

THE VOLVO/SCANIA MERGER:
An Analysis of the EC Merger Process

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SUMMARY

During the last few years activity in the market for mergers and acquisitions has reached unprecedented levels. Corporations are creating ever larger entities with operations which are truly global in nature. The ten largest mergers in history were announced in 1998 and 1999 alone. Examples include the merger between Daimler/Chrysler and Vodafone/Airtouch. As transactions reach ever increasing sizes companies are facing greater opposition from regulators in relation to the potential negative effect on competition in the markets where they operate. The European Commission has decided to block a number of high profile transactions in recent times for this very reason. Some of the most notable examples include General Electric's proposed acquisition of Honeywell, the merger between SEB and Föreningsparbanken and the merger between Volvo and Scania.

The basis for merger analysis in EU competition policy is Council Regulation No. 4064/89 which came into force on September 21, 1990 and created the Merger Task Force. It refers to concentrations with a Union dimension, which are assessed in combination with their compatibility with the Common Market. EC Merger Regulation is designed to prevent the negative effects, which are related to changes in the competitive structure of the market. A transaction is prohibited when it has sufficiently negative effect on competition. If there is no increase in the market share as a result of the concentration, there will accordingly be no significant impact on the market and the merger will most likely be approved.

This essay will describe the Merger Process from a theoretical perspective, as well as from a practical perspective, including an extensive description of the process of defining the relevant markets and all of the stages in the market investigation of the Volvo/Scania merger case. The study is an attempt to highlight the different types of aspects of the arguments presented in the Volvo/Scania merger case, and will conclude that the legal arguments in the presentation of the merger analysis are in a great extent based on economical facts and assessments. This conclusion goes well with the tendency that competition law arguments indeed differ from traditional legal argumentations.

Following the Volvo/Scania merger decision, a wide discussion was initiated regarding the outcome of the case. It has been argued which type of criteria laid the ground for the decision, how these criteria were assessed by the Commission and further which type of criteria ought to be assessed in a merger investigation. The fact that only a certain type of arguments are accepted as being part of a merger process, relates to the assumption that arguments featured in legal arguments, such as in the EC Merger Process must meet certain criteria in order to be approved of and allowed to form the basis for a decision. The standards presumed to be met in order to be accepted as part of the legal discussion in this study are: comprehension, sustainability, relevance and objectivity. The study concludes that the arguments used by the Commission in its final decision, do meet the above listed standards and accordingly seem to contribute to the decision having been made on fair conditions.

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1 INTRODUCTION

1.1 Background

A concentration (merger or acquisition) is a transaction where two companies combine their operations in order to create a new or improved entity. According to EC Merger Regulation, mergers corresponding to certain limits, as set by the regulation must be notified to the EC Commission which will conduct an investigation regarding the possible creation of a dominant position due to the market power and market shares of the combined entity. As EC Competition Law has grown to play an important role of national-, as well as European legislation, it has become all the more important for companies to be aware of the impact Merger Regulation has on M&A activity (mergers and acquisitions). As a result of the increasing number of mergers and acquisitions in Europe, the Commission has had to make an increased number of rulings on the matter.

European mergers have received much attention during the past few years. The media, company representatives, economists, politicians and the public have discussed mainly European mergers extensively, and not seldom criticised, the Commission and its interpretation of EC Merger Regulation. One of the reasons for the “newly gained” high profile of merger cases is not only the increasing number of mergers in recent times, but also the significant size of the proposed transactions. The ten largest mergers in history were announced in 1998 and 1999 alone. Examples include the merger between Daimler/Chrysler and Vodafone/Airtouch. The Commission has decided to block a number of high profile transactions in recent times. Some of the most notable examples include General Electric's proposed acquisition of Honeywell, the merger between SEB and Förenings Sparbanken and the merger between Volvo and Scania.

It may be argued why Competition Law discussions differ from traditional legal discussions, as may also be discussed what the other types of criteria, part from legal ones, are put forward. Also interesting of course, is whether any of the non-legal aspects actually have impact on the final decisions made by the Commission, and if so, how much impact such aspects may have.

Financially, symbolically, as well as politically important and controversial, the Volvo/Scania merger is a descriptive case in terms of how the merger process works practically. Further, this case shows how other arguments than strictly legal, can play a role, although it is arguable what type of impact such attention may have. As a result of the then ongoing, and later failed merger between Volvo and Scania in 1999-2000, a widely held debate around Europe argued whether the Commission's decision was right or wrong, whether the merger process in itself was fair and legitimate, and what implications European Merger Control would have on competition within Europe, as well as towards other markets.

One interesting aspect of the EC Merger Process is the type of mystification profile it has been given. The Commission and the Merger Regulation have been regarded as somewhat untouchable, in the sense that an extensive part of the Merger Process is confidential and in some parts not even regulated. The possibilities of insight into the Merger Process and the work of the Commission have been criticised for being far too limited. Other Member States,

among them Sweden, are used to an extensive transparency and openness into politics and other public matters. It may appear disturbing that such an important institution such as the Commission seems to be able to work in the dark, without much insight. Supported by a description of the Merger Regulation and application on the Volvo/Scania merger, this study will hopefully contribute to increased awareness of how the merger process is actually conducted and how the Commission reaches a decision in a proposed and notified merger.

1.2 Problem Discussion

There are a number of reasons why companies merge. Financial scholars have particularly focused on companies' ability to extract operational and financial synergies, but attention has also been given to a less noble cause such as increased market power. Market power, which is some times described as monopoly power, is defined as an entities ability to set and maintain prices above competitive levels to the detriment of competitors, consumers and the overall economy. In order to prevent unfair market conditions from being created as a result of a merger, EC Merger Regulation was implemented, underlining the importance of competitive markets and free competition, established as one of the main foundations within the EU. The fact that there are several parties with different aims and interests to protect involved in a merger, results in several different arguments and standpoints being presented.

There have been a considerable amount of media focus and debate on and around recent large mergers investigated and decided by the Commission. Mergers such as General Electric/Honeywell, SEB/Förenings-sparbanken and last but not least Volvo/Scania have set off wide spread discussions regarding EC Merger Control and the role of the Commission. A common notion seems to point out the special character of mergers resulting in especially designed legislation and investigators with a deep understanding of corporate finance and financial information, along with legal knowledge of the consequences of either an approval or a prevention of the proposed merger, mainly due to the size of-, and large financial impacts such a transaction has.

Much of the attention to recent merger cases has been in the shape of criticism against the Commission and its investigations and outcomes of the mergers. Among several arguments is that the Commission has not been consistent in its policy compared to earlier cases, the Commission has wanted to use its power in a dubious way, the Commission has been unfair and unreasonable, not enough financially aware of the implications and consequences, only regarding the legal aspects of the proposed mergers. The political positions of the Commissioners have also been discussed, and whether the fact that there was a shift of Commissioners in the middle of the Volvo/Scania merger case had any impact of the outcome of the case. Apart from representatives from Volvo and Scania, also Swedish politicians, economists, financial analysts, media among others criticised and debated the decision.

The issues highlighted above illustrate the type of presentation and analysis that will follow in this study. It will be investigated which type of arguments are given consideration by the Commission in a merger investigation, and which will eventually form a final decision, either approving or preventing the merger proposal. The aim is to investigate whether the Volvo/Scania decision was made on legitimate grounds and was therefore "right", or whether the Commission seems to have based its decision on other than legitimate grounds.

1.2.1 Problem Definition

The fact that a merger discussion differs from other legal discussions does not in itself seem to pose a matter of debate. What tend to be debated however is which arguments are considered in a merger investigation, and what the impact will be on a final decision as a result of this. As will be discussed further below there are three different main types of arguments will be investigated and evaluated in this study: legal-, economical-, and social, with the background of Merger Regulation and the Volvo/Scania case.

This study will present the EC Merger Process from a theoretical and practical perspective, describing the Merger Regulation and the Volvo/Scania merger case, in order to suggest an answer to the posed question of the study: was the decision in the Volvo/Scania case based on legitimate grounds, and what are the legitimate grounds in a merger discussion.

1.2.2 Purpose

The purpose of this study is to present what arguments are considered in a merger investigation, leading to a final decision by the Commission, and what those arguments are based on in terms of sources and character.

Analysing the Volvo/Scania case, this study will try to show that even though several arguments presented in the case, and in connection with the case, are of economical and political character part from legal character, the Commission's decisions are based on legal investigations and criteria as legislated in EC Merger Regulation.

This thesis will attempt to present the Merger Process from a legal-, as well as political- and economical perspective, in order to hopefully "demystify" the Merger Process and shed some light on the different aspects of the procedures.

1.3 Delimitation

Given the limited resources available, of which time is the most important, it is necessary to try to define and delimit the objective undertaken.

Included in the thesis is a quite extensive presentation of EC Merger Regulation and the Commission's working practises, in so far as it/they relate to the Volvo/Scania merger case.

1.4 Methodological Discussion

1.4.1 Method

In order to define the arguments which base the outcome of EC Mergers, it will be necessary to first look into what theoretical legal criteria are listed in the Merger Regulation, then relate the arguments to those presented in an already decided merger case, i.e. a practical approach, followed by a comparison of the two the outcome of the analysis, in order to finally be able to present a conclusion to the problem as defined. This study will feature the Volvo/Scania

merger as a practical tool, in order to establish and test various conclusions drawn from the Merger Regulation. The practical description will further present newspaper articles, analyses, Commission material, such as speeches by the *two* Commissioners who were involved in the Volvo/Scania merger, as well as other relevant material.

The author is aware of the quite technical and detailed descriptions of the Volvo/Scania merger decision in places, however they appear necessary to include, since these are a crucial key to the merger process and how the merger case was decided. Where not necessary for the study, some technical details have been left out.

Not all sections presented of the Merger Regulation were covered in the Volvo/Scania case. This will be reflected by the lack of a practical description, or a shortened description of the theoretical part of the Regulation.

1.4.2 Merger Case Study

Since the purpose of the study is to identify the different aspects of the EC Merger Process, a parallel description of the Volvo/Scania merger case, as presented in the decision published by the Commission, as well as in media and elsewhere, will follow immediately after every section describing the legal process according to the Merger Regulation. The reason for this outline is to simplify and clarify the understanding of the Merger Regulation and the way it is applied practically.

There are several reasons for applying the Volvo/Scania case on this study. First of all, the published decision seems to exemplify the merger process in a quite clear and extensive way. Second of all, the Volvo/Scania has been given a lot of attention, both among lawyers, as well as among others, resulting in available access to different aspects of the Merger Process, and clearly showing the complexity of the Merger Process argumentation.

1.5 Sources and Reliability

The material used in the study is based on the Merger Regulation, other regulation, the Volvo/Scania merger case decision, as well as newspaper articles, competition law analyses and Commission material, such as speeches by the two Commissioners who handled the merger case.

As mentioned, the insight into the Merger Process and the work of the Commission is limited, why all desired material is not available. It is therefore important to keep in mind that there is a limit to the accessibility to certain parts of the process. Also important to keep in mind is that all stages of the Process are not listed, why these will only presented in the extent they are described by other parties, such as for example Volvo and Scania. The validity of such information may be questionable, however it is still included in the attempt to describe all aspects of the Merger Process and how different parties may experience it.

A study of this kind can never claim to be correct or absolute. The theories presented and proposed are however based on an extensive study of the material available, including regulation and other sources. The concluding analysis is an attempt to explain the Merger Regulation and the Merger Process and the different aspects applicable to the same.

1.6 Outline

The second chapter will present the *EC Merger Control Argumentation* and the different criteria featured in this study.

The third chapter will introduce the *Volvo/Scania Merger Case*.

The fourth chapter presents the *EC Merger Control Procedure from a Theoretical- and Practical Perspective*.

Chapter five describes the procedure of defining the *Relevant Geographic- and Product Markets* with application on the Volvo/Scania merger case.

The sixth and final chapter features the *EC Merger Control Analysis* including conclusions.

2 EC MERGER CONTROL ARGUMENTATION

2.1 Introduction

It seems that recently, legal argumentations and the role of the lawyer have come to include other aspects than exclusively legal features. In order to become successful, the modern lawyer needs to possess broad knowledge in other areas than law. One area where this is particularly clear is within Competition Law, including Merger Process argumentation. The reasons for this may be disputed, however certain explanations have been suggested in Filip Bladidni's study, *And og Rett*.

Deregulation of competition law has been a consistent feature over the past twenty years in the Nordic countries as well as internationally. There are a numbers of reasons for this development such as: the reform of the planned economies in Eastern Europe into market economies and the deregulation of state owned industries through initially Mrs Thatcher in Great Britain as well as through the development of a European Common Market through the EU in order for goods to be able to pass freely within the Member Countries. Throughout this process, calls for economical efficiency have challenged the welfare state, resulting in the questioning of the possibility to govern market powers through strict legislation. In fact, it has been suggested that the market powers are so strong that market players will be able to find ways around a system of too strict legislation, why it has further been suggested that such regulation may result in other effects than first intended. This development has resulted in the notion of letting the markets powers act in order to create an environment in which the gained opportunity of free competition will lead to a sound economical development.¹

However, though much deregulation has taken place in the recent past, there has not been a complete abolishment of such legislation, but rather structural changes of the regulation, which may be illustrated by the quite extensive amount of regulation established in EC Competition Law in the recent years. The regulation has been changed from being focused on what is acceptable and not acceptable, towards rather a more open approach with aiming at the actual process of the market economy.² Further, Competition Law has become an integrated part of national legislation, which may also contribute to the explanation of the increased interest in European Competition Law. One other reason to the fairly extensive changes within European Competition Law can be related to the change in the basic aims and values of Competition Law. Though EC Competition Law indeed has its original background in ethical values, e.g. the protection of a weaker party exposed to pressure from economically stronger parties, i.e. ethical aspects, the tendency has been that EC Competition Law has moved towards focusing more on economic efficiency, why also economical theory has become an important component in the Competition debate. Many are therefore under the impression that EC Competition Law is exclusively about applied economics.³ Based on the mentioned it may be argued how the above stated can be applied on the discussion presented in this study, and how it relates to the Volvo/Scania case, if indeed it does. The implications of economic criteria along with other possible criteria and how these are interpreted will be analysed further throughout the study.

¹ Bladini, p.155

² *Id.* at p. 155-156.

³ *Id.* at p. 156

2.2 EC Merger Argumentation Features

There are structural differences between a legal argumentation and a general public debate. Bladini argues that a legal discussion can be expected to, in a larger extent, generate “correct solutions” due to the fact that a legal debate is governed by statements or implied principles stating how to value-, and prioritise different arguments.⁴ *Rationality* has often been listed as a proof of quality in the legal discussion. Bladini exemplifies by suggesting several arguments regarded as rational, naming comprehension, sustainability, relevance and objectivity.⁵ It is further argued that the legal argumentation is a special type of argumentation sorting under the general public argumentation, why arguments regarded to feature acknowledged legal legitimacy would be prioritised and a type of set standard for the legally relevant arguments would be founded. It is however a fact that the legal argumentation differs from other types of arguments, for instance due to its conflict solving character, which may be explained by the notion of the Competition argumentation being focused on a sole instance as opposed to other legal argumentations where the argumentation will be more general in its character. According to Bladini, regarding Competition Law argumentations, the focus ought to be aimed at the legislative function. Conclusively, Competition Law ought to be seen as an integrated part of the overall economic system, why the legal argumentation accordingly will be seen against overall goals and principals, which will set off the legislative function of the legal argumentation. One conclusion is that it will be quite complicated to separate the legal arguments from the economic arguments, due to the close connection between legal and economic arguments.⁶ The Volvo/Scania case will illustrate the above, presenting the different type of arguments posed by the Commission as well as by Volvo representatives, and also by the involvement by third parties such as competitors, politicians, supervising authorities, economists, company representatives, and the media.

There are also arguments of non-economic character featured in a Competition Law argumentation, of which Bladini lists two: “notions of justice”⁷ and the other one being “public approval”^{8,9} According to Bladini, a general sense of opposition towards ”unfair competition” can explain the background of notions of justice; the economically stronger party ought not to be able to use the economically weaker party, and Competition Law regulation would prevent such disloyal business methods. Competition Law was further a reflection of governments desire to protect itself from the financially influential powers of private enterprises.¹⁰

General public approval arguments can be described in different ways, of which one example is the political side of the Competition Law. Political views in terms of a Competition law argumentation are not equal to general political views, but can be explained as values supported in the legal sources.¹¹ These arguments will be considered as a complement if you will, alongside the financial aspects and the notions of justice. Bladini exemplifies the public approval arguments, listing protectionism and concern over a country’s labour market,

⁴ *Id.* at p. 157

⁵ *Id.*

⁶ *Id.*

⁷ Swe, *rättsviseföreställningar*

⁸ Swe, *samhällelig godtagbarhet*

⁹ Bladini, p. 163

¹⁰ *Id.* at p. 165

¹¹ *Id.* at p. 167

favouring of small-, or middle-sized companies, environmental political arguments, and lastly the financial integration between the Member States in order to achieve an *inner* market.¹²

2.3 Politics and Merger Regulation

As mentioned, politics do play a role in the Merger Process, however it is not quite clear how strong this role is, and what sort of impact it has on the process. Merger Regulation has been criticised more often lately, claiming injustice and subjectivity. Companies and reporters, as well as governments in the concerned countries, have expressed their dissatisfaction with decisions adopted by the Commission.

Only during the past few years it seems, the involvement of politics and media have become more and more obvious in the merger process, both in terms of public interest and in terms of the legality and the fairness of the cases assessed. According to Mario Monti, one problem due to this development is the risk of misunderstanding and ignorance of those governments and reporters getting involved, often leading to unjustified criticism or involvement.¹³ Depending on the outcome of such involvement, the impact of political and media involvement may differ. Since the importance of making sure that the companies concerned, media, as well as the general public are aware of the legal state of the merger process and that the process is fair and objective, the Commission has been moving towards a more open and frequent relationship with journalists.¹⁴

According to Karl Van Miert, the former EC Commissioner, the possibilities offered through journalism are a vital and actually often a quite delicate tool for the EU Commissioner responsible for competition. Van Miert seems to have thought that a certain amount of publicity and availability into the merger process is necessary. Despite quite restrictive rules of what to reveal, this is one way in order to have the merger policy understood and therefore more easily accepted.¹⁵ It is unclear whether the present Commissioner, Mario Monti, is of the same opinion, however it seems as if the EU as a whole is moving towards a more opened and informative institution.

