Merger Efficiencies and Remedies

Robbert Snelders

Cleary Gottlieb Steen & Hamilton LLP

Simon Genevaz

EU merger control has evolved in several important ways in recent years. Key changes include the adoption of a new substantive standard for the review of mergers under the EC Merger Regulation (*i.e.*, whether it "significantly impedes effective competition"), the issuance of guidance on the application of this test to horizontal mergers (the "Horizontal Merger Guidelines"), and the development of a policy on remedies that has been codified in a Remedies Notice.

The new substantive test and the Horizontal Merger Guidelines allow greater scope for economic efficiency arguments than thought possible in the early years of EU merger control (where, in contrast, efficiencies were regularly cited as a plus-factor in establishing dominance). This adds a further line of argument available to merging parties seeking to overcome the presumption of adverse competitive effects created by high combined market shares. Ideally, efficiencies arguments avoid the need for remedies. If not, remedies ideally should not undermine any efficiencies the transaction is designed to achieve. This chapter briefly explores efficiencies (Section 1), remedies (Section 2), and their interaction (Section 3) in EU merger control.

1. Merger Efficiencies

(a) Definition

Article 2(1)(b) of the old EC Merger Regulation required that the Commission take account of the development of technical and economic progress provided such "progress" benefited customers and did not impede competition. This, many commentators argued, was a sufficient basis to consider efficiency arguments in defense of a merger. Others had their doubts. The debate was sufficiently tedious not to be repeated. Under the new EC Merger Regulation, it is clear that economic efficiencies should be an integral part of the Commission's competitive effects analysis.

The new substantive test is whether a transaction will "*significantly impede effective competition … in particular as a result of the creation or strengthening of a dominant position.*" As explained in the recitals of the new EC Merger Regulation, this test integrates efficiencies in the overall assessment: "*It is possible that the efficiencies brought about by the concentration counteract the effects on competition, and in particular the potential harm to consumers, that it might otherwise have had and that, as a consequence, the concentration would not significantly impede effective competition.*" (Council Regulation No 139/2004 of 20 January 2004 on the Control of Concentrations Between Undertakings, OJ [2004] L 24/1, recital 29.)

The term "efficiencies," as used in these recitals, is not formally defined in the EC Merger Regulation or in the Horizontal Merger Guidelines. Nor is the notion of "efficiency" easily defined in economics. (The most common economic definition of efficiency is based on the Pareto superiority principle whereby one allocation of resources is superior to another if at least one agent is made better off, and no one worse off. A given market allocation is therefore "Pareto efficient" when the improvement of the situation of one agent would only be achieved at the expense of another.) Conceptually, "merger efficiencies" can be defined as welfare gains deriving from the combination of previously distinct economic entities. This definition, however, does not provide guidance as to what "welfare gains" should properly be taken into account for merger review purposes.

Efficiency Gains Must Further Consumer Welfare

What constitute efficiency "gains" rather than "losses" depends on the welfare standard that one chooses. Under the so-called "consumer welfare standard," antitrust authorities are concerned solely with the welfare of consumers. In contrast, under the so-called "total welfare standard," authorities look at overall welfare and can off-set losses in consumer surplus by increases in producer surplus.

Commissioners Monti and Kroes have both embraced consumer welfare as "the goal of competition policy". (Mario Monti, *The Future of Competition Policy in the European Union*, speech at Merchant Taylor's Hall, July 9, 2001, Commission press release SPEECH/01/340 of July 10, 2001.) While not containing a formal definition of "efficiencies", the EC Merger Regulation clearly requires that, in order to be considered positively, efficiency gains must benefit consumers. Explicit reference to consumer interest is included in Article 2(1)(b) of the EC Merger Regulation, which requires that any claim as regards technical and economic progress is "*to the consumers' advantage and does not form an obstacle to competition.*" The focus on consumer welfare is also emphasised in recital 29, which explains that efficiencies may counteract the effects on competition, "*and in particular the potential harm to consumers.*" Finally, the Horizontal Merger Guidelines clarify that efficiencies must benefit consumers (as well as being verifiable and merger-specific). (Guidelines on the

Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations Between Undertakings (hereinafter, the "Horizontal Guidelines"), OJ [2004] C 31/5, at 76-88.)

In sum, the EC Merger Regulation leaves no room for a total welfare standard. This is further borne out in the Commission's developing practice (discussed further below).

