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Possible Merger Threshold Reform in the EU

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Summary

Merger control is one of the instruments of EU competition law that is intended to protect competition in the Internal market and counteract possible distortion by concentrations.

The jurisdictional test used in the European Merger Regulation no. 139/2004 (“the EUMR”) is a threshold test. This threshold test is based on the turnover of the merging parties and the geographical location of said turnover.

As is natural in a dynamic field of law like merger law, discussions arise regarding the regulations and established case law in the field. From the 7th of October 2016 until the 13th of January 2017 the Commission sought feedback in a public consultation regarding several suggested changes to the EUMR. One suggested change is to the current threshold criteria. According to the Commission there is a possible legal gap when it comes to mergers and acquisitions of undertakings that don’t have a large enough turnover to fall under the current thresholds but might still have large market power.

To be able to understand this issue some aspects of merger control in the European Union must be examined. They are; how concentrations are defined under the EUMR, the current turnover thresholds and how the Commission’s jurisdiction is found in the EUMR. The Commission’s suggestions aim at widening this jurisdiction. When assessing if there is a need for widening the jurisdiction it is relevant too look at the referral mechanisms found in the EUMR. They allow, under certain circumstances, for cases that fall outside the jurisdiction of the EUMR to be referred to the Commission. There are also options, where cases that fall inside the jurisdiction of the EUMR, can be referred to Member States’ national competition law authorities. When these options have been considered, as well as the reasoning behind them, it becomes apparent that, if any reforms should be made to the EUMR to widen the jurisdiction, it should be done with the utmost caution.

Preface

I am thankful to Postdoctoral fellow Justin Pierce not only for his concise and astute advice, that helped me organise an otherwise often scattered thought process, but also for opening my eyes to new facets of law one of which resulted in the object of this thesis.

I'm also grateful to my family who made this thesis and my studies abroad possible.

Ekki eru allir lyklar á einnar konu belti
(E. *One woman does not have all keys on her belt*)
– *Icelandic proverb*

Þórunn Lilja Vilbergsdóttir

Abbreviations

BA	British Airways Plc
bmi	British Midlands Limited
EC	European Commission
EUMR	The European Merger Regulation – the Council Regulation (EC) No 139/2004 of 20 January 2004
IAG	International Consolidated Airlines Group
IB Opco	Iberia Líneas Aéreas de España, Sociedad Anónima Operadora
LH	Deutsche Lufthansa AG
LHBD	LHBD Holding Limited
NCA	National Competition Authorities
SIEC	Significant Impediment of Effective Competition
SNE	Spanish National Entity

1 Introduction

1.1 Subject Matter and Background

Jurisdiction has always been an interesting and debated topic in EU-law. That is not surprising, considering that the European Union is an economic and political union of 28 sovereign countries. EU-competition law is no different.

One of the main pillars of EU-competition law is merger control. To be able to regulate changes in market structure the Council adopted a European Merger Control Regulation. The one currently in force is the European Merger Regulation no. 139/2004 (“EUMR”). In the EUMR concentrations with a Community Dimension that would significantly impede effective competition in the Internal market or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, are declared incompatible with the Internal market.¹

This thesis will discuss the thresholds used to decide whether a concentration with a Community Dimension should be deemed to exist in accordance to the EUMR and, by doing so, whether that concentration falls under its jurisdiction.²

After a public consultation in 2013³ and a report in 2009⁴, the Commissions White Paper “Towards more effective merger control”, published in Brussels on the 7th of July 2014, the Commission took stock of how the substantive test of “significant impediment of effective competition” (“SIEC”) had been applied as well as suggesting proposals for specific amendments that were meant to make the EU merger control more effective.⁵ Based on the White Paper, the Commission invited interested stakeholders to respond to a public consultation to seek feedback on, among other things, the effectiveness of the turnover-based jurisdictional thresholds of the EUMR.

The EUMR only applies to concentrations with a Community Dimension, that is, where the concerned undertakings meet relevant turnover thresholds. The reason why this is now in the spotlight is that a debate has risen concerning

¹ Alison Jones, Brenda Sufrin *EU Competition Law: Text, Cases, and Materials* (6th Edition OPU 2016), p. 1084.

² Reg. 139/2004 [2004] OJ L24/1.

³ Commission staff working document “Towards more effective EU merger control” published in Brussels 25.06.2013.

⁴ Communication from the Commission to the Council - Report on the functioning of Regulation No 139/2004. Published in Brussels, 18.06.2017.

⁵ White Paper Towards more effective EU merger control (Text with EEA relevance) published 9.7.2014, p. 4.

whether these thresholds are effective enough because they might not capture all transactions that could have an impact on the Internal market.⁶

Is this the case? Are reforms necessary? Are there mergers, where the relevant undertakings don't meet the relevant turnover thresholds, that have such a big impact on the Internal market that they should by all rights fall under the jurisdiction of the Commissions merger control? These questions seem particularly relevant concerning undertakings in the digital and pharmaceutical industries where an acquired company, while not having generated high turnovers might still be of competitive importance. This could be because of considerable market potential or commercially valuable data.⁷ One of the Commissions merger cases highlighting these types of concentrations was the acquisition in 2014 of WhatsApp by Facebook, which fell outside the thresholds of Article 1 of the EUMR but was ultimately referred to the Commission pursuant to Article 4(5) thereof.⁸

Questions have arisen whether changes should also be made to the EUMR with regards to minority shareholdings, for similar reasons as to why it has been suggested that changes should be made to the current thresholds.

The Commission is also considering the question of whether its powers under Article 8(4) should be amended to allow it to require the dissolution of partially implemented transactions declared incompatible with the Internal market in line with the scope of the suspension obligation.⁹ This issue can however not be discussed in this thesis in any detail due to space constraints.

1.2 Research Approach

This thesis aims to examine a few aspects of merger control in the EU to inspect the effectiveness of the turnover-based jurisdictional thresholds of the EUMR.

In order to do this, a few aspects of Merger control will be examined; the concept of concentrations, the current judicial control of the EU and referral options found in the EUMR. To do so the research questions will be as follows:

⁶ http://ec.europa.eu/competition/consultations/2016_merger_control/index_en.html accessed 06.02.2017.

⁷ http://ec.europa.eu/competition/consultations/2016_merger_control/index_en.html accessed 06.02.2017.

⁸ FACEBOOK / WHATSAPP (C(2014) 7239) COMP/M.7217 [2014].

⁹ This was suggested as a result of the Case No COMP/M.4439 – Ryanair / Aer Lingus [2010] ECR II-3691 where Ryanair had already acquired a non-controlling minority shareholding in Aer Lingus. Even though the Commission didn't allow the merger it could not order the divestiture of Ryanair's already acquired non-controlling minority shareholding in Aer Lingus pursuant to Article 8(4). See White Paper, Towards a more effective EU merger control, COM(2014) 449 Final.

1. How are concentrations defined in the EUMR, the Commission's and the General Court's case law?
2. How is the current judicial control and why should it be changed?
3. What are the exclusive competences of the Commission, how can cases be referred and what impact can that have on merger control?

1.3 Method and materials

To answer the research questions a legal dogmatic method is applied based on the theory of legal sources. This is done to clarify and establish what the applicable law is and the researched and specified field of law. This is determined by analysing the current law and reviewing historical changes in the law. To specify the scope of the relevant Union law, the case law of the Court of justice and case law of the General Court and decisions of the Commission, are examined. The most relevant Union law for investigation for this thesis is the Council Regulation (EC) No 139/2004 of 20 January 2004.

As there are not many cases, that have come before the Court of Justice, that directly connect with the issues of this thesis, references are made to several of the Commission's notices that have been issued about the EUMR. Despite only being guidelines, that in no way limit the interpretation of the Court of Justice or the General Court, they have clear value as sources of law, partly because they have been made on the foundation of the Commission's practise, noted by the fact that the Commission refers to its own decisions which shows that the Commission itself finds itself bound to follow these guidelines. Because of its relevance to the subject of the thesis, Commissioner Vestanger's speech from the 10th of March 2016 will also be discussed, as well as the Commission's questionnaire for public consultation that was open from the 7th of October 2016 until the 13th of January 2017. Further analysis of the topic was aided with academic literature.

Due to the nature of the objective of this thesis, economic issues and ideas might influence the conclusions made. This is difficult to escape as competition law revolves around making sure that undertakings operating in the free market economy don't hinder optimal function of the market by acting anti-competitively.¹⁰

¹⁰ Alison Jones, Brenda Sufrin *EU Competition Law: Text, Cases, and Materials* (6th Edition OPU 2016), p. 1.

1.4 Delimitations

Due to space limitations, this thesis will be limited to reviewing the current EUMR while touching upon its development and connected case law. This means that the connection of the thesis subject to Article 101 and Article 102 of the Treaty on the Functioning of the European Union and to national merger laws will not be studied in greater detail.

Even with this limitation there is still enough content to be found to write something much more comprehensive than a thesis, of this length, can be. So, to limit the scope of the discussion even further, regardless of the strong connection to the subject, there will not be a chance to delve into minority shareholding or the Commission's powers under Article 8(4) of the EUMR.

2 Merger Control in the EU

Merger control in the EU is relatively new. Until 1990 the Commission had to rely on its power to apply Articles 102 and 101 to prevent firms from taking over or acquiring shares in other firms. The first merger regulation was adopted in 1989 and took force in 1990, a second, amends was made in 1997, which was consolidated into a new regulation in 2004: the EUMR.¹¹

The operations, to which the Merger regulation applies, are defined by a two-fold test. First, the operation must be a concentration within the meaning of Article 3. The second one comprises the turnover thresholds that can be found in Article 1. The next couple of chapters will define these concepts and how they have developed within EU law.

2.1 Concentrations

Concentrations are defined in Article 3(1) of the EUMR as either the true merger of undertakings, or the situation where one or more undertakings, directly or indirectly, acquire control over one or more other undertakings.

A concentration is perhaps more commonly known as a merger. A true merger would be when two separate undertakings merge entirely into a new entity, but this is not the only way that the expression “merger” is understood. When used with regards to competition policy it includes a much wider range of corporate transactions. A merger could be the result of a change in control by an acquisition of majority shares, for example.¹² The acquisition of intellectual property assets could also amount to a merger as well as undertakings merging part of their business into a separate joint venture company.¹³ By reason of simplicity and ease of reading, the term “merger” will be used in this thesis to encompass all of these possibilities unless context necessitates otherwise. As the EUMR is such an integral part of this thesis the expression “concentration” will sometimes also be used.

Mergers can have a lasting and permanent change on the market. Two competitors becoming a single entity might, for example, cause a decline in competition within that particular market. In this lies the purpose of merger control, it is to enable competition authorities to regulate changes in market

¹¹ Alison Jones, Brenda Sufrin, *EU Competition Law: Text, Cases, and Materials* (6th Edition OPU 2016), p. 1084.

¹² Richard Whish, David Bailey *Competition Law* (8th Edition OPU 2015), p. 853.