One of the arguments have been that the Commission, and especially the Commissioner Mario Monti, is against free competition and is more interested in power and working against globalisation. One criticising voice claimed that one ought not to forget that the increasing number of mergers is largely due to deregulation and the fact that the borders between countries in Europe are becoming less important, i.e. *increased competition*.¹⁶ Further, the deregulation of the financial markets, have led to a sharp increase in the amount of capital to fund acquisitions.¹⁷

Another argument is that the Commission wanted to state an example, and sharpen the legal practice in competition matters.¹⁸ It has even been argued that the Commission bases its decisions on previous cases with the same parties, in order to maintain its policy, or even due

¹² *Id.*

¹³ Monti, 2000-09-12

¹⁴ *Id.*

¹⁵ Van Miert, 1998-09-17

¹⁶ Svenska Dagbladet, 2000-06-30

¹⁷ *Id.*

¹⁸ *Id.*, 2000-04-04

to earlier rulings where the companies have been found guilty of abusing its market positions.¹⁹

Critics of the Volvo/Scania merger decision have claimed that the prevention of this type of mergers will lead to companies moving their headquarters from the small countries and to larger markets, where they can stay competitive and grow. This in turn leads to the small countries concerned losing even more in terms of capital and investments.²⁰ This argument leads to another argument, that European Merger Regulation puts small countries at disadvantage.²¹

It has been further argued that the Commission clears or prevents merger cases due to political reasons such as relations between Europe and the US, or between the EU and its Member States.²²

¹⁹ Financial Times, 2002-04-16

²⁰ Svenska Dagbladet, 2000-03-15

²¹ Från Riksdag & Departement, Nr 30, 2001

²² Financial Times, 2002-05-21

3 THE VOLVO/SCANIA MERGER CASE

In 1999 Volvo underwent fundamental structural changes through the sale of its private car production side to Ford Motor Co. Volvo then acquired a large share holding in Scania AB, Volvo's largest Swedish competitor within the field of trucks and buses. On August 6, 1999 AB Volvo reached an agreement with Investor AB, the then main holder of the shares in Scania AB, to acquire voting control in Scania. Volvo also announced that the company would make a public tender offer to acquire the remaining minority.

In accordance with EC Merger Regulation, Volvo notified the Commission of the plans to acquire with Scania. Following the first stage investigation, which gave rise to serious concerns whether the merger was compatible with the rules and regulations of the Common Market, the Commission decided to proceed with phase two according to Article 6.1 c of the Merger Regulation²³, resulting in deeper and more thorough investigations into the proposed merger. During the following negotiations and proceedings, efforts were made by both parts to solve issues threatening to put an end to the merger. These efforts did not seem to move the deal any further, and the final decision to block the proposed merger was made on 14 March 2000.

The proposed merger received a lot of attention, both in and outside Sweden, partly due to its symbolic- and precedent value, depending on the discussion how small markets such as Sweden would be able to develop large companies that would be able to compete internationally, within the European Market, as well as outside the Community. The merger between Volvo and Scania would have made the company the largest truck company in Europe. After the decision had been made, there was an extensive debate whether the decision had been correct.

The number of high profile mergers that have been blocked by the commission as a result of competition concerns seems to have increased in numbers in recent times. Among those that have been blocked include General Electrics proposed acquisition of Honeywell, the merger between Föreningssparbanken and SEB only to mention a few. As a result, mergers & acquisitions professionals, corporate scholars and last but not least the media have engaged in a vivid debate. Some critics have argued that the tuff stance adopted lately by the commission have had an unfairly negative effect on smaller markets such as Sweden²⁴, where corporation that want to merge in order to reach critical mass to enable them to compete in international arena, often are prevented from doing so due to the resulting significant market share created in their home market. The Commission has not only received criticism though, some are of the opinion that the interests of consumers are being taken into account through the strong Commission on Competition.²⁵ Mario Monti, himself has pointed out several different cases where he has fined large corporations for ordering retailers not to let consumers buy their cars where it is the cheapest. Mario Monti has said that he is convinced that a strict application of the competition regulation is the best way to guarantee economical freedom. Free competition he argues is a public freedom, it does not just influence economic politics, and it also

²³ Regulation 4064/89 on the Control of Concentrations Between Undertakings, hereinafter referred to as *the MCR*

²⁴ Riksdag & Departement, Nr 30, 2001

²⁵ *Id.*

influences the organisation of civil society. This is why competition politics is citizen politics.²⁶

The reality is that the Commission has cleared most cases since the implementation of the Merger Regulation. Approximately 1,500 cases have been decided upon since the start, of which only 15 have been stopped.²⁷ During the Volvo-Scania investigation the competition commissioner was replaced in the initial stage of the investigation. Some have argued that the previous commissioner, Karl van Miert, would have been more likely to approve the merger, compared to the more hawkish Mario Monti. If this was the case, then one could not rely on the merger process.

In an investigative and extensive article by reporter Gunnar Lindstedt, he questions the Merger Regulation and is of the opinion that there is room for quite a lot of arbitrariness in the Regulation.²⁸ There are however comments cited in the article of different views: The Director in the Directorate-General For Competition, European Commission in Brussels, Mr Alexander Schaub argued that Volvo had submitted comments and arguments of almost amateur nature. Mr Leif Johansson of Volvo commented that Sweden only takes up 5% of their business, something that was dismissed by Schaub as not being founded on fact.

Further, it was argued by Lars Anell, a former EU Ambassador and now employed by Volvo, that the fact that the same persons (implied the Commission) first assesses the case, then act as prosecutor against the company, and finally as judges in this type of merger cases is a threat to the law and order.²⁹ It was further argued that the Commission wanted to create a precedent with the decision in the Volvo/Scania case, and to tighten up EC Merger Regulation.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Svenska Dagbladet, 2000-04-04

²⁹ *Id.*

4 EC MERGER CONTROL PROCEDURES FROM A THEORETICAL- AND PRACTICAL PERSPECTIVE

4.1 Introduction

The increasing number of mergers & acquisitions in recent times has further highlighted the importance of creating necessary means in order to prevent anti-competitive consequences, such as dominant market positions and monopolization. EC merger control was adopted on 21 December 1989³⁰, through Council Regulation No. 4064/89 on the Control of Concentrations between Undertakings. The merger regulation descends from Articles 81 and 82, former 85 and 86, of the EC Treaty, forming the competition policy of the Community. Article 83, former 87, admits the introduction of necessary regulation in order to guarantee the policy. Before regulated EC merger control, national anti-competitive regulation did apply in each Member State as it does still today. The responsibility is divided between the Commission and the competition authorities of the Member States on the basis of turnover thresholds. Existing rules were however deemed insufficient as they for instance only applied to national mergers. This made the introduction of Community regulation on such a fundamental part of the Community necessary. As of today, merger regulation has developed further and it is the desire of the current European Commissioner, Mr Mario Monti, to transfer back certain responsibility on Member States in order to make merger regulation more efficient partly through removing some of the work load from the Commission³¹.

In line with the general competition policy of the Commission, concentrations such as mergers and joint ventures are still to be encouraged as long as the threat to competition is not significant. The lay-out of the regulation along with previous cases, show that in cases where concentrations are regarded as threatening to competition, the Commission prefers to suggest modifications and/or requirements of other concessions rather than to block the entire proposal, which also contributes to prove the overall attitude on the behalf of the Commission.

Since its implementation, merger regulation has been reviewed and altered. One change is the dividing of the investigation of the proposed merger by the Commission into two phases, which is time- and resource saving to the Commission as well as to the parties involved. In phase one, the parties are offered a possibility to alter certain issues pointed out by the Commission as being questionable and which may pose a ground for objection by the Commission at a later stage. Further more, procedure rules implemented in a separate regulation have been altered. For instance, the form provided to the Commission by the Companies involved regarding the preliminary application, *CO*, has been changed as has also certain estimation rules regarding turnover limits.

³⁰ In theory, European merger control has existed within the European Coal and Steel Community since its inception. Of interest to this presentation, due to its outlined regulation is however exclusively the regulation of 1989 as it was outlined and adopted in Council Regulation No. 4064/89.

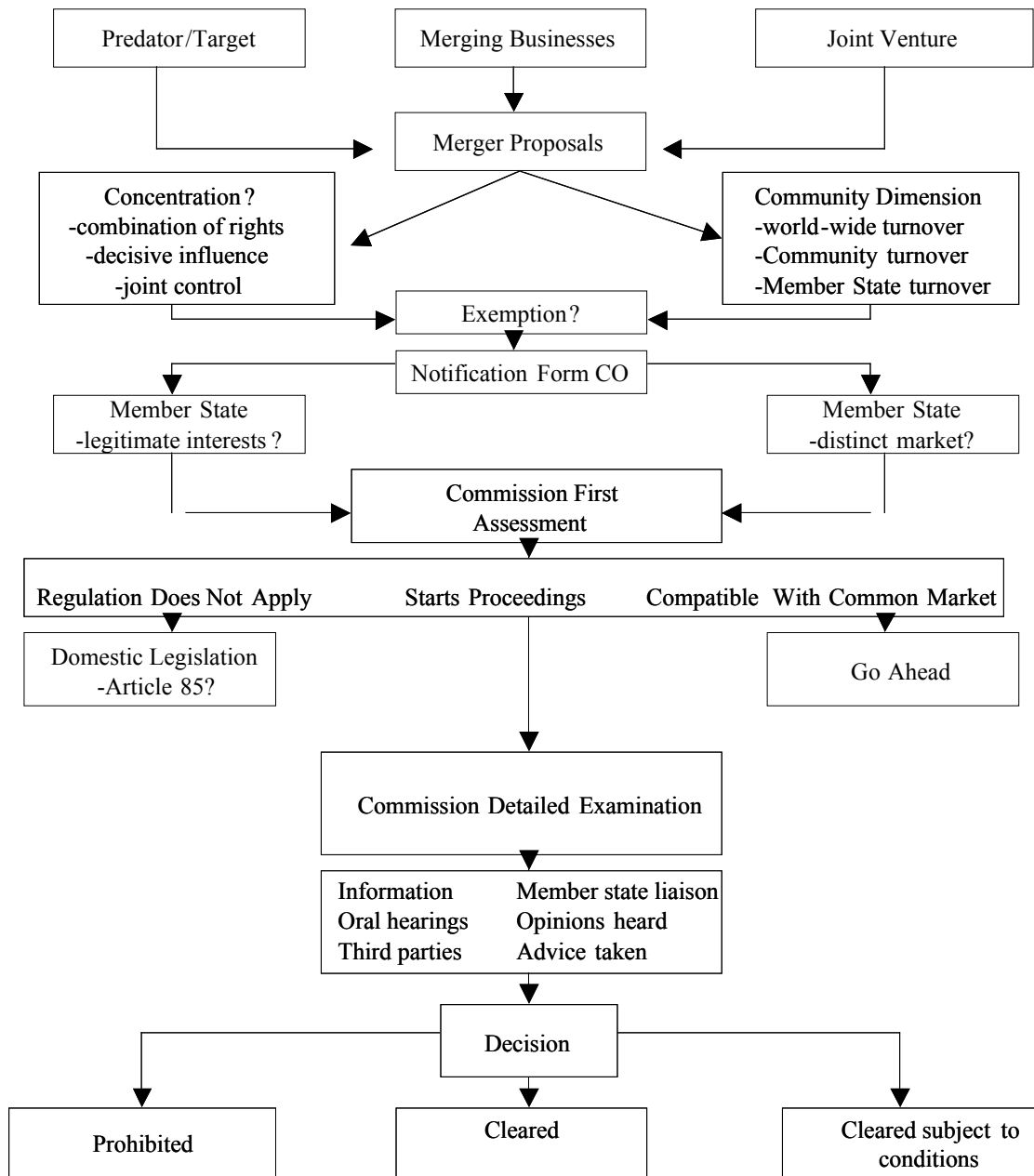
³¹ Certain merger cases, regarded *simple* in terms of size and financial value, will not have to be reviewed by the Commission. Such cases will be viewed and judged by the competition authorities of the Member States.

4.2 EC Merger Regulation

The Council Regulation No. 4064/89, hereinafter referred to as the MCR, applies to *concentrations* with a Community dimension. According to the Preamble, the underlying objective of the regulation is to “establish a one-step clearance process for concentrations which have effects at Community-level, and thereby allow companies to benefit from the internal market. Under this new regime, large-scale mergers must be notified in advance to the Commission and suspended from implementation pending a Commission inquiry.” The compatibility of a merger with the Merger Regulation is determined in reference to the *relevant product and geographic markets*. The relevant product market “comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products’ characteristics, their prices, and their intended use.”³² The relevant geographic market “comprises the area in which the undertakings concerned are involved in the supply of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because, in particular, conditions of competition are appreciably different in those areas.”³³

³² Commission Regulation (EC) No. 3384/94 of 21 December 1994 on the notifications, time limits and hearings provided for in Council Regulation (EEC) No. 4064/89 on the control of concentrations between undertakings, O.J. L 377, 21.12.1994, (former Council Regulation No. 2367/90), at Annex I, Section 6. [Hereinafter cited as Regulation 3384/94].

³³ Regulation 3384/94 at Annex I, section 6



Source: Business Guide to Competition Law, p. 79

4.3 The Merger Task Force

The multinational, multicultural, multidisciplinary and multilingual environment in which merger regulation is implemented, contributes to the complexity of the conforming of the Merger Regulation. In 1989-90 a special department titled the Merger Task Force was established, in order to investigate and administrate notifications of proposed mergers. The Task Force entered into force on 21 September 1990. One of the Task Force's main responsibilities is to ensure the efficiency and the meeting of the strict time limits pursuant to the Merger Regulation, through improving the communication of information to all those relevant and concerned at each level of involvement. Also, the handling of confidential information was an important issue, in order to ensure the security of business secrets and

other information, which could lead to disclosure of price-sensitive information throughout a merger investigation once initiated.³⁴

Through experience, the Task Force realised that it would have to work in a way that would avoid as many delaying factors as possible. In the view of the members of the Task Force itself, this could be achieved by working closely together in groups which considered each problem on an inter-service basis, meaning that for instance discussions of issues were treated at well-prepared meetings with strict time schedules, coordinating all planning carefully within agreed timetables and also reducing the number of different working languages to a minimal became standard procedure. Further, time-consuming correspondence was to be excluded, as well as securing fast access to the correct level for problem solving and decision-making. According to a former Director of the Merger Task Force in the Directorate-General For Competition, European Commission in Brussels, Mr H. Colin Overbury, all of these goals were achieved by “concentrated and collective thinking at the widest horizontal level followed by rapid decisions at the highest hierarchical level.”³⁵

The Task Force is part of Directorate-General IV (DG IV), the EU Directorate responsible for competition matters. The professional staff of the Task Force consists of 50 officials of whom approximately half are lawyers and the other half are economists. One-half of the staff consists of previous staff of DG IV and the remaining half are recruited from the Member States. The Task Force is managed by a Director, who reports to the Director General of DG IV, together with three Heads of Unit, who report to the Director. The three Heads of Unit each has one unit, and the professional staff, are divided between these three. Groups of two or three staff members are assigned to “case teams” irrespective of their unit affiliation, depending on the expertise and language required and the resources available. The Task Force has its own independent computer registry system, and consequently the cases are numbered according to this registry, from the moment a file is opened, usually at the instant a Notification reaches the Task Force.

4.4 Merger Task Force Competence

The extent of investigative powers of the Merger Task Force reaches as far as is necessary in order to be able to carry out the duties assigned to it according to the Merger Regulation.³⁶ As soon as a proposed concentration case becomes evident, a case team is set up consisting of at least two case handlers selected from the professional staff on the basis of availability, the expertise anticipated and the language of the case. In order to get the most efficient and accurate results, the case team is set up at the earliest possible time, even before the actual notification if possible. This way, pre-notification queries and uncertainties of a more formal administrative character can be avoided, and accordingly also unnecessary time loss.

The examination of each case starts by the Task Force determining the facts, secondly in assessing their economic significance in accordance with the criteria laid down, and thirdly proposing the appropriate legal conclusion. The factual investigation is primarily based on the information provided in the notification. The essential issues are verified, if necessary, by enquiries with competitors and customers. The investigation is in many aspects a hands-on process, where the Task Force goes out to the marketplace in order to find the actual facts and

³⁴ Overbury, at p. 565

³⁵ *Id.*

³⁶ MCR, at art. 13(1)

required information, in order to reach an as accurate conclusion as possible.³⁷ Further, the Task Force prepares the case and the outcome as far as possible, leaving the Commission with a well-prepared case, with only the necessary issues to clear and decide on.

4.4.1 Requests for Information

According to Article 11 of the MCR, the Task Force may obtain all necessary information from the governments and competent authorities, in effect the national antitrust authorities, of the Member States, one or more persons already controlling at least one undertaking and from undertakings and associations of undertakings. Furthermore, in all requests for information, the Task Force must state the legal basis and the purpose of the request as well as the penalties, according to Article 14 (1) (c), for supplying incorrect information. The fines may vary from ECU 1,000 to 50,000, depending on whether the incorrect information is due to negligence or intentional negligence. In the event that the information is not provided within the time limits, or in incomplete form, the Commission may order the information by decision.³⁸

4.4.2 Investigative Authorities of the Member States and the Commission

The Commission may request the “competent authorities”, i.e. the antitrust authorities, of the Member States to undertake the necessary investigations in order to be able to perform its duties.³⁹

Further powers of the Commission in “carrying out the duties”, include to “examine the books and other business records, to take or demand copies of or extracts from the books and business records, to ask for oral explanations on the spot, and to enter any premises, land and means of transport of undertakings.”⁴⁰ It is accordingly understood that a “search warrant” is not necessary when carrying out these undertakings. These investigative powers of the Commission are subject to several restrictions and demands according to the same Article of the MCR, such as for instance to inform the competent authority of the Member State concerned.

Article 17 of the MCR states the confidentiality of any evidence obtained during the investigations. The information is only to be used “for the purposes of the relevant request, investigation or hearing.” However, the confidentiality clause does not prevent non-confidential information from being published, such as for instance official surveys and the like.

4.5 Pre-Notification Meetings

It is important to be aware of the fact that, throughout a “merger case process”, all events and routines are not regulated in the Merger Regulation. Such proceedings occur despite the lack of being stated in the MCR, but are nonetheless common practise. One interesting point in

³⁷ Overbury, at p. 569

³⁸ MCR, at art. 11(5)

³⁹ *Id.* at art. 12

⁴⁰ *Id.* at art. 13(1)

conjunction with this is that such doings open up for discussion and speculation of the Merger Task Force routines and also the question of openness and possibility of insight and influence. My point being that when not stated, it is hard to argue the lack of such an event or misconduct etc of such events.

One such unregulated event is the *pre-notification meetings*, or *screening meetings*, which is a “vital part of the process”.⁴¹ One important goal of pre-notification contact is to further determine the necessity of a notification at all.⁴² In the event of failure to determine whether Notification is necessary, the issue is usually discussed and resolved in the weekly in-house meeting of all Task Force officials.

Further, pre-notification contact is a crucial part of the merger process, for example it enables the Task Force to have a better insight and knowledge of the case. It also enables the notifying parties to get to know the case team staff. The attendants of such a meeting are usually one or more Task Force officials, who are also the ones conducting the meeting, and of course possible notifying party. Other important issues, which might be interesting to the parties, are also discussed at pre-notification meetings. For example, the Task Force may clarify whether selected pieces of information may be withheld from the Notification, or whether it may be appropriate to grant a derogation from the rule requiring the suspension of mergers for at least a three-week period following the Notification.⁴³ A draft of the notification can be prepared and checked by the case team if the “notifying party” wishes so.

