported by integrated subcontractors, anyone is able to manufacture. The challenge has shifted earlier as well as later in the process, towards complex research and development, followed by marketing and sales.[26]

Further contributing factors are new and higher demands for improved cars, both in terms of customer requests for more complex cars and authorities' requirements when it comes to environment and safety have increased the expenses for research and development.[27] The costs associated with a new car model are astronomical, and allows itself to be decreased mainly by cooperation, partly themselves by sharing the costs amongst other manufacturers by creating larger groups, and partly by subcontracting research and development on subcontractors[28] and therefore attain diminished specialization costs when all participants do what they are best at.[29]

The complexity of the automotive industry thus raises many relevant competition law aspects.

1.2 Question and purpose

The automotive industry is without doubts one of the most important ones in the EU, because of its socio-economic significance. This goes far beyond pure economical figures and is linked to national innovation and development of other sectors of industries, trade balances and it is thus a matter of national prestige and nationalistic sentiment.[30] Additionally, some countries are still large shareholders in their respective manufacturers.[31] For the reasoning above, these crown jewels of national champions are sensitive political issues.[32]

This industry is undergoing a rapid as well as a substantial structural change through internal rationalization and externally in relation to the competitors towards a global market.[33] So, this research presupposes that the automotive industry is in need of a complete restructuring. Given the benefits of an increased common know how and the economies of scale presented above, the logic is to form larger groups in order to reach volume. Only larger units or groups are in the power and position to benefit from a joint research and development, purchasing, manufacturing, down to the retail level where

[26] Ibid., p. 47.
[27] Ibid., p. 48.
[28] Elsässer, (1995), p. 46.
[29] Ibid., p. 46. Swaak (1999), p. 49. See for example Autoliv (safety engineering), Bosch (vehicle electronics), Haldex (four-wheel-drive systems).
[30] Swaak (1999), p. 64.
[31] Renault (2010), (webpage). 15.01% of the shares in Renault is owned by the French Government. Volkswagen (2010), (webpage); The State of Lower Saxony holds 20.01% of the shares.
[32] Andera (2007), p. 47. Swaak (1999), p. 343.
[33] Swaak (1999), p. 22.

even dealerships can be shared between several brands[34]. The number of manufacturers is being clearly diminished, now as well as in the future,[35] a development that creates a clear pattern.[36] The need to merge is therefore presupposed in this study and for the purpose of research considered as a virtual circumstance. Nevertheless, an alterative road is shown.

The relevant questions are (1) if the major actors of the automotive industry are allowed to merge in the light of the EU Merger Regulation, (2) whether this application has changed in the light of the current financial crisis, (3) if potentially harmful mergers can benefit from the rescue merger theory[37] and finally (4) whether merging is the answer, or is there another way to achieve sustainable, long-term profit in the automotive industry?

1.3 Method and materials

This paper is controversial, when it comes to method as well as materials selected for the study. Due to the topic and its economic as well as industrial complexity, the parts providing a background and a relevant insight is relying on sources unknown to the traditional legal dogmatic method and mainly based on specialist literature about the automotive industry.

The analysis is updated with the latest news from the trade, all carefully as well as critically selected.

In between, the method used to evaluate current law consists of a review and analysis of relevant legal documents such as case law[38], legal writing, statutory acts, etc.[39] Non-binding legislation such as Commission guidelines will be emphasized and also non-traditional doctrine from legal writers, business articles and other commentaries will be used. A different and actual approach requires a different and actual method.

1.4 Delimitation

The paper has a clear focus on the European Union and presumes a general knowledge of EU as well as its competition law. Due to the global character of this industry, relevant outlooks will be done, to other trades as well as other continents. The main limitation remains within the field of manufacturing and sales of passenger cars. Distribution and after market are therefore excluded. It aims at horizontal mergers only.

[34] Andera (2007), p. 87.
[35] Ciferri in Automotive News (2009) (article).
[36] See relevant case law, chapter three and four below.
[37] See 3.3 below
[38] The cases examined below concern full-function joint ventures as well as mergers and acquisitions and its compatibility with the common market in the light of EU Competition policies. The paper deals with all cases in the automotive industry with Community dimension from year 1990, this in order to avoiding national state aid, which was still unofficially a national concern before this date.
[39] Peczenik (1995), p. 33 and 35-44.

Mergers are in this study synonymous with full-function joint ventures[40] as well as mergers and acquisitions. Only horizontal mergers are relevant and taken into account, thus the major interest lies in when competitors merge.[41]

In terms of relevant law[42], the focus stays on the EU Merger Regulation, since Commission guidelines are not legally binding. Nevertheless, guidelines are created by the Commission for increasing the legal certainty, thus contributing to a good corporate climate and will therefore be examined in this paper.

The case law examined for the analysis of this paper consists of all mergers since 1990 within the EU and the passenger car industry where the merging undertakings hold at least 1% of the relevant market each. Only these mergers change the market within a reasonable near future.[43] For the purpose of showing relevant currents in the "sister industries" – heavy trucks and buses will be elaborated.

Remedies, patents, technical legislation, and finally state aids[44] fall outside the scope this time.

1.5 Outline

First out is the road trip of the automotive industry, from its early days to the possibilities and challenges of today. Then current law will be presented, and later elaborated by case law - concluding with a broad analysis as well

[40] Navarro. Font, Folguera & Briones (2005), p 38. Article 3, EU Merger Regulation. The regulation makes a clear distinction between full-function joint ventures (concentrative) and cooperative ones. This since the merger regulation defines the concentrative joint ventures to have a legal as well as economic independence, with the result that the cooperative ones fall outside the scope of the EU Merger Regulation. The key is control (article 3, recital 26). "In addition, the criteria of Article 81(1) and (3) of the Treaty should be applied to joint ventures performing, on a lasting basis, all the functions of autonomous economic entities, to the extent that their creation has as its consequence an appreciable restriction of competition between undertakings that remain independent." (article 3(2)).

[41] Vertical mergers do not create dominance per se, but the efficiency resulting from it may be harmful in the form of the "double marginalisation problem". This refers to that the "same" undertaking is able to add up on more levels, for example on production as well as distribution. (Motta in Mateus & Moreira (2007) p. 278.) Vertical mergers can also ruin the competition further down the road. A dealer, owned by the producer, does not have to make money on this level, in despite to other independent dealers. (Ibid., p. 282). On the other hand, some mean that vertical mergers never harm the market, but only contribute consumers with efficiency. Amongst them is the Chicago School (of economics). (Ibid., p. 282). Conglo-mergers normally leaves the market intact and are considered to be harmless. (Ibid., p. 286). There are however risks with tying and bundling since dominance can spread to other markets. (Ibid., p. 286). See also Case T-5/02 Tetra Laval BV v. Commission of the European Communities.

[42] See also Lindsay (2003), describing the procedure step-by-step.

[43] European Automobile Manufacturers' Association (ACEA) (2009). In any case, see 3.2.4 below.

[44] See also Bildtsén, (2009).

as remarks of personal character. All again in the purpose of summarizing the competitive aspects with mergers in the automotive industry.

2 Background

2.1 Market

Many cars have broken down along the road and the struggle has begun. Everyone wants to get a ride, but the remaining cars allow only a limited number of passengers for a safe, durable and comfortable journey. Some will have to walk away and abandon their wrecks. It is a well-known game – described as the survival of the fittest.[45] Only mergers or bankruptcies are able to resolve the issue of over-production, if there is one. The automotive crisis is severe and there is need for a change.[46]

The automotive industrial development allows itself to be summarized as follows. First out was North America and followed by the later rise of Europe. Once they were established, Japan arose. The line-up was introduced and the battle for world domination could begin. This decade is the end of history and the beginning of the global market.[47] Today, 96% of the world trade of cars takes place between the EU, the USA and Japan.[48]

The global financial crisis has severely affected this industry. The automotive industry itself suffers from a lack of liquidity and access to sensible financing. The lack of reasonable financing is additionally problematic when somewhat 60 to 80 % of all cars are bought for borrowed money.[49] A decreasing demand has escalated the overcapacity, which used to be at least 20% globally, with another 25% and this industry now produces 94 million cars globally, targeting a demand of 55 millions only.[50]

In addition to the financial crisis, the overcapacity, high set up costs and severe price competition are other great challenges for this industry to address. It is nevertheless worth to note that the future is bright. The global demand for new cars will be quadrupled within the following 25 years as a result of new markets in need of motorization. And this despite a decreasing demand from mature markets such as the EU, Japan and USA.[51]

2.2 Importance

The automotive industry is highly important in the EU.[52] This market accounts for more than one third of both the consumption and

[45] Spencer (1868), p. 444.
[46] See for example Eaton quoted in Vlasic/Stertz (2001), p. 175, The Commission (2009) (webpage), Marchionne quoted by Ciferri in Automotive News (2009) (article).
[47] Mantle (1995), Offers an excellent structure, wherefrom I was inspired.
[48] Swaak (1999), p. 49.
[49] IHS Global Insight (2009), p. 9.
[50] Ibid., p. 8., Welch in Businessweek (2008) (article).
[51] Gott (2008) (article).
[52] Swaak (1999), p. 21.

manufacturing globally and it makes it the biggest manufacturer of cars in the world. This industry alone contributes to 17 % of the total tax revenues in the EU[53] and employs 1.7 million people directly. One out of ten jobs in the EU depends in the large sense from suppliers to servicing of this industry, by some referred to the “industry of the industries”.[54] This because of its cross-border character to other sectors and suppliers from all over the EU, it creates a mutual network of interests for all Member States.[55] The socio-economic importance is further underlined by the not insignificant shareholdings of the Member States in their respective national car manufacturers.[56]

2.3 Timeline

2.3.1 Early days

In the summer of 1886, Gottlieb Daimler fitted one of his engines to a carriage and created the first known motor vehicle on four wheels.[57] Focus then shifted from Germany to the USA where Henry Ford was the next to re-write history with his system of manufacturing, presented as ”mass production” as early as 1926.[58]

The horizontal consolidation started very early in the USA and already in the end of the 1920’s, GM, Ford and Chrysler had a dominant share of the American automobile market, an early sign of this essay. This development was not mirrored in Europe until the 1960’s and by then almost exclusively all transactions took place within the national borders.[59]

2.3.2 Postwar recovery

The Second World War severely left the European car industry in serious trouble. Its factories in France, Germany and Italy lay in ruins after extensive air campaigns and there was a massive shortage of raw materials. The Germans stole the French machinery during the war and the German equipment was lost in the form of reparations mainly to the Soviet Union. Momentarily, this business lost its most prominent generation of entrepreneurs such as Louis Renault (1944), Robert Peugeot (1945), Giovanni Anelli, the founder of Fiat (1945) and Ferdinand Porsche (1951).