¹³ Richard Whish, David Bailey *Competition Law* (8th Edition OPU 2015), p. 854.

structure by deciding whether two or more commercial companies may merge, combine or consolidate their business into one.¹⁴

The declared aim of the EU merger control system is to ensure effective competition in the Internal market or parts of it.¹⁵ Since the first Merger Regulation was adopted in 1989 EU merger control has become one of the main pillars of EU competition law and its basic features have become well established.¹⁶ The EUMR has been reviewed regularly and a re-cast of it was adopted in 2004. There the SIEC test was introduced into the regulation as a relevant criterion for examining mergers and the possibilities for referring merger cases from Member States to the Commission and vice versa were enhanced.¹⁷ In the Commission's White Paper the EU merger control is described as:

“...making an important contribution to the functioning of the internal market, both by providing a harmonized set of rules for concentrations and corporate restructuring and by ensuring that competition and thus consumers are not harmed by economic concentration in the marketplace.”¹⁸

The EU authorities have been hostile towards anticompetitive agreements that have been concluded between independent undertakings. As mergers can have even more permanent and lasting changes on the market than agreements, one could expect that many mergers would be prohibited.¹⁹

When considering this, it is important to note that mergers are not all bad. There are many reasons for firms to merge and most of them are not harmful to the economy but beneficial. These are e.g. economies of scale and scope but also the chance for a business owner to sell the business. This means that competition authorities must determine whether a merger will have such an adverse effect on competition that any possible resulting benefits from the suggested merger are cancelled out or should be ignored.²⁰

As might be understood by the word, mergers necessarily involve at least two undertakings. Therefore, the starting point in Article 3(1)(a) of the EUMR is

¹⁴ Alison Jones, Brenda Sufrin. *EU Competition Law. Text, Cases and Materials*. (5th Edition OPU 2014), p. 1129.

¹⁵ Commission staff working document Impact assessment Accompanying the document White Paper published 9.7.2014, p. 10.

¹⁶ White Paper Towards more effective EU merger control (Text with EEA relevance) published 9.7.2014, p. 4.

¹⁷ Commission staff working document Impact assessment Accompanying the document White Paper published 9.7.2014, p. 10.

¹⁸ White Paper Towards more effective EU merger control (Text with EEA relevance) published 9.7.2014, p. 4.

¹⁹ Alison Jones, Brenda Sufrin. *EU Competition Law. Text, Cases and Materials*. (5th Edition OPU 2014), p. 1129.

²⁰ Richard Whish, David Bailey *Competition Law* (8th Edition OPU 2015), p. 857-858.

that a merger involves two or more previously independent undertakings. Subparagraph (b) of the same article also allows for mergers to be when an owner of an undertaking acquires control of another. Yet there is no specific definition of what an “undertaking” is in the EUMR. It must thus be assumed that the concept should be understood broadly so that it can include an entity that carries out some kind of economic activity in any type of corporate form. It must also be assumed that the case law of the Court of Justice and the General Court (formerly known as the Court of First Instance), where the definition of an “undertaking” is interpreted with respect to article 101 and 102 of the Treaty on the Functioning of the European Union (“TFEU”), applies to how the concept of “undertaking” should be applied in the EUMR.²¹

2.1.1 Article 3(1) – Mergers Between Two Previously Independent Undertakings

Article 3(1) of the EUMR provides:

1. A concentration shall be deemed to arise where a change of control on a lasting basis results from:

(a) the merger of two or more previously independent undertakings or parts of undertakings, or

(b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.

That means that according to Article 3(1) there is a concentration only when a change of control in the undertakings concerned occurs on a lasting basis. Recital 20 of the preamble to the EUMR further explains that the concept of concentration is intended to relate to operations which bring about a lasting change in the structure of the market. What is also important to note is that, because Article 3 revolves around the concept of control, the existence of a concentration is decidedly determined by qualitative instead of quantitative criteria.²²

²¹ Air France/Sabena IV/M.157 [1992] OJ C272/0, para. 11c.

²² Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01) published 16.4.2008, paras. 7-8.

The first category of concentrations defined in Article 3(1), a merger between two previously independent undertakings, occurs when two or more independent undertakings combine to make a new undertaking and, by doing so, cease to exist as separate legal entities or when an undertaking is absorbed by another. A merger within the meaning of the first category can also occur where the combination of the activities of previously independent undertakings results in the creation of a single economic unit.²³ For this type of combination to be considered a merger there must be permanent, single economic management. The *de facto* merge may be solely based on contractual arrangements²⁴, but it can also be reinforced by cross-shareholdings between the undertakings forming the economic unit.²⁵

Article 3(1)(b) states that a concentration occurs in the case of an acquisition of control. Such control may be acquired by a single undertaking or by several undertakings working together. Control can also be acquired by a person, if that person (whether it be solely or jointly) controls at least one other undertaking.

‘Person’ has been extended to include public bodies²⁶ and private entities, as well as natural persons. If a natural person acquires control it is only considered to bring about lasting change in structure of the undertaking affected if the natural persons carries out further economic activities on their own account or if they control another undertaking.^{27,28}

Control of an undertaking can be acquired in several stages by means of one or more transactions, provided that the end result constitutes a single concentration. That means that a concentration may be deemed to arise where a number of formally distinct legal transactions are interdependent so that none of them would be carried out without the others and the result consists

²³ AstraZeneca/Novartis COMP/M.1806 [2000].

²⁴ Price Waterhouse/Coopers&Lybrand (C(1998) 1388) IV/M.1016 [1998]; Ernst & Young/Andersen Germany (SG (2002) D/231406/407/408) M.2824 [2002].

²⁵ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01) published 16.4.2008, para. 10.

²⁶ Including the State itself, e.g. Air France/Sabena IV/M.157 [1992] OJ C272/0 in relation to the Belgian State, or other public bodies such as the Treuhandanstalt Kali und Salz/MDK/Treuhand IV/M.308 [1993] OJ L186/38, as well as recital 22 of the Merger Regulation.

²⁷ Asko/Jakobs/Adia IV/M.82 [1991] including a private person as undertaking concerned; Apax/Travellex (SG-Greffe(2005) D/202673) M3762 [2005] where a private person acquiring joint control was not considered an undertaking concerned this can also be seen in the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01) published 16.4.2008, para. 13.

of conferring, on one or more undertakings, direct or indirect economic control over activities of another.²⁹

Because control is defined in Article 3(2) as the possibility of exercising decisive influence on an undertaking it is not necessary to show that the decisive influence is or will be actually exercised. The possibility of exercising decisive influence on an undertaking must be effective though it does not need to be exercised in order to exist.³⁰ This kind of control can be reached through the acquisition of property rights, assets, through shareholder agreements or may result from economic dependence. Hence it is not indispensable that a controlling interest has been acquired.³¹

2.1.1.1 Sole control

Sole control is acquired if one undertaking alone can take decisions regarding an undertaking. This can happen on a *de jure* or a *de facto* basis. Ordinarily this happens when an undertaking achieves a decisive influence through acquiring more than 50 percent of the share capital and with it more than 50 percent of the majority of the voting rights of another undertaking.³² However, every case must be examined as this is not always a prerequisite to acquiring sole control. In some cases, an undertaking with more than 50 percent of the share capital will not acquire share control because it does not have control of a majority of voting rights or because a supermajority is needed to decide on strategic issues. Minority shareholding can also result in sole control, where special rights are attributed to some shares, e.g. where the majority of voting rights are nonetheless allotted to the shareholder. Sole control can also be acquired on a *de facto* basis like when the remainder of shares is widely dispersed.³³

This was a factor that the Commission had to consider in the proposed acquisition of Aer Lingus by Ryanair.³⁴ The proposed transaction concerned the acquisition of sole control by Ryanair of Aer Lingus by way of public bid for all outstanding shares not already acquired.

Ryanair started to acquire a substantial number of shares of Aer Lingus on the 27th of September 2006 and by the 5th of October the same year it had acquired 19.16 percent of the share capital of Aer Lingus. On that day, Ryanair announced a public bid for the entire share capital of Aer Lingus. By

²⁹ Case T-282/02, *Cementbouw Handel & Industrie BV v. Commission* [2006] ECR II-319, paras. 104-109. See also footnote 81, Alison Jones, Brenda Sufrin. *EU Competition Law. Text, Cases and Materials* (5th Edition OPU 2014), p. 114.1

³⁰ Case T-282/02 *Cementbouw v Commission*, [2006] ECR II-319, para. 58.

³¹ Alison Jones, Brenda Sufrin. *EU Competition Law. Text, Cases and Material* (5th Edition OPU 2014), p. 1141.

³² Alison Jones, Brenda Sufrin. *EU Competition Law. Text, Cases and Materials* (5th Edition OPU 2014), p. 1142.

³³ *Ibid.*

³⁴ *Ryanair/Aer Lingus* (C(2007) 3104) COMP/M.4439 [2010] ECR II-3691.

the 28th of November 2006 Ryanair held 25.17 percent of the share capital in Aer Lingus and confirmed that this was all part of a plan to acquire control of Aer Lingus.

When the timeline of the acquisition of shares was considered, as well as Ryanair's explanations of the meaning of the acquisition, the entire operation comprising the acquisition of shares before and during the public bid period and the public bid itself was considered to constitute a single concentration within the meaning of Article 3 of the Merger Regulation.

The Commission didn't find that sole control was acquired by Ryanair with the 25 percent shareholding and did not consider that it could require Ryanair to divest this non-controlling stake it had already acquired.³⁵

In Case T-411/07, *Aer Lingus Group v. Commission* [2010] ECR II – 3691, the General Court agreed with the Commission on this. Finding that because control had not been obtained and the shareholdings, as such, did not confer the power of exercising decisive influence on the other undertaking on a lasting basis, there was no change of control. The General Court also found that the Commission is not granted the power under the EUMR to require an undertaking to divest shareholding under these conditions because:

“According to the actual terms used in Article 8(4) of the regulation, the power to require the disposal of all the shares acquired by an undertaking in another undertaking exists only ‘to restore the situation prevailing prior to the implementation of the concentration’. If control has not been acquired, the Commission does not have the power to dissolve the concentration. If the legislature had wished to grant the Commission broader powers than those laid down in the merger regulation, it would have enacted a provision to that effect.”³⁶

There was no concentration when Ryanair bought the first 25 percent shares because there was no lasting change of control and so the Commission did not have powers to require the disposal of the shares.

2.1.1.2 Joint control

As was discussed previously, sole control is not the only way where the EUMR can apply to transactions which lead to a concentration. The Commission explains joint control in its consolidated Jurisdictional notice from 2008, to be where two or more undertakings or persons have the

³⁵ Alison Jones, Brenda Sufrin. *EU Competition Law. Text, Cases and Materials*. (5th Edition OPU 2014), p. 1143.

³⁶ T-411/07, *Aer Lingus Group v. Commission* [2010] ECR II – 3691, paras. 63-66.

possibility of exercising decisive influence over another undertaking.³⁷ This is unlike sole control because with two or more undertakings there is a possibility of a deadlock situation resulting from the power of two or more parent companies to reject the strategic decisions.

This is clearest when there are only two parent companies and they share the voting rights equally between them in the joint venture. Equality is not necessary though and joint control may exist even where there is no equality between the two parent companies in votes, in representation in decision-making bodies or where there are more than two parent companies. This can be done when minority shareholders have veto rights that are related to strategic decisions on the business policy. That means that the rights of the minority shareholders are related to decisions on the essence of the joint venture.³⁸

In the Commission Case *Eridania/ISI*³⁹, the Commission considered whether an acquisition of shares by Eridania in Finbieticola, that brought its holdings in ISI from 50% to 65 %, was compatible with the common market.

Even though this concentration brought about a high combined market on the Italian sugar market (the affected market) the Commission considered the markets sensitivity to price increases. A one percent price increase of sugar in Italy a year before the decision was made was accompanied by a 100% increase in imports.