Established Typology of Merger Efficiencies

Irrespective of whether one employs a consumer or total welfare standard, economic efficiency is generally approached in two ways. First, static efficiency analysis (conducted for a given point in time) covers both allocative efficiency (*i.e.*, equalisation of market prices to production and supply costs) and productive efficiency (*i.e.*, production of output at the least cost). Second, dynamic efficiency analysis (covering several periods) focuses on the improvement over time of products and production processes.

Using a more pragmatic approach, Röller, Stennek and Verboven have systematised merger efficiencies by distinguishing between:

- rationalisation of production, i.e., the improvement of the merged firms' cost structure by shifting output from plants with relatively high marginal costs of production to plants entailing relatively lower marginal costs;
- economies of scale, i.e., the reduction of the merged firm's average cost due to the increase in output. In the short term, economies of scale may be realised by avoiding the duplication of certain fixed costs otherwise indivisible; in the long term, they arise when the integration of the parties' assets leads to a growth of output exceeding the corresponding increase of inputs. In addition, economies of scope arise when the merged firms can produce related goods within the same plant;
- technological progress, i.e., the increase of R&D capabilities and/or incentives to innovate through the diffusion of know-how in the merged firm, or the integration of investment capacities and R&D activities;
- purchasing economies, i.e., foreseeable savings due to an increased bargaining power, or improved access to capital; and
- reduction of slack, i.e., the improvement of managerial efficiency through, for example, increased discipline for management as the result of a takeover.

(Lars-Hendrik Röller, Johan Stennek & Frank Verboven, *Efficiency gains from mergers*, in The Efficiency Defence and the European System of Merger Control, Studies for the Directorate-General for Economic and Financial Affairs, p. 42.)

(b) The Rationale for Considering Efficiencies in Merger Control

As acknowledged in the recitals to the EC Merger Regulation, efficiencies are relevant to merger review because they can offset otherwise anticompetitive effects of increased concentration. Economists have long advocated incorporating efficiency analysis in merger control. In particular, economic literature has pointed to the impact of internal cost savings on market power, the external output effects of mergers on welfare, and the potential destabilising effects merger efficiencies may have for coordinated behavior. These are addressed in turn below.

First, the economic rationale for incorporating efficiencies analysis in merger control was pioneered by Williamson (Oliver E. Williamson, *Economies as An Antitrust Defense: The Welfare Tradeoffs*, American Economic Review, vol. 58(1), pp. 18-36 (1968)). Williamson presents a partial equilibrium model (the so-called "naïve model") to characterise the tradeoff between efficiency (a reduction in average cost) and adverse price effects. He argues that the deadweight loss resulting from increased market power following a merger must be assessed against the resulting reduction in average costs. Under the model, even modest cost reductions are generally sufficient to offset significant price increases -- making it likely that a merger's net allocative effect will be positive.

At the time of its introduction, Williamson's model had the merit of dispelling the notion that any increase of market power would necessarily trump any merger efficiencies. It also highlighted the appropriateness of efficiency considerations in merger control and introduced trade-off analysis in merger review.

Second, Farrell and Shapiro advanced an alternative view of merger efficiencies -- focusing on the external effects of mergers on consumers and rivals in a Cournot oligopoly (Joseph Farrell and Carl Shapiro, *Horizontal Mergers: An Equilibrium Analysis*, American Economic Review, No. 80(1), pp. 107-26 (1990)). They conclude that considerable economies of scale or learning are required for a merger to reduce prices. The required size of such economies is larger when merging firms' market shares are high and the industry's demand elasticity is low. On the other hand, even if a merger reduces output, the authors argue that external effects could nonetheless benefit consumers and rivals since, in a Cournot oligopoly, competitors will be responsive to the merged firms' output reduction by expanding their own output. As explained by Röller et al., such reallocation of output is desirable if the merging firms are relatively inefficient as compared to their competitors (Röller et al., ibid., p. 56).

Third, economists have shown that efficiencies may have a potential destabilising effect on coordination in oligopolistic markets prone to tacit collusion. Following Harris and Smith, (Barry C. Harris and David D. Smith, *The Merger Guidelines vs. Economics: A Survey of Economic Studies*, p. 49, in *Perspectives on Fundamental Antitrust Theory*, American Bar Association, Report of the Section of Antitrust Law, July 2001), cost reductions resulting from a merger may introduce a variation among the costs of firms previously prone to tacit coordination, thus destabilising an oligopoly's incentive and ability to reach and sustain terms of tacit coordination. This is because the more efficient merged entity has a greater incentive to cheat and adopt an independent profit-maximising behaviour based on its decreased cost structure. (In its decision of September 29, 1999, case COMP/M.1524, *Airtours/First Choice*, the Commission explains that, since expected cost savings are too modest to result in a material change in the overall cost structure of the merged entity, they could not be deemed to lead to increased incentives to compete and destabilise collusion (at 146).)