It took some five to ten years before the industry reached its pre-war manufacturing levels again. The initial production was light commercial

[53] McLaughlin & Maloney (1999), p. 3.
[54] Swaak (1999), p. 52.
[55] Commission (2009) (article).
[56] Swaak (1999), p. 55-56. Renault (2010), (webpage). 15.01% of the shares in Renault is owned by the French Government. Volkswagen (2010) (webpage), The State of Lower Saxony holds 20.01% of the shares.
[57] Swaak (1999), p. 30.
[58] Swaak (1999), p. 32.
[59] Elsässer (1995), p. 279.

vehicles, but the passenger car market became the main reason for growth.[60] Once craft production was replaced by the American mass production, Europe lost its dominance of the automotive industry. By 1955, 70% of the world production of cars was manufactured in North America and only 25% in the Western Europe.[61]

In 1950, Europe was the arena of no less than 31 independent producers, who controlled some 49 medium and large manufacturers.

2.3.3 Golden years

Between 1955 and 1970 the European car industry grew fast once the technique of mass production was adopted. This is explained by a rising demand for cars, low wages and the rise of fuel prices that favored the European cars, which were smaller, sportier and more economic with its new features such as front-wheel drive and five-speed transmissions. This compared to their American competitors.[62]

The overall output grew from some 1.6 million to almost 12 million vehicles between 1950 and 1973, mainly due to success of inexpensive cars in the smaller segments, such as Renault 4CV, Citroen 2CV, Fiat 500 and of course, the Volkswagen Beetle, which was produced in 16 million units alone until 1973.[63]

Even before the oil crises, there were evident signs of mergers within the European automotive industry.[64] Volkswagen acquired Auto Union, Fiat bought Lancia and Peugeot took over 30% of its competitor Citröen. The biggest merger of them all took place in 1968 in the United Kingdom, where British Leyland consisted of four major British car manufacturers, producing 14 different brands.[65]

The American manufacturers discovered Europe even on the manufacturing level. Already in 1914, Ford was the largest car manufacturer in the United Kingdom[66] and by 1926, Ford assembled its cars in no less than 20 foreign countries globally. The big three American mass producers participated in the same strategy or simply purchased local companies and moved the manufacturing around in order to get closer to the markets, avoid dependency on differences in the dollar and to take advantage of cheaper labour.

The Japanese on the other hand prohibited direct foreign investment in order to protect their automobile industry and imposed high tariff barriers. During

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[60] Andera (2007), p. 59.
[61] Swaak (1999), p. 34.
[62] Ibid.
[63] Andera (2007), p. 63.
[64] Andera (2007), p. 58. A number of Member States restricted foreign direct investments (FDI) and therefore made foreign take-overs over domestic car manufacturers impossible.
[65] Andera (2007), p. 48. See more details on p. 124-125.
[66] Swaak (1999), p. 45.

the sixties and seventies, the Japanese manufacturers enjoyed a safe and mature domestic market and were able to focus on export. The export directed both towards the USA as well as Europe was de facto an immediate success. This created trade imbalances that resulted in political contra-trade barriers towards the Japanese manufacturers. In order to circumvent this problem, the Japanese manufacturers set up assembly plants within the USA and Europe and imported the necessary parts. Much like the American mass-producers did back in the days; these so called "screw-driver plants" transformed their Japanese export cars to domestic ones.[67]

2.3.4 Crisis and adjustment

In the 1970s and particularly after the waves of oil crises in 1973-4 and 1979, European automotive industry diminished, due to stagnation of economic growth in general and increased Japanese competition in particular, whose share of the worldwide production grew from 14 % to 24,1 % during the 1970s.[68]

The mergers continued throughout the EU from the 1970s. PSA Peugeot acquired the remaining stocks in Citroën, Fiat took over Alfa Romeo and Volkswagen acquired the volume producers Seat and Skoda Auto.[69]

The recent merged British car industry got bankrupt after the first oil crisis due to inefficiency, over-employment and that little was done to rationalize the product ranges, share components as well as research and development.[70] The United Kingdom was the primary target for Japanese foreign direct investments in the European automotive industry[71] This Japanese investment was most welcomed in the United Kingdom, since it had just experienced a severe industrial decline and the Japanese invested in areas particularly affected by the UK car industry on its final journey to the scrap yard. The UK Government even provided these plans with financial aid and regional development grants.[72]

The Japanese offered fuel efficient and reliable cars at very decent prices.[73] With the opening of the Nissan factory in Sunderland, UK, political issues were raised, since France refused to consider these cars as UK-built and therefore European. After strong pressure from the British side, the Commission finally ruled in favour of the Brits after much protestation.[74]

[67] Ibid., p. 46-47.
[68] Ibid., p. 35.
[69] Andera (2007), p. 49.
[70] Ibid., p. 70, 126.
[71] McLaughlin & Maloney (1999), p. 70.
[72] Andera (2007), p. 86.
[73] Ibid., p. 85.
[74] Ibid., p. 86.

Today, the UK has no major domestic car manufacturer of significance and the car industry in Britain is no longer British.[75] The remains of the British car brands, Jaguar and the Rover Group were sold to Ford and BMW respectively.[76] Nevertheless, in 2007, the three largest Japanese manufacturers; Honda, Nissan and Toyota produced no less than 870 000 cars in the UK alone. As a comparison, this production corresponds to more than six times than the manufacturing of SAAB.[77]

The key to the successful Japanese manufacturing was the system of lean production, invented by Toyota. In contrast to other mass producers, the Toyota employees worked in teams and were put in charge over several steps in the production line. The teams were also encouraged to participate in improvements and it made the work along the production line both interesting and more effective. The time in the factories were even further reduced in close long-term cooperation with suppliers who delivered bigger units just-in-time, already in the 1960s.[78] This was some 20 to 30 years before the European and American manufacturers adopted the strategy.[79] For instance, the productivity per employee rose with 45% between 1993 and 1996 at Audi after adoption of the system and increased around a third compared to its competitors BMW, Volkswagen and Porsche.[80]

The German car industry exported almost 60% of its production and a large share went to the USA,[81] but Germany experienced several problems even before the first oil crisis. The post-war economy boom slowed down and the automotive workers were by law entitled seats in the German supervisory boards and this kept the salaries and benefits high. Momentarily, the German Mark increased against the US dollar, which took away much of the price advantage the German cars had on the US market.[82] It should be noted that the oil crises never stroke against the premium manufacturers, such as BMW and Mercedes-Benz, who experienced almost no decline in their sales[83] and saw their market share increase steadily during the 1970s and 1980s.[84]

It took three years for the market to return to pre-crisis level after the first oil shock and some remarkable six years for the industry to recover to the 1979 production output after the second crisis, even though the second crisis resulted in a manufacturing reduction only half the size of the first one.[85]

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[75] Automotive Unit of the Department for Business (BIS) (procution statistics) (2006) (webpage).
[76] Andera (2007), p. 49.
[77] Organisation Internationale des Constructeurs d'Automobiles" (OICA) (production statistics (2008) (webpage).
[78] Swaak (1999), p. 36.
[79] Ibid., p. 37.
[80] Ibid., p. 40.
[81] Andera (2007), p. 64.
[82] Ibid., p. 65.
[83] Ibid., p. 72.
[84] Ibid., p. 74.
[85] Ibid., p. 71.

Automation was introduced in the European automotive industry during the 1970s.[86] As a result of increased efficiency and strategic alliances, the manufacturers were able to benefit more and more from the economies of scale. As a result of this, the workforce in the Western European automotive industry has been nearly halved since 1973.[87]

It is somewhat a paradox, once the costs for manufacturing were reduced and the efficiency successfully increased the original problem of a global over-production grew even bigger. This led unavoidably to general over-capacity, high costs and a crisis that in turn resulted in a large re-organization of takeovers and other strategic alliances.[88]

The former chairman of Ford of Europe, Jacques Nasser, estimates the car manufacturing within the EU to exceed the demand of some 20%, compared to the 5 to 10% estimated by the former Commissioner for Industry, Martin Bangemann.[89]

On top of this, the problem has increased even further in the light of the current crisis, and the industry is now producing 94 million cars worldwide, meeting a global demand of 55 million only.[90] This problem is severe and has been addressed by the Council as well as the Commission, who both require the industry to deal with this issue itself.[91]

Another problem, as noted above, directly related to the financial crisis is that between 60 and 80% of all new cars are bought for borrowed money. The financial crisis has therefore resulted in a 20 to 30% decreasing demand.[92] The industry itself suffers from immediate shortage of liquidity and difficulties to get hold of reasonable financing.

2.3.5 Towards a unified market and global alliances

The race towards a global market started already in the early history with the global American manufacturing as well as export of the American as well as European brands.[93] During the second half of the 1980s the Commission drove towards integration on the European market through the Single European Act and this included the automotive industry.[94]

The Japanese producers found their way around import quotas by increasing their production in Europe. As a result from this, the Japanese import to the EU has declined from 70% of the total sum of cars imported to the EU to

[86] Andera (2007), p. 78.
[87] Ibid., p. 58.
[88] Swaak (1999), p. 36.
[89] Ibid., p. 40.
[90] The Commission (2009), p. 4.
[91] The Council (2009), (article).
[92] The Commission (2009), p. 3. The Comission 2009, (article).
[93] Swaak (1999), p. 45.
[94] Craig & De Búrca (2008), p. 607-612. See also Bildtsén, (2009).

modest 29,1%. Even though the Japanese brands have held a steady market share of some 10-15% in Europe, the lack of major increase is explained with production in Central Europe and new competition from Korean competitors.[95] The minor increase is almost exclusively accounted for by the successful Toyota.[96]

The 1990s was yet another decade of industry rationalization. The number of joint ventures at the product or component development increased radically,[97] the amount of independent manufactures continued to decrease and finally, the alliances changed alignment. The respective brands intensified their sharing and included component, production and even dealership sharing.[98] One of the news was the focus on platforms. By increasing the number of models manufactured on each type of platform, the costs could be diminished. The 1990s was also the decade offering a possibility to recover profits after the 20 years of crises. [99]

The focus on industrial sharing and rationalization along with a financial interconnectedness between the European and the global car industry thus gave rise to a new concept – global alliances! A truly global example is NedCar, which was a joint venture between Volvo and Mitsubishi in financial assistance by the Netherlands. Several models were produced in the jointly owned factory and platforms as well as other components were shared.

In addition to the globalization, the other news during the 1990s is the gradual diminishes of independent niche producers. Increased competition, rising production costs and a life cycle of some eight years for each product only is very difficult for smaller producers, which often depend on a few numbers of models. For these reasons, such independent producers seek the economies of scale in a volume producer and a strong partner for platform, engine and component sharing. One example is the Premier Automotive Group (PAG) where Ford arranged its premium brands and the pattern appears obvious after a brief overlook on the key acquisitions in the European automotive industry.[100]

2007 was the all time high for the automotive industry in Europe and around 15 million new cars were registered.[101] Even if the western part stagnated, a contributing factor was the expansion to 27 Member States.[102]

To sum up, the European car industry today consists of Volkswagen as the market leader, holding one fifth of the market and having nearly twice the market share of its competitors.[103]

[95] Andera (2007), p. 88.
[96] Ibid., p. 93.
[97] Ibid., p. 88.
[98] Ibid., p. 87.
[99] Ibid., p. 87.
[100] Ibid., p. 88.
[101] European Automobile Manufacturers' Association (2010), p. 11.
[102] Ibid.(2008), (webpage).