There are, however limitations to what may be discussed at pre-notification meetings, such as the substance of a proposal before it is officially notified. For instance, the case team will not enter into negotiations or discussions on possible substantive modifications of the proposal to meet the requirements of the Regulation unless it is permitted to obtain the view of the relevant national authorities. The case team will, depending on its current workload and ability, answer queries concerning the interpretation of the Merger Regulation, and will also give an unofficial view on “hypothetical” cases put on it.⁴⁴

Since pre-notification meetings are not regulated in the MCR, technically rules of confidentiality do not apply. However, in reality these rules do apply to information acquired by Task Force officials “through the application of this Regulation.”⁴⁵ A logical conclusion may therefore be that confidentiality is obtained at pre-notification meetings, when the rules in MCR are intended to be complied with. Meetings between the Commission and the notifying parties continue to take place throughout the entire merger process, however they may be of different character than the *pre-Notification meetings*.

4.6 The Volvo Pre-Notification Meeting

When discussing pre-Notification meetings, and in this case particularly the one held with representatives from Volvo among others, it is quite important to keep in mind that such meetings are unofficial. Consequently, sources of information relating to such meetings may be of variable quality and accuracy. However, since the meetings are part of the merger

⁴¹ Overbury, at p. 571

⁴² *Id.*

⁴³ *Id.* at p. 19

⁴⁴ Overbury, at p. 569

⁴⁵ MCR, at art. 17(2)

proceedings, it is of interest to present the facts and information available. Further, it is of essence to be able to understand how this type of meeting is performed and what is discussed and what they lead to. Also important to keep in mind is that these meetings do appear in different shapes, places and constellations of attendants.

The precise extension of direct contact between Volvo and the Commission is uncertain at this stage of the process. On Volvo's behalf, it has been argued that Managing Director (MD) of Volvo AB, Leif Johansson met with both Alexander Schaub, the Director-General of the Competition Directorate and Götz Draus, Head of the Merger Unit initially.⁴⁶ In August 1999, following several telephone conversations between the two, MD Leif Johansson met with the at that point Competition Commissioner Karel van Miert. As a result of these contacts, Leif Johansson claims that he was under the impression that there would not be any crucial complications with the proposed merger. Further, he claims that neither he himself nor van Miert could even imagine that the Nordic markets would be viewed as only national and not European at all. According to Johansson, although he could not promise anything, van Miert claimed that in the event that that the market for both buses and trucks is European the completion of the merger should not create any problems.⁴⁷

Further, Leif Johansson who had already underwent ten investigations by the Commission in his former career, was aware that the merger would be investigated in terms of which market the EU competition rules would be judged by. Two similar previous cases had showed that the market for buses was becoming more and more European, meaning that bus manufacturers would be more likely to compete within a European market than a national one.⁴⁸ In the Mercedes-Kässbohrer case the Commission viewed the merger resulting in a too dominant position, however, due to the so called "shrinkage effect" results in customers choosing alternative manufacturers, the market is opened up to foreign manufacturers.

A couple of weeks after the merger had been made public on August 6 1999 Mario Monti succeeded Karel van Miert and became the new Competition Commissioner. Volvo's negotiators in Brussels at the time later described the new Commissioner as initially giving a mysterious impression regarding his position in the Volvo/Scania merger.⁴⁹ People from the Volvo side have described the atmosphere of the immediately following meetings as almost aggressive. At one stage, representatives of the Commission demanded information regarding everything that had to do with Scania within seven days.

One of the competition officials, Dan Sjöblom, claims that the merger almost went through, but was stopped internally.⁵⁰ Volvo was under the impression that the merger was being made into an example. The Volvo side were not sure whether it was Mario Monti or the officials within the Commission who were moving towards tightening the regulation. According to an official within the former Karl van Miert administration claims that the wording in the Renault-Iveco case⁵¹, stating the bus market being European, was an initial and internal mistake, as was the Mercedes-Kässbohrer case. According to the official the market shares had not sunk as fast as was first thought.⁵²

⁴⁶ Svenska Dagbladet, 2000-04-04

⁴⁷ *Id.*

⁴⁸ *Renault-Iveco and Mercedes-Kässbohrer cases*

⁴⁹ Svenska Dagbladet, 2000-04-04

⁵⁰ *Id.*

⁵¹ Case No COMP/M.1739 – *Iveco/Fraikin*

⁵² Svenska Dagbladet, 2000-04-04

Throughout the autumn, the investigating group worked to obtain evidence that the merger would harm the competitive situation in the respective segments. The crucial issue was whether the markets were to be regarded as national, in which case Volvo/Scania would obtain too large a market share in its home market, leading to the dismissal of the proposed merger on that very basis. Volvo on the other hand argued for a more “dynamic” way of thinking, judging the market as European. Volvo were of the opinion that the bus- and truck markets were becoming more global, with transport companies working across borders. These customers own several hundreds of vehicles of different brands and foreign companies own 50% of the trucks on the roads in Sweden. The transportation market was therefore becoming more European and the price differences between vehicles in different EU countries were decreasing.

In the private car sector, the Commission accepts price differences of 10%, still viewing this market as a national one. Regarding buses and trucks the same figure is 10-15%. The investigating group were under the impression that the price differences were up to 30%, and wondered how there could be such large differences if the markets were national. They argued that smaller sized retailers are forced to turn to national retailers, and in the event of a merger between Volvo and Scania, prices could be increased without them having any other choice but to still buy trucks and buses from them. This argument was presented and argued again and again at the meetings held between Volvo representatives and representatives of the Commission.⁵³ It was Volvo’s understanding that the Commission encouraged mergers between companies from different European countries rather than the same country.

The investigating group further suggested that Volvo merged with Italian Iveco instead of with Scania. Volvo’s Lars Anell, former Swedish EU ambassador, claims he did not consider the suggestion as being serious. He proceeded: “One cannot just buy a company, especially not the crown jewel of Italy”.⁵⁴ Further, in December, the group asked for more documentation, based on the group considering Volvo’s market analyses showing too thin of a result according to a source within the investigative work. Two economics professors were assigned to perform a mathematic analysis, and the results were devastating and surprising to Volvo. The amount-, of and the extension of objections presented as a result of the investigation, presented in January 2000, came as a surprise and somewhat shock to Volvo. Instead of leaning on the market analysis, the Commission chose to put the emphasis on the mathematic analysis performed by the two professors. According to Anell, this surprised the Volvo side since the market analysis tended to agree with Volvo’s view, whilst the econometric analysis pointed out that Volvo/Scania would obtain a dominating position in all European countries except in Italy. According to the report Volvo/Scania would be able to increase prices with 15-30% in Europe. This report will be discussed further under the heading *The Volvo Hearing*.

Also interesting is that there was an ongoing discussion set off by Karl van Miert and Anita Gradin regarding how to adjust the EU competition rules in order to better suit the global environment in which most corporations compete. Gradin was under the impression that competition rules risked to prevent European companies from competing globally, and that the rules had to be improved.

⁵³ *Id.*

⁵⁴ Svenska Dagbladet, 2000-04-04

Conclusively, Leif Johansson's overall impression was that there would be no problems with the merger between Volvo and Scania, as he claims was also the case with van Miert.⁵⁵

4.7 Notification Requirements

According to EC Merger Regulation, all concentrations of Community dimension must be notified to the Commission.⁵⁶ The acquiring party notifies the Commission, unless the concentration is a subject of a so-called "friendly" merger or an acquisition of joint control, in which event both parties are required to notify the Commission. According to Article 4 of the MCR, the concentration must be notified to the Commission not later than one week after the conclusion of the agreement, or the announcement of the public bid, or the acquisition of a controlling interest. "The week beginning when the first of those events occurs."⁵⁷

4.7.1 Publication

Within the following days of the Notification, the Commission publishes the fact of Notification in the Official Journal, including the names of the parties, the nature of the concentration and the economic sectors concerned, in all nine languages.⁵⁸ Also, the Commission must submit a copy of the Notification to the antitrust authorities of all of the Member States within three working days. Furthermore, copies of all relevant documents in connection with the Notification must be submitted as soon as possible.⁵⁹

4.7.2 Effective Date of Notification

The Notification is generally considered effective upon the date on which the Commission receives it.⁶⁰ However, in the event of the Notification is considered incomplete in a material respect on the date of receiving, the Notification is not deemed effective until the date upon which it is handed in, in complete form.⁶¹ This remark has a significant importance, since the Commission's termination of the "first-stage" of the examination is subject to a deadline, which is linked to the effective date of the Notification.

The Task Force must inform the parties immediately in writing, as to the information needed and set a time limit for the completion of the Notification.⁶² The Task Force may also decide to dispense of certain pieces of information not considered necessary for the investigation of the proposed merger.⁶³

4.7.3 Required Documentation

⁵⁵ *Id.*

⁵⁶ MCR at art. 4(1)

⁵⁷ *Id.*

⁵⁸ MCR, at art. 4(3)

⁵⁹ MCR, at art. 19(1)

⁶⁰ Regulation 3384/94 at Section 1, art. 4(1)

⁶¹ *Id.* at art. 4(2)

⁶² *Id.*

⁶³ *Id.* at art. 4(3)

Merger Notifications are submitted on a special form, Form CO.⁶⁴ The Form Co may be submitted in any of the official languages of the Community, which will also be the language in which further proceedings will be held in.⁶⁵ Certain other documents are also required to be submitted together with the Form CO: (a) copies of the final or most recent versions of all documents bringing about the concentration, e.g., share or asset purchase agreement or public offer document; (b) copies of the most recent annual reports and accounts of all parties to the concentration; (c) copies of reports or analyses prepared for purposes of the concentration and from which information has been taken in order to respond to Sections 5 and 6 of Form CO; and (d) a list and short description of the contents of all other analyses, reports and studies prepared for the purpose of analysing the competitive conditions affecting the concentration, the competitive relationships of the parties, and the prevailing market conditions.⁶⁶

4.7.4 Confidentiality

The information provided in Form CO is in effect confidential. However, the information is not protected with the support of Article 17(1) of the MCR. This means that the Commission and the respective antitrust authorities of the Member States may use the information provided in other investigations. According to Article 17(2), officials and employees of the Commission and of the Member States' antitrust authorities are bound by a duty not to disclose information that they have "acquired through the application of this Regulation" which is covered by the obligation of professional secrecy, leading to the conclusion that obtained information is in fact confidential, since this obligation ought to extend to Form CO and other documentation in conjunction with it. As a result of this, information and documentation provided by notifying parties may not be transmitted to antitrust authorities or others, outside the Community.

4.7.5 Fines

According to MCR, fines ranging from €1,000 to 50,000 may be implied upon failing to notify a concentration, or for intentionally or negligently supplying incorrect or misleading information in the actual Notification.⁶⁷

4.7.6 Form CO

This Form is quite important in the initial as well as the following stages of the merger investigation, and was equally so in the Volvo/Scania case, why a rather detailed description of the Form will follow, pointing out the most essential parts and requirements.

Form CO is found in Annex I of Commission Regulation 2367/90. Besides formalities, such as providing the Form with the names of the parties and their representatives, if any, the Form also requires information on the concentration. The notifying parties is first asked to identify the type of concentration, e.g. merger or joint venture, and further whether the concentration involves the whole or parts of parties and whether any public bid has the support of the target

⁶⁴ *Id.* at art. 2(1)

⁶⁵ *Id.* at art. 2(4)

⁶⁶ *Id.* at Annex I, para. C

⁶⁷ MCR, at art. 14(1)(a)-(b), in conjunction with art. 3(1)(b)

firm's board of directors. The next issue in the Form is for the notifying parties to describe the economic sectors involved. Other information includes description and financial arrangements of the concentration, the conditions or events giving rise to its implementation, and the structure of ownership and control after implementation. The party has to provide company-specific financial data from the past three years, including the turnover worldwide, EU-wide and Member State-wide, and is presented in €.

Further on, the parties are to provide information for the purpose of identifying the affected markets and their positions in these markets as well as any conglomerate aspects. This is done by first restating the criteria for defining the relevant product and geographic markets, for the assessment of the parties' market power resulting from the concentration. Then, the Form requires information in order to determine horizontal and vertical relationships in the affected markets. The affected markets are defined as the relevant product markets in the EU, a Member State or any other relevant geographic market, where: (a) two or more of the parties are in the same product market and where the concentration will lead to a combined market share of 10% or more; or (b) any party is in a product market which is upstream or downstream of a product market in which any other party is engaged and any of their market shares is 10% or more. For each of these affected markets, the Form requires turnover, market share, price figures and other market data for the last three financial years.⁶⁸

The same section (5) also requires information on whether the concentration has any conglomerate aspects, in the absence of horizontal or vertical relationships, where any party holds a market share of 25% or more in any product market or individual product group. The parties must: (a) describe each relevant product market and explain why the products are included in this market by reason of their characteristics, price or intended use; (b) list the individual product groups as defined internally for marketing purposes, which are covered by each relevant product market described; and (c) estimate the value of the market and the market shares of each of the groups to which the parties belong for each affected relevant product market and, where different, individual product groups, for the last financial year for the EU as a whole, individually for each Member State where the groups to which the parties belong do business and, where different, for any relevant geographic market.

Section 6 is important since it requests information regarding the ability of the parties to impede competition, once the concentration has been carried through. This is done through seeking structural information of the parties and the market, for example through providing details on their vertical integration, if any, and on the factors influencing entry into the affected markets, such as the importance of research and development and the availability of distribution and service networks. Also requested in this section are details on suppliers and customers of the parties, as well as on the structure of supply and demand in the affected markets. Section 7 asks the parties whether the concentration is likely to benefit consumers or to stimulate technical progress.

4.7.7 Further Merger Task Force Procedures

After the notification has been published and the Director-General and the Commissioner have been informed of the essential facts of the notification, a preliminary report is then prepared covering all the points of interest, which will be subject to further investigation. An

⁶⁸ Form CO, Sec. 5

inter-service meeting is then held as soon as possible with a view to decide which type of decision seems to be appropriate. If agreement can be reached in this meeting, a draft decision is prepared and sent back to the inter-service meeting for approval. If a decision is not reached, the meeting agrees on the necessary action to be taken in order to complete the assessment before the draft decision is submitted. A note will be enclosed with the decision, containing the issues which are unresolved. A decision must be taken on these issues before the decision can be adopted. One such issue may be the very question of whether the proposed concentration raises doubts as to its compatibility with the Common Market, and should therefore go into the second phase of the merger procedure. The notifying party has constant access to the Task Force throughout this whole process, in order to be able to pose questions and maintain contact with the case team.⁶⁹

4.8 The Volvo/Scania Merger Notification

On 22 September 1999 the Commission received a Notification on the proposed merger between AB Volvo and Scania AB, pursuant to Article 4 of the Merger Regulation. According to the Notification, the concentration would be conducted through Volvo acquiring control of the whole of Scania by way of purchase of shares, within the meaning of Article 3(1)(b) of the merger regulation.⁷⁰ The announcement of the Notification was published in the Official Journal on September 30 1999 in accordance with Article 4(3) of the Merger Regulation.⁷¹

The announcement also includes a listing of the business activities of the undertakings concerned. The business activities of Volvo are listed as being: “production and marketing of buses, trucks, construction equipment, marine and industrial engines and aircraft and space components”.⁷² The business activities of Scania are listed as being: “mainly production and marketing of buses, trucks and marine and industrial engines”.⁷³

Further the announcement of the Notification states that on preliminary examination the Commission finds that the proposed merger may fall within the scope of the Merger Regulation, however that a final decision has yet to come.

The final paragraph of the announcement contains an invitation to the public to submit their *possible observations* on the proposed merger. Any such observations are to be submitted no later than ten days following the date of the publication of the announcement. Further it is stated that such observations may be sent by fax, and the fax number is also provided, or by post with the address included as well on the publication.

⁶⁹ Overbury, at p. 570

⁷⁰ OJ, C27774, 30/09/1999, *Prior Notification of a Concentration*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

4.9 Suspension Requirements

4.9.1 Time Frames, Extensions and Derogations

According to Article 7, following a preliminary examination, the MCR prohibits the implementation of a concentration having a Community dimension both before their Notification and within the first three weeks following their Notification. Further, the Commission may decide on its own initiative that it is necessary to continue the suspension in whole or in part until it takes a final decision, provided that the purpose of the extension is to “ensure the full effectiveness of any decision”⁷⁴ which it may later reach prohibiting the concentration.

Further more, any Member State seeking a referral to its own national antitrust authorities must inform the Commission within three weeks of its receipt of a copy of the Notification, which is sent to all Member States by the Commission.⁷⁵

There are derogations from the rules of three weeks and extended periods of suspension. Firstly, public bids may be implemented provided that they have been notified to the Commission in accordance with Article 4(1), and provided that the acquirer does not exercise the voting rights attached to the securities in question.⁷⁶ Secondly, the Commission may on request, grant a derogation from the obligations imposed in paragraphs 1, 2 or 3, i.e. shorten or waive the period of suspension in order to prevent serious damage to one or more of the parties to the concentration or to third parties.⁷⁷

4.9.2 Decisions

According to Article 18 of the MCR, before taking any decision provided for in Articles 7(2) and (4), i.e. decisions regarding extending the three-week period or extended period, it is required that the Commission provides the parties concerned advance notice in writing and also to set a time limit within which the parties may express their views orally or in writing.⁷⁸

However, the Commission may decide to continue the suspension of a concentration or to grant a derogation from suspension as referred to in Article 7(2) and (4) “may be taken *provisionally*, without the concerned parties being given the opportunity to make known their views beforehand, provided that the Commission gives them that opportunity as soon as possible after having taken its decision.”⁷⁹

4.9.3 Fines

Failing to comply with any of the obligations regarding the suspension of concentrations may result in fines. Article 14(2) provides that the Commission may by decision impose fines not

⁷⁴ MCR, at art. 7(2)

⁷⁵ *Id.* at art. 9(2)

⁷⁶ *Id.* at art. 7(3)

⁷⁷ *Id.* at art. 7(4)

⁷⁸ Regulation 3384/94, at art. 12(1)

⁷⁹ MCR, at art. 18(2)

exceeding 10% of the aggregate turnover of the undertakings concerned. When setting the amount the Commission is to regard the nature and gravity of the infringement.⁸⁰

4.10 Termination of the First Stage of the Investigation

Having examined the Notification, the Commission is to make a decision on further proceedings, if any. Either the Commission decides that the concentration does not fall within the scope of EC Merger Regulation, or it decides that the concentration does fall within the scope of the Regulation, but that it does not raise any serious doubts as to its compatibility with the Common Market and therefore do not oppose the Notification. In effect, these two choices both lead to .

