

COMPETITION POLICY AND ECONOMIC DEVELOPMENT

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MERGER CONTROL IN EUROPE AND GERMANY: RECENT DEVELOPMENTS

While there are numerous recent developments in the field of merger control in both Europe and Germany that might be examined, this Essay will explore the field generally without addressing the case law—an approach that seems fitting given the international character of this symposium. To this end, I focus on four points of general interest that concern issues inherent to merger law: (1) identifying the most appropriate test to assess the desirability of mergers; (2) determining the role of efficiency in merger assessment; (3) solving the common conflict between competition law and industrial policy in merger cases with an emphasis on the German solution; and (4) evaluating merger control in small, developing countries.

The European Commission (“Commission”) explored the relevant substantive test of merger control and the role of efficiency in its Green Paper of December 2001, which is a publication that sparked an intensive and lively discussion.¹ This Essay will briefly summarize and assess the principle arguments stemming from that discussion.

I. THE RELEVANT SUBSTANTIVE TEST OF MERGER CONTROL: DOMINANCE VS. SUBSTANTIAL LESSENING OF COMPETITION (SLC)

Article Two of the EC Merger Regulation (“ECMR”) relies on the dominance test. The Green Paper compares this test to the substantial lessening of competition test used in many jurisdictions, notably the United States. Both procedural and substantive reasons have been advanced for a reevaluation of the appropriateness of these tests.²

[†] Due to circumstances beyond this Law Review's control, we have relied on the integrity of this Author for all citations provided herein.

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1. Green Paper on the Review of Council Regulation 4064/89, COM(01)745 final [Green Paper], available at http://europa.eu.int/eur-lex/en/com/gpr/2001/com2001_0745en01.pdf (last visited Jan. 19, 2004).

2. See Ulf Böge & Edith Müller, *From the Market Dominance Test to the SLC Test: Are There*

From a procedural viewpoint, the main reason proposed in favor of a test reevaluation is that it could allow an alignment of the Merger Regulation's appraisal criteria with those applied in other major jurisdictions, such as the United States, Canada, and Australia—jurisdictions that rely on “the SLC test.”³ The creation of a global standard for merger assessment holds a certain attraction. It would, for example, simplify the assessment by merging parties of possible competition issues arising from contemplated transactions in an international context by obviating the current need to argue each case according to the different tests.⁴ This simplification would in turn provide agencies charged with reviewing competition with a better basis on which to build effective cooperation in cases involving more than one jurisdiction. Moreover, as a common test would tend to draw attention to the application of the test, rather than to the test itself, it would ultimately provide for better benchmarking of the activities of competition authorities and courts, as well as facilitating the development of competition-oriented research and modeling.

From a substantive viewpoint, there are many similarities between the dominance test and the SLC test.⁵ Both tests, for example, involve an investigation into the scope of the relevant market, an assessment of how the market will be affected by the proposed concentration, and a determination as to which competitive constraints would bind the merged entity. It should also be noted that, despite the current difference in legal tests, the vast majority of cases dealt with by the Commission and the major jurisdictions using the SLC test have revealed a significant degree of convergence in the systems' approaches to merger analysis.⁶

It has been argued that the SLC test is a more appropriate standard because of its consideration of economic factors, which is a requirement that avoids the legal “straitjacket” of establishing dominance.

Any Reasons for a Change, 23 (10) E.C.L.R. 495, 498 (2002); Kai-Uwe Kühn, *Reforming European Merger Review Targeting Problem Areas in Policy Outcomes*, 2 J. INDUS. COMPETITION & TRADE 311, 335 (2002); INGO SCHMIDT, WIRTSCHAFT UND WETTBEWERB-ZEITSCHRIFT FÜR DEUTSCHES UND EUROPÄISCHES WETTBEWERBS, KARTELL-, UND FUSIONSRECHT 155 (2003).