The industry has become horizontally integrated and vertically disintegrated. Independent subcontractors develop their own systems and deliver components as well as sub-assemblies in larger units directly on-time for the assembly plants. This development has turned the car brands into system integrators and thus pushing the centre of gravity further down from production to retail and after-purchase services, which has become the new focus.[104]

The European system integrators, or car manufacturers, do indeed have a positive forecast. It is already the biggest manufacturer and its products meet the demands on a global increasing market. It has an advantage on its American competitors when it comes to the new generation of CO_2-friendly cars.[105]

[103] For the groups Volkswagen 20,1%, PSA 13,6%, Ford 10,8%, Renault 10,3% GM 8,3%. European Automobile Manufacturers' Association (ACEA) (2008), (production statistics).

[104] Andera (2007), p. 51.

[105] The Commission (2009), p. 4. Also underlined by that Fiat acquired Chrysler and will resume its export to the USA by small, CO_2-friendly cars. See also Borroz in Wired (2009), (article).

”I would now like to turn to merger control. I am not against mergers. Business restructuring is needed to enhance the competitiveness of the European economy. Mergers and acquisitions contribute to this goal. Restructuring, however, cannot be at the expense of the consumer.”[106]

[106] Neelie Kroes quoted in Mateus & Moreira (2007), p. 20. For more fundamental reading about mergers and its necessary conditions see for example Goyder, EC Competition Law, 4th ed. Oxford (2008). p. 335-.

3 EU Merger Regulation

Competition itself is a core value. Effective competition is crucial for the innovation and development of new and improved products, low prices and a broad supply of products on the market. With this motive, the Commission uses Community legislation and policies to prevent mergers that otherwise would abuse its' market power, leading towards the opposite.[107]

3.1 Legal history

The pre-2004 merger policy was mainly focused on dominance. The presence of post-merger dominance determined whether the merger was found compatible with the common market or not.[108] This instrument is unilateral though it was forced to allow mergers that neither created nor upheld dominance but still increased the resale prices.[109]

Momentarily, the opposite problem occurred since mergers that did create or upheld dominance was found incompatible with the common market even if it created efficiencies on behalf of the market and even consumers.[110]

The bluntness appears to be a result of the difficulty to prove efficiency for beneficial for consumers. However, some dissidents mean that the Commission never was open for argumentation in this matter.[111]

The Commission based its merger supervision on the EC Treaty[112], by looking into transactions aimed to strengthening a dominant position. This method was later considered to be an inadequate control of mergers.[113]

In 1989, the EEC Merger Regulation was adopted. This sharpened the instruments of the Commission to deal with mergers in a more multilateral, sophisticated way. The 1989 Regulation offered a great advantage with the creation of time limits. This formed a clear advantage compared to the articles in terms of legal certainty. [114]

Later developments in the legal evolution is the shift in focus from dominance towards economic considerations, indicated first of all by usage of the SIEC-test[115] that replaced the test of dominance. Market shares and

[107] Art 8 Horizontal Merger Guidelines.
[108] Motta in Mateus & Moreira (2007), p. 287.
[109] Ibid., p. 288.
[110] Ibid.
[111] See ibid., p 275-290.
[112] Articles 85 and 86, EC Treaty.
[113] Bishop& Walker (1999), p. 139.
[114] Ibid.
[115] See 3.2.3.2. below.

concentration levels do in any case continue to provide a useful first indication of the market structure and the impact of the merging parties.[116]

Secondly, efficiency gains are being balanced with harms in the new 2004 EU Merger Regulation and its horizontal guidelines.[117]

3.2 The 2004 EU Merger Regulation

Based on article 3(1g) in the EC Treaty, the Merger Regulation established "a system ensuring that competition in the internal market is not distorted".[118] This since the European Court of Justice (ECJ) found that EC Treaty and foremost article 81 and 82 were insufficient to control all actual and potential operations incompatible with the common market.[119]

In order to attain legal certainty and a sound, predictable economic climate, the Commission creates guidelines, in line with and based on the EU Merger Regulation.[120] The purpose is to provide guidance on how the Commission assesses concentrations when two or more competitors, actual or potential, acting on the same relevant market intend to merge.[121]

By this, merging undertakings have a somewhat clearer view to determining whether or not the potential merger may be declared compatible with the common market.

Without entering the field of procedure,[122] there are two conditions for the Community legislation to apply; first out is the definition of concentration and secondly a community dimension in terms of size and significance. Only larger mergers are normally capable of affecting the common market.

3.2.1 Assessment

Once it is clear that the proposed merger first of all is a merger, in the light of the definition below and second, whether it comprises of the EU Merger Regulation by reaching the thresholds, the Commission compares the competitive climate that would result from the proposed merger with the climate that would have continued to prevail if not for the merger[123]. It may, in particular, take account of the likely entry or exit of firms if the merger

[116] Article 14 Horizontal Merger Guidelines. See also de la Mano & Röller (2006), (article).
[117] Motta in Mateus & Moreira (2007), p. 293.
[118] Recital 2, EU Merger Regulation.
[119] Recital 7, ibid.
[120] Recital 28, ibid.
[121] Recital 1, ibid.
[122] See 1.5 above.
[123] However, in some circumstances, the Commission may take into account future changes to the market that can reasonably be predicted. See for example T-102/96, Gencor v. Commission, 1999 ECR II-753, para. 247-263.

did not take place when considering what constitutes the relevant comparison.[124]

In most cases, the Commission uses current market information for its analyses. When it comes to dynamic or rapidly changing markets, the Commission can in its market description predict reasonable changes in a near future, such as entry and exit of markets, or simply summing up the market share of the post-merger undertaking.[125]

A concentration must confer a clear shift in the control of one entire or parts of an undertaking. Control can be reached either by pure ownership, as a result of legal considerations, or by other means, such as contracts or rights.[126]

The Commission's assessment of mergers normally entails; first of all a definition of the relevant product and geographic markets;[127] followed by the competitive assessment of the merger.[128]

3.2.2 The substantive compatibility test

Market definition is a method to identify the competition between undertakings.[129] The result of the equation is the market power of each undertaking and central in all competition policy.[130]

In order to provide legal certainty along with guidance, the Commission has created a notice on how the relevant market is being defined,[131] which reads as follows; "a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices or their intended use."[132]

The substantive compatibility test consists of two stages. Initially, it is to define the relevant product as well as geographical markets.[133]

3.2.2.1 Relevant product market

The relevant product market is defined by the product and the method is to see whatever competes with it.

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[124] Article 9, Horizontal Merger Guidelines. See also 3.3 below.
[125] Article 15 Horizontal Merger Guidelines and thereto relevant remarks and references.
[126] Art 3(2-5) EU Merger Regulation.
[127] See 3.2.2.1- below.
[128] Article 10, Horizontal Merger Guidelines.
[129] Article 2, Notice Of Relevant Market.
[130] Lindsay (2003), p. 68. (and thereto linked case law). Article 4, Notice Of Relevant Market.
[131] Article 1, 5 and 6, Notice Of Relevant Market. The Notice is not legally binding but serves as a guideline.
[132] Article 7, ibid.
[133] Glader (2004), p. 88. See also Article 1 Notice Of Relevant Market and Case 85/76 Hoffman-La Roche [1979] ECR 461.

In short, undertakings are under three types of competition; demand substitutability, supply substitutability and potential competition.[134]

Substitution in terms of demand includes products that in the eyes of the consumers do the same job.[135] One way to evaluate the demand substitution is to explore whether consumers will switch to other products (substitutes) in case of a small, but lasting price increase of some 5 to 10 %. If the price increase results in a loss of sales, these competitive products bought instead are included in the relevant product market.[136] This is known as the SSNIP test (small but significant non-transitory increase in price).[137]

Supply substitution on the other hand means that suppliers are able to switch production and start manufacturing the relevant products and market them within short time without addition of significant restructuring costs or risks.[138]

Potential competition finally, is not taken into account at this stage of the process, since it depends on specific factors related to each merger. Only if required at later stages in the merger process, potential competition will be considered.[139]

The relevant market consists of products that matches, or are likely to substitute each other,[140] either on the supply- or demand side.[141]

3.2.2.2 Relevant geographic market

“The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas”.[142]

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[134] Article 13, Notice Of Relevant Market.

[135] Lindsay (2003), p. 73. The test is developed by the head of the DOJ Antitrust Division, William Baxter (US) and later adopted the Commission. (Glader (2004), p. 74. Article 15 Notice Of Relevant Market. In the automotive industry, the passenger car market has sometimes been divided into segments, such as price, size, etc. and is an important factor, however not determining. See also the Commission Decision regarding Daimler-Chrysler (1998), para 9.

[136] Article 17, Notice Of Relevant Market. See also the example (in Article 18 ibid.) regarding flavor of soft drinks. Does the consumer stick to flavor A or switch to B instead, after price increase?

[137] See note 129 above.

[138] Article 20 and 23, Notice Of Relevant Market. See also the example (in Article 22, Notice Of Relevant Market.) about paper. Paper cannot be replaced by another type, but the manufacturing process can be adjusted.

[139] Article 24, Notice Of Relevant Market.

[140] Motta (2004), p. 102. For more reading, see ibid. p. 102-.

[141] Lindsay (2003), p. 71 and Article 13, Notice Of Relevant Market.

[142] Article 8, Notice Of Relevant Market.

A market in the market, a smaller unit, national or regional part of the common market, can be created. Technical matters such as pricing, national legislation, transport costs, trade flows, or deprived out of demand characteristics, which consists of – "factors such as national preferences or preferences for national brands, language, culture and life style, and the need for a local presence are all important factors in defining the relevant geographic market.[143]"[144]

3.2.2.3 The economic link

Whatever the general economic theories and tools used relating to the understanding and analysis of competition, economics is used as a tool in the application of the relevant law in the area of merger control. Law trumps economics.[145] Sometimes, the law constitutes "bad" economics, and therefore economists evaluate their argumentation in front of the respective courts – forecasting the likely positive effects of a merger.[146]

3.2.2.4 Community Dimension

For the Merger Regulation to apply, a merger must have a community dimension.[147] This is a question of pure levels of thresholds. As for example, Volvo Car Corporation is a small car manufacturer, with a market share in the EU of a modest 1,5%.[148] Volvo Car Corporation reaches the given thresholds, which results in that nearly all car manufacturers reach the limits and thus comprise of the EU Merger Regulation.

3.2.3 Competitive assessment

Once settled the application of Community legislation, the Commission analyses its possible negative, such as anti-competitive effects or barriers to entry as well as positive effects, for example buyer power and efficiencies. Only in exceptional (!) circumstances, the Commission takes into account the evaluation of a failing firm.[149]

The logic is clear. The larger the market share, the more likely an undertaking is to control the market. And the larger the addition of market share, the more likely it is that a merger will lead to a significant increase in market power. Hence, only with a substantial share of the market, the large company can use/abuse the market power.