The third alternative is for the Commission to decide that the concentration falls within the scope of the Regulation, and that there are grounds for raising serious doubts regarding the compatibility with the Common Market. This leads to the Commission initiating the second stage of investigations. Whichever the decision may be the Commission is obliged to notify its decision to the parties concerned as well as the competent authorities of the Member States.⁸¹ When making such decisions, the Commission is not present in its entirety. Instead the Commissioner responsible for competition matters is the one making the decision.⁸² However, in the event that the Commissioner decides to initiate a second stage, the Commission President must be consulted.⁸³

According to Article 10 of the MCR, a decision such as referred to above, must be taken within one month. That period is to begin on the day following that of the receipt of a Notification. This period may be extended to six weeks if the Commission receives a request from a Member State in accordance with Article 9(2). In the event of the Commission failing to make a decision within the time limits in accordance with Article 6(1)(b) or (c)⁸⁴, the concentration is to be regarded as compatible with the Common Market.⁸⁵ However, in the event of the Notification being incomplete, the one-month time limit does not begin until the day following the Commission's receipt of the complete information.⁸⁶

4.11 The Termination of the First Stage of the Volvo/Scania Investigation

According to Article 6 (1) the Commission is obliged to examine the Notification "as soon as it is received". According to the same Article the Commission may either decide that the proposed concentration as its definition does not fall within the scope of the Merger Regulation, or that the merger does not give rise to any doubts as to its compatibility with the Common Market. A third possibility is that the Commission decides that the proposed concentration does fall within the scope of the Merger Regulation and that it does give rise to

⁸⁰ *Id.* at art. 14(3)

⁸¹ *Id.* at art. 6

⁸² Overbury, at p. 21

⁸³ *Id.*

⁸⁴ The author is not sure on what grounds Article 6(1)(a) is not included under the same rule.

⁸⁵ MCR, at art. 10(6)

⁸⁶ *Id.* at art. 10(1), second sentence

doubts as to its compatibility with the Common Market. The Commission is obliged to make a decision within one month at the most, however there are exceptions as to the time limits.⁸⁷

On 9 December 1999, the Commission adopted such decisions in accordance with Article 11(5) of the Merger Regulation, based on the fact that Volvo and Scania had failed to submit replies within the time frame set by the Commission as to a request for information regarding their competitive position on the markets for heavy trucks and buses.⁸⁸ Volvo and Scania had been given a period until December 7 to submit the information, but failed to do so until December 20 1999. Consequently, in accordance with Article 9 of Commission Regulation (EC) 447/98 of 1 March 1998 on the Notifications, Time Limits and Hearings provided for in the Merger Regulation, the time periods referred to in Article 10(1) and (3) of the Merger Regulation were suspended for a total of 13 days.⁸⁹

Having examined the Notification, the Commission concluded that the Notification did fall within the scope of the Merger Regulation and also raised concerns as to whether the proposed concentration would be compatible with the Common Market, because it could create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the Common Market or in a substantial part of it in the territory covered by the EEA Agreement. Conclusively, on October 25 1999, the Commission terminated the first stage of the investigation and at the same time decided to initiate proceedings pursuant to Article 6(1)(c) of the Merger Regulation.⁹⁰

4.12 Second Phase Proceedings

As mentioned, the second stage investigations are initiated by a decision by the Commission, according to Article 6(1) (c), stating that the notified concentration raises “serious doubts” as to its compatibility with the Common Market. The decision must be notified to the undertakings concerned and to the antitrust authorities of the Member States without delay.⁹¹

The second phase of the merger procedure, is much more formal than the first stage procedures to its character. Phase two must follow the extensive outlining and formal rules according to the Merger Regulation. The objective of the second phase of investigations, is to determine whether the serious doubts are to be maintained as a result of further in-depth investigation. The notifying party may also alter and modify its notified concentration in order to avoid the operation from being stopped based on these doubts.⁹²

4.12.1 Article 18 Statement

The opening of a second phase investigation requires the Commission pursuant to Article 18(3), to “base its decision only on objections on which the parties have been able to submit their observations”.

⁸⁷ *Id.*, at art. 10(1)

⁸⁸ The Decision, at para. 3

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ MCR, at art. 6(2)

⁹² Overbury, at p. 571

Consequently, the first step of the Commission after the decision is taken is to send the parties an Article 18 Statement, which confirms the initiation of a formal investigation.⁹³ Prepared by DG IV, the Statement is then reviewed by an inter-service group before its submission to the Commissioner.⁹⁴ The Article 18 Statement contains the Commission's objectives and states a time limit by which the parties concerned must inform the Commission of their views by written reply.⁹⁵ It is important to remember that the Article 18 Statement does not necessarily mean that the proposed merger will be prohibited, only that further investigations need to be pursued.

If an Article 18 Statement is sent, the parties are offered the possibilities to make a written reply and also to attend a hearing before the representatives of the national authorities where they can make an oral presentation and answer the questions of the Commission and the national representatives.

4.12.2 Oral Hearing

The Commission must grant an oral hearing before the representatives of the national antitrust authorities where they can make an oral presentation and answer the questions of the Commission and the national representative.⁹⁶ The procedures of such a hearing are described in Regulation 2367/90 and include fixing of the date of the hearing and summons the persons who are to attend. Apart from the parties concerned, the persons summoned to the hearing may include third parties designated in the parties' written reply for the corroboration of evidence, and an official appointed by the Member State authorities.

Further on, persons heard may be represented and according to Article 14(3) it can be lawyers, university teachers and professors authorised to plead in the European Court and "other qualified persons". The persons conducting the hearing are appointed by the Commission, why it is not possible for the parties concerned to request in their written reply that the hearing be conducted by a preferred official.

Following the hearing, a decision is taken on how to proceed. Regardless of the outcome of such a decision, a preliminary draft must be prepared proposing either a positive or negative decision, which is then submitted to the Advisory Committee for opinion. Although the notifying party has continuous access to the Task Force throughout the whole procedure, the notifying party is not directly involved in the proceedings after the oral hearing.⁹⁷

4.12.3 Third Parties

According to Article 18(4) of the MCR, third parties do not have a right to be heard unless they show a sufficient interest and apply in writing to be heard. Third parties may be heard on the basis that the Commission or competent authorities "deem it necessary".⁹⁸ These persons must be informed in writing and informed of the subject of the hearing by the Commission.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Regulation 3384/94, at art. 12(2)

⁹⁶ Overbury, at p. 571

⁹⁷ Overbury, at p. 572

⁹⁸ MCR, at art. 18(4)

After the hearing has been held, the Commission composes a preliminary draft decision, which is submitted to the Advisory Committee on Concentrations for its opinion.⁹⁹ The parties concerned do not obtain a copy of this draft decision.¹⁰⁰

4.12.4 Advisory Committee on Concentrations

According to the MCR, the Advisory Committee shall consist of representatives of the authorities of the Member States, and must be consulted by the Commission prior to its adoption of final decisions pursuant to Articles 8(2)-(5), 14 and 15, or of implementing legislation pursuant to Article 23.¹⁰¹ Each Member State may appoint one or two representatives, one of whom is to be competent in antitrust matters.¹⁰²

The parties concerned may not attend at the meetings, and are not directly informed of the opinions expressed by the Committee.¹⁰³ Regarding preliminary drafts, the Committee may form an opinion informally or by taking a vote.¹⁰⁴ The Committee may make a decision regardless of whether the entire Committee are present or not.¹⁰⁵ The decision is delivered to the Commission in writing and is appended to the preliminary draft decision.¹⁰⁶ According to Article 19(7) of the MCR, the Committee may request the Commission to publish their opinion in the Official Journal, still maintaining the confidentiality of any business secrets of the parties concerned.

After the meeting of the Advisory Committee, a draft decision is prepared and submitted to the Commission for its adoption.¹⁰⁷ Neither of this decision is made available to the parties.¹⁰⁸

4.13 Second Stage Proceedings in the Volvo/Scania Merger Case

According to the publication of the initiation of the second stage, an opening of a second stage investigation is in accordance with Article 6(1)(c) of the Merger Regulation. In the Volvo/Scania case, again interested third parties were invited to submit their views and observations on the proposed merger. Third parties were given 15 days counting from the date of the publication of the initiation of proceedings, to submit their comments. Yet again third parties are given a choice of sending their comments by fax or by post, and the respective numbers and addresses are submitted on the Notification.

In accordance with the Merger Regulation, an oral hearing was held on February 9 2000 between Volvo representatives and the Commission, during which among other things a report put together by two professors of economics was presented. The econometric analysis showed that Volvo would gain a dominating position through its merger with Scania. The

⁹⁹ MCR, at art. 19(3)

¹⁰⁰ Overbury, at p. 572

¹⁰¹ MCR, at arts 19(3) and (4)

¹⁰² *Id.* at art. 19(4)

¹⁰³ Overbury, at p. 572

¹⁰⁴ MCR, at art. 19(6)

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Overbury, at p. 572

¹⁰⁸ *Id.*

report was however reputed by professors hired by Volvo and the Commission later withdrew it from the investigation.

4.14 Termination of Second Stage Proceedings

4.14.1 Final Decisions

All proceedings initiated under Article 6(1) must be closed by a decision made by the Commission.¹⁰⁹ Either the Commission decides that the merger is incompatible with the Common Market, or it decides that the proceedings are compatible with, or without conditions. Such a declaration that the concentration is incompatible with the Common Market, is not the same as a declaration of invalidity, however the decision is connected with fines should the parties concerned proceed with the merger despite the decision.¹¹⁰

4.14.2 Conditions and Obligations

According to Article 8(2), second subparagraph, of the Merger Regulation, the Commission may attach conditions and obligations to a *decision* in accordance with Article 8(1), i.e. the decision on whether to proceed with an investigation into the notification provided by the notifying party. According to the same Article, such conditions and obligations are to be intended “to ensure that the undertakings concerned comply with the commitments they have entered into *vis-à-vis* the Commission with a view to modifying the original concentration plan”.¹¹¹ A decision taken declaring the concentration compatible shall also cover restrictions directly related and necessary to the implementation of the concentration.

Decisions made pursuant to Article 8(2), second subparagraph, through (4) may be enforced by the imposition of fines. Such fines may not exceed 10% of the aggregate turnover of the undertakings concerned within the meaning of Article 5 where they put into effect a concentration declared incompatible under Article 8(3) or fail to take the measures ordered by decision under Article 8(4).¹¹² Also, the Commission may impose penalty payments of up to €100,000, in order for the undertaking parties to comply with obligations pursuant to Article 8(2), second subparagraph, or to apply measures ordered by decision under Article 8(4).¹¹³

4.14.3 Decisional Procedures and Time Limits

The full commission is responsible for decisions made under Article 8(2)-(5), and such decisions may be taken at a meeting without a vote, on the basis of the advice provided by the cabinets of the various Commissioners.¹¹⁴ In the event of the attendants being of the same opinion, a decision may be adopted without much formal discussion.¹¹⁵ However, should this not be the case, there will be a debate and a formal vote. A majority vote will be necessary in

¹⁰⁹ MCR, at art. 8(2)-(5)

¹¹⁰ *Id.* at art. 8(2)-(3)

¹¹¹ *Id.* at art. 8(2)

¹¹² *Id.* at art. 14(2)(c)

¹¹³ *Id.* at art. 15(2)(a)-(b)

¹¹⁴ Overbury, p. 573

¹¹⁵ *Id.*

order to adopt a decision, meaning that nine Commissioners must be of the same opinion, regardless of how many Commissioners are present.¹¹⁶

In the event of the Commission intending to authorise a notified concentration under Article 8(2), the decision must be made as soon as the serious doubts referred to in Article 6(1)(c) have been removed.¹¹⁷ Other decisions, under Article 8(2) or (3), must be taken within four months counting from the date on which second stage proceedings were initiated.¹¹⁸ In the event of the Commission failing to do so, the notified concentration is regarded as compatible with the Common Market.¹¹⁹ The four-month period may be suspended by the Commission however, should the Commission have had to request the parties concerned for further information due to a fault in the Notification.¹²⁰

Decisions taken under Article 8(2)-(5) are published in the Official Journal, according to Article 20(1) of the MCR.

4.15 Termination of Second Stage Proceedings in the Volvo/Scania Merger

4.15.1 *Volvo's Conditions and Obligations*

Undertakings submitted by a notifying party are an important part of the merger regulation, despite the fact that it has not been given much attention in literature and other sources. Undertakings *can* play a key role in a decision pursuant to Article 8, as has been shown in several previous merger cases, where concentrations have been cleared due to among other things *undertakings* submitted by the notifying party.

According to the Decision, in order to ensure the adoption of a decision pursuant to Article 8(2) of the MCR, Volvo submitted a number of undertakings or conditions and obligations on 21 February 2000, which would take effect on the date of adoption of such a decision.¹²¹ These undertakings were also subject to an extensive investigation and presented in the Decision.

The assessment of the proposed undertakings is divided between heavy trucks and coaches, city and intercity buses, starting with an outline of Volvo's "offered" undertakings, and followed by the actual assessment conducted by the Commission.

4.15.2 *Heavy Trucks*

On the heavy trucks side, Volvo states that it would open up Volvo and Scania's dealer and service networks in Sweden, Finland, Denmark and Norway, as well as the Volvo network in Ireland.¹²² This would be done through informing all authorised dealers and service centres in

¹¹⁶ Fine, p. 277

¹¹⁷ MCR, at art. 10(2)

¹¹⁸ *Id.*

¹¹⁹ *Id.* at art. 10(6)

¹²⁰ *Id.* at art. 10(4)

¹²¹ The Decision, at para 332

¹²² *Id.* at para 332(1)

the relevant countries that they would be free to establish contractual relations with Volvo's competitors, including their foreign and/or Swedish subsidiaries, for the sale and leasing of those competitors' heavy trucks, city buses, intercity buses and performance of maintenance, servicing and repair related thereto or to provide the same on an ad hoc basis without the need to establish a separate company or to carry out such activities at separate premises.

Further, Volvo agreed to let dealers and service stations terminate any existing dealership agreement or service centre agreement. Volvo also committed not to discriminate against any actual or prospective dealer or service centre on the basis that they deal with any of Volvo's competitors. Volvo also stated "precautions" in terms of that it would be free to enter into exclusive arrangements with new or existing dealers or service centres and would no longer be bound by the commitment above, should the combined share of Volvo and Scania heavy truck fall below 40% of total heavy truck sales in the relevant countries in one year.¹²³

The Commission states that the proposed opening up of Volvo's and Scania's dealer and service networks, does not necessarily lead to dealers being prepared to take on additional brand or switch to a completely different one. The Commission even states a requisite that would need to be fulfilled in order to be able to state that this undertaking would show significant results on the market structure. According to the Commission, it would be necessary to demonstrate that, despite its lack of structural features, it is highly likely to provide the existing dealers with a strong incentive to change their behaviour in a way that would have a structural impact on the market.¹²⁴

Respondents given the opportunity to evaluate and assess Volvo's proposal of opening up of the dealers and service networks, gave several different explanations to why this was not a sufficient proposal. One of them being that all Volvo and Scania dealers were already allowed to take on a competing brand, with the restriction they have to do so on separate premises. The fact that this opening had not yet been exercised, pointed towards the direction that dual-branding was not of interest to dealers.¹²⁵ The undertaking regarding not to discriminate against dealers which do take on a new brand, was dismissed and criticised for being too vague and virtually impossible to monitor.

Arguing that both formal and economic arguments hereby had been given, and the fact that several respondents to this proposal argued that this undertaking would have little or no impact on Volvo/Scania's market share within the next two to three years, it was dismissed by the Commission.

Secondly, Volvo would agree to divest its 37% stake in Bilia (a distributor in the Nordic countries). Despite the fact that this undertaking would remove Volvo's vertical link, Bilia would still be dependent on Volvo, in the sense that a large majority of its business activities relate to the sale and service of Volvo vehicles. Proceeding, the most likely buyer of this stake was claimed to be Ford, which in its turn owns Volvo's car division, and uses Bilia for its distribution of cars in the Nordic countries. Since Ford does not deal with heavy trucks and buses, Ford will most likely not provide any additional competition. Volvo has also claimed that it might terminate its contract with Bilia should the company be acquired by a competitor.

¹²³ *Id.* at para 334

¹²⁴ *Id.* at para 341

¹²⁵ *Id.* at para 343

The third, and probably one of the most surprising proposed undertakings were Volvo's proposed efforts to put pressure on the Swedish Government to abolish the "cab crash test", viewed by the Commission as one strong barrier to entry. Volvo stated that it had contacted the Swedish Government and requested the elimination of the "cab crash test", the specific Swedish technical safety standard applicable to cabs used on heavy duty trucks, as soon as possible and "in any event no longer than six months following the adoption of the Commission's Decision".¹²⁶ After the adoption of the Decision, Volvo was to do its best in order to influence the Government to abolish the "cab crash test" requirement, and to keep the Commission informed of the progress.

According to the Commission, which also claimed support from the conducted markets test, the abolishment of the cab crash test as well as the suspension of the Scania brand in Sweden, Norway and Finland, would have only little or no impact on the competitive situation. According to the Commission there were no indications from the Swedish Government pointing towards such an abolishment within the time frame submitted by Volvo. It was therefore concluded that there were no certainties regarding the actual abolishment of the cab crash test.¹²⁷

Volvo's fourth proposed undertaking was not to use the Scania trademark for new heavy trucks, city/intercity buses and coaches sold in Sweden, Finland and Norway, for a period of two years. This undertaking would commence on the date of the closing of the transaction or as soon as, technically and contractually, possible. Scania vehicles would still be sold during this two-year period, but under another trademark to be decided solely by Volvo.

The Commission dismissed this undertaking, referring to the fact that it only applied to a two-year period, and secondly that it did not include Ireland. Further, the proposal would not withhold the actual production of Scania vehicles it would neither apply to existing contracts, binding orders or products in stock. According to the Commission, the undertaking would therefore have only little, or no impact at all on the competitive situation.

Lastly, Volvo listed a two-year temporary suspension of the Scania brand name in Sweden, Finland and Norway.

4.15.3 Coaches, City and Intercity Buses

Volvo's undertakings regarding coaches, city and intercity buses were partly the same as for heavy trucks, with the same opening of sales and service network and suspension of the Scania brand. These undertakings will therefore not be further examined in this presentation. This section will instead concentrate on the additional undertakings regarding the bus side, which Volvo proposed, such as a divestiture of three bus and coach body-building plants (two in Denmark, one in Sweden), and lastly access to body-building capacity in Finland.

Volvo's proposal to divest three bus and coach body-building plants was also criticised and finally dismissed on the basis that it would not improve market access for competitors to the relevant market, and more generally, as being insufficient to remove the identified competition concerns. Among other things, it was argued that the divestiture of the three proposed plants would not significantly facilitate access to the Nordic markets for

¹²⁶ *Id.* at para 333

¹²⁷ *Id.* at para 339

competitors, in particular as there is a strong belief that these plants, for technical compatibility reasons, will continue to be dependent on chassis supplied by Volvo/Scania within the foreseeable future.¹²⁸

Volvo's proposed undertaking to provide third parties access to Volvo's bus and coach body-building capacity relates to Volvo's subsidiary, Carrus, in Finland. Volvo would hereby commit to oblige Carrus to supply bus and coach bodies to Volvo's competing European bus and coach suppliers for their sales of buses and coaches in Finland on terms that are non-discriminatory as compared with the supply of Carrus bus and coach bodies to Volvo for sale in Finland.¹²⁹

According to the Commission, this undertaking would provide little or no change from the existing situation. Some of the respondents had indicated that they would be unwilling to contract with Carrus, as it is a wholly owned subsidiary of Volvo. Among others, Volvo itself had confirmed that Carrus has already, in the past, had a practice of supplying bus and coach bodies to unrelated bus and coach suppliers on commercial terms. The Commission concluded that this undertaking was unlikely to have any significant impact on the relevant markets for coaches, city buses and intercity buses.¹³⁰

4.15.4 Conclusion of the Proposed Undertakings

The Commission concludes the assessment by stating that even if Volvo's proposed undertakings could have had some beneficial effect on the competitive situation in the relevant markets, the proposed undertakings were still insufficient in order to ease the concerns regarding the competitive situation following the elimination of Volvo's main competitor (Scania) through the proposed concentration.¹³¹

4.15.5 Additional Undertakings by Volvo

One noticeable and also quite abnormal incident was the fact that Volvo proposed a new and substantially modified undertaking at a very late stage of the merger procedure. Volvo withdrew the proposal to divest Volvo's 37% shareholding in Bilia as they also did with the proposal to suspend the use of the Scania brand name for a two-year period. A new proposition was introduced, concerning distribution networks, and a provision was added to the proposition to divest the Scania body-building plants regarding sales of city and intercity bus chassis.