Another deciding factor was the Commission's assessment of the operations before the merger would occur. Eridania already played a key role in the determination and running of ISI's commercial activities. That meant that, from a competition point of view, the acquisition did not significantly modify the horizontal relationship between Eridania and ISI and thus not the conditions on the market.

Consequently, the Commission found that the concentration didn't raise serious doubts with regards to the compatibility with the common market and it was declared compatible in application of Article 6(1)b of the EUMR. When determining changes like this the crucial element is that the veto rights are enough to enable exercise of influential control related to strategic

³⁷ Commission Notice on the concept of concentration under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings published 02.03.1998 OJ C66/5, para. 20-22.

³⁸ Commission Notice on the concept of concentration under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings published 02.03.1998 OJ C66/5, para. 20-22.

³⁹ *Eridania/ISI* Case No IV/M.062 [1991] OJ L2985.

decisions. It is not necessary to establish whether the acquirer will make use of such possible control.⁴⁰

When the Commission assesses whether a ‘concentration’ has occurred according to the EUMR, it is paramount that each case is assessed. Even though there are some rules of thumb that can indicate change of control on a lasting basis, like acquisition of the majority of shares for example, it is not always that simple.

2.1.2 Joint Ventures

Article 3(1)(b) provides that a concentration shall be presumed to arise where control is acquired by one or more undertakings of the whole or parts of the undertaking. Whether the acquisition would lead to sole control of an undertaking or a joint control of an undertaking, it would lead to a structural change in the relevant market.⁴¹

Article 3(4) then states that:

The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 3(1)(b)

The full-functioning criterion found in this Article defines the application of the EUMR for the creation of joint ventures by the parties. This full-functioning criterion does not mean that it must be completely autonomous from the undertakings that created it. The venture only needs to be economically autonomous from an operational viewpoint. Strategic decisions could still be made by the creating undertakings. If this was not the case then jointly controlled undertakings could never be considered full-functioning and would therefore never fall under the condition in Article 3(4).

To be full-functioning the joint venture must have its own access and presence on the market. This means that where a joint venture is essentially limited to one specific function of the parent companies’ business activities will not fulfil this criteria for example, in joint ventures that are limited to production.

To assess whether the joint venture can be considered economically autonomous from an operational view point it has to be demonstrated that the joint venture will supply its goods or services to the purchasers who value

⁴⁰ Commission Notice on the concept of concentration under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings published 02.03.1998 OJ C66/5, para. 23.

⁴¹ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01) published 16.4.2008, para. 91.

them most and will pay most and that the joint venture will also deal with its parents' companies on the basis of normal commercial conditions.⁴²

2.1.3 Exceptions

In Article 3(5) three exceptional situations are set out where the acquisition of a controlling interest does not constitute a concentration under the Merger Regulation. They deal with shares held by financial institutions on a temporary basis, the acquisition of control by liquidators or other administrators and operations carried out by financial holding companies.⁴³

The exceptions under Article 3(5) of the EUMR only apply to a limited field. Which is if the operation would otherwise be a concentration independently. This would not be the case if the transaction is part of a broader, single concentration, where the final acquirer of control would not fall within the terms of Article 3(5). For example, when an undertaking is 'parked' with an interim buyer, like a bank, on the basis of an agreement on the later sale of the business to the final acquirer.⁴⁴

The exceptions also do not apply to normal investment fund structures. Of course, it depends on the objective of the funds but they generally don't limit themselves in the exercise of voting rights, but adopt decisions to appoint the members of the management and the supervisory bodies of the undertakings or even restructure the undertakings. This is not compatible with the requirements under both Article 3(5)(a) and (c) that the acquiring companies do not exercise voting rights with a view to determine the competitive conduct of the other undertakings.⁴⁵

2.1.4 Abandonment of Concentration

If the undertakings concerned abandon the concentration it ceases to exist and the EUMR does not apply to the concentration. If the Commission has initiated proceedings under the first sentence of Article 6(1)(c), though those proceedings must be closed, without prejudice to Article 9, by means of a decision as provided for in Article 8. Undertakings can escape this by demonstrating to the satisfaction of the Commission, that they have

⁴² Zeneca/Vanderhave IV/M.556 [1996] OJ C188/10.

⁴³ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01) published 16.4.2008, paras. 110-118.

⁴⁴ *ibid.*

⁴⁵ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01) published 16.4.2008, paras. 114-115.

abandoned the concentration. This obligation was introduced with the revised EUMR 139/2004.⁴⁶⁴⁷

In the Commission's Jurisdictional Notice from 2008 guidance is set out as to how the parties can demonstrate that the practice has been abandoned. There it is explained that the proof of abandonment must correlate with the original act that was considered sufficient to make the concentration notifiable. It is not considered adequate proof to withdraw the notification so that the concentration has been abandoned in the sense of Article 6(1)(c).⁴⁸ This shows that an abandonment of a merger is not something that can be used to escape the jurisdiction of the Commission.

2.1.5 Relation between Article 3 and Article 5(2) second subparagraph

Several transactions can be treated as a single concentration under Article 3 of the EUMR but there is also a specific provision in Article 5(2) second subparagraph that allows for it as well.⁴⁹

In Article 3 a 'concentration' is defined in general and material terms but the question of the Commission's competence in respect of concentrations is not directly determined. Article 5 is intended to specify the scope of the EUMR, this is done by defining the turnover to be taken into account to see whether a concentration has a Community Dimension.⁵⁰

Article 5(2) second subparagraph then provides:

However, two or more transactions within the meaning of the first subparagraph which take place within a two-year period between the same persons or undertakings shall be treated as one and the same concentration arising on the date of the last transaction

This means that the Commission can consider two or more concentrative transactions to constitute a single concentration for the purposes of calculating the turnover of the undertakings concerned. This answers the question of whether a number of transactions give rise to a single

⁴⁶ Reg. 139/2004 [2004] OJ L24/1 Article 6(1)(c).

⁴⁷ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01) published 16.4.2008, para. 118.

⁴⁸ Alison Jones, Brenda Suftrin. *EU Competition Law. Text, Cases and Materials*. (5th Edition OPU 2014), p. 1142.

⁴⁹ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01) published 16.4.2008, para. 36.

⁵⁰ The definition of Community Dimension will be discussed later in this thesis.

concentration or whether those transactions must be regarded as giving rise to a number of concentrations.⁵¹

Article 5(2), subparagraph 2 provides for a specific period of time where successive transactions can be considered as a single concentration. This is to prevent transactions being broken down into series of sales of assets over a period of time with the aim of avoiding the competence conferred on the Commission by the EUMR.

The definition of a concentration in Article 3(1) implies that it makes no difference whether a concentration was acquired by one or several different legal transactions if, in the end, there is a single concentration by the end. This is not always clear but, to be able to determine the unitary nature of the transactions in question, the Commission must, for each case, ascertain whether the transactions are so linked that one would not have been carried out without the other.⁵²

This can also be deduced from recital 20 to the EUMR and is likewise set out by the Court of First Instance in the *Cementbouw* judgment.⁵³ In the Commission's Consolidated Jurisdictional Notice from 2008, this is explained to mean that under the EUMR, transactions that depend on each other according to the economic objectives of the subjective parties, should be analysed in one procedure. If different transactions are independent of each other however, then they should be assessed individually under the EUMR.⁵⁴ Several transactions that are linked by condition upon each other can also only be treated as a single concentration if control is ultimately acquired by the same undertaking(s). This means that e.g. when two companies de-merge a joint venture, the transactions that result will be considered as separate concentrations or, when an undertaking sells a business, and then acquires the seller, including the business sold, would again also have to be considered as separate concentrations.⁵⁵

⁵¹ Judgment in Case T-282/02 *Cementbouw v Commission*, paragraphs 104-109 [2006] ECR II-319. See also Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01) published 16.4.2008, para. 36.

⁵² Judgment in Case T-282/02 *Cementbouw v Commission*, paragraphs 104-109 [2006] ECR II-319. See also Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01), paras. 38-39.

⁵³ Judgment in Case T-282/02 *Cementbouw v Commission*, [2006] ECR II-319, paras. 106-109.

⁵⁴ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01) published 16.4.2008, paras. 40-41.

⁵⁵ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01) published 16.4.2008, paras. 43.

2.2 Current judicial control

One way of deciding which mergers should be examined by the competition authorities is to have jurisdictional thresholds that the merging companies need to cross to be likely to have effect on the relevant market. The current EUMR relies on thresholds that are based on the annual turnover of the merging companies. There are, however, other ways in which jurisdiction might be determined, e.g. jurisdiction may be determined by reference to the market shares of parties, as is the case in Spain and Portugal.⁵⁶

If a merger has or is regarded to have a ‘Community Dimension’ in principle it must be notified to the Commission. The Commission then has exclusive jurisdiction to investigate the transaction and the National Competition Authorities (‘NCA’) are precluded from, with some exceptions, applying their national control rules. This has been called the ‘One-stop principle’ and is set out in Article 21(2) and (3) as well as Recitals (8) and (11) of the EUMR. If a merger does however not have an ‘Community Dimension’ then it is subject to the NCAs review under the national merger control and the Commission does not have any jurisdiction to investigate.⁵⁷

As the notification of concentrations with a Community Dimension is compulsory and usually limited to the jurisdiction of the EUMR, the jurisdictional test incorporated in the EUMR is supposed to be a bright line test, one that can be applied quite easily, simply and objectively.⁵⁸

2.2.1 Community Dimension

When Regulation 4064/89 was first revised, the amending regulation introduced changes to the scope of the regulation. One of the most significant changes to Regulation 4064/89 were the turnover thresholds.⁵⁹ They are objectively quantifiable criteria that depend on the respective turnovers of the undertakings concerned at the date of the transaction or its notification.⁶⁰⁶¹

⁵⁶ Note 124 Alison Jones, Brenda Sufirin. *EU Competition Law. Text, Cases and Materials*. (5th Edition OPU 2014), p. 1149.

⁵⁷ Bellamy and Child. *European Union Law of Competition* (7th edition), p. 522.

⁵⁸ Alison Jones, Brenda Sufirin. *EU Competition Law. Text, Cases and Materials* (5th Edition OPU 2014), p. 1149.

⁵⁹ Ioannis Kokkoris, Howard Shelanski. *EU Merger Control: A Legal and Economic Analysis* (OPU 2014), p. 30-31.

⁶⁰ Bellamy and Child. *European Union Law of Competition* (7th edition), p.547.

⁶¹ The relevant date of established jurisdiction for the Commission is either the conclusion of the binding agreement, the announcement of the public bid or the date of the first notification to the Commission or a Member State’s NCA where the parties give good faith intention that they will conclude such an agreement or make such a bid. See Bellamy and Child. *European Union Law of Competition* (7th edition) p.572-573. In Case C-202/06P *Cementbouw Handel & Industrie v Commission* [2007] ECR I-12129, [2008] 4 CMLR 1324 The Court of Justice held that the Commissions jurisdiction must be decided at a fixed

When the jurisdictional test of the threshold criteria was introduced it was done to include transactions that had a significant cross-border impact, yet would not have satisfied the previous turnover thresholds. This was done to eliminate the need for multiple national filings.⁶² These thresholds only relate to the economic size of the parties and do not depend on the substantive impact of the transaction, or on whether the merger will have any effects within the EU. This means that the EUMR is not limited to mergers that take place in the EU and that it can apply regardless of the nationalities of the parties.⁶³

Originally, introduced in 1989, the test was whether the merger in question fell under the three cumulative criteria:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 000 million; and

(b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million,

(c) unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

When the EU Merger Regulation was then reviewed again with the Commissions 1996 Green Paper there was broad support for the “one stop shop” principle to be extended to mergers that would otherwise be subject to merger control by three or more NCAs in the EU.⁶⁴ These additional tests mean that mergers that do not meet the original threshold requirements still have an “Community Dimension” if they meet the following tests:

(i) lower worldwide threshold: the aggregate worldwide turnover of all the undertakings concerned exceeds €2,500 million; and

time. It was accepted by the parties that there was an Community dimension at the time of the concentration and on the date of the notification made at the Commission’s request. It was therefore found irrelevant that the concentration didn’t meet the thresholds during the investigation and that fact did not deprive the Commission of jurisdiction in this merger, see para 44. This is understandable as one could imagine the jurisdiction of the Commission being very limited if the parties concerned could limit their turnover during the investigation to escape the Commissions jurisdiction.