[143] Mario Monti quoted by Motta in Mateus & Moreira (2007), p. 133.
[144] See ibid., p124-144 for more reading. See also 3.4.3 below.
[145] Furse (2007), p. 21.
[146] Ibid., p. 22.
[147] Art 1, 2 and 3 EU Merger Regulation.
[148] European Automobile Manufacturers' Association (ACEA) (2008), (production statistics). The worldwide turnover of Volvo Car Corporation was 83,5 billions in 2008 (Bolagsverket).
[149] Article 12, Horizontal Merger Guidelines, see also 3.3 below.

Although market shares and additions of market shares only provide first indications of market power and increases in market power, they are normally important factors in the assessment.[150]

3.2.3.1 Dominance test

Before the 2004-policy, the dominance test was laid down by the ECJ in the case United Brands v Commission and used in the first EU Merger Regulation from 1989. "The dominant position referred to in article 86 (now 82) relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers. In general a dominant position derives from a combination of several factors which, taken separately, are not necessarily determinative."[151] The form "acting independently" is being criticized, since not even a true monopolist can protect itself from decreasing demand.[152]

Despite the new and refined methods given in the 2004 EU Merger Regulation, the focus is still on dominance, which serves as an important indicator. And the market shares are first indicators.[153] Mergers with a post-market share below 25% either in the common market or in a substantial part of it are not likely to dominate the market.[154] This is also the case with joint dominance, which means that two or more firms create or keep dominance only together.[155]

3.2.3.2 SIEC test

The test after the revised 2004 EU Merger Regulation is being described as follows; "A concentration which would significantly impede the effective competition (SIEC), in particular by the creation or strengthening of a dominant position, in the common market or in a substantial part of it shall be declared incompatible with the common market."[156]

SIEC results from the creation or strengthening of a dominant position. It preserves the old case law[157], from the 1989 EU Merger Regulation, development while still maintaining the consistency and not in the position to replace the pre-2004 policy.[158] The new approach is that it is no longer necessary for a dominant position to be created or strengthened for a merger to be declared incompatible with the common market.[159] Dominance is

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[150] Article 27, Horizontal Merger Guidelines.
[151] 27/76 United Brands Co and United Brands Continental BV v Commission [1978] 1 CMLR 429, para 2.
[152] de la Mano & Röller (2006), p. 4.
[153] Furse (2007), p. 125. Articles 14, 17 and 18, Horizontal Merger Guidelines.
[154] Article 32, EU Merger Regulation.
[155] Motta (2004), p. 271.
[156] de la Mano & Röller (2006), p. 3. And article 2 Horizontal Merger Guidelines and thereto referred case law.
[157] Glader (2004), p. 88.
[158] Recital 26, EU Merger Regulation.
[159] Thompson in Furse (2007), p. 123.

neither sufficient nor even necessary, according to the new SIEC test. A merger may have adverse anti-competitive effects even in the absence of dominance. [160] In practice, the authorities still relies on market shares and it continues to play an important role in most cases.[161] Above 50% is strong evidence of dominance, but even between 40 and 50% may be dominant, in particular if other competitors are small.[162]

The SIEC-test will not result in a great many more mergers being condemned.[163] It is indeed a move towards an effect based approach in merger control[164] and a shift away from structural indicators of dominance.[165] This has been a gradual development since approval of the merger guidelines in line with upcoming case law.[166]

3.2.3.3 The Herfindahl-Hirschman Index, HHI

Market shares still serves as an important first indicator of the competitive climate on the relevant market.[167] Additionally, the HHI offers a sharper and refined instrument than a general calculation of the percentage of the market share. This since the HHI considers the entire situation, by using proportionality to give greater weight to the market shares of larger firms. By taking the entire market in the evaluation then more attention is paid to a merger in a highly concentrated industry about one that occurs in a fragmented industry.[168]

The HHI takes into account the relative size and distribution of the firms in a market and approaches zero when a market consists of a large number of firms of relatively equal size. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.[169] For example, Volkswagen (market share some 20%) is not a problem since the others have 10% each, but may very well be a problem if the other competitors are way smaller.[170] The more independent and competing undertakings remaining - the healthier market.[171] This is what the HHI takes this into account[172] and forms the underlying logic behind the HHI index, thus calculating a proportional index.[173]

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[160] de la Mano & Röller (2006), p. 7.
[161] Ibid., p. 15.
[162] Ibid., p. 7.
[163] Furse (2007), p. 122.
[164] de la Mano & Röller (2006), p. 13.
[165] Ibid., p. 14.
[166] Ibid., p. 13. A merger which would normally be regarded as leading to the creation or strengthening of a dominant position may not be so, if the acquirer would reach this position anyway. (Commission Decision (1993) Kali und Salz, para 70-) Later confirmed on appeal C-68/94 and C-30/95 France v Commission [1998], ECR I-1375.
[167] Article 14, Horizontal Merger Guidelines.
[168] Motta (2004), p. 235.
[169] U.S. Department of Justice and the Federal Trade Commission, (webpage).
[170] Author's notes.
[171] Motta in Mateus & Moreira (2007), p. 272.
[172] Author's notes.
[173] Motta in Mateus & Moreira (2007), p. 235, 236 and 272, and U.S. Department of Justice and the Federal Trade Commission, (webpage). For more reeding, see Navarro. Font, Folguera & Briones (ed.) (2005). However, smaller competitors may act as a

The HHI further uses a delta, showing whether the level of concentration on the market increases a lot or only little. Mayor changes in the market of course raise larger concerns.[174]

3.2.4 Potential competition

Potential entry matters and reducers the current undertakings room for pricing.[175] If the barriers to entry are low, the merging undertakings will be affected, since the introduction of a new competitor on the relevant market is very likely. The opposite occurs when the barriers to enter are high.[176]

The automotive industry is difficult to enter[177], since for example brand reputation, access to dealer network, safety technology, spare parts, and not to mention legislation each contributes to consumer preferences. Nevertheless, Skoda has for example entered the premium market with its Superb. Mercedes-Benz entered the “Golf-segment” with its A-class. Potential competition may very well come from, and is likely to, from manufacturers in other segments.[178] Despite there are nowadays several new Korean and in a near future perhaps Chinese as well as Indian competitors, entry is normally only considered timely if it occurs within two years.[179]

When it comes to potential competition, recent as well as historical examples of entry and exit in the industry may provide an inkling regarding the height of the entry barriers.[180] For a new entry to be considered a challenger, the entry must be of a sufficient size[181], within a few years[182] and finally likely to compete.[183] Entry is also considered less likely if the investment would only be profitable on a large scale, thereby resulting in significantly depressed price levels.[184]

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sufficient constraining influence if, for example, they have the ability and incentive to increase their supplies. See article 20 Horizontal Merger Guidelines.

[174] Ibid., p 237.

[175] Ibid., p 236.

[176] Article 68, Horizontal Merger Guidelines.

[177] Article 71, ibid. Dealer network was one of the motives behind the Daimler-Chrysler merger, access to safety and brand reputation (perhaps the motive for Geely, whilst acquiring Volvo Car Corporation), etc.

[178] Author’s notes.

[179] Article 74, Horizontal Merger Guidelines.

[180] Article 70, ibid.

[181] Article 76, ibid.. Entry must be of sufficient scope and magnitude to deter or defeat the anti-competitive effects of the merger. Small-scale entry, for instance into some market "niche", may not be considered sufficient.

[182] Article 74, ibid.

[183] Article 68, ibid.

[184]Article 69, ibid.

3.2.5 Efficiencies – potential benefits

As starting point, mergers may be in line with the requirements of dynamic competition and are capable of improving the entire industry.[185] Although most of the mergers are beneficial, at least for the undertakings involved, mergers without efficiencies for the market may be harmful.[186] The benchmark in assessing the result of the proposed merger is that consumers should not be worse off.[187] In order to evaluate the impact of a concentration on competition in the relevant market, the Commission considers any substantiated and likely efficiencies put forward by the undertakings involved.[188] If the efficiencies are effective and timely,[189] they are likely to counteract the negative effects on competition and the merger may be approved.[190] This argumentation is in any case very unlikely to justify a monopoly or a similar market power for the sake of efficiency.[191]

Efficiencies can be won by pure economies of scale, such as cost savings in the production or the distribution, not to mention service points and dealer network in the automotive industry. This may give the newly merged entity the possibility to compete by reducing the prices.[192] Consumers may also benefit in other ways than strictly economic factors, such as enjoying new or improved products or services as a result of joint research and development as well as cross-access to technology.[193]

3.3 Failing firm defense

The failing firm defence is a concept originally imported from US antitrust law, where the term is rescue merger. The failing firm defence is a method applicable in situations where, but for the merger, one of the undertakings would leave the market and its assets would be lost.

The underlying reasoning behind it is that the acquiring undertaking gains capacity but not market share due to the merger, since the market share would rise in any event. This defence also allows assets of the failing firm to remain in the industry, leaving the capacity as well as the employment intact.[194] To save capacity, assets and employment on the market, the Commission may declare an otherwise harmful merger compatible with the common market if one of the merging parties is a failing firm.[195]

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185 See note 100 above.
186 Motta in Mateus & Moreira (2007), p. 271.
187 Article 79, Horizontal Merger Guidelines.
188 Article 29, ibid.
189 Article 83, ibid.
190 Article 77, ibid.
191 Article 84, ibid.
192 Ibid. Kipferler & Nadler (1998) (article). See also 3.4.3 below.
193 Article 81, ibid. Ibid. See also 3.4.1 below.

194 Furse (2007), p. 136.
195 Article 89, Horizontal Merger Guidelines.

In the case of failing firm analyses, the ex post merger situation is being compared not with the ex ante merger situation, but the situation occurring after the failing firm would have exited the industry, since this is the correct alternative scenario and clearly stated in the US Merger Guidelines[196].[197]

Based on article 21 in the EU Merger Regulation, the theory was for the first time accepted in the Kali and Salz/MDK/Treuhand[198],[199] where three conditions for the failing firm defence were set by the Commission. If proven, these three establish the defence.[200] The conditions first of all state that, if there was no merger, one undertaking would exit the market shortly, secondly the proposed merger is not the most harmful potential merger and finally that after the failing company left the market, its market share would be in the hands of the acquiring company in any event.[201] This decision was upheld by the ECJ despite that the applicability test was somewhat broadened.[202]

Following this judgment, the Commission refined its test into four conditions. Firstly, the acquired undertaking would leave the market if not being acquired, secondly, there was no potentially less harmful purchase, thirdly, the assets of the one undertaking would be forced out of the market but for the merger, and finally the competitive structure of the market would be no less bad due to the merger than in case of a failing firm.[203]

The test is yet threefold again after the entry into force of the Horizontal Merger Guidelines. The conditions are identical with the ones given by the ECJ in France v Commission, apart from the third condition that has been somewhat softened.[204]

It may appear easy for merging undertakings to use the failing firm defence. Clearly the Commission accepts this defence in "exceptional" situations only[205] and the Commission is ready to permit a failing firm to leave the market if a merger would create larger harm than an exit.[206] This since mergers last forever.[207]

[196] section 5.0-5.2 The US Horizontal Merger Guideline.
[197] Motta in Mateus & Moreira (2007) p. 237.
[198] Commission Decision Kali+Salz/MDK/Treuhand, IV/M.308 [1994] OJ L 136/38.
[199] Navarro. Font, Folguera & Briones (ed.) (2005), p. 336.
[200] Lindsay (2003), p. 285.
[201] Furse (2007), p. 134.
[202] Joined cases C-68/94 and C-30/94, France v Commission [1998] ECR I-1375, referred to in Lindsay (2003) p. 285.
[203] Commission Decision BASF/Eurodiol/Pantochim, COMP/M.2314 [2002] OJ L 132/45, referred to in Furse (2007), p. 135.
[204] Article 90, Horizontal Merger Guidelines.
[205] Lindsay (2003), p. 286 and thereto linked case law.
[206] Furse (2007), p. 136.
[207] Shapiro (2009), p. 15.