The time aspect of these additions to the former proposal of undertakings, was immediately noted by the Commission and it was stated in the Decision that according to the Merger Regulation, commitments intended to form a basis of a decision of compatibility pursuant to Article 8(2) of the Merger Regulation, are to be submitted to the Commission within three months of the decision to open proceedings.¹³² The Commission may suspend that time period under exceptional circumstances, however Volvo failed to show such reasons. According to

¹²⁸ *Id.* at para 353-355

¹²⁹ *Id.* at para 336

¹³⁰ *Id.* at para 352

¹³¹ *Id.* at para 338

¹³² *Id.* at para 358-359

the stated, the last day for submitting proposed undertakings was, in this case, 21 February 2000, and Volvo's new proposal was submitted on 7 March 2000. The Commission held that there was nothing in the new proposal that Volvo would not have been able to submit in the undertaking submitted within the three-month period.

The Commission further added that the new proposals would be dismissed on the grounds that it would have been too complex from a procedural point of view, to terminate the contracts with dealers and/or divest sales points. The Commission proceeds by stating that it¹³³ would be impossible to conclude that the new proposal in an obvious and clear cut-way would remove all the identified competition concerns. Also, the complexity of the new proposals would have made it impossible for the Commission to assess within the strict time limit provided for in Article 10(3) of the Merger Regulation. Much investigation would have been necessary, as well as seeking the views of interested third parties.

Concluding, the Commission stated that the undertakings proposed by Volvo on 21 February 2000 were insufficient to remove the competitive concerns resulting from the proposed acquisition of Scania. Regarding the new proposals submitted by Volvo on 7 March 2000, it was concluded that Volvo had not been able to justify its submission several weeks after the expiry of the deadline for submission of undertakings. In any event, it is stated, that the new proposal did not in a clear-cut way remove all the identified competition concerns.

4.16 The Decision

The Decision in the Volvo/Scania case was made on March 14 2000, and was based on the far going investigation carried out by the Commission.

The structure of the actual decision of the Volvo/Scania case follows the main guidelines according to EC Merger Regulation. Starting with a short summary of the actions by the parties leading up to the investigation, pointing out particularly important incidents and the following decision, the Decision continues with a presentation of the parties. Facts such as in which countries Volvo and Scania are registered, their main business activities and also basic background facts leading up to the Notification are presented.

The next part describes the operation and the concentration, namely what the outcome of such a concentration will be and the conclusions accordingly. Immediately following, the next part states what type of markets will be affected by the proposed concentration.

The main investigation and matter of argumentation in the Volvo/Scania case, was regarding the relevant markets, and more specifically the relevant product market and the relevant geographic market. Consequently, a majority of the contents of the Decision also focuses on this investigation and conclusions. The argumentation brings forward both the views and arguments held by the Commission, but also the views and arguments brought forward by Volvo and Scania. In the Volvo/Scania case, the markets were divided up between trucks on the one hand and buses and coaches on the other hand, why the chapters on the above are also divided up accordingly.

¹³³ *Id.* at para 360-361

The Decision is concluded with a chapter called *Overall Conclusion*, in which the Commission concludes that the notified concentration is incompatible with the Common Market and the functioning of the EEA.¹³⁴ The Commission continues the statement by claiming that the proposed concentration would create dominant positions in the markets for heavy trucks in Sweden, Norway, Finland and Ireland, and touring coaches in Finland and the United Kingdom. Further, dominant positions would be created for intercity buses in Sweden, Finland, Norway and Denmark, and lastly for city buses in Sweden, Finland, Norway, Denmark and Ireland. The creation of such dominant positions would result in “effective competition being significantly impeded in the Common Market within the meaning of Article 2(3) of the Merger Regulation and Article 57 of the EEA Agreement”.¹³⁵

Immediately following the *Overall Conclusion*, the Decision is formally outlined in a section headed Article 1, stating the notified concentration being incompatible with Merger Regulation. Article 2 addresses the decision to the notifying party, in this case Volvo. The date and place of the decision is stated in the end of the Decision, as is also the name of the Commissioner, in this case Mr Mario Monti. The very last section contains a list of footnotes, referred to throughout the Decision.

Immediately following the Decision, a number of critics, media as well as others, raised doubts and criticism towards the Decision. The grounds for this type of criticism were of different character, including unfair, power play by the Commission etc.

According to Ulf Bernitz, the outcome might have been different if Volvo had presented different and more believable obligations, which would have kept Scania as an independent competitor in the market. This proposition is however strictly hypothetical, and would also go against the very reason why Volvo wanted to buy Scania, namely to integrate it into its operations in order to extract them maximal possible synergies¹³⁶. Having studied the decision concerning the proposed concentration between Volvo and Scania, he cannot see that the Commission is to have changed its policy or their attitude towards mergers. This merger was simply not compatible with the Common Market. According to Bernitz, media and other critics have showed little knowledge or comprehension of the EC Merger Regulation.

4.17 Appeals to the Court of Justice

Certain decisions taken by the Commission under the MCR, are appealable: Decisions concerning referrals to the Member States under Article 9, decisions ordering information under Article 11(5), decisions ordering investigations under Article 13(3), and decisions imposing fines and periodic penalty payments under Articles 14 and 15. Also, decisions under Article 8(2), second subparagraph, through (5), which concern the very legality of the concentration, are also appealable pursuant to the MCR, including the right to appeal the rejection of a proposed and notified concentration.¹³⁷

However not explicitly outlined in the MCR, the legal basis of appeal of a decision taken by the Commission concerning concentrations, is found in the Treaty. It is hard to find the actual provision, however it seems the relevant legal basis can be found in Article 173 of the Treaty.

¹³⁴ *Id.* at para 363

¹³⁵ *Id.*

¹³⁶ Bernitz, at p. 485

¹³⁷ MCR, at Art. 8(2) second subparagraph-5 and 21(1)

Article 173 provides grounds for appeal concerning “lack of competence, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.” The MCR is explicitly based on Articles 87 and 235 of the Treaty, one can assume that the MCR would constitute a “rule of law”, relating to the application of the Treaty.¹³⁸

Due to the outcome of several previous cases decided by the Commission, interestingly enough, there does not seem to exist a right to appeal decisions taken pursuant to Article 6(1), concerning the actual examination of the notification and initiation of the proceedings. However, it seems that it would, technically, be possible to appeal decisions taken pursuant to Article 6(1)(a) and (b) would be appealable as *final decisions*. These are decisions concerning whether the concentration falls within the scope of the MCR, and also decisions concerning concentrations which do fall within the scope of the MCR but do not raise serious doubts as to its compatibility with the Common Market. Article 6(c), concerning decisions taken to open second stage investigations, does not appear to be appealable.¹³⁹ A decision to reject a complaint would be subject to appeal, based on several previous cases.¹⁴⁰

Appeals are made to the Court of Justice (ECJ), which is also indicated throughout the MCR. However, according to Council Decision 88/591,¹⁴¹ appeals of decisions pursuant to Article 172 and appeals by natural or legal persons of decisions under Article 173(2) are to be made initially to the EEC Court of First Instance (CFI). The CFI is however attached to the ECJ.

4.18 No Appeal in the Volvo/Scania Merger Case

Volvo did not appeal the decision to prevent the proposed merger, on the grounds that the concentration would have been incompatible with the Common Market.

¹³⁸ Fine, at p. 280

¹³⁹ *Id.* at p. 279

¹⁴⁰ *Id.*

¹⁴¹ Council Decision 88/591 establishing a Court of First Instance of the European Communities, O.J. L319/1 (1988)

5 RELEVANT GEOGRAPHIC- AND PRODUCT MARKETS

One important tool exercised by the Commission in order to be able to determine whether a merger would result in negative consequences for consumers, is to determine the relevant markets; the *relevant product market* and the *relevant geographic market*. This was also the crucial reason indicated by the Commission to why the Volvo/Scania merger was blocked. The legal tests carried out by the Commission, in conjunction with the Merger Regulation when determining the relevant markets descend from the ones established in conjunction with Article 82 of the Treaty. Since its implementation, the concepts have been refined and developed in order to suit merger analysis.

According to the Commissioner Mario Monti, the Commission uses the market definition as an easily available proxy for the measurement of the market power enjoyed by firms. The main objective of the market definition is to identify the competitors of the undertakings concerned by a particular case that are capable of constraining their behaviour. The necessity for defining markets has been part of the competition policy of the EU from its inception.¹⁴²

In practice, the starting hypothesis for the Commission's analysis is the market definition provided by the notifying parties. Parties are asked to define the relevant product- and geographic markets and to provide very detailed additional information to allow the Commission to investigate that definition. This position is then contrasted with the experience of the Commission in the sector as well as with the views of customers and competitors. Customers, competitors as well as other third parties receive requests for information, often quite detailed, so as to assist the Commission to define the relevant markets. Although aware of the attempts of customers and competitors to influence the Commission in one or another direction, Mr Monti is confident that experience and knowledge will help distinguish between "objective facts and subjective opinions", and will therefore not be unduly influenced in their assessments.¹⁴³

5.1 Relevant Product Market

The Commission undertakes several different proceedings in order to obtain sufficient information when determining the relevant markets. Part from their own investigations, the Commission also processes information obtained by the notifying parties as well as competitors and customers requesting their views on the relevant market. In order to define the product market, different criteria are assessed in order to base a final decision on. Testing *demand and supply substitutability* is one such criteria assessed when determining the relevant product market. Here will follow a summary of the main assessment criteria for defining the relevant product market in the Volvo/Scania merger case.

5.1.1 Demand Substitutability

Demand substitutability can be summarised as being all those products regarded as interchangeable or substitutable by the consumer, by reason of the *products' characteristics*,

¹⁴² Monti, 2001-10-05

¹⁴³ *Id.*

their *price elasticity* and their *intended use*.¹⁴⁴ There are several different attributes examined by the Commission in order to define the product characteristics, for instance qualities, technical specifications or performance. In the Volvo/Renault case, the Commission placed trucks in the 5-16 ton and above-16 ton ranges in separate product markets due, in part, to differences between the two ranges in their key components, such as their engines, number of axles and size of trailer.¹⁴⁵ This segmentation was also used in the Volvo/Scania case.

Price elasticity features the main principle that if two products belong to the same product market, a minor increase in the price of one product should shift demand to the lower priced item. Consequently, if consumer loyalty to the first product persists despite a substantial decrease in the price of the second product, this is the strong evidence of a lack of demand substitutability, and accordingly this indicates a state of lack of substitutability.

The intended use of a product is quite self-explanatory. One slightly confusing matter however, is that a product's intended use depends largely on its physical characteristics, which has been seen in previous cases.¹⁴⁶

5.1.2 Supply Substitutability

Supply substitutability has the effect of enlarging the product market under consideration where the products are not interchangeable in terms of demand. There is no existing exclusive solution on how to determine supply substitutability, i.e. how to determine the relative importance of a company's economic and technical means of entering the field. One option is to assume that it exists when the relevant technology is available and when only a minor adjustment to one's production process is necessary to enter the field.¹⁴⁷ It seems that in the majority of already judged cases, the main issue is whether the potential entrant may foreseeably enter the market in question in view of the expense and risk involved.¹⁴⁸

5.1.3 Product Segmentation

Yet another means of determining the relevant product market is the product segmentation, which was also applied when investigating the Notification of the Volvo-Renault Case¹⁴⁹. In the Renault/Volvo case trucks were divided into sub-markets based on the weight of the vehicles, i.e. markets were identified in the below-five ton range, the 5-16 ton range and the above-16 ton range.

¹⁴⁴ *Aerospatiale-Alenia/de Havilland*, O.J. L334/42 (1991), at para. 10

¹⁴⁵ *Renault/Volvo*, Commission Decision of 7 Nov. 1990

¹⁴⁶ One such case is the *UAP/Transatlantic/Sun Life*, Commission Decision of 11 November 1991.

¹⁴⁷ This approach was suggested in the *Continental Can* case, J.O. L7/25 (1972), [1972] CMLR D11. The Court established that light metal containers for meat and fish might be substituted by other containers where the manufacturers of the latter containers were capable of entering the former market by a "simple adaptation".

¹⁴⁸ One example of this is *Nederlandsche Banden-Industrie Michelin v. Commission*, Case 322/81 [1983] ECR 3461, [1985] 1 CMLR 282.

¹⁴⁹ Case No IV/M.004 – *Renault/Volvo*, Decision of 7 November 1990

5.1.4 Conditions of Competition

In addition to the analysis of demand and supply substitutability, the conditions of competition are also assessed, i.e. the “structure” of supply and demand. The general idea is to consider whether the exact same product can be divided up into different product markets, for example due to the fact that the product is distributed and sold exclusively in different quantities and packages depending on the specific target market.¹⁵⁰

5.2 The Relevant Product Market as Defined in the Volvo/Scania Merger

As regards the two types of relevant markets and their relevance to this case, these are presented in two different sections in the investigation featured in the final decision of the Volvo/Scania merger case.¹⁵¹

5.2.1 Trucks

Firstly it is stated, “the proposed concentration would create Europe’s largest producer of heavy trucks (over 16 tonnes)”.¹⁵² An immediately following discussion concludes that the notifying party’s reliance on a previous Commission Decision¹⁵³, identifying three market segments according to the truck’s gross vehicle weight: the high-duty segment (below 5 tonnes), the medium-duty segment (5 to 16 tonnes), and the heavy-duty segment (above 16 tonnes), is however confirmed by the investigation carried out by the Commission.¹⁵⁴

The Commission’s investigation further concludes that the technical configuration of trucks of tonnage lower than 16 tonnes and trucks above 16 tonnes is very different as regards the key components; the type of engines and the number of axles are mentioned as particularly different. Further more, the technical aspects of the upper range are more sophisticated because the requirements length of life and operating costs are greater than for the other ranges. Trucks of 16 tonnes or heavier are vehicles used in transports of considerable weight, and the type of transport can also be regional or long distance.

The investigation further states, *marketing* is also affected by the technical differences between the ranges of trucks, which are of “great importance” for the buyer.¹⁵⁵ The Commission therefore concludes that the technical boundary between the two product groups corresponds to a commercial distinction, which makes it possible to differentiate between two groups of customers. This statement is of high importance since it, along with the above conclusion, means that *upper range trucks*, i.e. trucks of 16 tonnes or more, are not normally considered to be interchangeable with, or substitutable for trucks belonging to the

¹⁵⁰ One example of this is the *Eridania/ISI* case, Commission Decision of 30 July 1991.

¹⁵¹ OJ, L143, 29/05/2001 P. 0074 – 0132, The Commission Decision, Case No COMP/M. 1672 *Volvo/Scania*, hereinafter referred to as *the Decision*.

¹⁵² The Decision, at para 13

¹⁵³ Case No IV7M. 004-*Renault/Volvo*

¹⁵⁴ The Decision, at para 15

¹⁵⁵ *Id.* at para 17

intermediate and lower range. The Commission therefore concludes that the three categories of trucks do constitute three separate relevant product markets.¹⁵⁶

Also argued by the Commission, is that different product lines are used for the different ranges of trucks, even further stressing the distinction between the ranges. Manufacturers can concentrate their production on one range, with little or no presence of the other ranges in the production line. As regards to Volvo and Scania, both companies manufacture trucks in the range of 16 tonnes and above, but neither of the two companies manufactures trucks in the lower range. Volvo also manufactures trucks in the range of 7-16 tonnes.

5.3 Volvo's Standpoint Regarding the Relevant Product Market for Trucks

Heavy-duty trucks (above 16 tonnes), considered the most interesting segment concerning this case due to its impact on the transaction, is also the segment focused on in this assessment. Although reaching the same final conclusion, due to the Commission and Volvo *arguing* somewhat differently in this part, both sides' argumentations are presented in the Decision.

In the Notification, Volvo argued that there are generally two model categories for heavy trucks: long haul and regional/local. It was argued by Volvo that chassis for trucks over 16 tonnes are essentially the same for all models and that differentiation only occurs in respect of the cab and the body or configuration for specific applications (for example, cement-mixing, city delivery, long-haul transport).¹⁵⁷ Also noted and stated by Volvo is that in Sweden and in Finland, longer trucks (25,25 metres) with higher maximum load capacities (60 tonnes) are commonly used.¹⁵⁸ This special range of truck is generally not allowed in other Member States. In the Notification, Volvo argues that any major truck manufacturer would easily be able to modify its standard truck models for a special application and names the longer trucks used in Sweden and Finland. Volvo summarises by concluding that on the basis of the above, trucks above 16 tonnes belong to the same market.

5.4 The Commission's Standpoint Regarding the Relevant Product Market for Trucks

The market investigation, as presented by the Commission in the decision, suggests that the reality from the customer's point of view is quite complex. The investigation states there are several different criteria, relevant for the choice of a given type of heavy truck over another type.¹⁵⁹

The market investigation further suggests a somewhat different distinction of heavy-duty trucks than in the Notification by Volvo. The Commission chooses to divide the ranges of trucks between "rigid trucks" and "tractor heavy trucks". Rigid trucks are integrated trucks, meaning that they are in one solid body from which one cannot detach a semi trailer. Tractor heavy trucks are detachable, meaning that one can add a semi trailer to the top back of the

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at para 20

¹⁵⁸ Almost exclusively used for timber

¹⁵⁹ The Decision, at para 24

cabin. The market investigation suggests that the customer's choice of either the rigid truck or the tractor heavy truck will strongly depend on its geographical location.¹⁶⁰ Also suggested is that customers living in the North of Europe will be more likely to buy a tractor heavy truck.

Further, in addition to the distinction made above, the investigation shows that there are three main criteria according to which customers will choose to buy a certain heavy truck. The first criterion relates to the power of the engine, which is important depending on what type of goods and how much weight the truck is expected to carry. The choice of engines is also based on in which type of environment and geography the customer is located and will drive the vehicle.

The second criterion is the number of axles of which the truck is composed. According to the investigation, there are different number of axles on trucks, and the number of axles would most likely be chosen by customers on the basis of whether conditions and topography in which the customer is located.