⁶² Ioannis Kokkoris. Howard Shelanski. EU Merger Control: A Legal and Economic Analysis (OPU 2014), p. 31.

⁶³ Bellamy and Child. European Union Law of Competition (7th edition), p. 547

⁶⁴ Green Paper on Vertical Restraints in EC Competition Policy. COM (96) 721 final, para 192.

(ii) lower EU-wide threshold: the aggregate EU-wide turnover of each of at least two of the undertakings concerned exceeds €100 million; and

(iii) additional three Member States thresholds: in each of at least three Member States:

– the combined aggregate turnover of all the undertakings concerned is more than €100 million; and

– each of at least two of the undertakings concerned achieves a turnover of more than €25 million (in each of the same three Member States identified); and

(iv) two-thirds rule: a concentration does not have an EU dimension if each of the undertakings concerned achieves more than two-thirds of its aggregate EU-wide turnover within one and the same Member State⁶⁵

In 2000 and 2009 the Commission reported to the Council on the operation of these thresholds.⁶⁶ In the report from 2000, the Commission concluded that a number of transactions that have significant cross-border effects don't fall under the EUMR.⁶⁷ In the Green paper from 2001, the Commission raised the issue of multiple filings. This issue was one of the reasons for the changes that were made on Article 1(3) but, as was noted by the Commission, it fell short of its objectives. Despite further cooperation between NCAs *inter alia* it was suggested that it would still not be an equivalent substitute for the 'one-stop-shop' control of mergers with a cross-border effects. The Commission deliberated some possible modifications to the Article but found that it would most likely not solve the problem.⁶⁸ In 2009 the Commission reported to the Council that, overall, the thresholds generally operated in a satisfactory way. Despite this it was also noted that number of transactions still had to be notified in three or more member states.⁶⁹

The Commission has explained that the thresholds are designed to govern jurisdiction and neither assess the market position of the parties to the concentration nor the impact of the operation. The thresholds are not limited to any specific part of the operations but include all turnover of the parties involved in the merger. The fact that they are only based on turnover

⁶⁵ Reg. 139/2004 [2004] OJ L24/1

⁶⁶ See the older EUMR.

⁶⁷ Report to the Council on the application of the Merger Regulation Thresholds, COM(2000) 399 final.

⁶⁸ Green paper on the Review of Council Regulation (EEC) No. 4064/89 COM(2001) 745/6 Final, paras. 24-33.

⁶⁹ Commission report to Council on the functioning of Regulation 139/2004 COM(2009) 281 final.

calculation also means that they are purely quantitative. They are supposed to provide a simple and objective mechanism that can easily be handled by the companies involved in a merger so they can determine if their transaction needs to be notified or not.⁷⁰

2.2.2 Turnover calculations

When determining jurisdiction, the undertakings concerned are the ones that participate in a concentration, or an acquisition of control as is mentioned in Article 3(1). When there is a merger then the undertakings concerned are the merging undertakings. Whereas if there is an acquisition it is the concept of ‘acquiring control’ that determines which are the undertakings concerned.⁷¹

When deciding whether the thresholds in Article 1 are met, both the individual and aggregate turnover of the relevant undertakings will be decisive in determining whether the thresholds are met.⁷²

Once the undertakings concerned have been identified, their turnover for the purposes of determining jurisdiction is to be calculated per the rules set out in Article 5.⁷³ Article 5(1) defines the turnover as ‘the amount derived by the undertakings concerned in the previous financial year from the sale of products and provision of services falling within the undertakings ordinary activities’.⁷⁴

Article 5(4) of the EUMR provides the following:

Without prejudice to paragraph 2, the aggregate turnover of an undertaking concerned within the meaning of this Regulation shall be calculated by adding together the respective turnovers of the following:

- (a) the undertaking concerned;*
- (b) those undertakings in which the undertaking concerned, directly or indirectly:*
 - (i) owns more than half the capital or business assets, or*
 - (ii) has the power to exercise more than half the voting rights, or*

⁷⁰ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01) published 16.4.2008, para. 127.

⁷¹ *ibid*, paras. 132-133.

⁷² Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01) published 16.4.2008, para 129.

⁷³ *ibid*, para. 130.

⁷⁴ *ibid*, paras. 154-157.

(iii) has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the undertakings, or
(iv) has the right to manage the undertakings' affairs;

(c) those undertakings which have in the undertaking concerned the rights or powers listed in (b);

(d) those undertakings in which an undertaking as referred to in (c) has the rights or powers listed in (b);

(e) those undertakings in which two or more undertakings as referred to in (a) to (d) jointly have the rights or powers listed in (b).

Article 5(4) sets out comprehensive criteria to identify undertakings whose turnover may be attributed to the undertaking concerned because of certain direct or indirect links with the latter. The Article provides that turnover is calculated by reference not only to the undertakings concerned but also to the turnover of all those entities which they control or by which they are controlled, and to other connected undertakings.⁷⁵ This is done to capture the total volume of the economic resources that are being combined through the operation without regard to whether the economic activities are performed directly by the undertaking concerned, whether they are undertaken or indirectly by companies and undertakings that are linked to the undertaking concerned as is described in Article 5(4).⁷⁶

The concept of ‘a group’ is not defined by an abstract definition in the EUMR but certain rights and powers are set out in Article 5(4)(b) that, if undertakings, directly or indirectly, concerned possess, mean that they are part of a group for purposes of turnover calculations according to the EUMR.⁷⁷⁷⁸

In the Commission’s Case *IAG/BMI* COMP/M.6447 the Commission reviewed a proposed concentration pursuant to Article 4 of the EUMR where the undertaking International Consolidated Airlines Group (“IAG”) directly or via a subsidiary British Airways Plc. (“BA”) planned to acquire, within the

⁷⁵ Alison Jones, Brenda Sufrin. *EU Competition Law. Text, Cases and Materials* (5th Edition OPU 2014), p. 1149.

⁷⁶ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01) published 16.4.2008, para. 175.

⁷⁷ *ibid*, paras. 175-177.

⁷⁸ It is important to note that the definition of control that is found in Article 5(4) is different and more narrowly defined than in Article 3(2). This was done with the aim to provide more legal certainty and it has been suggested that harmonization might be needed although no harmonization of the rules has been made to that effect. See Green Paper on the Review of Council Regulation (EEC) No 4064/89, COM/2001/0745 final.

meaning of Article 3(1)(b) of the EUMR, sole control of the whole of the undertaking British Midlands Limited ("bmi") by way of purchase of shares.

IAG was the holding company of both BA and Iberia Líneas Aéreas de España, S.A. Bmi was owned by Deutsche Lufthansa AG ("LH") through its subsidiary, LHBD Holding Limited ("LHBD"), at the time of the proposed concentration.

In determining the jurisdiction of the case, the Commission used the definition found in the Jurisdictional notice from 2008⁷⁹ on the undertakings concerned. So in this case the undertakings concerned were the ones participating in a concentration. As this was an acquisition of sole control of an undertaking, the undertakings concerned were the acquiring undertaking and the target undertaking. The Commission found that on the target side the 'undertakings concerned' were bmi and on the acquirer's side either IAG or BA, dependent on which one would acquire bmi.⁸⁰

When calculating the turnover on the acquiring side, the Commission found that under Article 5(4)(b)(i) the turnover of BA had to be added to the turnover of IAG. This was reasoned with the fact that IAG held far more than half the aggregate nominal value of the shares, and so fulfilled the criterion of Article 5(4)(b)(i).⁸¹

It was also found that the turnover of the Iberian operating company Iberia Líneas Aéreas de España, Sociedad Anónima Operadora ("IB Opco"), should be added to that of IAG under Article 5(4)(b)(iii) and, in subsequent order, also under Article 5(4)(b)(iv). IAG had the power to appoint more than half the members of IB Opco's board of directors. The fact that the majority of directors had to be Spanish nationals and that one of the directors, that IAG was entitled to appoint, must be the CEO of BA did not affect this. IAG had in practice chosen the BA CEO.⁸² IAG also had the right to manage IB Opco's affairs, e.g. development of strategy for the group, the annual budgets or financial plans for IB Opco (including capital, revenue and manpower), and so fell under Article 5(4)(b)(iv).⁸³ IAG was also found to have *de facto* the power to exercise more than half of the voting rights in the shareholder's assembly even though the Spanish National Entity ('SNE') had 50,1% of the shares and voting rights in IB Opco Holdings. This was because SNE could only vote contrary to IAG's instructions in a limited number of cases and even if SNE would vote contrary to the instructions of IAG the final word would

⁷⁹ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01) published 16.4.2008.

⁸⁰ IAG/ BMI (C(2016) 3893) COMP/M.6447 [2012], paras 2-6

⁸¹ *ibid*, paras 10-11.

⁸² *ibid*, paras 13-16. See also footnote 7 and 8 in the same authority.

⁸³ *ibid*, paras 17-21.

still be with IAG through the decision of its shareholders' meeting. For this reason, the Commission found that this fell under Article 5(4)(b)(ii).⁸⁴

The Commission found that if BA was the 'undertaking concerned' then the turnover of Iberia should be added to that of BA under Article 5(4)(d) of the EUMR, given that IAG owned more than half of the capital of BA and enjoyed one or more of the powers and rights of Article 5(4)(b) of the EUMR in Iberia, as was discussed earlier.

This meant that, regardless of whether IAG or BA would be the final buyer such links were found to exist between IAG, BA and Iberia, that their turnovers must be added together for the purposes of determining jurisdiction under the EUMR. As the parties did not achieve more than two thirds of their respective turnover within one and the same Member State, the proposed transaction was found to have a Community Dimension pursuant to Article 1(2) of the EUMR.

After defining the relevant market of the transaction, the Commission decided not to oppose the transactions as it was modified by the Commitments and to declare it compatible with the Internal market and with the functioning of the EEA agreement.⁸⁵

This case shows the extent of power needed to for an undertaking to be considered to fall under Article 5(4) and how that can greatly impact the turnover calculations and, in return, whether a case falls under the jurisdiction of the EUMR. If e.g. the undertaking concerned is a joint venture, for example where the joint venture takes over another undertaking, the question then arises whether the joint venture partners' turnovers should be added to the turnover of the joint venture.⁸⁶

2.2.2.1 The related undertakings

Article 5(4)(b) only defines when an undertaking must be counted as a subsidiary. To be able to determine the limits of the group of an undertaking concerned it would normally be necessary to decide also on the inclusion of e.g. parent undertakings and sister-undertakings. Article 5(4) and (5) give instructions on this.