3.3.1 “Flailing firms”

“Flailing firms” are failing firms without the requisites for failing firm defence fulfilled. Financial issues may be relevant to the Commission’s appraisal, but it is generally in the interest of consumers that undertakings compete exit of less efficient, as well as the exit ensures the survival of the fittest in a market economy.[208]

Is the automotive industry facing over-production and new, Asian competitors in the short term? Or, simply new markets in need of motorization? Recent development have proven there not to be any legislative changes in the financial crisis for the automotive industry.[209]

3.4 Elaborating case law

3.4.1 Autoeuropa

3.4.1.1 Background

Autoeuropa was a full-function joint venture between Ford and Volkswagen signed in 1991 with the production of a joint-developed multi-purpose vehicle (MPV)[210] starting some four years later.[211]

This type of car was introduced in the middle of the 1980s. The MPV market was new and undeveloped, with less than 100 000 units per year. This was very moderate in comparison to the car market as a whole. Nevertheless, this market was expected to grow significantly within the EU the coming years, with 350 000 a year in 1995 already.

It is important to point out that Ford already offered a MPV on the market; a US-produced model named Aerostar, but held only less than 1% on the relevant market in the EU. Ford and Nissan cooperated to replacing the Aerostar on the US market and Ford was also a minority owner of Mazda, who produced MPVs however without selling them within the EU. The emerging MPV market was at the time dominated by Renault Espace[212], with three times the sales of its closest competitor, the Chrysler Voyager.[213]

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[208] Lindsay (2003), p. 288.

[209] The Commission (webpage).

[210] Korah (2006), p. 739. A MPV is a car designed to carry up to seven passengers in three rows, or five plus a large space for luggage. This new type of car made its entry in the early 1990s by offering flexibility and thus being suitable for leisure as well as work. It has the ride, comfort and handling as a passenger car and occupies the space between five seater estates (i.e. Volvo V70) and light vans (i.e. Ford Transit). Finally, this car can also be distinguished from light commercial vehicles, not designed for transport of persons from the beginning (i.e. Volkswagen Multivan). MPVs therefore formed a new and distinct market.

[211] Autoeuropa (webpage).

[212] A Renault that was built by Matra SA.

[213] Korah (2006), p. 739. Relevant product market - All models but the Espace were produced outside the EU. Renault 54,7%, Chrysler Voyager 15,6%, Mitsubishi Space Wagon 12,0%, Nissan Prairie 7,6%, Toyota Previa 3,9%, Toyota Space Cruiser 2,9%, VW

Ford and Volkswagen notified the cooperation aiming at producing 190,000 units a year and a new factory was set up. Each of the companies agreed to buy fixed quantities of vehicles from the joint venture, usually half of the production of MPVs and parts at cost plus. Each parent would provide most of its own engines and slightly differentiate the design of the vehicles. Distribution would finally be executed separately.[214]

3.4.1.2 The Commission

The Commission held that the co-operation between the two would not lead to an elimination of competition in the car segment for MPVs. Neither Ford nor Volkswagen was currently in the market and it was found unlikely that either party would enter by themselves since the minimum viable scale of entry was larger than the likely sales of either party acting on their own.[215]

Entry of the market was considered relatively difficult in general, in the light of investment for development and production, since it was found necessary to reach a minimum output of an estimated 110 000 cars a year, to target break-even and get a decent return on invested capital. In this case, the partners presented for the Commission the investment costs necessary to develop and produce an MPV individually, and figures proved they could only reach 80-90 000 each annually, based on costs and anticipated sales. Even though either company could in principle do it themselves in the light of financial, technical and research capacities, it would not make economical sense in a relatively near future.[216] Despite the joint venture, it would take several years for the parties to make profit.[217]

Additional to the pure mathematic figures, the Commission accepted the potential lack of competition by first of all underlining that Ford and Volkswagen remain being important competitors on the EU as well as the global arena, both offering a wide and mostly competing range of cars.[218] Secondly, cooperation would also lead to technical know-how and would affect the competitive behaviour in other segments as well.[219]

3.4.1.3 Comments

In the light of Article 81(1); Volkswagen and Ford could have completed this MPV by themselves, given the need for money and technology. The Commission appears to have trusted the calculations provided by the merging parties, and their estimated yearly volume of 80 000-90 000 vehicles and the break-even on 110 000 units, as given. Apparently, the

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Caravelle is not designed to carry persons from the beginning, so it does not constitue a MPV.

[214] Korah (2006), p. 738.
[215] Bishop & Walker (1999), p. 99.
[216] Korah (2006), p. 742.
[217] Ibid.
[218] Ibid., p. 740.
[219] Ibid., p. 741.

Commission used these figures to conclude that none of them would reach break even by themselves.[220]

The Commission predicted that neither Volkswagen nor Ford would be interested in doing something similar in this segment by themselves. [221] Along with full-function joint ventures comes always the danger of a complete merger between the parent companies, if the cooperation would spread to other segments as well.[222]

It was in the light of these facts, that first of all neither Ford nor Volkswagen was a current supplier of MPVs,[223] a segment that had a very low market share (if any) and secondly that the structure of the market with one clearly dominant player acting without considerable competition from other European (!) suppliers,[224] cleared the joint venture using the third paragraph of article 81 in the EC Treaty. Other factors included that the MPV market had a moderate volume compared to the overall market of cars; it would lead to a technical progress where two skilled companies pooled good technology and produced the coming segment leader in fuel efficiency, recycling and emission levels. The cars were to be produced in a completely new and modern plant[225] in a poor region of Portugal.[226] Finally the Commission noted that other competing MPV projects were already under construction.[227]

3.4.2 Daimler-Chrysler

3.4.2.1 Background

The merger between Daimler and Chrysler was one of a kind. The size and importance of this deal stood out and took globalization to new heights. The Economist (UK) referred to it as “a new kind of car company”, and the New York Times (US) said “when big is not big enough”.[228] The Business Week (US) wrote in line with other experts about “global motors” and predicted that this transaction would trigger global consolidation by mergers in the automotive industry, much the same way as with steel, oil and railroad in 19th century USA.[229]

The Daimler-Chrysler merger did indeed set off the merger-go-round. In the end of 1990’s Ford as well as Renault wanted to acquire Nissan. Other midsize European manufacturers such as Fiat, Volvo and BMW were in the game, either in the role of chess-playing masterminds or its pieces. BMW

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[220] Ibid., p. 742.
[221] Ibid., p. 740.
[222] Korah (2006), p. 740.
[223] Commission Decision Ford Volkswagen, Case IV/33.814 - OJL 020/14, 28/01/1993, 23 December 1992, para 12.
[224] Ibid., para 13.
[225] Korah (2006), p. 741.
[226] Ibid.
[227] Ibid., p. 739.
[228] Vlasic & Stertz (2000), p. 246.
[229] Vlasic & Stertz (2000), p. 249.

and Volkswagen struggled in a new German battle of Britain to buy Rolls-Royce and Bentley from the British. Ford aimed at acquiring the Korean brands Hyundai, Kia and Daewoo. The giants Toyota, GM, Ford and the newly wedded Daimler-Chrysler all had cash, some 20 billion dollars each. The Asians on their hand had big debts and the smaller Europeans worried about their lack of scale.[230]

This is what it appears to be all about, the battle of scales. Rhyg summarized the development, meaning "it comes down to economies of scale…this kind of merger allows manufacturers to cut costs and fund the lower car prices needed to survive".[231]

3.4.2.2 Daimler

Daimler is a global conglomerate of premium passenger cars, automotive electronics, rail systems, diesel engines, aerospace and defence systems, as well as other surrounding services.[232] Daimler is the largest manufacturer of commercial vehicles in the world.[233] Its car and heavy-truck division Mercedes-Benz was a tradition-bound manufacturer of expensive sedans as well as a large manufacturer of heavy-trucks that wanted to marry a nimble, low-cost foreign carmaker.[234]

The Daimler-conglomerate was in need of growth. Historically, the group had grown seven percent every year, making it double its revenues every ten years, 1976, 1985 and 1995. In the mid-1990s, Daimler considered that only the car division – Mercedes-Benz, of the group had the potential to grow. A car division in need of volume, yet at the time premium cars constituted some 12 % of the entire car market only.[235] The turnover could not be doubled in ten years on premium cars alone and Mercedes-Benz therefore reloaded and aimed for the mass-market of cars.[236] Only through volume one could possibly grow and Mercedes-Benz started to investigate Toyota, Honda, GM, Ford and finally Chrysler.[237]

On top of this, the Mercedes-Benz executives believed that the world's car industry was at a big change, and predicted major consolidations in the automotive industry since too many manufacturers built too many cars for consumption in the same markets. They found that companies were forced to team up or be driven out by the bigger and stronger. By this time, Mercedes had recently broadened its range of products, now including a SUV[238] (M-class), a compact family car (A-class) and a revolutionary micro

[230] Ibid., p. 289.
[231] Ibid., p. 249.
[232] Commission Decision Daimler-Benz / Chrysler (1998), Case No IV/M.1204, para 3.
[233] Daimler (webpage).
[234] Vlasic & Stertz (2000), p. 41.
[235] Ibid., p. 171.
[236] Ibid., p. 172.
[237] Ibid., p. 171.
[238] Sport Utility Vehicle refers to a four-wheel driven off-road car.

car for urban commuters (Smart). Even at a company level, a similar pattern became visible.[239]

3.4.2.3 Chrysler

The Chrysler key to success lay in a lean and nimble organization very talented in making money on mass-market cars by offering hip cars at a decent price. Chrysler's fun, creative and rapid cross-functional teamwork created a entrepreneurial culture, which made it possible to make twice the money per produced car compared to the GM in 1994 and spending as little as 2.9% of its total revenues on engineering compared to 5.9% at Ford, 5.5% at GM and 5% at Toyota. In 1997, Chrysler was named "Company of the year" by Forbes Magazine (US).[240]

Chrysler's brand and products had a very American appeal and almost no recognition around the world, not even in Europe,[241] where it marketed cars under the names Chrysler and Jeep.[242] Chrysler suffered from a complete lack of strategy when it came to design, production and distribution for its overseas markets.