The third criterion relates to the cabin of the truck. The cabin can be low, high or very high depending on the level of comfort required. Although there are a variety of options when buying a heavy truck, the Commission concludes that any manufacturer will most likely offer any of the key elements presented above.¹⁶¹ Also mentioned is that customers based in Sweden and Finland will have yet another choice, indicating the extra long trucks with higher maximum load capacities also acknowledged by Volvo in their Notification.

The investigation proceeds by stating that any major European truck manufacturer would be able to offer a complete range of different types of heavy trucks. However, in order to offer specific trucks for certain European areas would "certainly represent a supplementary cost for such manufacturers"¹⁶². The cost would then have to be compared to the attractiveness of the market under consideration, however the Commission states that the costs related to switching from the production of one type of heavy truck to another would not be considered to be substantial. Therefore it is considered that the different types of heavy trucks *do not* constitute separate product markets.

5.4.1 Buses and Coaches

The bus market will not be as thoroughly presented as the truck section, since the methodology used follows the same pattern as for the trucks.

The Commission states that the proposed concentration will produce a major impact on the bus market as well as on the heavy truck market.¹⁶³ The merger would create the second largest European bus manufacturer after DaimlerChrysler. The Commission divides the bus market into three different segments, each corresponding to different product markets. The categories are city buses, intercity buses and touring coaches.¹⁶⁴ In its comments, the Commission points out the different *areas of usage* as the main explanation to the segmentation concluding, "given that the buyer of a bus, in any purchasing situation, will

¹⁶⁰ *Id.* at para 25

¹⁶¹ *Id.* at para 27

¹⁶² *Id.* at para 29

¹⁶³ *Id.* at para 214

¹⁶⁴ *Id.* at para 215

have a definitive idea as to the type of service for which the vehicle is primarily intended, the substantiality between the various types of bus will necessarily be low”.¹⁶⁵ The Commission’s opinion is consequently that it is likely that the merged entity would be able to take advantage of this in the future. This in turn is possible through the increased market power in one or more of the three vehicle types due to the concentration. Therefore the Commission will assess the bus market as three separate ones.¹⁶⁶

5.5 Relevant Geographic Market

“The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply of products or services, in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighbouring areas because, in particular, conditions of competition are appreciably different in those areas.”¹⁶⁷ The importance of determining the impact of a concentration, such as a merger, within a territorial context is explicitly established in the MCR. According to Article 2(3) a concentration shall be prohibited if it leads to the strengthening of- or the creation of a dominant position within the Common Market.

It is worth noting that it is far from all cases where the Commission even initiates an investigation regarding the relevant geographic market. In so called “clear-cut cases”, in which there is no indication of market dominance as such, the Commission simply dismisses any such deeper investigations by referring to for example defining the relevant geographic market simply as the market where the parties are active, or which is affected by the concentration. The concept of competitive conditions does not occur at all in such cases. Another conclusion refers to the relevant geographic markets as the national territories and regions within them. When determining the relevant geographic market in a certain case, several different sources of information are used, one of them being the notifying party’s own view and understanding stated in the notification. Such a statement includes company specific data, and also details on competitive conditions in the affected markets. Also used are reports and analysis performed by the notifying party and/or third entities, such as for example the Lexecon- and Neven reports in the Volvo/Scania merger. Such reports are investigated and assessed by the Commission and are given credibility depending on the outcome of such an assessment. There are several different criteria taken into account by the Commission when determining the relevant geographic market according to the MCR, one of them being *barriers to entry*.

5.5.1 Barriers to Entry

One example of a barrier to entry is the *state regulated industries* and is applicable where a Member State government restricts the conditions of competition within their territories leading to the relevant market being national in scope.

Another barrier to entry is the *national technical standards and specifications*, applicable within sectors where global standardisations apply, and accordingly it is hard to maintain national market definitions.

¹⁶⁵ *Id.*, at para 230

¹⁶⁶ *Id.*

¹⁶⁷ Regulation 3384/94, at Annex I, Section 6

5.5.2 Local Purchasing Preferences

The Commission has found that various circumstances may influence consumers to buy products locally rather than from cross-border suppliers. In most cases this leads to the Commission concluding that the conditions of the competition in the Community are not homogenous.

5.5.3 Structure of Supply

The supply of the relevant product constitutes differences between Member States, which according to the Commission, suggests that the conditions of competition are not homogenous within the territory concerned. One such example is when consumers' expectations force the producers to be situated within the locality of the purchaser, so called *physical proximity*. This phenomenon may lead to the Commission determining the relevant geographic area as national or regional. However, in cases where physical proximity has not been regarded as necessary for the marketing of the product, the Commission may determine the relevant geographic market being Community wide.

5.5.4 Market Shares and Penetration

This tool of defining the relevant geographic market focuses on market shares within the EC. Although few indications have been provided or presented in cases where referred to by the Commission regarding the use of this criterion, it seems one explanation is simply the actual market shares held in each country.¹⁶⁸ Despite what was just said, it is important however, to acknowledge the fact that the Commission has defined the relevant geographic market being EC wide, due to the fact that purchases are made on an EC wide basis and that delivery is possible throughout the EC, leading to the relevant market being defined as EC wide.¹⁶⁹

5.5.5 Prices

Prices, and the ability for parties and their competitors to charge varying prices in different Member States for the same products, makes another indication of uneven conditions of competition. In such cases, the Commission will define the relevant market as national. Despite this, there may however be extraordinary circumstances leading to the market being defined as EC wide. One such case is *Volvo/Atlas*, in which the Commission held that an EEC-wide market existed despite price differences between Member States and were due to varying practises in stockholding, consumer expectations in providing installation service and methods of charging customers.¹⁷⁰

¹⁶⁸ *Magneti Marelli/CEAc*, O.J. L222/38 (1991)

¹⁶⁹ One example of this is *Mannesman/Boge*, Commission Decision of 23 Sept. 1991

¹⁷⁰ Commission Decision of 14 Jan. 1992

5.5.6 Stage of Development of the Market

In the process of defining the relevant geographic market, the Commission may examine whether the product or service market is *novel* or *mature*. This procedure is motivated by the fact that where the market is relatively new, the opportunities for suppliers may be greater in some Member States or regions than in others, and because of this may indicate that the conditions for competition may vary in the Community. One important thing to keep in mind, is that the differing stages of developments of a given product or service market in the Community may be offset by evidence of a lack of barriers to entry.¹⁷¹

5.6 The Relevant Geographic Market as Defined in the Volvo/Scania Merger

5.6.1 Trucks

Determining the relevant geographic market in the Volvo/Scania case, the Commission starts by referring back to its conclusion in the Volvo/Renault Decision of 7 November 1990: “It is not necessary to determine whether or not the geographic market for trucks is a Community market or is still composed of several national markets as this was not essential for the purpose of the specific case”.¹⁷² The investigation in the Volvo/Scania merger case is focused on Northern Europe, in particular Ireland and the four Nordic Countries, Denmark, Finland, Norway and Sweden. The Commission concludes that since even on a national market definition, the merger would not create market dominance in other parts of the Community, it is not necessary to determine the exact scope of the geographic market outside the Nordic countries and Ireland.¹⁷³

Again the argumentations as presented by Volvo and the Commission are different, and both parties’ opinions will be presented below.

Due to the fact that the relevant geographic market definition assessment outlines the main core of the Volvo/Scania merger investigation, and that the final decision is accordingly based on this assessment, this part of the case study is also the most far going and detailed presentation herein.

5.6.2 The Geographic Market as Defined by Volvo

In its notification, Volvo argued that the analysis on the relevant market for *touring buses* applied by the Commission earlier in the Volvo/Iveco Case¹⁷⁴, would also be applicable in the Volvo/Scania merger regarding *heavy trucks*. In the Renault/Iveco analysis, it was concluded that the relevant market was the European Economic Area (EEA), mainly due to the high levels of imports and exports. Also stated in the case was that the market for touring buses is private with price sensitive customers and with little regard as to considerations of brand loyalty to national manufacturers. The relevance of this statement is further discussed in the section regarding buses further below.

¹⁷¹ For example *Alcatel/AEG Kabel*, Commission Decision of 18 Dec. 1991

¹⁷² The Decision, at para 31

¹⁷³ *Id.*

¹⁷⁴ Case No IV/M. 1202, *Volvo/Iveco*

Arguing that the analysis on touring buses was equally applicable to heavy trucks, Volvo submitted six different main points in order to support its standpoint. According to Volvo, price differences between the Member States were not substantial. Volvo argued that, with the exception of France, Member State price variations were within a +/-10% range.

The next argument stated that manufacturers were already active EEA wide and imports within EEA also were increasing. Volvo argued that all of the leading truck manufacturers¹⁷⁵, representing approximately 97% of the European Market were present in almost all Member States and all made substantial export sales. Further, Volvo argued that the fact that manufacturers maintained relatively large market shares in their home countries was mainly a historical phenomenon, and that imports were continuing to increase.

Further, the emergence of large, private, trans-border purchasers due to deregulation had changed the customer profile significantly, resulting in the emergence of large, multinational “fleet operators” as opposed to the traditional rather small fleet operators. These large customers consequently have good knowledge of the market and possess the ability to negotiate competitive prices and conditions when purchasing trucks.

“Dual-sourcing” was another argument, meaning that large fleet operators also kept at least two different brands of trucks within their business.

Further, Volvo argued the market was harmonised as a result of EU Directives, meaning that the same trucks in terms of weight and dimensions could be sold throughout Europe, i.e. product standardisation.

Lastly, Volvo submitted that entry barriers for non-domestic truck manufacturers had been eliminated, in the sense that the need to establish after sales networks no longer prevented non-domestic manufacturers from competing in a given Member State.

Parts of the reply to the Commission’s Statement of Objections Referred to in the Decision indicates Volvo was of the opinion that the Commission “should not base its assessment of the relevant geographic market on *non-price factors* which were set out in Volvo’s Notification, as these are not relevant to the definition of the relevant geographic market”.¹⁷⁶ Instead the Commission ought to assess the geographic market based on whether suppliers actually price discriminate across markets. Volvo submitted two reports¹⁷⁷ showing that prices for comparable heavy trucks are within a 5% to 15% band throughout the Community, with the exception of Sweden, and that there were therefore no significant price differences between the other Member States.

In its reply to the Statement of Objections, Volvo also submitted new arguments relating to parallel trading in heavy trucks, which sought to prove that there was an EEA market, minus Sweden, as opposed to only national markets, for heavy trucks. Regarding the market definition assessment, Volvo focuses on the suppliers’ ability to price discriminate across markets. Based on the evidence submitted to the Commission in conjunction with this standpoint, it is the view of the Commission that the evidence shows the contrary. According to the assessment made by the Commission, the evidence instead shows that the other

¹⁷⁵ DaimlerChrysler, Volvo, Scania, MAN, RVI, Iveco and DAF-Pacar: the Decision, at para 34(b)

¹⁷⁶ The Decision, at para 35

¹⁷⁷ The Lexecon and the Neven reports

suppliers of heavy trucks have applied significantly different prices and margins for comparable products in different Member States.¹⁷⁸ Immediately following is an extensive assessment of evidence and figures made by the Commission, concluding that price levels do differ significantly across Member States.

Among the assessments and conclusions, the Commission made direct comparisons between the prices for the exact same engine type in various countries while using the methodology of the Lexecon and the Neven reports of correcting for differences in specifications. The conclusion was that there were large price differences and that these did not support the finding of an EEA-wide market or a regional geographic market in the Nordic region.¹⁷⁹ Overall, the Lexecon- and Neven reports, submitted by Volvo in the Notification, are assessed and overruled by the Commission's own investigations. The Commission refers to the reports and concludes it "cannot accept that the price differences within a +-5% (or+-6%) band should be disregarded for the purposes of market definition, as this would suggest that a hypothetical monopolist in one area could impose a price increase in some cases as large as 10% (or12%) without being restricted from doing so by conditions of competition in neighbouring areas."¹⁸⁰

The argumentation proceeds by the Commission referring to the two reports yet again, and quite straight forward dismisses them, referring to its inaccuracy and non-reliability. The Commission summarises: "the proposed conclusion of these reports is incompatible with other available sources of information. This includes not only the price comparison submitted by Volvo in the Notification, but also the pricing information subsequently submitted during the Commission's investigation, and pricing comparisons contained in internal Volvo documents provided at the Commission's request."¹⁸¹ Volvo concludes that the main question regarding the definition of the relevant geographic market should be whether price or margin discrimination is possible between different areas. Volvo further concludes that the geographic market is to be defined as an EEA-wide market, as opposed to defining the six different Northern European countries as separate markets.

5.6.3 *The Geographic Market as Defined by the Commission*

Volvo's argumentation in the Notification is investigated and assessed methodologically by the Commission. The investigation is divided up in different areas, starting with *customer preferences*. The Commission presents several pieces of evidence in order to show that different types of trucks are preferred and sold in different countries, and that the markets are therefore not coherent and the same applies throughout the Common Market. Further, it would be quite expensive for truck manufacturers to be able to provide all different types of models and varieties of trucks.¹⁸² To its help, the Commission refers to tables and reports submitted by Volvo itself, but assessing the information in a rather different manner than Volvo does.

The Commission's own market investigation further shows that customers in the Nordic countries tend to purchase a certain type of trucks compared to purchasers in other European

¹⁷⁸ The Decision, at para 37

¹⁷⁹ *Id.* at para 43

¹⁸⁰ *Id.* at para 45

¹⁸¹ *Id.* at para 46

¹⁸² *Id.* at paras. 50-52

countries, namely the heavy duty trucks. According to the Commission, this must have to do with the topography and the climate conditions prevailing in these countries, as well as the specific regulations applicable in terms of allowed tonnage. Nordic customers also tend to require more horsepower and comfortable cabins, whereas customers in other European Countries tend to prefer rigid trucks and less cabin comfort. Apart from these general differences in characteristics, other more specific options seem to attract different countries' customers, such as the gearbox and the number of cylinders in the engine.¹⁸³

It is further argued that despite much of the regulation in terms of weight and dimensions for international traffic within the Union, legislation is still not harmonised in all areas. The investigation highlights the issue of all vehicles having to be adapted for right hand driving severely restricting the possibility of importing vehicles intended for continental Europe.¹⁸⁴ Another particularly interesting example pointed out by the market investigation as a "barrier to entry", because of Volvo later offering to put pressure on the Swedish government in order to abolish it, is the Swedish unique "cab crash test"¹⁸⁵. Trucks imported to Sweden, must pass this test. In the market investigation, one of Volvo's competitors explained the reason it could not enter the Swedish market was partly due to the "cab crash test".¹⁸⁶

Purchasing is done on a national basis, is stated by the Commission based on findings in the market investigation. According to the market investigation it is rare that purchasers of heavy trucks turn to dealers outside their own country, due to price differences, technical requirements and dealer support. Dealer support is often tightly connected with the purchase of a truck, and the customer is therefore more or less forced to turn to the dealer for reparations and service, since this has been either included in the purchasing price or discounts are offered at the place of purchase.¹⁸⁷

In the conclusion on relevant geographic markets for heavy trucks, the Commission presents the relevant countries one by one (Sweden, Denmark, Norway, Finland, and Ireland). This detailed conclusion merges into an assessment presented immediately following thereon.

One section of the Decision brings forward a presentation of the methods used when assessing the market. The Commission states that: "Article 2 of the Merger Regulation requires an assessment of proposed concentrations with a view to establishing whether or not they are compatible with the Common Market".¹⁸⁸ The Commission proceeds by stating that the key to such an assessment is whether the proposed operation will lead to the creation or strengthening of a *dominant position*. The main parameters involved in this particular assessment relates to the market position of the undertakings concerned and their economic and financial power.

According to the Commission, from an economic viewpoint the effects of a merger on market conditions may be measured in a number of different ways. "Traditionally, the market power of merging parties has been measured by way of proxy, using criteria such as the market shares of the merging parties on the relevant markets and those of the remaining competitors. This analysis is normally supplemented with an assessment of the possible purchasing power

¹⁸³ *Id.* at paras. 53-55

¹⁸⁴ *Id.* at para 56

¹⁸⁵ The "cab crash test" measures the level of safety of the vehicle in the event of an accident.

¹⁸⁶ The competitor is not named in the Decision, due to confidential reasons.

¹⁸⁷ The Decision, at para 58-59

¹⁸⁸ *Id.* at para 71

of the customers, the likelihood of new entry, etc.”¹⁸⁹ The commission states that these are the criteria assessed in the Volvo/Scania investigation, and the conclusion is the proposed concentration would be incompatible with the Common Market.¹⁹⁰

In addition to the traditional analysis presented above, the Commission also assessed a requested econometric study from two professors, in order to more practically find out what the effects of the merger would be. The Commission’s using of such a study was commented as being a “valuable supplement” to the traditional means of investigating a merger like the Volvo/Scania case.¹⁹¹ According to the Commission, the study points to serious competition problems, and the conclusion is yet again that the proposed concentration would create a dominant position.¹⁹² The Commission also comments on the fact that the method of using an economic study in its investigation is a fairly new development in European Merger control. The Commission chose not to base its decision on the outcome of the study, based on the fact that the usage of economic studies is a new initiative and the fact that Volvo had challenged the report criticising the contents.¹⁹³

Continuing, the *current structure of the European heavy truck market* is further assessed in the Decision. The market leading truck manufacturers are identified, which are claimed to be stronger in their home countries than in other countries and quite specific percentage figures are presented accordingly in order to support this statement.

Further, *customers’ concerns* are brought up, as is price discrimination, market shares and brand valuation and loyalty. Also assessed are barriers to entry and absence of potential competition. Presenting the different opinions and statements, the Commission concludes that the proposed merger would create a dominant position.

The next part of the Decision is divided up on a country basis, starting off evaluating the Swedish market.

5.6.4 *The Shrinkage Effect*

Regarding *customer structure and shrinkage effect*, Volvo argues that the shrinkage effect will result in Volvo losing a certain amount of market share directly as a result of the merger. The term “shrinkage effect” was first presented in the Mercedes-Benz/Kässbohrer case¹⁹⁴. In mergers with horizontal overlaps in industrial markets where there is some dual sourcing, merging parties often present calculations of a certain loss of market share resulting from customers switching supplier. Such calculations are partly motivated by the management’s desire to stay cautious towards its shareholders.¹⁹⁵ It is the Commission’s opinion that such calculations are “more like worst-case scenarios than actual predictions”.¹⁹⁶ The Commission argues that it therefore has to evaluate carefully the assumptions behind the calculations and the likelihood that the predicted losses will actually materialise. It is only if this evaluation results in a finding that a certain merger can be safely predicted to lead to market share losses

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at para 72

¹⁹² *Id.* at paragraphs 73-74

¹⁹³ *Id.* at para 75

¹⁹⁴ Case No IV/M. 477, *Mercedes-Benz/Kässbohrer*

¹⁹⁵ The Decision, at para 116

¹⁹⁶ *Id.*

that will significantly change the competitive situation, will these losses be taken into account in the competitive assessment.