Subsidiaries of an undertaking concerned must be included in the group according to Article 5(4)(b). As the Article also refers to 'undertakings' in plural, it covers all situations where one undertaking concerned has more than one direct subsidiary. According to Article 5(4)(c), the group of an undertaking also covers 'those undertakings which have in the undertaking

⁸⁴ It being noted that IB Opco Holding holds all the shares in IB Opco so that these two companies are linked in the meaning of Article 5(4)(b)(i).

⁸⁵ IAG/ BMI (C(2016) 3893) COMP/M.6447 [2012], paras. 21-30.

⁸⁶ Karsten Engsig. Sorensen, Pernille Jessen, et.al, *Regulating Competition in the EU* (Kluwer Law International 2016), p. 267-268.

concerned the rights or powers listed in (b)’. So, a parent to an undertaking concerned must be included for the purpose of calculating the Community Dimension.

Two questions have been raised concerning this: can an undertaking have more than one parent, and are both direct and indirect parent undertakings included in the group of the undertaking concerned.⁸⁷ The first question seems quite straight forward. The Article applies the plural ‘undertakings’ which indicates that the drafters of the EUMR foresaw situations where an undertaking is controlled by more than one undertaking concerned within the meaning of Article 5(4)(b). The second question leaves more room for debate. The wording of Article 5(4)(c)⁸⁸ does not contain the words ‘directly or indirectly’. This could be interpreted to mean that only the direct parent undertakings may be included. This interpretation is flawed because it would not give a clear measurement of the financial strength of the group of the undertaking concerned and it would mean that very similar transactions made by the same business would be treated very differently. That could make forum shopping very easy.⁸⁹

The Commission seems to have taken the same view and does this by relying on the fact that the word ‘undertakings’ is in the plural in Article 5(4)(c). Arguing that, by using the plural the drafters intended to cover both direct and indirect parent undertakings. This could have been clearer if the words ‘indirect or direct’ were included in the text.⁹⁰ Sister-undertakings must also be included when calculating the Community Dimension, per Article 5(4)(d), the same line of argument follows here that because of the plural of ‘undertakings’ both direct and indirect sister-undertakings fall within the group.⁹¹

The Commission has explained that where two or more undertakings jointly control the undertaking concerned, in the sense that an agreement between them is needed to manage the undertakings affairs, the turnover of all of them

⁸⁷ Morten P. Broberg *Broberg on the European Commission's Jurisdiction to Scrutinise Mergers* (Fourth Edition European Monographs Series Volume 16 Kluwer Law International 2013) pp. 101-105.

⁸⁸ At least in the English version. The author of this thesis does not have the language skills to investigate all language versions to see whether this applies to all of them.

⁸⁹ Morten P. Broberg *Broberg on the European Commission's Jurisdiction to Scrutinise Mergers* (Fourth Edition European Monographs Series Volume 16 Kluwer Law International 2013), p. 105-106. See Morten P. Broberg's examples for further explanation of the problem.

⁹⁰ Interestingly enough this was the case in the Danish version of the former Merger Regulation.

⁹¹ Morten P. Broberg *Broberg on the European Commission's Jurisdiction to Scrutinise Mergers* (Fourth Edition European Monographs Series Volume 16 Kluwer Law International 2013), p. 106-107.

should be included in the turnover calculations.⁹² This can result in small joint ventures exceeding the turnover threshold, provided that the joint venture partners have a sufficiently large turnover threshold.

Article 5(4)(e) is supposed to deal with joint ventures that are set up by several undertakings in the same corporate group. The turnover of such a joint venture should also be included in the turnover of the participating undertaking. Article 5(5) then deals with the situation when a joint venture is jointly controlled by the undertakings concerned, e.g. where two undertakings that already have a joint venture merge or set up a new joint venture. Finally, Article 5(5)(b) explains that the turnover of the undertakings concerned is allocated in proportion to their participation.⁹³

Reading Article 5 of the EUMR one might assume that every stone has been turned and all questions have been answered with regards to the turnover calculations. This is however not so, one does not have to dig deep to see that there are some aspects that are not as clear as they might be.

This is for example a problem regarding publicly owned undertakings. Article 106 TFEU provides a non-discrimination principle between public and private businesses. The EUMR is no exception to this principle and concentrations involving public undertakings may be notifiable under the EUMR in the same way that concentrations involving private undertakings are.⁹⁴ The drafters of the EUMR seem to have recognised this issue when it comes to calculating turnover. In recital 22 of the EUMR it is established that in the public-sector calculation of the turnover needs to take account of undertakings making up an economic unit with independent power of decision, irrespective of the way in which the capital is held or of the rules of administrative supervision applicable to them.

This is a derogation from the system provided for in Article 5(4) and (5). Here it seems that ‘an economic unit with an independent power of decision’ is referencing actual control instead of Article 5(4)(b)’s formal notion of control. This would be closer to the definition of control found in Article 3(2).⁹⁵ It is not clear from the Commissions case law how the Commission applies this to turnover calculations of publicly owned bodies.

For example, in the Commissions Case IV/M616 *Swissair/Sabena*, the Commission states that ‘there is no need in the present case to calculate the

⁹² Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01) published 16.4.2008, para. 182.

⁹³ *Karsten Engsig Sorensen, Pernille Jessen, Regulating Competition in the EU*, p. 269.

⁹⁴ Morten P. Broberg *Broberg on the European Commission's Jurisdiction to Scrutinise Mergers* (Fourth Edition European Monographs Series Volume 16 Kluwer Law International 2013), p. 116.

⁹⁵ *ibid*, p. 117.

turnover of the Belgian State, even though it is an undertaking concerned within the meaning of Article 1 of the Merger Regulation'.⁹⁶ While in the Commission's Case IV/M157 *Air France/Sabena*, the Commission seems to have considered Sabena alone to constitute the full group for the purposes of turnover calculations. The reason for this is not clear but could be in-line with the Commission's explanations in the Jurisdictional notice from 2008 where, in paragraph 193, it is stated that 'Member States (or other public bodies) are not considered as 'undertakings' under Article 5(4) simply because they have interests in other undertakings which satisfy the conditions of Article 5(4). Therefore, for the purposes of calculating turnover of State-owned undertakings, account is only taken of those undertakings which belong to the same economic unit, having the same independent power of decision'.

Accordingly, State-owned companies, that are not subject to any coordination with other State-controlled holdings, should be treated as independent for the purposes of Article 5 and the turnover of other state owned undertakings should not be taken into account.⁹⁷ In practise a state owned undertaking that has been placed on the stock exchange has been considered to be a single economic entity. This seems to show that the level at which strategy, business plan and budget are decided is decisive in this regard.

2.2.2.2 The two thirds threshold and the undertakings concerned

The two thirds threshold can be found in the second paragraph of Article 1(3)(d). It provides that where all the undertakings concerned, in the merger or acquisition, generate more than two thirds of their Union-wide turnover in one and the same Member State, the merger does not have a Community Dimension. The Commission's Jurisdictional Notice from 2008⁹⁸ does not explain whether this threshold must be viewed individually, so that it applies to all undertakings concerned, or whether it is linked to the thresholds requiring at least two of the undertakings to generate EUR 250 million, respectively EUR 100 million in the Union. If the latter case were chosen it would then mean that, the two-thirds threshold would only apply to those undertakings which meet the Union-wide turnover thresholds.⁹⁹

⁹⁶ This decision was made before the Commission's Jurisdictional Notice from 2008.

⁹⁷ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01) published 16.4.2008, para. 194.

⁹⁸ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01) published 16.4.2008.

⁹⁹ Morten P. Broberg *Broberg on the European Commission's Jurisdiction to Scrutinise Mergers* (Fourth Edition European Monographs Series Volume 16 Kluwer Law International 2013), pp. 24-25.

Both readings could be argued but the decision in the Commission's Case IV/M883 *Prudential/HSBC/Finnish Chemicals*¹⁰⁰, seems to give an answer to this question. There Prudential and HSBC jointly acquired Finnish Chemicals. The acquiring undertakings were both situated in the United Kingdom and both of them generated over EUR 250 million in the union but more than two-thirds of their Union-wide turnover was within the United Kingdom alone. Finnish Chemicals, however, did not generate more than two-thirds of its Union-wide turnover in the United Kingdom. The Commission found that the transaction had Community Dimension, the two-thirds rule must have been applied to all the undertakings concerned regardless of whether they generated more than EUR 250 million in the Union.¹⁰¹

This seems like a logical conclusion with regards to the wording of Article 1(2) and (3) where thresholds are defined in positive terms together with the 'two-thirds threshold' that is defined in negative terms. It would seem inconsistent to include all undertakings concerned when calculating the worldwide turnover thresholds and the Union-wide thresholds but then exclude some of these when calculating the two thirds thresholds. That would mean that two different interpretations would be applied to the term 'undertaking concerned' that is included in all the thresholds without any notion of doing so from the drafters of the EUMR.

2.2.3 Current discussion on the threshold system

In the Commissions White Paper from 2014 it is suggested that the case referral system could be enhanced to better serve the purpose of departing from the results of the turnover tests when necessary.¹⁰² Here it seems that the Commission is suggesting that there are mergers, where the turnover tests are not an adequate measure to see whether or not a merger, should fall under the Commissions jurisdiction.

On the 7th of October 2016 the European Commission launched a public consultation on the functioning of certain procedural and jurisdictional aspects of EU merger control. One of the main aspects of this was the effectiveness of the purely turnover-based notification thresholds of the EUMR.¹⁰³

¹⁰⁰ *Prudential/HSBC/Finnish Chemicals IV/M883* [1997].

¹⁰¹ Morten P. Broberg *Broberg on the European Commission's Jurisdiction to Scrutinise Mergers* (Fourth Edition European Monographs Series Volume 16 Kluwer Law International 2013) pp. 24-25.

¹⁰² White Paper, Towards a more effective EU merger control, COM(2014) 449 Final.

¹⁰³ http://europa.eu/rapid/press-release_IP-16-3337_en.htm, accessed March 15, 2017.

In the questionnaire for public consultation that the Commission released at the same time, this effectiveness is discussed. There it is explained how a debate had arisen whether the current threshold system allows for capturing all transactions which can potentially have an impact on the Internal market.¹⁰⁴ This falls in line with Commissioner Vestager's comments in her speech on the 10th of March. There she explained how Facebook's purchase of WhatsApp in 2014, a company with 600 million users and a purchase price of 19 billion, didn't meet the merger thresholds of the EUMR.¹⁰⁵

According to Commissioner Vestager's speech and the Commission's questionnaire this is especially clear in some industries, namely the digital and pharmaceutical industries. This could be where the acquired company, while having generated little turnover, may play a competitive role, hold commercially valuable data or have considerable market potential for some other reasons. In the digital economy, this is quite common. Often services are launched to build up a significant user base before significant revenues are made. Because of the large number of users, however, these services may play a competitive role. This could e.g. be because the relevant business model involves collecting and analysing large inventories of data that has the potential of generating significant turnover. Acquisitions of companies like this might not be captured under the current turnover-based thresholds. They would therefore not have a Community Dimension even though the acquisition could have a significant impact on the Community market.¹⁰⁶

It has therefore been suggested that additional notification requirements based on alternative criteria, such as transaction value, should be added to the EUMR to complement the existing turnover-based jurisdictional thresholds.¹⁰⁷

At first glance these suggestions seem to be reasonable but, when read in conjunction with the EUMR, questions rise on the real need for these complementing requirements, especially with regards to the referral and allocations of cases where mergers do not have Community Dimension.¹⁰⁸

¹⁰⁴http://ec.europa.eu/competition/consultations/2016_merger_control/consultation_document_en.pdf, accessed March 15, 2017.