In Europe, Chrysler suffered from a poor network of distributors acting as independent sales, marketing and service agents. Their dealerships were to be found in lower-rent, hard-to-find locations and employed with local salesmen with no knowledge or interest in the Chrysler brand. Another problem for Chryslers European division was the high costs for export in general and taxes and tariffs in particular which priced its subcompact Neon model close to the price of a BMW 3-series in Germany.[243]

In 1997, Bob Eaton, the former CEO of Chrysler stated that as few as 10 out of 40 car manufacturers make money, and even less enjoy a decent return on invested capital.[244] Momentarily he addressed the issue of overproduction and estimated a forecast for 2002 with a total global production of 79 million cars meeting a demand of 61 millions only.[245]

The global warming raised new issues on the blackboard that required investment of enormous funds for research and development on green technology such as fuel cells, electric cars and hybrid-power. The budget for research and development at Chrysler was very modest and nothing compared to the other giants; Ford, Toyota and even Mercedes-Benz.[246] Eaton stated; "we need to do something, we need to do something big".[247]

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[239] Ibid., p. 40.
[240] Ibid., p. 76.
[241] Ibid., p. 75.
[242] Commission Decision Daimler-Benz / Chrysler (1998), Case No IV/M.1204, para 4.
[243] Vlasic & Stertz (2000), p. 75.
[244] Ibid., p. 168.
[245] Ibid., p. 169.
[246] Ibid., p. 170.
[247] Ibid., p. 171.

3.4.2.4 Merger

Chrysler and Mercedes-Benz appeared very suitable when it came to the range of products, where almost no overlap existed. Chrysler sold pickup trucks, minivans and stylish but economic sedans and compacts on the broad middle market. Chrysler was stuck in these spectra, having only a small portion of up-market buyers with its Jeep Grand Cherokee and some luxurious minivans.

The companies were also geographically compatible. Mercedes-Benz held a strong position in Europe, where Chrysler was weak. Chrysler on the other hand sold 30 (!) times as many cars in the US than Mercedes-Benz. Chrysler did not make or sell heavy trucks, which Mercedes-Benz did successfully in 43 countries, with presence in every region of the world.[248]

Mercedes-Benz searched for volume and growth, but had no experience when it came to subcompact inexpensive cars.[249] Chrysler wanted access to qualified dealerships with global presence. They both lacked the scale, technology base and the depth of brands.[250] Together they wanted to develop and manufacture a new third-world product in common, by using the Mercedes-Benz heavy-truck dealerships in South America and Asia, where none of the car divisions had distribution.

3.4.2.5 The Commission

As touched upon above, the proposed merger had a clear Community dimension as seen in turnover, with Daimler's 64,9 billion ECU and Chrysler 53,9 billion, worldwide. Their figures within the Community were 37,9 and 1,8 billion respectively. Neither did none of them reach two-thirds of their turnover in one Member State.[251]

The relevant product market with regard to passenger cars was not further developed and the car segments remained and were considered as well.[252] With a total combined market share of 4,1 % in the Common Market (Daimler-Benz 3,7 % and Chrysler 0,4 %) and not exceeding 8,5 %[253] in any country within the European Economic Area,[254] the competition would not be significantly impeded in the common market or any substantial part of it as a result of the merger. [255]

[248] Ibid., p. 96.
[249] Ibid., p. 63-64.
[250] Ibid., p. 342.
[251] Commission Decision Daimler-Benz / Chrysler (1998), Case No IV/M.1204, para 6. See also 3.2.2.1 and 3.2.2.2.
[252] Ibid., para 10.
[253] Ibid., para 14.
[254] EU + Norway, Iceland and Lichtenstein constitutes the European Economic Area. (webpage).
[255] Commission Decision Daimler-Benz / Chrysler (1998), Case No IV/M.1204, para 14. By that time the European market shares were as follows; Volkswagen Group 16,5 %, Ford/Mazda 12,4%, GM 12,1%, PSA Group 11,7 %, Renault 10,3%, Fiat Group 9,7% and BMW/Rover 5,7%.

Despite the fact that Daimler-Benz held an overall community-wide 24,5% market share in the segments of executive cars and sport coupes respectively and up to 44,8% in some countries, this was cleared since Chrysler did not contribute with more than decimals with its cars, mainly designed for the North-American market, and these segments are indeed highly competitive.[256]

The opposite market situation prevailed for multi-purpose vehicles (MPVs)[257] where Chrysler was a large actor with its Voyager-series, reaching 11,4% on the EEA market and up to 44,8% of some specific countries. Daimler-Benz contributed with the V-class, which despite its three seat rows was originally designed as a light commercial vehicle and as such not offering the advantages of a passenger car.[258] If the V-class model was added however, it only contributed with a few percents. The competition was (and is) tough and the market leader Renault had fallen from 50,7% of the common market within the segment to a modest 13,7% in 1997 as a direct result of five new competitors entering the segment, making it 13 competitors in total. This segment can in many situations also be substituted (see above relevant product market) by estate cars (or sport utility vehicles, SUVs). As a final remark, the market for MPVs in the four countries where Chrysler reached a market share above 25% were small and accounted for up to 4,4% only.[259]

The Commission has in earlier decisions[260] concluded that the production and distribution of passenger cars is international, even global in its character. Years of harmonization has resulted in a improved competition within the common market in terms of technical barriers and transparent car pricing from a consumer point of view. Vehicle taxation, distribution systems and "national champions"[261] do however remain. In this particular case, the Commission left the relevant geographic market undetermined, since no distortion in competition was estimated in any market.[262]

The conclusion reached by the Commission was that the overlap in the product ranges of Daimler-Benz and Chrysler was very limited. On the executive markets where Daimler-Benz was strong, so was also its other executive competitors, and Chrysler had only little or nothing to contribute. The opposite occurred on the MPV-market where Chrysler's Voyager was one of the segment leaders, accompanied by Renault's Espace as well as Autoeuropa (Volkswagen and Ford) and Daimler-Benz was unable to add up market shares for the soon-to-be merger. The competitors' positions were

[256] Ibid., para 18. BMW held 22,5% of executive cars, Volvo 12,1%, GM 12,1 %, Volkswagen with Audi 11,8%. On all markets where Daimler-Benz was big, so was also BMW. Somewhat similar was the market for sport coupes, where BMW was the market leader ahead of Daimler-Benz and Chrysler together.
[257] See 3.2.1 above.
[258] Korah (2006), p. 739.
[259] Ibid., para 17.
[260] Commission Decision Ford/Mazda, decision of 24 May 1996, Case no IV/M. 741.
[261] See footnote 57 above.
[262] Decision Daimler-Benz / Chrysler (1998), Case No IV/M.1204, para 13.

left and the concentration was found unlikely to significantly impede the effective competition in the Common Market or substantial parts thereof.[263]

3.4.3 Volvo-Scania, the relevant outlook

The proposed merger constitutes a relevant outlook, since it forms the single notification in the automotive industry found to be incompatible with the common market since 1990.[264]

Volvo is a Swedish manufacturer of trucks, buses, construction equipment, marine and industrial engines and finally aerospace components. The trucks are heavy (16 tonnes and above) as well as medium-heavy (between 7 and 16 tonnes).[265] The bus division is active in complete buses and bus chassis for city, inter-city and tourist coaches.[266]

Scania on the other hand, is also a Swedish manufacturer of heavy trucks, buses and marine and industrial engines. Scania is also the 50% owner of Svenska Volkswagen AB, importer, distributor and marketer of passenger cars as well as light commercial vehicles in Sweden. Finally, Scania holds the Swedish car dealer Din Bil, with a 40% share of the Svenska Volkswagen's deliveries.[267]

It was a proposed merger in which AB Volvo acquired the shares of Scania AB[268] and it was according to Volvo in perfect line with its decision to focus on heavy trucks and buses, after the recent sale of its passenger car division to Ford.[269] The Volvo master plan was to acquire Scania to support Volvo's ability to compete on large and developing markets, such as Asia, central Europe, South America and the former Soviet Republics.[270] Volvo and Scania were found to be each others' closest competitiors in strategy, offering a high-quality product with global services.[271]

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[263] Ibid., para 19.
[264] Furse (2007), p. 169. Furse has examined relevant case law between 21 September 1990 and 31 July 2005. The Commission (webpage).
[265] The relevant product market for trucks was divided by the Commission (in Commission Decision Renault/Volvo, Case No IV/M.004, 9 November 1990) into heavy (above 16 tonnes), medium (5-16 tonnes) and light (below 5 tonnes) trucks.
[266] Commission Decision Volvo / Scania, Case No COMP/M.1672, 15 March 2000, para 4. Bishop & Walker (1999), p 52.
[267] Commission Decision Volvo / Scania, Case No COMP/M.1672, 15 March 2000, para 5.
[268] Ibid., para 1.
[269] Ibid., para 6.
[270] Ibid., para 7.
[271] Ibid., para 80. Truck users considers not only the purchase price of a truck but the entire life cycle cost., including purchase cost, financing, after sales-network, warranties and second-hand value (including trade-in of used trucks). Volvo and Scania are unique in offering considering the life-cycle and offering every link of the chain. (Ibid., para 98.).

3.4.3.1 Heavy trucks

The proposed merger had an apparent community dimension[272] and would clearly affect the heavy truck as well as the three bus markets.[273] When it came to geography, the relevant geographic market had not up to this decision been determined by the Commission.[274] This since on an overall common market level, DaimlerChrysler was the market leader of heavy trucks with 20,6%, followed by Scania (15,6%), Volvo (15,2%), and MAN, Paccar/DAF, RVI and Iveco, all between 10,4% and 12,6%.[275] Only the first three are generally present on the common market, since the other four are mainly active in their respective national markets.[276]

In this case however, the focus was on the Nordic countries and Ireland, [277] because the conditions for competition differed between the Member States[278] as a direct result of customer preferences,[279] technical requirements,[280] access to service and distribution network,[281] and the customers purchased trucks on a national basis.[282]

Even with potential competition taken in consideration,[283] the Commission recognised the creation of a dominant position in Sweden[284], Norway[285], Finland[286] and Ireland[287].

[272] Ibid., para 11.
[273] Ibid., para 12.. City, inter-city buses and tourist coaches.
[274] Commission in Commission Decision Renault/Volvo, Case No IV/M.004, 9 November 1990.
[275] Commission Decision Volvo / Scania, Case No COMP/M.1672, 15 March 2000, para 78.
[276] Ibid., para 79.
[277] Ibid., para 31.
[278] Ibid., para 37. Purchasing pattern, pricing, profit, different specifications, distribution and service network (since constant running is essential for transportation companies) made each Nordic country and Ireland unique and separate markets. (Ibid., para 66-75). Lindsay (2003) p. 125.
[279] Commission Decision Volvo / Scania, Case No COMP/M.1672, 15 March 2000, para 50-55.
[280] Commission Decision Volvo / Scania, Case No COMP/M.1672, 15 March 2000, para 56-57. One example is the difference between left- and right hand drive, higher tonnage and longer vehicles that was allowed in Sweden and Finland. Sweden also had a legal barrier to entry, in its crash cab requirement.
[281] Ibid., para 61-64.
[282] Ibid., para 58-60. For this reason, the parallell import is close to zero, since truck owners have an interest in keeping a good relation to the dealer/service partner during the lifetime of the truck fleet.
[283] Daimler Chrysler with a 31% market share of medium trucks in Sweden, has according to Volvo the potential to build up the network of dealers and service points necessary to compete with the Volvo-Scania. (Ibid., para 136-139). The Commission rejected the argumentation by Volvo insofar as only on a longterm basis, such an high-risk investment can pay of. It also underlines that establishing in the large but scarcely populated Nordic countries is problematic and as well as unlikely, since it was found financially unattractive for other heavy truck manufacturers. (Ibid., para 136-143, 211).
[284] Ibid., para 145.
[285] Ibid., para 173.
[286] Ibid., para 202.
[287] Ibid., para 213.