Volvo further claimed that the evidence as presented in the Mercedes Benz/Kässbohrer merger supports Volvo's calculation of a large shrinkage effect in the Nordic countries. Volvo presented data showing a shrinkage effect over four years after the merger of 3% in inter city buses and 5% in touring coaches. The Commission argued that such figures do not in themselves support Volvo's claims about the magnitude of possible shrinkage effects in the heavy truck markets in the Nordic countries. Further, the Commission claimed that the figures showing change over a four-year period do not necessarily reflect an immediate change of customer support, such as the one claimed by Volvo.¹⁹⁷

Further, the Commission stated that possible shrinkage effects have to be analysed in the light of the specific circumstances of the markets in question, and in this particular case it may be noted that the Mercedes-Benz/Kässbohrer merger concerned the German markets, which are significantly larger and therefore potentially more attractive to new entrants than any of the Nordic markets. This effectively would result in the Mercedes-Benz/Kässbohrer case there would remain two independent German bus and coach suppliers (MAN and Neoplan), which is not the case in the Nordic countries, and consequently not in the Volvo/Scania case either.¹⁹⁸

According to the Commission, Volvo has not been able to sufficiently substantiate its claims that the merged entity will suffer losses of sales as to support changing the competitive situation in the relevant markets.¹⁹⁹

Volvo in turn argued that the proposed merger would without any doubt result in a shrinkage effect, i.e. a certain amount of Volvo and Scania heavy truck customers would switch to other brands. Volvo supported this view based on a report carried out by JP Morgan²⁰⁰, showing that the proposed operation would result in a loss of customers corresponding to 10%-20% in Sweden, Norway, Finland and Denmark.²⁰¹ Volvo further argued that financial reports prepared by market analysts, such as the one provided by JP Morgan, and is the best way to show post-merger reductions. The Commission develops this standpoint and argues that these reports have not been produce to evaluate the proposed concentration's effects on competition. Quite the opposite according to the Commission, arguing that such reports is to evaluate the value of the shares in the companies involved, should the concentration be approved. The Commission concludes that the fact that analysts can be over cautious or optimistic in their evaluation, in order to fit the long term or short term recommendation they wish to make, can not be excluded.²⁰² The Commission however, argues that such reports need to be approached with caution. One further point stated in the Decision is that reports prepared by analysts do not have to follow a certain pattern or systematic approach, such as according to the Merger Regulation where each relevant market needs to be evaluated separately.

¹⁹⁷ *Id.* at para 129

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at para 116

²⁰⁰ One of the top ten American Investments Banks

²⁰¹ *Id.* at para 117

²⁰² *Id.* at para 118

Further, the facts and outcome of the report were based on information provided only by Volvo, which was however pointed out by Volvo itself.²⁰³ Volvo also stated, a number of analysts apart from JP Morgan had expressed their views on the proposed merger indicating the same results as the JP Morgan report. The Commission did not exclude however, the risk of such a report being based on the same information provided by Volvo as in the JP Morgan report. In order to reach an assessment in the likelihood of the proposed shrinkage effect, the Commission contacted several important customers. These customers generally answered that they would stay with Volvo and Scania, and it was therefore concluded that the shrinkage effect therefore was not likely to occur.²⁰⁴ The argumentation continues regarding the shrinkage effect and in order to evaluate Volvo's decision to keep the two brands apart even after the merger. The Commission refers to two previous cases (Iveco/Pegaso and Freightliner/Ford). The relevance of the two cases were dismissed by an independent report performed by Alfred Berg, the investment bank, claiming that there was no comparability between the two previous cases and the Volvo/Scania merger.²⁰⁵

In conclusion, the Commission states that Volvo has not been able to substantiate its claims of a large market share loss as an immediate effect of this merger. The Commission continues claiming that there might be a certain shrinkage effect, however not as extensive as claimed by Volvo.²⁰⁶

5.6.5 Barriers to Entry and Absence of Potential Competition

Barriers to Entry and Absence of Potential Competition is the next requisite presented in the Decision. The Commission states that there is virtually no competitor to Volvo and Scania in Sweden, which has also been the case for a number of years and the future does not look any different according to the Commission.²⁰⁷ Also, the cab crash test (see above) constitutes a significant barrier to entry into the Swedish market for heavy trucks. The market investigation also shows that a strong presence on the service network level is essential for any truck manufacturer to become truly competitive and that Volvo and Scania have an additional advantage based on their well-spread service network in Sweden. Such a network is quite important for heavy truck customers, and would most likely play a major role when deciding which brand to buy.²⁰⁸

Further, through the market investigation it was found the competitors were not prepared to establish business in the Nordic Countries within the near future, due to costs and other barriers. Based on the above the Commission concludes that it is not likely that any competitor of Volvo and Scania will establish business within the near future. Through the proposed merger, Volvo and Scania would acquire 90% of the market share in Sweden and based on these conclusions, the merger would therefore create a dominant position in Sweden.²⁰⁹

²⁰³ *Id.*

²⁰⁴ *Id.* at para 123

²⁰⁵ *Id.* at para 124-126

²⁰⁶ *Id.* at para 131

²⁰⁷ *Id.* at para 132

²⁰⁸ *Id.* at para 133-134

²⁰⁹ *Id.* at para 143-144

5.6.6 Conclusion

The same methodology applied on Sweden is also applied when evaluating the other markets: Denmark, Norway, Finland and Ireland. The conclusions were only briefly presented in the Decision due to their similarity with the Swedish investigation, which is why only the conclusions will be presented regarding those countries in this presentation.

Regarding the Danish market, the Commission concluded that it was highly unlikely that actual or potential competition or purchasing power among customers would be sufficient to restrict Volvo/Scania from exercising its increased market power with a market share of 60%. If regarded as a separate geographical market, it would result in the creation of a dominant position in Denmark.²¹⁰

The Commission's statement in regards to the Norwegian market was concluded the same way as the Danish, but with an increased market share resulting in a total of 70%, which would lead to Volvo/Scania creating a dominant position.²¹¹

Finland was yet again regarded the same way as the above countries, and the Commission concluded that a merger between Volvo and Scania would give the two companies a market share of 65% in Finland. Therefore the Commission concluded that the proposed merger would result in the creation of a dominant position in Finland.²¹²

The fifth and last country to be evaluated regarding geographical markets is Ireland and the same conclusion applies to this country.²¹³

5.6.7 Buses and Coaches

For the same reason as indicated in the section regarding the relevant *product* market for buses and coaches, this section on the relevant *geographic* market for buses and coaches will not investigate and present the bus and coaches market as thoroughly regarding the definition of the relevant geographic market.

In the notification Volvo claimed that the relevant geographic market for buses and coaches is at least the EEA and that there are no barriers to entry.²¹⁴ The Commission starts by stating that the competitive market for buses is to be treated separately in each of the Nordic countries (Sweden, Finland, Norway and Denmark) and Ireland. This conclusion is mainly based on an investigation carried out by the Commission showing that these countries are subject to fairly large differences in price.²¹⁵

In its reply and at the oral hearing, Volvo questioned the Commission's market investigation as well as arguing the issue of shrinkage as was previously argued regarding the relevant geographic market for heavy trucks. Volvo argued that customers had not expressed any concerns regarding the proposed merger. According to the Commission support could be

²¹⁰ *Id.* at para 160

²¹¹ *Id.* at para 173

²¹² *Id.* at para 201-202

²¹³ *Id.* at para 212

²¹⁴ *Id.* at para 231

²¹⁵ *Id.* at para 246-259

found to that argument, and consequently dismisses Volvo's position on customer concerns.²¹⁶

5.6.8 The Shrinkage Effect

Being one of the main arguments put forward by Volvo, the shrinkage effect will be presented separately. The Commission concluded that Volvo had not been able to establish that there would be a market share loss as a result of the proposed concentration. Further, Volvo's referring to the Mercedes-Benz/Kässbohrer case, in which the shrinkage effect was established, was also dismissed by the Commission.²¹⁷ The Commission concluded that that particular case concerned mainly the German market and was not applicable to the Volvo/Scania merger case.²¹⁸

In the Mercedes-Benz/Kässbohrer case the markets were regarded as national in scope, and pointed on for example former intangible barriers of entry in the German market, as well as to the fact those foreign suppliers' products were not properly tailored to the German market. The Commission concluded that the potential competition together with the already existing competition was sufficient to limit the merged entity's freedom of manoeuvre on the German market, because the tangible entry barriers could be overcome and the tangible barriers were expected to lose significance.²¹⁹

Regarding the Volvo/Scania case, the Commission claims there are significant differences between the Mercedes-Benz/Kässbohrer case and the proposed merger between Volvo and Scania, leading to the conclusion that the two cases cannot be directly compared. In terms of market size, the German market is by far the most important bus market in Europe and foreign bus manufacturers have a strategic interest in entering that market. The second argument presented by the Commission is that following the concentration, two further significant domestic bus manufacturers (MAN and Neoplan) remained on the market in addition to foreign manufacturers, which was not the case in the Volvo/Scania merger.²²⁰

Continuing, the Commission argues that even if there would have been a loss of market share in the Mercedes-Benz/Kässbohrer merger, any such loss would be expected to be substantially lower in the Volvo/Scania case.

5.6.9 Individual Assessment of the Bus Market

The Decision proceeds with a thorough investigation into the touring coaches market for Finland and the United Kingdom. These were the two countries in which the Commission expected a creation of dominant market positions through the merger, while the other Member Countries and Norway would not be as negatively effected by the merger. The special requisites investigated regarding Finland were the *Market Size and Market Shares, Barriers to Entry and Potential Competition* and *Demand Characteristics*, and regarding the United Kingdom: the two previous requisites mentioned and also *Actual and Potential Competition*.

²¹⁶ *Id.* at para 260-263

²¹⁷ Case No IV/m.477 - *Mercedes-Benz/Kässbohrer*

²¹⁸ The decision, at para. 264

²¹⁹ *Id.* at para. 265

²²⁰ *Id.* at para. 266

As the three characteristics are evaluated based on the same principles, these requisites will only be illustrated by either Finland or the United Kingdom.

5.6.10 Market Size and Market Shares

Regarding the Finnish market, the Commission states that the market is relatively small in volume and that the combined sales by Volvo and Scania in the country was 80%-90% during the years of 1996-1998. *The Market Size and Market Shares* in Finland have been consistently high over the past ten-year period. In 1998 Volvo strengthened its position against Scania, leaving the Commission to conclude that Volvo and Scania are competing for the same customers.²²¹ Finally, the Commission also concluded that, despite Volvo's view that DaimlerChrysler would most probably make a serious competitor to the constellation Volvo/Scania, DaimlerChrysler would only be able to gain a 5% market share and would therefore not be regarded as a serious competitor. With no other competitors in Finland, the merger would create a dominant position in terms of Market Size and Market Share.²²²

5.6.11 Demand Characteristics

In Finland, customers had quite consistently bought their coaches with the chassis and body separately, leading to the customer buying from two different suppliers. It was admitted by third parties that Volvo's position was strengthened through its acquisition of the largest body-builder (Carrus) in 1998.²²³ Further, another third party, the Finnish Bus and Coach Association, participating at the oral hearing, stated that Volvo had a 75% share of the body-building production in terms of volume through the Volvo-owned Carrus factories in Finland.²²⁴ This situation was also predicted to be consistent, based on previous years' figures. As a result of this, the Commission argued Volvo's ability to strengthen its market position would further reduce the credibility to Volvo's argument that, despite an important structural change in the market, Finnish touring coach customers would "support" a second manufacturer in order to maintain the possibility of dual-sourcing. The Commission even went as far as stating it was more likely that customers would turn to the manufacturer with the strategically strongest market position.²²⁵

It was further stated that 83% of all bus companies in Finland had 20 vehicles or less, and this was found typical for the touring coach market. The Commission's market investigation showed that for small bus companies it was more interesting to restrict the bus manufacturer to one single supplier, as this reduces the cost and complexity of maintaining multiple contacts with suppliers, spare parts, logistics and stockholding, training of drivers and mechanics etc. Further the market investigation showed that the small bus companies were able to purchase vehicles in other countries outside Finland only to a small extent, which was also the view of the Finnish Bus and Coach Association at the oral hearing. This indicates that Volvo and Scania were enabled to maintain higher prices in Finland, than for example in Sweden.²²⁶

²²¹ *Id.* at para 273

²²² *Id.* at para 274

²²³ *Id.* at para 275

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.* at para 276

5.6.12 Barriers to Entry and Potential Competition

The Commission argued that, since there is a certain similarity between the service network used for touring coaches and other types of buses and heavy trucks, it was important to note that Volvo and Scania also had similarly high market shares for city and intercity buses and heavy trucks in Finland. Small bus companies may rely on their suppliers for more complex repairs and maintenance of their vehicles. This would show the difficulty for the bus companies to source their touring coaches from DaimlerChrysler or any other manufacturer who do not have the same service network as Volvo and Scania. According to third parties, other manufacturers had higher prices and less availability and longer waiting time in terms of supply and spare parts. According to the Commission, this reflects the importance of a well-established service network also in respect of touring coaches.²²⁷

The next issue outlined in the Decision by the Commission, is the number of service points in Finland. The total number of Volvo and Scania service points combined available was higher than any of their competitors. Volvo responded that the number of service points was not significantly important, as customers could use the service networks of competitors as well as independent service points as a source of service and repair. The Commission on the other hand, pointed out the significance of the small bus companies and their general lack of available in-house service facilities and that the importance of efficient after sales service ought not to be underestimated.²²⁸

The lack of service network competition in the Nordic countries compared to the rest of the EEA, as a result of high wages, large areas, small total vehicle population and the existing position of Volvo and Scania was one other difficulty pointed out by the Commission.²²⁹

Further, it is indicated that prior to the proposed concentration, Scania was the only competitor of importance to Volvo on the Finnish market. The concentration would remove this source of competition, and the new company would accordingly be able to raise their prices significantly. The Commission argues that the small bus companies on the Finnish market would not be able to restrain the merged companies behaviour on the market and concludes that the proposed merger would create a dominant position on the Finnish market.²³⁰

Volvo argued that there were no barriers to entry, and that the new company would be subject to sufficient competition from other manufacturers, and that these competitors would offer opportunities to increase their presence on the market following the merger. Again the Commission argued that a number of characteristics that make touring coaches intended for Continental Europe less suitable for the Finnish market and adoptions for climate and road conditions, length of vehicle, etc. are thus necessary. Third parties submitted that the costs for such adoptions would be significant.

Further, in order to become a significant competitor to the merged companies, it would be necessary to invest in the establishment of a service network comparable to Volvo and Scania.

²²⁷ *Id.* at para 277

²²⁸ *Id.* at para 278

²²⁹ *Id.*

²³⁰ *Id.* at para 279

The market investigation has also shown that other manufacturers regard the Finnish market as having barriers to entry, due to its relatively limited market size and in the sense of costs and time wise. Based on the above, it is therefore stated that Volvo has not been able to show that it would be subject to such potential competition as to significantly restrain it from exercising the increased market power gained through the acquisition of Scania.²³¹ The proposed merger was therefore concluded to create a dominant position on the Finnish market for touring coaches.²³²

5.6.13 Actual and Potential Competition

Following Finland, the Decision concentrates on the United Kingdom for touring coaches. Different from the investigation on the Finnish market for touring coaches is that *Actual and Potential Competition* is investigated here, and the requisite of *Barriers to Entry* is not. Only the not yet analysed requisite will be presented, i.e. actual and potential competition.

The Commission states that Volvo and Scania also have high market shares for city buses and would become the market leader in heavy trucks in the United Kingdom. According to the Commission, the connection between the service network for all these vehicles, and also the fact that many touring coach customers are dependent on their supplier for repairs and maintenance creates a lock-in effect. The finding further supports the statement that touring coach customers display a high degree of brand loyalty. Volvo and Scania together would have an extensively higher amount of service points in the United Kingdom, than DaimlerChrysler and Iveco.²³³

It is also stated that Volvo would be able to take advantage of its strong position in terms of brand loyalty, enabling a raise in prices as well as in strengthening its leadership. Before the merger, Volvo would have risked losing customers to Scania had the company raised its prices. Following a merger between Volvo and Scania, Volvo would however eliminate its largest competitor and would be able to raise prices without risking any serious consequences in terms of competition.²³⁴

The section on Actual and Potential Competition is concluded stating the proposed merger between Volvo and Scania would strengthen Volvo's market position, due to Scania not being the main competitor any longer. Based on the said, the Commission concluded that the merger would create a dominant position on the United Kingdom market for touring coaches.²³⁵

5.6.14 Concluding the Bus Markets

The investigation regarding the city and intercity bus market included the same type of requisites and method evaluating this market, why there will be no closer presentation on this section. The Commission concludes that dominant positions would be created also on this market in Sweden, Finland, Norway, Denmark and Ireland.²³⁶

²³¹ *Id.* at para 280

²³² *Id.* at para 281

²³³ *Id.* at para 286

²³⁴ *Id.* at para 287

²³⁵ *Id.* at para 289-290

²³⁶ *Id.* at para 291-330

Conclusively, the Commission states that the proposed merger would create a dominant position on the markets for touring coaches in Finland and the United Kingdom, as well as on the markets for city and intercity buses in Sweden, Finland, Norway and Denmark as well as on the Irish city bus market.²³⁷

5.6.15 Conclusions

Based on the assessment carried out by the Commission, it was concluded that the merger between Volvo and Scania would result in a dominant market position and the proposed merger was therefore later stopped by a decision of the Commission.

The decision not to allow the merger has been discussed and debated, as well as criticised. Particularly in the Nordic countries, the process of defining the relevant markets has been questioned. Some say it could lead to discrimination towards small Member States. In the Volvo/Scania case, as in other cases where the relevant geographic market is defined by the country, it prevents companies from that country to merge in order to reach critical dominance in the national market. This would prevent these companies from reaching the dimension necessary to compete worldwide, whereas in larger countries this would not become a problem, since companies could reach the necessary dimension without approaching the level of confidence.

This type of criticism has been met by the Commissioner, Mr Mario Monti, claiming that first of all the Commission's objective in defining geographic markets is to identify the competitive constraints that the companies concerned will face. "When national companies do not face serious competition constraints from abroad, the market can only be defined as national".²³⁸ According to Mr Monti, EC Merger Regulation was partly designed to ensure that Member States do not use political power in a discriminatory manner in order to block mergers.²³⁹

In terms of the Volvo/Scania case, the Commission argued that, in addition to differences of prices with neighbouring countries and legal barriers (the "crash test"), in this sector; the sale of the product is inherently linked to the provision of after-sales services. The geographical dimension of the market is therefore not only determined by the geographic scope of the manufacturing level, but also by the conditions of competition for the provision of after-sales services. Referring also to a case where Michelin was fined for abuse of its dominant position in the French market where again the importance of a distribution and after-sales network across the country, Mr Monti argues that there was nothing exceptional about the decision in the Volvo/Scania case. The Commission used normal market definition standards, which supported the conclusion of the existence of national markets. The result of the assessment was that the merger would have led to serious competition problems on the relevant truck and bus markets in the Nordic countries. Mr Monti concludes that the criticism towards the decision is unfair and unjustified, since the normal and standard procedures and criteria were used in this case, as they are in other such cases.²⁴⁰

²³⁷ *Id.* at para 331

²³⁸ Monti, 2001-10-05

²³⁹ *Id.*, 2000-09-14/15

²⁴⁰ *Id.*

Following this argumentation, Mr Monti presents statistics in order to show that the Commission is not biased when defining geographic markets. (Mr Monti even expresses his open-minded approach, without any preference for any particular outcome). The figures present results of merger decisions adopted over the past five years. Only in a minority of the cases, were the geographic markets defined as national. This result is consistent also when only looking at the Nordic countries, as well as when analysing both first- and second phase investigations.