¹⁰⁵https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/refining-eu-merger-control-system_en, accessed March 15, 2017, Commissioner Vestager.

¹⁰⁶https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/refining-eu-merger-control-system_en, accessed March 15, 2017, Commissioner Vestager.
http://ec.europa.eu/competition/consultations/2016_merger_control/consultation_document_en.pdf, accessed March 15, 2017.

¹⁰⁷http://ec.europa.eu/competition/consultations/2016_merger_control/consultation_document_en.pdf, accessed March 15, 2017.

¹⁰⁸ Reg. 139/2004 [2004] OJ L24/1.

One case in particular has been used as an example of a case that could have fallen outside of the Commission's jurisdiction. That is the Commission's Case No COMP/M.7217 - *Facebook/ Whatsapp*.

In August 2014, the European Commission received notification of a proposed concentration pursuant to Article 4 of EUMR, and, following a referral pursuant to Article 4(5) of the EUMR, by which Facebook, Inc. ("Facebook", USA) acquires within the meaning of Article 3(1)(b) of the EUMR control of the whole of WhatsApp Inc. ("Whatsapp", USA) by way of purchase of shares.¹⁰⁹

The parties of this merger, Facebook and Whatsapp, were both providers of consumer communications services. The proposed concentration consisted of the acquisition of WhatsApp by Facebook for a purchase price of USD 19 billion.¹¹⁰

This merger was interesting in many ways and is still being debated.¹¹¹ Due to constraints in length this thesis will focus only on the Community Dimension of the merger. The transaction did not have a Community Dimension within the meaning of Article 1(2) or Article 1(3) of the EUMR as the EU turnover of WhatsApp didn't amount to the thresholds needed. Regardless of this, the transaction fulfilled the two conditions set out in Article 4(5) of the EUMR since it was a concentration within the meaning of Article 3 of the EUMR and was capable of being reviewed under the national competition laws of three Member States.

Facebook therefore informed the Commission on the 19th of May 2014 by means of a reasoned submission that the transaction should be examined by the Commission pursuant to Article 4(5) of the EUMR. A copy of that submission was transmitted to the Member States on the 19th of May 2014 but none of the Member States that were competent to review the Transaction expressed disagreement as with it being referred to the Commission. The merger was then accordingly deemed to have a Community Dimension pursuant to Article 4(5) of the EUMR.

This means that even though the acquisition price for WhatsApp was 19 billion USD, the turnover of WhatsApp was still so low as not to require notification to the Commission based on the turnover thresholds in Article 1. Facebook opted for the "One stop shop" option of Article 4(5) and informed

¹⁰⁹ FACEBOOK/ WHATSAPP (C(2014) 7239) COMP/M.7217 [2014].

¹¹⁰ FACEBOOK/ WHATSAPP (C(2014) 7239) COMP/M.7217 [2014].

¹¹¹ The Commission fined Facebook € 110 million on the 18th of May 2017 for providing incorrect or misleading information during the Commission's 2014 investigation under the EU Merger Regulation of Facebook's acquisition of WhatsApp.
http://europa.eu/rapid/press-release_IP-17-1369_en.htm, accessed May 23 2017.

the Commission with a reasoned submission that the concentration should be examined by the Commission.

The Commission agreed with Facebook with regards to the relevant geographic market for the transaction and found it to be at least EEA wide, if not worldwide.¹¹²

Even though Whatsapp's turnover wasn't high enough for it to fall under the Community Dimension, discussed in Article 1 of the EUMR, it still held a large percentage of the relevant market, or 20-30% per the Commission's assessment.¹¹³ The Commission also notes that it believes that this is an underestimation because the data used was collected by an app that is owned by Facebook but there was no other good data that could be used instead.¹¹⁴

Despite this, the Commission found, based on further analysis and market investigations, that the transaction did not give rise to serious doubts as to its compatibility with the Internal market.¹¹⁵¹¹⁶

This case is a good example of a merger which did not have to fall under the Commission's jurisdiction according to the EUMR. In Commissioner Vestager's speech it's clear that mergers, such as this one, are the ones that the Commission expects might not be covered under the current EUMR. Here we find two companies which have very different turnovers, but both have considerable market power. The high purchase price of WhatsApp also indicates that the turnover of the undertaking might not have been the reason for the acquisition.

What is interesting to review is that even though there was a possibility of this merger falling outside the EUMR jurisdiction it didn't. Here there was a possibility to apply Article 4(5) of the EUMR and, in line with the idea behind the 'One-Stop-Shop' principle, it was applied.¹¹⁷ This is not surprising considering the convenience of only needing to go through one investigation instead of several which would otherwise have been the case. Especially considering the market of the proposed merger is such that it was unlikely that the Commission would refer according to Article 9. This then raises the question of whether there is need to change the current threshold regulations.

¹¹² FACEBOOK/ WHATSAPP (C(2014) 7239) COMP/M.7217 [2014], para. 44.

¹¹³ FACEBOOK/ WHATSAPP (C(2014) 7239) COMP/M.7217 [2014], para. 96.

¹¹⁴ FACEBOOK/ WHATSAPP (C(2014) 7239) COMP/M.7217 [2014], para. 96.

¹¹⁵ FACEBOOK/ WHATSAPP (C(2014) 7239) COMP/M.7217 [2014], paras. 141-142, 163, 190-191.

¹¹⁶ On the 20th of December 2016, the Commission however sent a Statement of Objections to Facebook alleging that the company gave misleading information during the Commission's investigation. (http://europa.eu/rapid/press-release_IP-16-4473_en.htm, accessed 20. March 2017).

¹¹⁷ This will be explained further in a later chapter.

3 Exclusive Competence of the Commission under the EUMR and Referral of Cases

The Commission has, as has been explained, competence over merger cases which have a Community Dimension. Not only does it have jurisdiction, but according to Article 21(1) of the EUMR, it has exclusive jurisdiction over them. What Article 21 also indicates is that mergers that do not have Community Dimension are not under EU law.¹¹⁸

There are also provisions in the EUMR that provide for circumstances where a merger that has a Community Dimension can be referred to a NCA. Article 4(4) allows the Commission to refer a case to the relevant NCA. This is possible where the Commission considers that a concentration may significantly affect competition in a market within a Member State which presents all the characteristics of a distinct market. Article 9 also allows for the Commission to refer a case to the relevant NCAs if a concentration threatens to significantly affect competition in a market within that Member State, which presents all the characteristics of a distinct market, or a concentration affects competition in a market within that Member State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market.

The EUMR also provides provisions where mergers without a Community Dimension can be referred to the Commission. These are Article 4(5), and Article 22. Article 4(5) allows the parties involved in the concentration to notify the Commission without notifying the NCA if the merger would fall under the jurisdiction of at least three Member States. Article 22 then allows the NCAs to refer mergers to the Commission if the concentration affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request.

Originally Merger Regulation no. 4069/89 was foreseen by the Council and the Commission so that referrals would only be resorted to in 'exceptional circumstances' where 'the interests in respect of competition of the Member State concerned could not be adequately protected in any other way'.¹¹⁹ As competition law developed in the Member States so did the circumstances

¹¹⁸ Alison Jones, Brenda Sufirin. *EU Competition Law. Text, Cases and Materials* (5th Edition OPU 2014), p. 1157.

¹¹⁹ Commission 'Notes on Council Regulation (EEC) No 4064/89' [Published in 'Merger Control in the European union', European Commission, Brussels-Luxembourg, 1998], p. 54. See also Case T-119/02 Philips v Commission [2003] ECR II-1433.

that Merger Regulation no. 4096/89 was applied to and changes needed to be made. Almost all the Member States had introduced Merger Control laws and referrals, both from the Commission to the Member states and vice versa, were made where ‘exceptional circumstances’ were debatable. The number of transactions where the thresholds of Article 1 were not met but still had to be notified in several Member State Jurisdictions also grew.¹²⁰

Because of this, revisions have been made in the current EUMR. They were designed to facilitate the re-attribution of cases between the Commission and Member States consistent with the principle of subsidiarity while still preserving the basic features of the older regulation especially the ‘One Stop Shop’ provision.¹²¹

3.1 Article 4(4) and (5) Referrals

Article 4(4) allows notifying parties to make a reasoned submission that a merger with a Community Dimension may significantly affect competition in a distinct market in a Member State and should be examined, in whole or in part, by that Member State.¹²² This Article is an important option for notifying parties but, by reasons of this thesis being limited to questions regarding the broadening of the Commission’s Jurisdiction, there will not be further discussion on the application of this Article.

Article 4(5), on the other hand, allows merging parties to refer straight to the Commission, even though there isn’t a Community Dimension, if the requirements of the Article are met. Those requirements are only two: the transaction must be a concentration within the meaning of Article 3 of EUMR and it must be possible that the merger falls under the jurisdiction of three Member State NCAs.¹²³

In the recitals for the current EUMR it was explained that requests for pre-notification referrals to the Commission would be especially relevant when a merger would affect competition beyond the territory of one Member State.¹²⁴ This would make mergers, where the merger participants are not very dependent on the physical location of their services, likely to fall under the criteria granted that the other tests of the Article would be fulfilled. This could also be where markets are wider than national markets. In such cases it is likely that competitive dynamics extend over territories, beyond national

¹²⁰ Commission ‘Notice on Case Referral in respect of concentrations’ (2005/C 56/02) published 5.3.2005, para. 4.

¹²¹ Reg. 139/2004 [2004] OJ L24/1, recitals 11, 12 and 14.

¹²² Alison Jones, Brenda Sufrin *EU Competition Law. Text, Cases and Materials* (5th Edition OPU 2014), p. 1164.

¹²³ Regulation 139/2004 [2004] OJ L24/1.

¹²⁴ Regulation 139/2004 [2004] OJ L24, recital 16.

boundaries. It could therefore be argued that, because investigations might need to be made in several countries with appropriate enforcement powers, it is likely that the Commission would be in the best position to accomplish such an investigation.¹²⁵

The merging parties could also submit that it would be more efficient, both with regards to time and economically, to be able to submit only to the Commission instead of having the merger investigated by multiple NCAs.¹²⁶

One famous case that was referred to the Commission with application of Article 4(5) of the EUMR is Facebook's acquisition of WhatsApp which was discussed in an earlier chapter.

Another interesting case is the Commission's case *NOKIA/NAVTEQ*. There Nokia, a provider of equipment, solutions and services for electronic communication networks, planned to acquire, within the meaning of Article 3(1)(b) of the EUMR, the whole of the undertaking NAVTEQ a supplier of navigable digital map databases.

The parties to the proposed concentration met neither of the turnover thresholds set out in Article 1(2) and (3). This meant that the concentration did not have a Community dimension within the meaning of Article 1. Because the transaction could have been reviewed under the national merger control law of eleven Member States, Nokia opted to request a referral to the Commission pursuant to Article 4(5) of the EUMR. As no Member State objected to this the proposed concentration was deemed to have a Community dimension.¹²⁷

The Commission found that this concentration was of a purely vertical nature where a producer of a good acquires its main provider of an important input. The Commission's analysis was in line with its Guidelines on the assessment of non-horizontal mergers and the Commission's previous decision concerning the merger between TomTom and Tele Atlas,¹²⁸ which were the other supplier of navigable digital map databases. After an in-depth economic analysis, the Commission concluded that the merged company would be unlikely to close off competitors and concluded that the proposed concentration would not raise any competition concerns.