3. David S. Evans & A. Jorge Padilla, *Demand Side Efficiencies in Merger Control*, 26(2) World Competition 167 (2003); Charles Miller, *UK Competition Policy Reform: Impact of the Latest Proposals on Processes and Influences*, 23(2) E.C.L.R. 68 (2002); MARKUS BURGSTALLER, WIRTSCHAFT UND WETTBEWERB 726 (2003).

4. Wolfgang Von Meiborn & Andreas Geiger, *A World Competition Law as an Ultima Ratio*, 23(9) E.C.L.R. 445 (2002); J. William Rowley QC, Omar K. Wakil & A. Neil Campbell, *Streamlining International Merger Control*, presented at EC Merger Control 10th Anniversary Conference 3 (2000).

5. Böge & Müller, *supra* note 2, at 498.

6. *See generally supra* note 4.

Furthermore, the dominance test is considered to be too focused on static structural considerations such as corporate size or industry concentration, and does not allow for sufficient consideration of dynamic and behavioral factors.⁷ It has been pointed out that, while the dominance test has been successfully applied to some cases involving coordinated effects, the SLC test is nonetheless better suited to the type of analysis that these cases necessitate.⁸

In general, it is believed that the SLC test is more flexible, and as a result, can better accommodate an effects analysis based on more sophisticated microeconomic tools, instruments, and models developed through econometric and industrial organization research.

German experts, from the Monopolies Commission⁹ and Federal Cartel Office (FCO),¹⁰ to national scholars in the field,¹¹ oppose international adoption of an SLC type test. These groups argue that in principle, there are no substantive differences between the tests, and therefore, there are no convincing reasons for changing the prohibition criteria from the market dominance test to the SLC test.

As evidenced by an analysis carried out by the Bundeskartellamt (German Federal Cartel Office) for the Conference of the Working Group on Cartel Law held in 2001,¹² both criteria ultimately pursue the same primary objective: the prevention of undesirable market power. In defining SLC, both U.S. and Australian Merger Guidelines, for example, refer to the concept of market power. Market power, in turn, is defined as the possibility of acting differently from what would be expected under the conditions of effective competition.¹³ It appears then, that the SLC test assesses precisely the “scope of action which is not sufficiently controlled from a competition point of view” that is typically used to define a dominant position in European merger control.¹⁴ It logically follows that the two criteria do not differ significantly in terms of their substantive content—both allow concentrations to be analyzed in a rigorous, flexible, and effective manner.

7. Green Paper 37, *supra* note 1; HILDEBRAND, WORLD COMPETITION 3 (2002).

8. INGO SCHMIDT, WIRTSCHAFT UND WETTBEWERB (2003); METTE ALFTER, WIRTSCHAFT UND WETTBEWERB 20 (2003).

9. Monopolkommission, Hauptgutachten XIV (2000/2001) 325 (2002).

10. *Infra* note 12.

11. STEFAN VOIGT & ANDRÉ SCHMIDT, WIRTSCHAFT UND WETTBEWERB 899 (2003).

12. Bundeskartellamt, Comparative Study, Fall 2001, *available at* http://www.bundeskartellamt.de/discussion_papers.html (last visited Jan. 19, 2004).

13. VOIGT & SCHMIDT, *supra* note 11.

14. *Id.*

Convergence, however, is not the only point that must be addressed. While the SLC test might be inherently more flexible, it is a more uncertain standard. This uncertainty may well result in lower thresholds that would, in turn, allow the Commission unacceptably broad discretion in its analysis of merger cases.

Another essential point is the serious practical drawbacks that will follow as a consequence of a change to the SLC test. These drawbacks affect industry and legal practitioners, as well as the Commission and European courts. At least initially, the change could result in a degree of uncertainty or unpredictability about how exactly the new standard would be interpreted. Decades of dominance test application by both the Commission and European courts has resulted in a considerable body of precedential case law, in both Germany and Europe in general, involving the dominance test.¹⁵ These experiences would become, at least to some extent, moot. In addition, many member States of the European Union and most of the EU accession candidate countries have aligned their substantive merger control provisions with the dominance test.¹⁶ It is clear then that while a change to the SLC standard would facilitate convergence with some jurisdictions, it could also result in a counterproductive degree of disunity among the EU's national regimes.