Mr Monti further highlights the fact that some critics believe that it is the fact that the Commission does apply the same rules everywhere, which makes the process unfair and discriminating against small Member States. Göran Persson, the Swedish Prime Minister, has expressed his concerns in connection with the Volvo/Scania case, arguing that: “the present rules are disadvantageous to us since we tend to dominate our market fraction to such a great extent”. He also added: “there is a structural error in the EU’s competition rules”.²⁴¹

Summarising, Mr Monti expresses that Merger Control is about protecting the competitive process in the market and thereby aims at ensuring consumers a sufficient choice of products at competitive prices. By preventing a merger such as the Volvo/Scania merger, the Commission ensures the protection of the customers who live there. In fact, allowing a merger where the customers would suffer from the creation of a dominant position, would be discrimination against these customers.

²⁴¹ *Id.*

6 EC MERGER CONTROL ANALYSIS

This study is an attempt to describe the merger process from a legal, as well as from a political- and economical perspective. Based on the assumptions presented in the chapter on EC Merger Control Argumentation and the following presentation of the Merger Process with practical application on the Volvo/Scania case, conclusions showing which type of arguments were considered in the Volvo/Scania case can be drawn, and perhaps also represent the situation regarding the merger process as a whole.

6.1 EC Merger Process Methodology

EC Merger Regulation is designed to prevent the negative effects related to changes in the competitive structure of a market. A transaction is prohibited when it has sufficiently negative effect on competition. If there is no increase in market share as a result of the concentration, there will not be a significant impact on the market and the merger will probably be approved. In the Volvo/Scania merger case, the Commission conducted a market investigation, resulting in the decision to prevent the proposed concentration, concluding that the merger would have created a dominant position for the New Company in the relevant geographic market. In the Volvo/Scania case, as is the case in the majority of merger cases, the defining of the relevant market became the crucial point, contributing to the decision. It may even be argued that the outcome of this particular case could have been different, had the relevant markets been defined on an EU scope rather than on a national scope.

In determining the relevant markets, the EC Commission conducts several investigations, assessing the relevant criteria according to Merger Regulation. In the initial stage of the market investigation, it was decided to separate the markets for trucks and buses and accordingly conduct two parallel investigations. Further, it was decided to divide the trucks and the buses into three different segments, depending on the varying weights of the vehicles, according to the Commission, resulting in the vehicles belonging to different customer based markets. Further, due to the geographical market being defined on a national scope, the market investigation was divided into nation by nation, assessing each separate market by itself. Based on the different investigations carried through by the Merger Task Force, the outcome of these investigations were analysed and led to one, final decision for the entire merger proposition.

In assessing the markets and the possible creation of a dominant position as a result of a merger proposition, the Merger Regulation contains different methods for reaching a conclusion, of which the relevant ones are used for each individual case. The Commission will neither conduct investigations into criteria of no significance to the current case, as it will neither use unnecessary methods in order to conclude the case. In the Volvo/Scania case, several types of methods were presented. The Commission made use of their own investigations as well as third party reports, made available from Volvo's competitors and independent parties. Further, Volvo's own assessments and arguments were presented and considered in what became the final decision. It has been made clear that the Commission is aware of the risks in using third party reports, whether it is competitors, the notifying party itself or objective reports. Based on facts presented throughout the study, the Commission tends to rely mainly on its own investigations, only referring to other investigations and presented arguments where these support the conclusion already reached by the Commission.

In instances where third party arguments and investigations have reached a conclusion differentiating from the Commission's, the arguments have yet been presented, followed by thorough motivations why the arguments have been considered to be insufficient in that particular instance.

There seems to be a structural difference in the way the proposed merger was presented by the Commission on the one hand, and Volvo on the other hand. Throughout the process, the Commission have based its conclusions referring to current market situations in the different relevant countries as defined earlier. The Commission refers to several different legal criteria to assess when determining the market situation, such as customers' concerns, price discrimination, market shares, brand valuation and loyalty. One such rather important criteria, was the one of barriers to entry. One of the main arguments why the merger would create a dominant position in the relevant Member Countries was that the countries had a number of regulations and other conditions making it quite hard for competitors to establish themselves on the markets, which could have contributed to the creation of a dominant position, which would lead to the merger being prevented. The Commission proceeded stating that the barriers of entry were yet an obstacle, and would result in negative consequences for the customers. Volvo on the other hand argued that most such barriers of entry had been abolished through new legislation, and that competitors were already established or would be able to establish themselves in the various markets. The arguments presented by the Commission are consequently of legal character, although based on economical facts and assessments. This conclusion can be argued throughout the entire market investigation and the following decision.

According to the Commission, one of the main tools at hand when determining the effects of a merger, may be measured by way of proxy, using criteria such as the market shares of the merging parties on the relevant markets and those of the remaining competitors. Possible purchasing power of the customers and the likelihood of new entry are also assessed. As a supplement to the presented criteria was the relatively new method of using financial reports used by both sides. The Commission used two reports, one of which was conducted by professors of economics, while Volvo referred to a financial report conducted by an investment bank, J P Morgan. Interestingly enough, neither of the reports' content was used in what became the final decision, the Commission dismissing the credibility and relevance of the reports. Interestingly, the Commission explicitly stated the reason for the reports being dismissed was due solely to assessments made in the Volvo/Scania, not excluding the use of such reports in future notifications and merger cases.

One of Volvo's main arguments which, theoretically, could have contributed to the approval of the merger case had it been admitted, was the referral to the Mercedes/Kässbohrer merger case and the shrinkage effect as defined by the Commission in that particular case. Volvo argued that a certain shrinkage effect would occur also as a result of the Volvo/Scania merger, but was denied by the Commission, dismissing the conclusion arguing that the German market was not compatible with the relevant markets as defined in the Volvo/Scania merger. Further, the expected shrinkage effect in the Mercedes/Kässbohrer case had not occurred in the predicted extent. It has even been admitted that the referral to the shrinkage effect in the Mercedes/Kässbohrer case was a mistake and that the Commission was not prepared to commit the same mistake again. This may suggest the need for a certain amount of caution in referring to precedents. The outcome in the Volvo/Scania case also suggests that each case will be assessed in the light of the facts and situation of that particular case, and it will be

quite hard to be certain that the Commission will admit the same conclusions as presented in a previous case, especially if based on debateable grounds.

One of the more interesting parts of the merger case presentation, is the conditions and obligations, where Volvo listed several quite far-going actions in order to prevent the merger to result in the creation of a dominant position. Although such conditions and obligations are a common part of mergers notified to the Commission, Volvo's list can be regarded long and extensive, especially considering the contents. One example of one of the questionable criteria listed was of course the obligation to exercise pressure on the Swedish Government regarding the cab crash test. The criteria were accordingly dismissed as unpredictable and unlikely to either come through, or to result in the listed predictions and expectations. The quite hard line presented by the Commission in this particular part of the Volvo/Scania case may suggest that conditions and obligations must be well-thought through, as well as likely to be relevant to the case. What seems to be implied by the Commission is that Volvo as the notifying party attempted to list rather a number of obligations in order to seem willing, rather than obligations that would actually compensate for the effects occurring followed by the dominant position the New Company would have obtained through an approval of the merger. The rather unregulated status of conditions and obligations points to the Commission seemingly intending to set a standard not only for the current case, but also for future cases.

6.2 Merger Assessment Criteria

In the introduction to this study, it was stated that not only legal arguments are assessed in the EC Merger Process. It is quite obvious that nearly all of the arguments listed throughout the Volvo/Scania merger presentation are of economic character. It can be argued though, whether such arguments do not take form of legal arguments anyway, since the economically based arguments are concluded on the basis of legal assessments. Four criteria were listed in the introduction, upon which it was suggested one could determine whether criteria presented and argued in a merger argumentation can and ought to be used in a legal process such as the Merger Control Process. The listed criteria were: comprehension, sustainability, relevance and objectivity.

In order to evaluate the merger process and the type of criteria assessed, it will be necessary to conclude whether the different types of criteria presented throughout the study meet these standards. As mentioned earlier, having presented the arguments listed in the Volvo/Scania merger case, it has become quite clear that most of the arguments presented are of economical character. It is important to keep in mind though, that economical criteria must still be viewed in the light of legal aspects, i.e. a decision may not be based on for instance that a small Member Country would gain important financial and competitive ground due to the approval of a merger. Further, a merger decision shall not to be based on negative facts, i.e. financial losses due to the prevention of a merger case. Instead, the prevention or approval of a proposed merger is to be based on whether the merger would result in a *negative* structural change of the market situation, i.e. the creation of a dominant position. Part from legal and economical arguments, it was stated in the introduction however, that a third category of aspects are present in the merger process discussion: political arguments. The question is what sort of impact political arguments had on the outcome of the Volvo/Scania case, and on the merger process as a whole.

The criteria actually used when evaluating the Volvo/Scania merger proposition, can all be related to financial and legal aspects. Judging from the presentation of the case, the Commission's arguments are all based on facts and outcomes of the market investigation. Volvo's arguments have been taken into account, and where regarded as relevant they have duly been referred to, and in places approved of. Due to the fact that the Commission and Volvo had sufficiently different opinions regarding the outcome of the case, the arguments proposed by Volvo have received smaller space in the decision. All arguments however, have been assessed based on the legal merger process as described and outlined in the Merger Regulation. The conclusion will therefore be that the decision was based on legal criteria and meet the standards of comprehension, sustainability, relevance and objectivity.

In the Volvo/Scania case, aspects of political character are hard to actually discover. The arguments presented seem to be of legal and economical character. It can be argued though, that certain aspects indicated in the presentation are of political *character*, e.g. Volvo's offer to attempt to make the Swedish Government abolish the cab crash test rule. It seems, however most of the political aspects have been introduced *after* the actual decision, presented by both Volvo itself, as well as by critics of the merger decision, although not by the Commission. The critical opinions listing arguments such as discrimination towards smaller Member States, the fact that there was a change of Commissioners during the merger process, the Commission being dubious, the personal views of the commissioner in terms of competition-friendly or not, as well as the non-transparency of the merger process are all arguments which have been brought forward *after* the decision, and as presented in media and by critics. One can therefore conclude that the above-mentioned arguments have not played a part in the actual decision. It seems that rather than basing their decisions on political criteria, such arguments are brought forward as a reaction to a decision, and are mostly subject to criticism of a certain decision, or the entire Merger Process for that matter. One could argue that such criticism is due to media's presentation, and the fact that they present the criticism as part of the criteria judged on, when in fact this is not true, and it is media who do not base their comments on legal facts, relevant to the case. This, in turn may result in the merger process being criticised for being non-legal and based on dubious reasons, out of reach for the notifying party in a merger case. One may argue that the merger process is of political character based on the composition of the Commission. This is a different type of argument however, and does not contribute to the type of merger process discussion as presented in this study.

Much of the criticism presented in connection with the Volvo/Scania decision can be related to disappointment as to the outcome of the case. It must be stated that the criticism towards the merger process and the Commission would probably have been much greater had the decision been based mainly on political criteria or to economical criteria impossible to find legal support for in EC Merger Regulation or elsewhere. Analysing the merger case, the underlying interests of the notifying party, Volvo, are quite obvious. The purpose of the proposed merger was obviously in order to grow towards competitors and to make larger profits. Judging from the facts as presented, as well as the market investigation and the conditions and obligations proposed by Volvo, it was most likely quite clear to Volvo that the merger would be hard to get approved of. It is quite obvious, which was also determined by the Commission, that the conditions and obligations set up by Volvo, left a scope for manoeuvring and did not seem as far going as was suggested by Volvo. The effects of those conditions would not have reached the intended targets, why the Commission also dismissed them. Nevertheless, all merger cases are of new character compared to earlier ones, and need to be judged on a case-to-case basis. Depending on the facts of the case and also which conditions and obligations are presented and approved of, the outcome is hardly ever quite

clear from the beginning. Nevertheless, in the Volvo/Scania case, based on all arguments and assessments, the merger would have resulted in the creation of a dominant position on the markets. Therefore, the merger had to be prevented by the Commission. Had it not, the Commission had been guilty of misconduct and the case would most probably been overturned by the European Court of Justice. What does strike as rather surprising however, is the seemingly lack of knowledge on behalf of the notifying party. As has been described in this study, the access to information in terms of the methodology used in the market investigation, as well as the access to the Merger Regulation and also precedents, is rather far going, and should not be the reason for failing a merger notification. Further, as was described regarding pre-notification meetings, the accessibility to information and contact through the Merger Task Force during the merger process is quite extensive, and indications can be received from the very start of the process. Having already concluded that the decision was not as unclear and controversial as perhaps described by critics after the decision, the notion of unawareness seems surprising. One argument against this, is that Volvo was aware of the complications, but relied on the arguments brought forward, mainly in their presented conditions and obligations.

In fact, some of the criticism presented in connection with the outcome of the Volvo/Scania case, is also the same type of criticism presented in connection with other parts of EU. Swedish media for instance is used to an extensive amount of insight into political processes, and this may be one of the reasons why critics have argued negative effects as a result of the non-transparency of the EC Merger Process. This type of argumentation however, will not be further analysed in this study, not being the purpose of here.

The purpose of the Merger Regulation must be kept in mind when analysing the outcome of the Volvo/Scania case, as in all merger cases, i.e. in order to prevent negative structural changes in the markets, resulting in negative and unfair consequences for customers. It is however, not in the interest of the Commission to make sure companies are able to make a profit and survive the competitive climate through approving mergers, resulting in the creation of dominant positions in the relevant markets.

6.3 Conclusion

Based on the presented, it is clear that merger case argumentations feature other than only legal criteria, however assessed on the same basis as considered in traditional legal argumentations. Having said that, it will still be important to control what type of arguments are considered relevant in a merger investigation. All criteria must meet the same level of relevance and quality as in a traditional legal argumentation.

In conclusion, it has been shown in this study that there are other than legal criteria argued and investigated in a merger case. It may also be concluded that the criteria forming the base for the decision in the merger case, were of legal and economic character, which met the standards of traditionally accepted criteria in legal arguments. The study points out that the Commission's approach towards the market investigations under the Merger Regulation, tends to rely on economic rather than purely legal analysis of the proposed concentration. This study has further discussed a third category of arguments with an indirect impact on the EC Merger Control Process, i.e. political arguments. The notion of political arguments does not mean arguments with political opinions, but rather arguments based on other criteria than legal and economical ones. As has been discussed, such arguments have impact rather in the

after-debate than during the actual merger process and have no impact on the outcome of such a merger decision. Such aspects may not serve as criteria sustainable to a merger decision, however such arguments may constitute propositions for future changes in the Merger Regulation and the Merger Process. The Merger Process will always stay dynamic and change as the EU and the competition situation develop and change, and it is in those terms, the political aspects are much needed and valuable. Media and other critics cannot change regulations directly, however it has been shown again and again that media and critics do play a big role in the changing of law and other politically governed topics. Having presented the arguments put forward by the Commission as well as by Volvo, it must be concluded that all of the arguments meet the standards of comprehension, sustainability, relevance and objectivity.

Also, it seems that the Commission has tried to establish certain criteria as precedents, i.e. in order not to have to go through the exact same procedure again in similar future cases. The Volvo/Scania case seems to show that the legal status of the interpretation of EC Merger Regulation was not entirely clear in all areas. The establishment of the legal status of the Regulation seems to have been done on a case-to-case basis. In some sense this will of course still be done in the future, however, through this clear and detailed investigation, the Commission has set limits and standards not before stated. The Volvo/Scania case has in many ways been unprecedented, in the way that the method and the character of many of the arguments presented and assessed in the case have not before been either presented at all, or not assessed in order to meet future merger cases such as the Volvo/Scania merger.

If one assumes the Volvo/Scania merger case is representative for other quite recent merger cases and future ones, one can also assume that the conclusions drawn in this study may be applied on other such merger cases investigated by the Commission. Based on the arguments presented, the criteria investigated and later referred to by the Commission in its decision, seems to lead to the conclusion that economical arguments are the ones which base the content of a merger case procedure in the EU, and on which the market investigation is built. These economical criteria are linked to legal criteria in legislation and in guidelines regarding mergers and acquisitions. Merger cases tend to contain more of economical arguments together with legal ones, than in traditional arguments where more legal ones are used. Although introduced and presented in the Volvo/Scania merger case, new and even less traditional arguments were to be found, such as the econometric report by two professors, such new and before untested criteria did not contribute to base the final decision in the end. Although impossible to state for certain, it may be argued that such arguments of “new” character could have played a major role in the outcome of the case, had the outcome not been so clear in the Commission’s opinion. It is noticeable that such arguments, with no immediate link to legal arguments are presented and even requested by the Commission. This may prove that the merger process is continuously dynamic and is developing new procedures as new cases appear. This conclusion also seems to be supported by the fact that all mergers are different in detail from each other and in order to be able to make decisions and in order to present relevant arguments, it is necessary to find new ways to present the case. For now, the Commission does set a limit to how far they are willing to let the merger argumentation go, and all arguments accounted for in the Volvo/Scania decision can be related to explicit legal rules and guidelines in the Merger Regulation.

Further debated has also been the involvement by the media and other critics who appear to have tried to make an impact on the outcome of the Volvo/Scania case in different ways. This thrive does not appear to have worked however, judging by the Merger Process as conducted

by the Commission. Having stated that though, the discussions and debates most likely do have a certain impact, however rather in the development of the merger process, than the actual merger investigation and decision as such. The fact that mergers are a special form of legal acts, with mostly economic features, makes the process different from any regular legal process. In order for EC Competition Law to maintain its value, it is crucial that the Commission's investigative role also stays dynamic, understanding the financial characteristics and consequences of the process, as is equally important for the modern corporate lawyer. Competition Law was introduced in order to ensure free competition between the Member Countries, but also in order to create a climate making it possible for companies to stay competitive towards each other and also towards other markets.

It can be speculated to what extent, as well as how, the merger process will change in the future. As has been discussed already, mergers constitute a special type of business transaction with a need for specially designed rules as a result. The conditions for European Corporate Law change along with the type of business conducted, why legislation must stay dynamic in order to stay a meaningful and useful tool in order to maintain fair conditions within the Community. It is likewise quite important that any legislation adopted regarding mergers and acquisitions, as is important in all areas of law, is relevant and designed according to its purpose. If not, based on experience from all areas of law, actors on the market, such as companies, will find ways around the legislation and the law will become weakened, and lose its purpose resulting in the failure to control the conditions which the free competition is built upon. Free competition is the goal, as long as it does not become unfair towards other actors.

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