CHAPTER THREE

A COMPARATIVE ANALYSIS OF EC AND US MERGER CONTROL LAW: THE SUBSTANTIVE RULES

I. Introduction

This paragraph is concentrated to the comparative analysis of the US and EC merger control laws by focusing on the substantive rules. The second section gives a brief account of the substantive tests adopted by the US and the EC. The third section looks at the methodologies for the definition of relevant markets. The fourth section looks at the approaches of the US and EC competition authorities for the assessment of the alleged anti-competition effects of mergers. The fifth section compares the scope of application of the substantive tests adopted by US and EC. The sixth and seventh sections examine the Boeing/Mc Donnell Douglas and General Electric/Honeywell cases and review the different positions taken by the EC and the US on these mergers. The eighth section outlines the different approaches adopted by these two jurisdictions for the regulation of mergers between large firms, namely in case of conglomerate mergers. The ninth section tries to identify the reasons of such a difference, which may be indicated in the different goals of competition law, in confidence in market forces, in the availability of post-merger remedies and in the treatment of efficiencies. The tenth section summarises the reasons which can be invoked to explain the divergent views between US and EC on merger cases. It also addresses the question whether the EC Regulation 139/2004 has eliminated any causes of the above divergences. The eleventh section draws conclusions.

II. Substantive assessment of mergers: Introductory remarks

A. The US substantive test

The purpose of merger control is to defend the competitive structure of markets from the risk of an accumulation of excessive market power in the hands of one or a few firms. The EC and US merger control laws employ different substantive tests to establish whether a proposed merger operation would have restrictive effects on competition and therefore should be prohibited.

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The US law prohibits a merger when the consequences of the acquisition of stocks and assets, through which the merger is implemented “may be substantially to lessen competition, or tends to create a monopoly”. This formula focuses on the prohibition of mergers the consummation of which may lead to a significant decrease in the competitive structure of markets. A merger is more likely to produce these effects when the market power of the merged entity in the post-merger markets is such as to enable it to raise prices and reduce output level.2

B. The EC substantive test

EC merger control law initially adopted the market dominance standard, which consists of two phases. First, the Commission had to establish whether the merger would create or strengthen a dominant position in the market; secondly, it evaluated the impact of the merger on the competitive structure of the markets concerned.3 As explained above, the recent judgments of the Court of First Instance sparked the debate regarding the overhaul of EC Regulation 4064/89. The discussion concerning the amendment of the substantive provisions of the regulation mainly revolved around the question whether the market dominance test should be abandoned in favour of the substantial lessening of competition test.4

The switch to the substantial lessening of competition test would bring the EC much closer to the US and other important jurisdictions such as Canada and Australia. Firms trading globally would enjoy a level playing field in merger control in many jurisdictions with a following reduction in transaction costs. Another merit normally recognised in the substantial lessening of competition test is its flexibility and economics-based nature. As a result, its adoption would allow a more attentive position on the enhancement of consumers’ welfare and on the efficiencies resulting from the mergers.

The majority of the replies received by businesses and counsellors pointed out that the advantages of the adoption of the substantial lessening of competition test would not compensate the disadvantages of the abolition of the market dominance test. In the initial period of application of the new test