Despite their similarities, however, cases such as *GE/Honeywell*¹⁷ make it clear that the tests possess a number of differences as well. These differences are unavoidable even where there is close cooperation between the agencies concerned.¹⁸ However, these differences are not necessarily a result of the application of different substantive tests, but perhaps of differences in the economic theories applied, or the parties' principle objectives of competition policy.¹⁹

II. MERGER CONTROL AND EFFICIENCY DEFENSE

The efficiency defense allows a merger to proceed when the benefits to the economy resulting from the greater efficiency are deemed to outweigh

15. *Id.*; Doris Hildebrand, *The European School in EC Competition Law*, 25(1) WORLD COMPETITION 3 (2002).

16. See IMMENGA & MESTMÄCKER (EDS.), 1 EG WETTBEWERBSRECHT 789 (1997).

17. *General Electric/Honeywell*, COMP/M.2220 (July 3, 2001).

18. Yusaf Akbar, *Grabbing Victory from the Jaws of Defeat: Can the GE/Honeywell Merger Facilitate International Antitrust Co-operation*, 25(4) WORLD COMPETITION 403 (2002); Larry Fullerton & Camelia C. Mazard, *International Antitrust Co-operation Agreements*, 24(3) WORLD COMPETITION 405 (2001).

19. For a focus on trade liberalization, see Andrew D. Mitchell, *Broadening the Vision of Trade Liberalisation: International Competition Law and the WTO*, 24(3) WORLD COMPETITION 343 (2001).

the harm suffered by the economy from reduced competition. U.S. merger control is moving, at least to a certain extent, in this direction. Under the EC Merger Regulation, however, the issue of efficiency has been raised in only a limited number of decisions, chief among them, the case of GE/Honeywell.²⁰ There is a clear relationship between the efficiency defense and the substantive test, however it is difficult to reconcile this defense with the dominance test.²¹

Any discussion of the relevance of the efficiency defense requires a brief examination of its conception. This conception appears in the application of U.S. merger control, however, a discussion of this conception is not within the scope of this Essay. Instead, the following discussion is restricted to the relevant provisions of the horizontal Merger Guidelines issued by the Antitrust Division of the Department of Justice, which were revised in 1997.²²

The potential conflict between efficiency and competition is known as the “Williamson tradeoff.”²³ According to the standard defense of efficiency, efficiency gains can outweigh competitive losses from mergers. The Merger Guidelines expressly consider efficiency in Section Four. This so-called “efficiency section” was the primary target of the revisions of the Guidelines’ in 1997. The revised Guidelines set out, for the first time in great detail the policies applied by both the Antitrust Division and the FTC in analyzing efficiency claims in mergers.²⁴

The new Section Four begins with a general recognition of merger-related efficiency, stating that “mergers have the potential to generate significant efficiencies by permitting a better utilization of existing assets, enabling the combined firm to achieve lower costs in producing a given quantity and quality than either firm could have achieved without the proposed transaction.”²⁵ This declaration appears to indicate that the Guidelines are adopting a broad definition of the potentially pro-competitive effects of mergers. It seems to follow then that the Government will accept all types of merger-related efficiency as long as they result in lower prices, improved quality, enhanced services, or new

20. Eleanor M. Fox, *Mergers in Global Markets: GE/Honeywell and the Future of Merger Control*, 23 U. PA. J. INT’L ECON. L. 457, 458 (2002).

21. Fabienne Ilzkovitz & Roderick Meiklejohn, *European Merger Control: Do We Need an Efficiency Defence?*, 3 J. INDUS. COMPETITION & TRADE 57 (2003).

22. FTC 1992 Horizontal Merger Guidelines with 1997 revisions, <http://www.ftc.gov/bc/docs/horizmer.htm> (last visited Jan. 19, 2004).

23. HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY* 501 (West Pub. Co. 2d ed. 1999).

24. RICHARD A. POSNER, *ANTITRUST LAW* 130 (Univ. of Chicago Press, 2d ed. 2001).

25. Fox, *supra* note 20.

products. A footnote makes clear, however, that the agencies deem efficiency that affects marginal costs more likely to be cognizable than other types of efficiency. Greater weight is thus given to short-term efficiency than to any claimed long-term cost savings, although the Guidelines state that delayed efficiency gains will be taken into account.²⁶

The Guidelines also refer to efficiency which will be considered in merger cases. This “merger-specific” efficiency is efficiency “likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or other means having comparable anti-competitive effects”.²⁷ The agencies therefore fail to consider pro-competitive efficiency that would likely occur without the proposed transactions, for example, through plain cost cutting, joint venture, licensing, or divestiture.²⁸ As it is difficult to define efficiencies with complete specificity, and as there is theoretically always the possibility to pursue increased internal growth as a least restrictive alternative to a proposed merger, the Guidelines point to a focus on the practical alternatives merging firms face in their specific business situations.²⁹

The burden of proof rests with the merging firms. They must be able to explain: how, when, and at what cost the efficiency will be achieved; why the cost savings are merger-specific; the likelihood and magnitude of claimed efficiency likely to result from the merger; and how the efficiency will affect the merged firm’s ability or incentive to compete.

When weighing such efficiency, the agencies will offset the resultant benefits by the costs associated with the merger and with obtaining the savings. It is only the net efficiency that is, therefore, balanced against any adverse competitive effects. The agencies will not challenge a proposed merger if the cognizable efficiencies are of such a type and magnitude that they would offset the merger’s potential harm to consumers in the relevant market. In conducting the overall analysis, the agencies evaluate whether the benefits from any efficiency is sufficient to prevent price increases to relevant consumers. This means, in effect, another tradeoff. On the sole condition of sufficient remaining competition, advantages resulting from efficiency must be balanced against consumer welfare—this is a serious

26. HOVENKAMP, *supra* note 23, at 504.

27. Fox, *supra* note 20.

28. LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 608 (2000).

29. Fox, *supra* note 20.

restriction. It is interesting to note that Article Two of the EC Merger Regulation contains an identical restriction.³⁰

It is questionable whether or not the EC Merger Regulation provides a legal basis for its consideration of efficiency benefits likely to result from a proposed merger. The issue is only referenced in the second part of the dominance test in Article Two, sections two and three (referring to a significant impediment to competition) and section one (subpart b) (referring to a consideration in an assessment of a concentration of the interests of intermediate and ultimate customers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition).

The Commission, in general, has failed to utilize Article Two in the development of a real efficiency defense. In my view, there are two arguments against such an application. First, the very existence of a second part of the dominance test in Article Two is controversial in and of itself. Second, the encouragement of technical and economic progress is one of the criterion used to assess market dominance but not to justify market dominance. As a result, Article Two has also been interpreted to support an "efficiency offence," allowing the Commission to argue that the efficiencies resulting from the merger are likely to have the effect of reducing or eliminating competition in the relevant market. If any efficiency considerations were advanced, the Commission generally countered their value through an invocation of the text regarding technical and economic progress and consumer advantage. The Commission asserts that this latter requirement is not fulfilled if there is a dominant position that prevents the passage of advantages on to consumers.³¹

Initial reactions to the Green Paper were mostly favorable. The arguments advanced were generally in line with criteria, which were developed in conjunction with the U.S. model. Furthermore, it had been stressed that merger-specific efficiencies are only those that are achieved by the merger and not by other means, for example, through cooperation. Nevertheless, any consideration of efficiencies in the European context should be clarified by altering the wording of the substantive test—not the dominance test—and through the introduction of clear additional text.