Even though this merger was smaller in scale than the Facebook/Whatsapp merger, discussed earlier, in many ways it depicts a similar situation. The merger is between two companies in the digital industries who opted for the 'One Stop Shop' option of the EUMR. The same had in fact been done by

¹²⁵ Commission 'Notice on Case Referral in respect of concentrations' (2005/C 56/02) published 5.3.2005, paras 9-13.

¹²⁶ Regulation 139/2004 [2004] OJ L24, recital 12-16.

¹²⁷ *NOKIA/NAVTEQ* (C (2008) 3328) COMP/M.4942 [2008], para. 13.

¹²⁸ *TOMTOM/TELE ATLAS* (C(2008) 1859) COMP/M.4854 [2008].

their competition not long before.¹²⁹ Another case, regarding undertakings in the digital industries, was the Commission's case IBM / TELELOGIC. In this case IBM, a U.S. company, active worldwide in the development, production and marketing of IT products, software and services, planned to acquire sole control the Swedish company Telelogic which was active in the development and sale of software development tools. This concentration within the meaning of Article 3(1)(b) did not meet the turnover thresholds set out in Article 1(2) and 1(3) of the EUMR. As was the case in the previously mentioned mergers, there was a referral case made pursuant to Article 4(5) because it would have had to notify the concentration to several NCAs otherwise.^{130 131}

The cases discussed are not nearly the only cases where Article 4(5) has been applied. In fact, there have been 315 Article 4(5) referral requests accepted and only 7 requests refused, making this type of referral the most commonly used one since the year 2004.¹³² Based on this information, one could imagine that the benefits that an undertaking can gain from the 'One Stop Shop' advantages, where Article 4(5) is applicable, could be substantial, making it less likely that an undertaking would try to circumvent the EUMR jurisdiction.

3.2 Article 9 Referral

Article 21(3) paragraph 2 allows Member States to carry out all enquires necessary to be able to apply Article 4(4), 9(2) or after referral, pursuant to Article 9(3) first subparagraph, indent (b), or Article 9(5), to take the measures strictly necessary for the application of Article 9(8).

Article 9 is commonly referred to as the 'German clause', as it was initially introduced by the Germans who at the beginning were opposed to the introduction of EU merger control, fearing that the Commission's investigations might not be as vigorous as the national merger control.¹³³ They were also afraid that national control would be lost and local and regional issues might not be sufficiently addressed.¹³⁴ Article 9 provides for the referral, at the request of a national authority, of a merger or aspects of it, to that authority where the concentration threatens competitions.

¹²⁹ TOMTOM/TELE ATLAS (C(2008) 1859) COMP/M.4854 [2008].

¹³⁰ IBM / TELELOGIC (C(2008) 823) COMP/M.4747 [2008], paras. 9-10.

¹³¹ This concentration was found not to significantly impede effective competition in the common market or in a substantial part of it making it compatible with the common market and the EEA agreement.

¹³² <http://ec.europa.eu/competition/mergers/statistics.pdf>, accessed May 8, 2017.

¹³³ Ivo Van Bael, *Due Process in EU Competition Proceedings*, p. 439.

¹³⁴ Alison Jones, Brenda Sufirin. *EU Competition Law. Text, Cases and Materials*. (5th Edition OPU 2014), p. 1159.

Article 9 has been recognised to have the objective, within the principle of ‘One Stop Shop’ and legal certainty, to secure the principle of subsidiarity so a NCA should manage a case when it is in the best position to do so.¹³⁵ It now works as an important corrective mechanism for reallocating appropriate cases to NCAs, for example where cases raise distinct queries regarding a Member State, or regional or local markets.¹³⁶

Despite this role the article concedes little authority to the Member States. The Commission, after having received a request from a Member State, in accordance with Article 9(2)(a) or (b), determines whether the requesting State has *prima facie* demonstrated that a distinct market exists, and that the concentration threatens to significantly affect competition within that Member State. Even if these conditions are satisfied, the Commission still has discretion, provided for in Article 9(3), to deal with the case itself or to make a total or partial reference of the case to the competent national authority. It is only in Article 9(2)(b) cases where the Member State has provided preliminary evidence establishing that the concentration affects competition in markets with a narrow geographic scope.¹³⁷ This is counteracted by the recitals of the EUMR. There it is made clear that there should be co-operation between the NCAs and the Commission with the view that multiple notifications of a given concentration are avoided to the greatest extent possible.¹³⁸ The reality is that most cases are referred partially or fully following an Article 9 request.¹³⁹

Article 9 now operates as an important corrective mechanism for reallocating appropriate cases or aspects of them to NCA’s. In the Commission’s case M.5996 *Thomas Cook/CGL and Midland* the issue arose concerning specific elements in a Member State. Here the NCA of the UK (Office of Fair Trading (“OFT”)) requested a referral based on Article 9(2)(a) and 9(2)(b) for a merger of three travel businesses, constituting a single concentration within the meaning of Article 3(1)(b). At least two of the undertakings concerned had an EU-wide turnover in excess of EUR 250 million and the two-thirds turnover threshold did not apply so there was a Community dimension pursuant to Article 1(2) of the EUMR.

When assessing whether the two conditions for a referral on the basis of Article 9(2)(a) were met the Commission found that there was real risk that the proposed transaction could have significant adverse impact on

¹³⁵ Commission ‘Notice on Case Referral in respect of concentrations’ (2005/C 56/02) published 5.3.2005, p. 9-13.

¹³⁶ Alison Jones, Brenda Sufrin *EU Competition Law. Text, Cases and Materials* (5th Edition OPU 2014), p. 1162.

¹³⁷ Alison Jones and Brenda Sufrin, *Eu Competition Law. Text, Cases and Materials* (5th edition OPU 2014), p. 1161.

¹³⁸ Regulation 139/2004 [2004] OJ L24, recital 14.

¹³⁹ <http://ec.europa.eu/competition/mergers/statistics.pdf> , accessed 03. May 3, 2017.

competition in the market. The Commission also found that because of the nature of the market in question the merger would lead to a high combined market share of the parties, both at the national level and even more at the regional level. Correspondingly, the Commission found that the conditions for referral under Article 9(2)(a) of the EUMR were met. Even so, the Commission had discretion whether to refer the case to the competent authorities of the United Kingdom. Based on the fact that the merger would not have any impact on competition in other Member States, the OFT's thorough knowledge of the UK market and because the OFT had recently dealt with one case in the same industry, it was concluded that OFT was better suited to carry out a thorough investigation of the whole case.

The referral option of Article 9(2)(a) is a delicate one. The Commission has to make sure that it doesn't undermine the 'One Stop Shop' principle and the General Court has made it clear that these references should only be made in exceptional circumstances.¹⁴⁰

In the Commission's case *Exxon/Mobil* the United Kingdom notified the Commission in accordance with Article 9(2)(b) of the EUMR that it considered that the concentration affected competition in northwest of Scotland in the retail motor fuel sector. The Commission found, however that this concentration concerned competition in the market for motor fuel retailing in the whole of the UK. The Commission could therefore not refer the case in accordance with Article 9(2)(b) of the EUMR.¹⁴¹ The Commission does not spend many words on explaining how it finds this market but considering the wording of Article 9(2)(b)¹⁴² the narrow scope of the Article explains it in a way. Although, as has been mentioned, the Commission has a wide margin digression.

With all of this in mind it is interesting to go back to the beginning. The purpose of this Article was to try to secure the interests of Member States where the concentration threatens competition in a 'distinct' market in the requesting NCA's state.¹⁴³ Here the Commission shares its exclusive competences with the appropriate NCAs which conforms to the ideas behind the EU's subsidiarity principle defined in Article 5 of the Treaty on European Union, giving a Member State more opportunity to deal with a merger at a central, regional, or local level.¹⁴⁴ Even so the General Court has defined the

¹⁴⁰ Case T-119/02, *Royal Philips Electronics v Commission* [2003] ECR II-1433, para 354

¹⁴¹ *Exxon/Mobil IV/M.1383* [1991], para. 3.

¹⁴² Article 9(2)(b) provides the following: "a concentration affects competition in a market within that Member State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market."

¹⁴³ Alison Jones and Brenda Sufrin, *Eu Competition Law. Text, Cases and Materials* (6th edition OPU 2016), p. 1111.

¹⁴⁴ http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.2.pdf , accessed May 4, 2017.

cases where this is possible narrowly¹⁴⁵ and, with regards to the possible implications of mergers with a Community dimension, that is understandable.

Nevertheless, this is worth inspecting with regards to the suggestion of widening the jurisdiction of the EUMR. If Article 9 is a type of ‘safety net’ to secure that national and regional merger issues are sufficiently addressed, then widening of the jurisdiction, combined with the limited possibilities of referrals under the Article, could mean that domestic issues of the Member States would fall through the cracks.

3.3 Article 22 Referral

Originally, Article 22, or the Dutch rule as it was called, was included to enable Member States without merger control rules to refer especially complicated mergers, from a competition perspective, to the Commission. Three of the four first cases, that were referred with application of this rule, were from Member States without merger rules.¹⁴⁶ The latest EUMR sought to simplify and clarify the Article 22 procedure.¹⁴⁷ There were only seven referrals with application of Article 22 in the years 1990 until 2004 but 25 referrals from the year 2005 until 2017 which might suggest that this was, at least partly, achieved.¹⁴⁸

The aspired results of the Article 22 procedure is described in the EUMR recitals. There it is explained that a Member State should be able to refer to the Commission a concentration, which does not have a Community Dimension, but which affects trade between Member states and threatens to significantly affect competition within its territory.¹⁴⁹ With the current EUMR NCAs are given the possibility to refer any concentration as defined in Article 3, of the same regulation, that don’t have a Community Dimension within the meaning of Article 1 to the Commission.

Once a referral has been made, the Commission follows the procedural rules of the EUMR as if the merger in question had a Community Dimension. In the previous Merger Regulation, the Commission could not examine the effects of the merger in the territory of Member States, that did not make or join the request, unless the examination of the effects of the merger couldn’t be completed without such examination. This has, however, been changed with the current EUMR and even though these cases are referred to the

¹⁴⁵ Case T-119/02, *Royal Philips Electronics v Commission* [2003] ECR II-1433, para. 354.

¹⁴⁶ See Case IV/M.784, *Kesko/Tuko* [1997] OJ L174/47 and Case *Blokker/Toys’R’Us* IV/M.890 [1998] OJ L316/1.

¹⁴⁷ The previous provision had both procedural and operational shortcomings. See Green Paper on the Review of Council Regulation (EEC) No 4064/89, COM/2001/0745 final, para 25-26. See also Regulation 139/2004 [2004] OJ L24, recital 12.

¹⁴⁸ <http://ec.europa.eu/competition/mergers/statistics.pdf>, accessed March 17, 2017

¹⁴⁹ Regulation 139/2004 [2004] OJ L24, recital 15.

Commission by the Member States (or their NCAs), the Member States do not have any power over how the Commission conducts its investigation, and the Member States can't apply their national competition rules.¹⁵⁰

The takeover of Sulzer Textil by Proatech was the first merger that was jointly referred to the Commission with the application of Article 22 of the EUMR.¹⁵¹ This merger was referred to the Commission by seven NCAs. Sulzer Textil was the textile machinery division of Swiss company Sulzer Ltd. that Promatech SpA, another maker of weaving machinery, wanted to acquire. The deal did not meet the threshold requirements in Article 1 of the EUMR, and so did not have a Community Dimension. The Commission found, after a careful examination of the proposed concentration, that the operation raised serious doubts as to its compatibility with the common market and with the EEA Agreement. The Commission identified serious competitive concerns in the market for rapier weaving machines or, alternatively, in a further segmented market for negative rapier weaving machines, in Western Europe, that is to say, in the EEA Member States and Switzerland.¹⁵² Consequently, the Commission initiated proceedings in this case pursuant to Articles 6(1)(c) and 22(4) of the EUMR and Article 57 of the EEA Agreement. The Commission opened phase II proceedings but ultimately approved the merger, subject to divergents.