3.4.3.2 Buses

The Volvo-Scania merger would also impact the bus market.[288] As stated above, the relevant product markets are city buses, inter-city buses and touring buses. These markets are separated, but not rigid, because of the different characteristics between city, inter-city and touring buses. In addition to the differences in the product and its usage, pricing as well as customer groups are factors that vary substantially. City buses are normally bought by public or semi-public sectors whilst touring buses are runned by smaller, private undertakings.[289] This applies both to the supply- and demand side of the market.[290]

When it comes to the relevant geographic market, several indicators show that the relevant geographic market is divided and as such, narrower than the overall common market. As a start, the market shares vary significantly between the Member States,[291] as well as the purchase habits when it comes to "chassis-only" or complete buses.[292]

Further, purchasing is done on a national basis, which means that only few buses are imported from another Member State. Access to a well-established dealer network and its' after-sales services is crucial for a transportation company. Another note is that trade-in might be difficult with an imported bus when future upgrading of the bus fleet is on.[293] A direct result of the lack of trade between Member States is large differences in price.[294]

As a final remark, technical requirements vary between the Member States – leading to divided markets. Some countries allow longer vehicles, but also request for alternative fuels and driving on different sides of the roads requires different bus specifications.[295] This assessment of the relevant market confirmed previous case law, with the difference that the newly merged national champion was left with enough competition by two other

[288] Ibid., para 214.
[289] Ibid., para 215. As given in Commission Decision Mercedes-Benz/Kässbohrer No. IV/M.477, 14 February 1995, OJ L 211, 6.9.1995, para 9, 11, 13, 14. For charachteristics of the bus types as well as its potential buyer groups, see Commission Decision Volvo / Scania, Case No COMP/M.1672, 15 March 2000, para 222-229.
[290] Ibid., para 222.
[291] Ibid., para 238, 250. Volvo has a general market share for touring coaches of some 10-20% in the EEA., significantly below average in some countries and significantly higher in the Nordic countries, Ireland and the United Kingdom. It is as such difficult for Volvo to argue for EEA as the relevant geographic market, in order to reduce the calculated market shares. (Ibid., para 237). Same can be said about the Commission Decision Mercedes-Benz/Kässbohrer No. IV/M.477, 14 February 1995, OJ L 211, 6.9.1995, para 23-40.
[292] Commission Decision Volvo / Scania, Case No COMP/M.1672, 15 March 2000, para 222.
[293] Ibid., para 241, 242, 252, 253.
[294] Ibid., para 246-247, 257.
[295] Ibid., 243-256.

significant domestic brands, as well as foreign competition. This was not the case with Volvo-Scania.[296]

The assessment of the merger was a combination of the following factors; first out was the market share[297] and customer demand, for example whether complete buses are preferred or separate chassis and bodies are mainly retailed.[298] Secondly, barriers to entry in the light of potential competition on the respective markets were investigated and also service network, access to spare parts were mentioned.[299] So was also the problem to enter the Nordic markets where large areas and small population requires many service points with not many customers per service point.[300] In the end, the Nordic climate was briefly mentioned[301] and the assessment was concluded with the fact that Volvo and Scania often are each others closest competitors.[302]

The Commission concluded its investigation and determined a dominant position for touring coaches in Finland and the United Kingdom. When it comes to city- and intercity buses, domination was predicted for the Danish, Finnish, Irish, Norwegian and Swedish markets.[303]

Since mergers are proposed for economic gain, the Commission is open for negotiations. Volvo proposed opening of its dealer network,[304] resale of bus body factories[305] and promised not to use the Scania trade mark for two years.[306] This was found insufficient,[307] too vague and impossible to

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[296] Ibid., 265-266.
[297] Ibid., pare 273. The market shares affected the outcome, but special attention was paid to the gap down to the next rival (Lindsay (2003), p. 243), in the light of the Commission Decision Mercedes-Benz/Kässbohrer No. IV/M.477, 14 February 1995, OJ L 211, 6.9.1995, para 294.
[298] Commission Decision Volvo / Scania, Case No COMP/M.1672, 15 March 2000, para 275, 276, 284.
[299] Ibid., para 277.
[300] Ibid., para 278, 280, 303 Commission Decision Mercedes-Benz/Kässbohrer No. IV/M.477, 14 February 1995, OJ L 211, 6.9.1995, para 33, 35, 86, 100, where the issue of entry barriers was raised, however brand loyalty was considered to be the worst but possible to overcome. Other bus manufacturers had service points for trucks, which could be used for buses at a low investment cost.
[301] Commission Decision Volvo / Scania, Case No COMP/M.1672, 15 March 2000, para 280.
[302] Ibid., para 80, 282, 299, 315. It is common for larger road carriers to have a second brand in their truck fleets in order to avoid being bound to one single supplier of trucks. When it comes to Volvo owners, their most common alternative brand is Scania, and ditto.
[303] Ibid., para 331.
[304] Ibid., para 334.
[305] Ibid., para 335-6.
[306] Ibid., para 337.
[307] Ibid., para 338. Lindsay (2003), p. 494-5.

monitor effectively.[308] The proposed merger was therefore incompatible in the meaning of article 2(3) of the EU Merger Regulation.[309]

[308] Commission Decision Volvo / Scania, Case No COMP/M.1672, 15 March 2000, para 340, 341, 353. Lindsay (2003), p. 497.
[309] Commission Decision Volvo / Scania, Case No COMP/M.1672, 15 March 2000, para 363. Article 57, EEA Agreement.

”Den som håller på att drunkna kan knappast välja vem som ska kasta ut livbojen.”[310]

[310] Bäcklund in Vi Bilägare (2009), (article). [The one that is about to drown cannot choose from whom to accept the life jacket.].

4 Analysis

4.1 Messy mergers

4.1.1 Corporate culture

However non-legal this topic may appear, this thought is as interesting as rarely brought up in a legal context. It is in any case indeed relevant when it comes to mergers, thus it contributes to the explanation of why companies do not merge and this despite the fact that there are economical benefits to enjoy as a result of cooperation.[311]

When it comes to Mercedes-Benz and Chrysler, they were oil and water.[312] This huge merger was named the "marriage of opposites". A diversified German conglomerate, with 300 000 employees that built luxury cars, heavy trucks, buses, jetliners, military aircraft, satellite systems, diesel engines and railroad cars married 121 000 people at Chrysler, that built passenger cars and light trucks. Chrysler was strong in North America (where Mercedes-Benz was weak) and Mercedes-Benz in Europe (where Chrysler was almost nothing).[313]

Mercedes-Benz was formality, structure and hierarchy, with a suit-and-tie dress code, respect for titles and proper names. Chrysler on the other hand had no barriers and worked in cross-functional teams through free-form discussions, wearing open collars. All Germans spoke English, but hardly any of the Americans spoke German.[314] Against the "masters of detail" with their thick binders and long meetings - the Americans bit the dust.[315] On top of that they simply did business in completely different ways, there was a six hour time difference of German advantage from the head office in Germany at the Americans' expense.[316]

The motives, finally, unclear as well as hidden ones are in the outskirts of this paper. In any case, when it comes to DaimlerChrysler, that deal was never a merger of equals for the Germans, also known as the puppet-mastering architects behind it.[317]

[311] See 1.1 above.
[312] Maryann Keller quoted in Vlasic & Stertz (2001), p. 249.
[313] Ibid.
[314] Ibid.
[315] Ibid., p. 76.
[316] Ibid., p. 302.
[317] Süddeutsche Zeitung (2003), (article). The Autochannel (2003), (article).

4.1.2 Brand value

Mercedes-Benz is the second most valuable automotive brand in the world.[318] The German manufacturer was in need of increased production capacity for its SUV model M-class. Chrysler had facilities in Austrian Graz, which was the only European Chrysler factory. Even though the Chrysler model Jeep Grand Cherokee scored better in quality reviews, the Mercedes-Benz management was initially afraid risking its brand value by sharing production line with the cheaper Jeep model.[319] The new Daimler-Chrysler had all possibilities to enjoy the economies of scale and save dollars by sharing platforms. It was just that Mercedes-Benz didn't want to.

Mercedes-Benz charged premium prices for premium cars and thought this sharing of platforms, production and technology would kill its brand. However, by enjoying the size of Daimler-Chrysler and its enormous new buyer power, Mercedes-Benz agreed on sharing "invisible" items, such as transmissions, AC units, axles, airbags and even complete engines. The motive behind the merger is still hidden and was there ever any gain but for some percents quantity discount on subcontractors, fighting for their small margins to keep alive, as it is?

Brand value is being confirmed on the one hand by the Daewoo cars that are being retailed on the European market with the Chevrolet badge, or the Saab 9-2X and 9-7X, which are a slightly modified Subaru and Chevrolet respectively. This shows not only the economies of scale, by (ab)using existing models and creating something "new", but also, the art of brands – that are indeed important. This could be the first step towards the slow death of Chevrolet and Saab, but also brand new products for almost a nickel, contributing profit from day one?

The other side of the coin is Volkswagen's troubled acquisition of Porsche[320] (also the ninth car manufacturer on the value list, despite its yearly volume and limited market share)[321], where brand value and heritage are everything. The importance is underlined since it forced Volkswagen undergo the largest new share issue ever, and that during a severe financial crisis.[322] Next to brand value, there are of course family, technology as well as heritage to add to the list. Nevertheless, Porsche did indeed have financial problems. What was really the motive? The art of straight talking is as golden as apparent in the failure of the Daimler-Chrysler merger.

[318] Interbrand (2009), (webpage).
[319] Vlasic & Stertz (2001), p. 266.
[320] Commission Decision, Porsche / Volkswagen, Fall Nr. COMP/M.5250, 23 July 2008.
[321] Interbrand (2009), (webpage).
[322] Volkswagen (2009), (webpage).