Another aspect of this discussion is a focal point in German circles. The German Monopolies Commission has observed that efficiency should be generally related to, or at least an aim of, merger activities; these are

30. Commission Regulation 4064/89; WISH'S COMPETITION LAW BOOK 728 (4th ed. 2001).

31. Case No.IV/M.53/Aérospatiale-Alenia/de Havilland 2001 O.J. (L 334) 42.

standard cost-saving synergies, and are considered to be the basis of merger control.³² Merger control and control of anti-competitive agreements, however, differs considerably with regard to the presumed impact on competition. The spectrum of tests to determine merger control ranges from that of assessing horizontal agreements to that of assessing market dominance. The latter test allows for a much higher degree of anti-competitive effects.³³ With regard to competition policies, this difference is justified by the inherent economic advantages generally expected to result from mergers—the built-in efficiencies. Any efficiency defense might, therefore, be justified in only the rarest of cases if there are not only standard synergies, but those going above and beyond as well, such as technological advantages or innovation. This line of argument generally fails to consider efficiency in the merger context, save in extreme cases where an exception might be justified. In order to avoid uncertain and often unfounded discussions revolving around efficiency in myriad individual cases, these exceptions should not be incorporated into merger law.

III. INDUSTRIAL POLICY AND MERGER CONTROL

The Report of the World Trade Organization's (WTO) Working Group on the Interaction between Trade and Competition Policy to the General Council recognizes the limits of competition laws, particularly with regard to political interests that may conflict with market-oriented legislation.³⁴ The Report included discussion regarding the appropriate measures needed to address tacit and explicit government policies tolerating and encouraging anti-competitive practices, or the consideration given to factors other than "pure" competition concerns in merger evaluation.³⁵ National competition laws identify international competitiveness as a goal. Furthermore, it was stated that implementation of a merger control system might, at least in economies still adjusting to foreign competition, create an obstacle to beneficial rationalization and discourage foreign direct investment.

32. Monopolkommission, Hauptgutachten XIV (2000/2001) 326 (2002).

33. MESTMÄCKER & VEELKEN, *GWB KOMMENTAR* § 36 n.19 (Immenga & Mestmäcker eds., 3d ed. 2001).

34. Document WT/WGTCP/2 (98-4914).

35. *Id.*

These issues are widely discussed in Europe, particularly within the European Community and Germany, under the heading “Industrial Policy and Competition Policy.”³⁶

The politicalization of the *Boeing/McDonnell-Douglas* case³⁷ effectively illuminates the topics of industrial policy and competition policy.³⁸ This case involved the merger of two U.S. companies. While the companies’ productive assets were confined to the United States,³⁹ the market for their large passenger jets was most certainly global. The merger was to result in a market share of sixty-five percent for the newly merged company (sixty percent Boeing; five percent McDonnell-Douglas), with European Airbus holding roughly thirty percent of the remaining marketshare. The Federal Trade Commission authorized the merger on competition grounds, however, the Commission very nearly prohibited the transaction. This contradictory appraisal could have resulted in a trans-Atlantic trade war between the United States and the European Union. The U.S. Government feared the effects of merger prohibition on its defense industry and labor markets, and it presented these concerns to the Commission.⁴⁰ These arguments contributed mightily to the Commission’s decision to stay away from a more severe intervention into the merger. It did, however, impose several conditions aimed at the merger’s exclusive-dealing arrangements. The U.S. Government rebuked these conditions as the Commission’s attempt to bolster European Airbus.⁴¹

This type of conflict between industry interests and the application of competition policy may arise on the national level as well. Case in point is Germany’s Daimler-Benz/MBB merger⁴²—initiated by the German Government. The FCO barred the merger on pure competition grounds, arguing that it would have allowed the new company to become the dominant force in several defense-related markets, particularly, the air and space industry. The FCO expressly stated that it would not consider any criteria that were not related to competition.⁴³ Ultimately, however, the

36. Ulrich Immenga, *Conflicts Between Competition Policy and Industrial Policy*, in TOWARDS WTO COMPETITION RULES 343 (Roger Zäch ed., 1999).