This case fulfilled the criteria that the Commission now states is necessary for a referral to be made. In the Commission's Notice on Case Referral from 2005, it is explained that because a referral by way of Article 22 may entail additional cost and time delay for the merging parties, they should be limited to cases that appear to present a real risk of negative effects on competition and trade between Member States, and where these effects would be best addressed at the EU level. The Commission has divided the cases that would normally be most appropriate for referral to the Commission pursuant to Article 22. They are:

— *Cases which give rise to serious competition concerns in a market/s which is/are wider than national in geographic scope, or where some of the potentially affected markets are wider than national, and where the main economic impact of the concentration is connected to such markets.*

— *Cases which give rise to serious competition concerns in a series of national or narrower than national markets*

¹⁵⁰ Case T-221/95 Endemol Entertainment v Commission [1999]-ECR II-1299, [1999] 5 CMLR 611, para. 40.

¹⁵¹ Promatech / Sulzer Textil (C (2002) 2807) COMP/M.2698 [2002] OJ L29/27.

¹⁵² Promatech / Sulzer Textil (C (2002) 2807) COMP/M.2698 [2002] OJ L29/27, para 3.

*located in a number of countries of the EU, in circumstances where coherent treatment (regarding possible remedies but also, in appropriate cases, the investigative efforts as such) is considered desirable, and where the main economic impact of the concentration is connected to such markets*¹⁵³

Even though this limits the cases that can be referred by the NCAs to the Commission, Article 22 still offers an important option. If viewed together with the recitals to the EUMR¹⁵⁴, one could assume that, because of the substantial cooperation between the Commission and the NCAs, few cases that could have an impact on competition in the Internal market, or in a substantial part of it, would not be referred by the NCAs to the Commission.

¹⁵³ Commission 'Notice on Case Referral in respect of concentrations' (2005/C 56/02) published 5.3.2005, para. 45.

¹⁵⁴ Regulation 139/2004 [2004] OJ L24, recitals 13-16.

4 Conclusions

The jurisdictional test made with the threshold criteria is only related to the economic size of the parties. As could be seen from the Commission's case *Facebook/ Whatsapp*¹⁵⁵ the turnover of a party in a merger is not always a clear indication of the size of the merger or the possible impact that it could have on the Internal market. This case also clearly shows that turnover is not necessarily a clear indication of the possible value of the undertakings that are parties to the merger in question.

In situations like this the undertakings may, even with the limited turnover, still play a competitive role on the relevant market, e.g. they might have a significant number of users or have significant amount of valuable assets that do not fall under calculatable turnover. To cover the perceived legal gap that could occur because of instances like these there have suggestions have been made that are aimed at complementing the existing turnover-based jurisdictional thresholds by addition of further notification requirements that would be based on alternative criteria, like transaction value for example.¹⁵⁶ New developments in industries, such as the digital and pharmaceutical industries, have in particular shown that these types of mergers are not merely possibilities, thought up by forward thinking legal drafters, but practical reality.

Nevertheless, one must question whether these mergers really do fall outside the jurisdiction of the EUMR and, if so, whether they would then have such an impact on the Common market that they shouldn't. As has been explained above, the jurisdiction of the EUMR is quite extensive. Even when the merging parties do not fulfil the turnover requirements the mergers can still be referred to the Commission by request. Either by the parties or the NCAs. These referral mechanisms can be found in Article 4 and 22 of the EUMR.

If a merger falls outside the requirements that make referral by way of these Articles possible and does not have the turnover required in Article 1 of the EUMR, should it then fall under the jurisdiction of the Commission at all?

This would for example be a merger that would be limited to the possible jurisdiction of the NCA of one or two Member States.¹⁵⁷ If this merger would then also affect trade between Member States and threaten to significantly affect competition within the territory of the Member State or States that it is

¹⁵⁵ FACEBOOK/ WHATSAPP (C(2014) 7239) COMP/M.7217 [2014].

¹⁵⁶http://ec.europa.eu/competition/consultations/2016_merger_control/consultation_document_en.pdf, accessed 12 May 2017.

¹⁵⁷ Requirements for referral by Article 4(5).

limited to¹⁵⁸, then the relevant NCAs would choose not to refer the merger to the Commission. This merger would therefore either not meet the turnover thresholds of Article 1 or achieve more than two-thirds of its aggregate Community wide turnover within one and the same Member State.

The turnover thresholds have been a debated subject since the original EUMR. The Commission's previous suggestions of lowering those thresholds was met with severe opposition from some Member States, including Germany, France and the United Kingdom.¹⁵⁹ This, as well as Article 9 of the EUMR, shows that the Member States have argued the importance of their sovereignty with regards to the application of merger rules. The preamble to the EUMR also maintains that there should be close cooperation between the competent authorities in each case.¹⁶⁰ This is complemented with Article 22 of the EUMR. It has been argued that referral by way of Article 22 will not be used often. It was originally a way for Member States to provide sufficient merger control, where none existed, at a national level.¹⁶¹ While it is not used as often as referral by way of Article 4(5) it has been used several times.¹⁶² This can also be seen in the Commission's guiding principles on more appropriate authorities found in the Jurisdictional Notice from 2008:

In principle, jurisdiction should only be re-attributed to another competition authority in circumstances where the latter is the more appropriate for dealing with a merger, having regard to the specific characteristics of the case as well as the tools and expertise available to the authority. Particular regard should be had to the likely locus of any impact on competition resulting from the merger. Regard may also be had to the implications, in terms of administrative effort, of any contemplated referral.

*The case for re-attributing jurisdiction is likely to be more compelling where it appears that a particular transaction may have a significant impact on competition and thus may deserve careful scrutiny.*¹⁶³

¹⁵⁸ Requirements for referral by Article.

¹⁵⁹ Alison Jones, Brenda Sufrin. *EU Competition Law. Text, Cases and Materials* (6th Edition OPU 2016), footnote 124, pp. 1091.

¹⁶⁰ Regulation 139/2004 [2004] OJ L24, recital 14.

¹⁶¹ Paul Craig, Gráinne de Búrca *EU Law. Text, Cases and Materials* (6th Edition OPU 2015), p. 1098.

¹⁶² <http://ec.europa.eu/competition/mergers/statistics.pdf>, accessed May 16, 2017

¹⁶³ Commission 'Notice on Case Referral in respect of concentrations' (2005/C 56/02) published 5.3.2005 5.3.2005, paras. 9-10.

Based on all of this it seems prudent to argue that the Commission shouldn't have to worry too much about the cases that fall outside its jurisdiction and are not referred to them by the appropriate NCAs. If the NCAs and the Commission fulfil their role prescribed in the preamble the EUMR¹⁶⁴ then the relevant mergers should fall under the applicable NACs jurisdiction.

Now Article 4(5) also gives merging companies the option of referring the applicable merger to the Commission. As has been discussed before this option has been used several times, or on average almost 25 times a year since 2004.¹⁶⁵ This option seems like a very practical option for merging parties, as it not only means that the 'One Stop Shop' principle applies, but also gives legal certainty for the parties. The parties can trust the well-established case law of the commission. Not only that but if the parties choose not to refer then the relevant NCAs could still use Article 22 and refer the case to the Commission. This could theoretically also mean that even though the Commission would then be empowered to proceed as if the referred merger had a Community dimension, it is possible that the transaction may be examined by NCAs that didn't join the referral.¹⁶⁶

In the Commission's White Paper from 2014 it is suggested that, because it happens so seldom that a 4(5) referral is vetoed by a NCA, the referral procedure should be simplified. The simplified procedure would mean that instead of having the risk of needing to make multiple notifications to NCAs after having already made a reasoned submission if a Member State objects, the parties would notify directly to the Commission that would then have jurisdiction unless a Member state which would be *prima facie* competent to review it opposed it.¹⁶⁷¹⁶⁸

This seems like a reasonable suggestion and, because simplifying this procedure would make it more likely for merging parties to refer cases to the Commission, it would in reality broaden the Commission's jurisdiction while still giving Member States a chance to oppose each case.

The current determination of jurisdiction exclusively by reference to a fixed turnover-related criteria provides legal certainty for merging companies. The Commission's suggestion of a complementary jurisdictional criteria of a deal-size threshold could introduce further complexity to the EUMR. Also, a

¹⁶⁴ Regulation 139/2004 [2004] OJ L24, recital 13-16.

¹⁶⁵ <http://ec.europa.eu/competition/mergers/statistics.pdf>, accessed May 16, 2017. Calculations were made by author.

¹⁶⁶ White Paper Towards more effective EU merger control (Text with EEA relevance) published 9.7.2014, para 63 see also Alison Jones, Brenda Sufirin. *EU Competition Law. Text, Cases and Materials* (6th Edition OPU 2016), p. 1122.

¹⁶⁷ White Paper Towards more effective EU merger control (Text with EEA relevance) published 9.7.2014, paras. 63-73.

¹⁶⁸ Alison Jones, Brenda Sufirin. *EU Competition Law. Text, Cases and Materials* (6th Edition OPU 2016), p. 1126.

practical aspect is that transaction value can change very fast and a merger, where the transaction value was a certain number in the beginning, could change before the deal is finalised (e.g. where shares in the acquiring company is considered as part of the payment. This was the case in the Facebook/Whatsapp merger where the final value of the acquisition rose from 19 billion USD to 21.8 USD).¹⁶⁹

These aspects seem to go against the path of simplification and functioning of the case referral system, which has been an explained objective in the Commissions publications until now and what was named as one of the reasons for the public consultation that ended the 13th of January 2017.¹⁷⁰

One could assume that in order for changes like these to happen there would have to be a certain number of cases which would indicate the need for the reform. Currently there is not much public evidence of this but in the consultation document the Commission requests consultants to give information on such cases if they know of them.¹⁷¹ It will be interesting to see the results.

Notwithstanding those possible cases, one could still argue that altering the turnover thresholds, and by doing so possibly reducing the legal certainty of the EUMR, would not be worth it. Especially if there are other changes that could be made that would be more coherent with the Commission's aim of a more effective merger control.

It is also important to note that if a merger falls outside the jurisdiction of the Commission, it doesn't fall into some competition law void. The merger will still fall under the jurisdiction of the relevant NCAs and even then, the EUMR provides for circumstances in which cases without a Community dimension can be transferred to the Commission. As it currently stands, the criteria for deciding Community dimension, and thereby the Commission's jurisdiction, is what it was supposed to be; a bright-line test which now is well-established and clear-cut.

Accordingly, all changes to the current threshold system of the EUMR should be made with uttermost caution. Regards should also be made to not only the possible cases that might not fall under the EUMR but also how changes to the threshold criteria might affect the communities whole network of merger law cooperation.

¹⁶⁹ <http://www.reuters.com/article/us-facebook-whatsapp-idUSKCN0HV1Q820141006>, accessed May 17, 2017.

¹⁷⁰ http://ec.europa.eu/competition/consultations/2016_merger_control/index_en.html, accessed May 17, 2017.

¹⁷¹ http://ec.europa.eu/competition/consultations/2016_merger_control/consultation_document_en.pdf, accessed May 17, 2017.

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