4.1.3 Timing

"Word that Fiat, of all companies, wants to save Chrysler has us thinking about that old joke about the drowning man saved by the Titanic."[323]

It was just about time. Mercedes-Benz was no longer as profitable as before and was in need of growth. To reach growth, it needed volume in the automotive industry.[324] Fiat-Chrysler is further evidence of the desperation. Chrysler is bankrupt and Fiat after being left stranded by GM in 2005 appears to be back on track, however with an empty wallet. Chrysler cannot select neither colour nor size of its lifejacket. Is Fiat able to rescue a drowning partner whilst still struggling to keep its nose above the surface? It appears difficult to undergo a merger when momentarily reconstructuring the existing undertaking. If the timing is wrong, the motives are wrong.[325]

Volkswagen-Suzuki breaks this pattern of desperation and creates a soft alliance in advance, ready to conquer the Asian markets.[326]

4.2 Further remarks

4.2.1 Turning point

The European automotive market has reached its turning point. This is a car market that correlates well with the curve of GDP (gross domestic product).[327]

In comparison, the North-American market has decreased since 1997, where it reached its all-time high. Perhaps this is the natural result of a healthy market economy since the numbers of driving licenses are fewer than registered vehicles.[328]

4.2.2 Entry to market

The Indians and Chinese are buying their respective entry to the market.[329] Asia consists of new, enormous, immature markets in need of motorization. The Chinese manufacturer Beijing Automotive Industry Import & Export Corporation, BAIEC is a 25-year-old car manufacturer, producing some

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323 Borroz in Wired (2009), (article). Commission Decision, Fiat / Chrysler, Case No COMP/M.5518, 24 July 2009.
324 3.4.2.2 above.
325 Lewin in The Wall Street Journal (2009), (article).Borroz in Wired (2009), (article).
326 AFP (2009), (article). See also 4.3.4 below.
327 European Automobile Manufacturers' Association (ACEA) (2010), p. 12.
328 U.S. Department of Transportation, Federal Highway Administration. (2007), (production statistics).Research and Innovative Technology Administration (RITA), Bureau of Transportation Statistics. (2008), (production statistics). U.S. Department of Transportation, Federal Highway Administration, (2003), (highway statistics).
329 Feast in Reuters (2010), (article). Gripenberg in Dagens Nyheter (2009), (article). BBC News (2008), (2009), (article).

700 000 units a year already.[330] BAIEC has recently bought the rights, but for the brand, as well as the complete assets of the factory regarding the ex Saab 9-5 and 9-3 models.[331] The Indian manufacturer Tata Motors is the owner of the former crown jewels in the British automotive industry, including Rover, Land Rover and Jaguar.[332] It does appear that the Russians tried out the same strategy with Opel/Vauxhall from GM.[333]

Most Chinese automakers are either churning out foreign brand cars in tie-ups with global heavyweights in the form of joint-ventures, or simply focusing on incredibly cheep cars. Examples of the former are Brilliance-BMW[334] and BAIEC-Mercedes-Benz[335] where the foreign premium cars are manufactured locally with adaptations to meet national preferences. The latter is exemplified by manufacturers making cars as cheap as 30,000 yuan ($4,394).[336]

Market entry requires not only a product, but also a customer. Anything but low-price products, as the Korean Kia and Hyundai once were (or are) are also in need of a trust or an image. The second issue is access to retailers and service-points. This is the case for all new car manufacturers, low-price or not.

4.3 Answers

4.3.1 One

Yes, several mergers have taken place within the common market. Volvo-Scania is however the only merger in the automotive industry found to result in effective competition being significantly impeded in the common market within the meaning of the EU Merger Regulation, since 1990.

The apparent conclusion is that the EU merger policy is clear as well as predictable, which is a feather in one’s hat, thus contributing to legal certainty and a healthy economic environment, contributing to wealth and growth. A second conclusion lets itself being drawn – the Commission approves anything but high market shares without the threat of actual or potential competition. The Daimler-Benz/Kässbohrer merger taught us that, since Daimler-Benz reached high market shares after merging Kässbohrer, but there was still tough competition and the Commission gave its approval.

[330] Beijing Automotive Industry Import & Export Corporation (BAIEC), produces some two times the annual procution of Volvo Car Corporation worldwide, (2010), (webpage).
[331] Flood & Sundén Jelmin in E24! Näringsliv (2009), (article).
[332] Tata Motors (2010), (webpage).
[333] Geoghegan, Callus & Lewis in Reuters (2009), (article).
[334] CarsUK (2010), (webpage).
[335] Beijing Automotive Industry Import & Export Corporation (BAIEC), (2010), (webpage).
[336] Taipei Times (2010), (article).

High market shares do not per se result in a dominant position.[337] A SIEC-investigation came to the conclusion that customers' demand would switch in case of a price increase of some 5-10 %. There was also a significant potential competition, with only low barriers to entry, in comparison to the Nordic and left-hand-driven markets in the Volvo/Scania case.[338] Shrinkage is when two companies merge and the customer buys some buses of another competitor, to keep its independence from the the merging giant. It was put forward in the Daimler-Benz/Kässbohrer case[339], however less useful in the Volvo-Scania since the second-brand for Volvo owners is Scania and the opposite ditto.

4.3.2 Two

No, law is at least in short terms not equal politics and the competition law remains the same and in line with the same approach.

Hence this question, the scope has not changed and shows an interesting as well as important conclusion – crises come and go, but mergers last forever. The European automotive industry has followed the GDP (gross domestic product) and the crisis appears to be over for this time. Competition is long-lasting value that creates growth and a sound economic area increasing the European welfare, and it was also pointed out in the Commission's action plan to fight the automotive crisis.[340]

4.3.3 Three

Well, the Commission is ready to permit a failing firm to leave the market if a merger would create larger harm than an exit. A failing-firm-defended merger may very well ruin the European competition, but on the other hand fit out a European champion, able to take the fight from American, Asian and Indian competitors – something that contributes to the common market in another way. The Autoeuropa case opened up for the creation of European champions as efficiently as Volvo-Scania closed the door for national giants. European competitiveness leads to European champions, ready to conquering the world.

Today, there is a clear over-production and almost anyone can produce. The challenge is to reach out to the customers in the "mess". On the other hand, new and emerging markets are in need of motorization. Joint-ventures are created in China and play major roles on the market. When it comes to India, the British premium brands are taken over already. It will be difficult for the European manufacturers to face the Asian low-price competition.

[337] Commission Decision Mercedes-Benz/Kässbohrer No. IV/M.477, 14 February 1995, OJ L 211, 6.9.1995, para 65.
[338] Ibid., para 81, 82, 99.
[339] Ibid., para 64, 99.
[340] Commission (2009), (article).

In any market economy, it is generally in the interest of consumers that undertakings compete, even if the result is the exit of less efficient actors.

4.3.4 Four

There is definitely another way – a way that has been left behind the stage lights, aiming at the merger-go-round from the end of the 1990s. The fourth question and its answer riped throughout the process of this paper. At the end, I am convinced that there is a future in cooperative joint ventures, rather than mergers.[341]

The reasoning is as easy as beautiful. Car brands are in need of its national independence and heritage to play its myth. It is apparently important for Porsche, but probably also for Saab. On the other hand, economy of scales is for real, why else would PSA, BMW, Mini and Volvo share the same engines[342]? Some years ago, Porsche called upon Mercedes-Benz in order to acquire the "ML-platform" for its SUV-project.[343] This flirt was rejected by Mercedes-Benz in pure fear of competition and Porsche instead turned to its cousin Volkswagen for the Touareg platform – and based its bestseller upon it.[344] The game works and leads to great competition!

Among the most recent examples is the Renault/Nissan-Daimler soft alliance, leading to cooperation about their superminis, commercial vehicles and future powertrains.[345] Volkswagen-Suzuki is another new example, where Volkswagen is the market leader in China and Suzuki is dominating the Indian market as well as it is a large player in the Asian emerging markets. Volkswagen will provide Suzuki the hybrid and electric car technology it lacks today and Suzuki will in return contribute to Volkswagen entrance on the Asian markets.[346]

In cooperative joint-ventures or ”soft alliances” one must cooperate to develop and compete to retail, which indeed leads to an interesting balance. In these soft alliances, modern technology is available to any manufacturer with a thick-enough wallet and the undertakings are no longer strictly bound to the over-priced storage shelves within its respective groups, one of the death traps behind the attempted murder of Saab.[347]

To sum up, soft alliances lead to fewer identity problems, stronger brands, optimal technology, no culture collisions and finally no internal over-pricing.

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[341] Navarro. Font, Folguera & Briones (2005), p 38.
[342] Kjellström in Teknikens Värld (2007), (article).
[343] Autoevolution (2009), (webpage).
[344] Marriage in Auto Express (2003), (article). Porsche (2007), (website).
[345] Greimel in Automotive News (2010), (article). Automotive News (2010), (article).
[346] Foster in Reuters (2010), (article).
[347] When bringing home the bacon to the USA, no one really knows what Saab paid for its parts from its American parent, GM.

On the other hand, weaker alliances with only symbolic mutual shareholding might lead to less loyalty and a problem of predictability when it comes to for example research, development, access to technology and dealer networks.

Finally, an interesting indicator is the stranded Volvo-Renault merger from 1993.[348] Volvo and Renault had (and still have) a soft alliance, starting in 1971, and regarded the development and mutual sharing of complete engines.[349] The proposed merger failed and among the contributing factors were the problems of corporate culture[350] and the unclear motives of the French.[351]

4.3.5 Follow up

Still in the thoughts of culture, even if this may appear as "soft" issue in the hard world of law and economics. Company culture is interesting as well as important, something that has been underlined by DaimlerChrysler as well as the latest news, yet again presented by Daimler-Benz in the Daimler-Renault/Nissan soft alliance. This time, Daimler-Benz appears to have learnt its bitter lesson regarding corporate culture and hidden motives.

Patents are – if possible – just as interesting. More and more development is executed by the subcontractors. One actual example is the Saab XWD-system. Saab has exclusive rights to the complex all-wheel drive system, which consists of the fourth generation Haldex AWD-system. This generation is not yet available for the other partners and customers of Haldex. This highly modern all-wheel drive system for passenger cars is developed for Saab and provided by Haldex.[352] The same regards for example safety and crash restraining systems developed by Autoliv, in close companionship with respective orderer.

What happens if and when the Chinese ends up taking over Volvo Cars? Bosch, Autoliv, Haldex, Getrag and many other companies have interest in keeping "their" patents, or are their respective rights already included in the deal? [353] No problems appear to have been reported from the manufacturing joint-ventures runned by BMW and Mercedes-Benz with their respective Chinese partner.

It would indeed be fascinating to find out how mergers and other take-overs affect the brand value in the longer run. Brand value, heritage and image is the key, look at Porsche, a profitable manufacturer making billions over

[348] Commission Decision in Volvo / Renault, decision IV/M004, 7 November 1990.
[349] Olsson & Moberger (1995), p. 147.
[350] Ibid., p. 213.
[351] Stevenson in The New Tork Times (1993), (article). There was also a "golden share" ensuring French control of the new company.
[352] Haldex (2010), (webpage).
[353] Gripenberg in Dagens Nyheter (2009), (article).

many years. Sometimes there is just a feeling, look at Saab and its fans in the recent stormy GM divorce.

Finally, I am still pending the first merger between a car manufacturer and another actor, not only contributing with money in the conglomerate way, but in a cooperative way. Imagine the possibilities with an Apple-Audi or an IKEA-Saab[354].

Love is irrational. So is the automotive industry.

[354] The Vehicle Component (2010), (article), p. 8.

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