37. Case No.IV/M.877-Boeing/McDonnell Douglas, 1997 O.J. (L 336) 16. For a detailed discussion, see William E. Kovacic, *Transatlantic Turbulence: The Boeing-McDonnell Douglas Merger and International Competition Policy*, 68 ANTITRUST L.J. 805 (2001).

38. Fox, Antitrust Report 20 (Nov. 1997).

39. Immenga, *supra* note 36.

40. HIRSBRUNNER, EUROPAISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 390 (1999).

41. Kovacic, *supra* note 37.

42. Monopolkommission, Sondergutachten 18 (1989), Bundeskartellamt, 2335 WuW/E BKartA; Bundesministerium für Wirtschaft, WIRTSCHAFT UND WETTBEWERB 191 (1989).

43. Kovacic, *supra* note 37.

Federal Economics Minister authorized the merger—an action completely in accord with the Minister’s official rights and duties under German law. The Minister cited international competitiveness, the creation of economies of scope, and the preservation of high technology labor as his rationale for the authorization.

A further example in this context is the first prohibition of a merger by the Commission. In this matter, a French/Spanish joint venture (ATR) intended to acquire de Havilland, a Boeing subsidiary.⁴⁴ The Commission refused to authorize this acquisition because it believed the merger would result in high shares in the turbo-aircraft market. In the aftermath, the French Government accused the Commission of failing to consider the predominant aspects of European and national interests in the aircraft industry.⁴⁵ This line of cases representing “industrial policy” might easily be expanded, and it illustrates the enormous potential for conflicts between national or regional interests in specific industries. These conflicts may result in a tolerance of anti-competitive activities by firms in these industries.

Merger law provisions are, at least in most EU Member States, more or less open to industrial policy considerations alongside competition policy. The texts range from a defense of public interest and international competitiveness concerns (e.g., in Spain and France),⁴⁶ to an emphasis on technical and economic progress (e.g., in Spain, Portugal, and Belgium). The relationship of these concerns to competition criteria is determined in different ways. Beyond the relevant rules, one must consider that there are different institutions applying these rules among the various antitrust authorities and ministries. These patterns reflect the respective attention being paid to industrial policy if opposed to competition policy.

Germany provides a specific and, with the exception of recent Swiss legislation, unique institutional solution. When merger control provisions were introduced in 1973, both the Minister of Economics and industry in general insisted that under certain sets of circumstances where paramount national interests are at stake, the Minister of Economics should be authorized to override a decision by the FCO to prohibit a merger. In response, the law was drafted in a manner that divides the competences between both institutions. The FCO is confined to a strict application of

44. See generally *supra* note 31.

45. Leonard Hawkes, *The EC Merger Control Regulation: Not an Industrial Policy Instrument: The De Havilland Decision*, 13(1) E.C.L.R. 34 (1992).

46. Lucie Carswell Parmentier, *Reform of French Competition Law: Adoption of a Mandatory Pre-Merger Control Regime*, 23(2) E.C.L.R. 99 (2002).

the relevant merger control criteria.⁴⁷ In the aforementioned *Daimler-Benz/MBB* case, for example, the FCO expressly refrained from any political considerations. The Minister of Economics, however, is empowered to authorize any FCO-prohibited merger on the condition that the negative anti-competitive effects of the merger are outweighed by general economic advantages, or justified by a predominant public interest. According to the text, this appraisal must also take into account the international competitiveness of the firms involved. In addition to these requirements, the independent German Monopolies Commission must be consulted by the Minister of Economics for its views on the case. This system similarly applies to prohibited cartels that may be authorized for public interest reasons by the Minister of Economics.

This institutional solution obviously raises a host of pertinent questions. Is for example, this method a portal through which political influence can erode competition policy? To date the Minister of Economics has made little use of this authority, accepting that such power should only be employed under exceptional circumstances. As of 2001, there were 133 prohibitions of mergers and sixteen resulting demands for ministerial authorization. Of these demands, only six were granted, and most of these were subjected to a number of conditions.⁴⁸ The Monopolies Commission positively assessed these decisions as well as the institutional separation of competitive and political criteria.

To render this system truly viable, two preconditions must exist. First, the institutional process of decision-making must take place publicly. A prohibition by the FCO, for example, is published as well as the results of the Monopoly Commission's consultation, and a public hearing precedes the decision of the Economics Minister. As a result, the Minister of Economics must articulate strong arguments in order to overcome considerations of free and unrestricted competition. The transparency of this institutional process keeps the public abreast of industrial developments and impedes the ability of political influence to dictate the outcome of merger assessments. Second, an equally important precondition is a basic understanding between the FCO's and the Minister of Economic's comprehension of the values and virtues of an open market system. In the German context, this coherence dates back to the first German Minister of Economics, Ludwig Erhard, who strongly advocated a

47. The competition-related conclusions in the decision of the Bundeskartellamt are binding for the Minister's decision, see MESTMÄCKER & VEELKEN, *GWB KOMMENTAR* § 42 n.29 (Immenga & Mestmäcker eds., 3d ed. 2001); Möschel, *Betriebs Berater* 2078 (2002).

48. MESTMÄCKER & VEELKEN, *GWB KOMMENTAR*, *supra* note 47, § 42 n.2.

competitive economic order and was one of the founders of Germany's economic model, the social-market system.

There has been some discussion as to whether this institutional model should be incorporated into European Community law through the creation of an independent antitrust authority requiring transfer of competence from the Commission (General Directorate IV on competition) and the institution of a second-level organ that can override prohibitions of the independent authority.⁴⁹ This, however, is a subject I will not elaborate on in this Essay.

Any adoption of the German model, however, requires the adoption of three conditions derived from the German experience to make it viable. First, the antitrust authority must be truly independent and act with antitrust experts nominated irrespective of any quorum. Second, institutions at both levels must have a basic and common understanding of the role of competition in the economy and society. Without this cohesive understanding, it is likely that all or most prohibited cases would result in a second-level assessment. Third, the entire process must be transparent in order to facilitate genuine and well-informed public participation.

IV. GLOBAL COMPETITION AND NATIONAL MERGER CONTROL IN SMALL DEVELOPING COUNTRIES

The above mentioned Report of the WTO Working Group on the Interaction between Trade and Competition Policy reveals a certain reluctance of smaller States, particularly developing countries, to implement merger control as a part of their competition laws.⁵⁰ At first glance this attitude appears understandable. There is an underlying assumption that the generally small companies in these countries will not be in a position to compete in international markets until they reach a certain critical size. Confined to their small national markets, this growth seems impossible. Under these circumstances, the most logical move would be for these companies to combine with competitors in their national markets or in neighbouring states in order to reach the necessary dimensions required for competition abroad. The application of national merger control is thus considered an obstacle to development.

This line of arguments is convincing if mergers will create companies that dominate national markets in the countries concerned and would, therefore, be prohibited; in practice this might reasonably be expected. In

49. Immenga, *supra* note 36.

50. *Supra* note 34.

such cases, however, it is the definition of the relevant geographic market that is the decisive point, whether the markets concerned are defined as national or international. If international competition is a firm's concern, it should be assumed that the markets for its business activities are international—provided that there are no state barriers to cross-border trade—and if markets have to be defined as international, the firm's of smaller countries will not generally dominate those markets. Consequently, there is no reason to believe that national merger control will result in wide-scale merger prohibition. The external growth of firms in small, developing countries will not be impeded by national merger control if the activities in question are related to international or even global markets. It must be noted that national companies that do not face serious competitive constraints from abroad will have their markets defined as national. The effects of a national merger would likely have a detrimental impact on national markets and at that point, it is the function of merger control to intervene.