(c) The Role of Efficiencies in the EC Merger Regulation

Efficiencies should be an integral part of the Commission's competitive effects analysis. It is therefore not appropriate, strictly speaking, to talk of an efficiencies "defense". A defense intervenes after a finding of harm to competition and consumers, and purports to demonstrate that the merger's beneficial effects outweigh its anticompetitive effect. Such is not the role given to efficiencies under the EC Merger Regulation. The Commission's assessment of a merger's effects is not designed to be sequential. All factors are to be considered and balanced before the Commission is to take a view as to whether a proposed transaction significantly impedes competition. (This was also true before the 2004 reform and the use of Article 2(1)(b) of the old EC Merger Regulation. *See* Commission decision of March 3, 1999, *Danish Crown/Vestjyske Slagterier*, at 198: "*The creation of a dominant position in the relevant markets identified above, therefore, means that the efficiencies argument put forward by the parties cannot be taken into account in the assessment of the present merger*".) In addition, the express admission of an efficiency "defense" might have given ground for the recognition of an efficiency "offense," a concept which Commission officials have strongly rejected. (*See* response of Francisco-Enrique González Díaz to Carl Shapiro, in *Transatlantic Antitrust: Convergence or Divergence? - The Roundtable Discussion, Antitrust*, vol. 16(1) (2001): "*We do not have an efficiencies offense doctrine in Europe*"). However controversial the issue of an efficiency offense, it remains true that EU merger control practice has not always welcomed merger efficiencies as a positive factor. Outright hostility to purported efficiencies was manifested in early cases where the Commission took the view that efficiencies would only contribute to strengthening the merged firm's dominance. (*See* Commission decision of January 18, 1991, case IV/M.50, *AT&T/NCR*, at 30: "*It is not excluded that potential advantages flowing from synergies may create or strengthen a dominant position*").

(d) The Commission's developing decisional practice

The first landmark decision on efficiencies came as early as 1991 when, in *Aerospatiale-Alenia/de Havilland*, the Commission explained that, to the extent a merger contributes to the development of technical and economic progress under Article 2(1)(b) of the EC Merger Regulation, any cost savings should be both merger-specific and substantial (Commission decision of October 2, 1991, case IV/M.53, *Aerospatiale-Alenia/de Havilland*, at 65-67) and their benefits should be passed on to customers (*Id.*, at 69). Following this somewhat promising start, however, subsequent cases included only timid endorsements of efficiencies arguments or even pointed to efficiency "offenses".

Interestingly, efficiency analysis appeared in particular in cases involving oligopolistic competition. In *Mannesmann/Vallourec/Ilva*, a seamless steel tubes merger in a sector characterised by overcapacity, the Commission entertained the notion of a trade-off analysis, stating that "*while a merger can be the vehicle for reducing structural overcapacities in a market and mitigating the effects of a recession, it is important that the higher level of concentration which results does not lead to the creation of a position of joint dominance which could harm effective competition on a lasting basis.*" (Commission decision of January 31, 1994, case IV/M.315, *Mannesmann/Vallourec/Ilva*, at 55.) Ultimately, however, the Commission's clearance decision rather turned on the competitive constraints exerted by potential entry of Eastern European and Japanese competitors. In *ABB/Daimler Benz*, efficiencies in the mainline trains market were considered as a factor undermining coordination within the duopoly resulting from the merger. The Commission considered that the transaction would not strengthen the existing oligopoly because "*[t]he chances of competitive offers against Siemens will in fact be improved [because of the more efficient merged entity], so that the competitive structure inside the duopoly will be improved.*" (Commission decision of October 18, 1995, case IV/.M.580, *ABB/Daimler Benz*, at 112-15.)

In other cases, the Commission's approach to efficiencies has been either ambiguous or outright hostile. In *Mercedes-Benz/Kässboher*, although the Commission acknowledged that the merger would lead to synergies in R&D, production and administration, their importance was deemed limited and it ultimately remained unclear how any such synergies, had they been found to be significant, would have influenced the Commission's position. (Commission decision of February 14, 1995, case IV/M.477, *Mercedes-Benz/Kässboher*, at 66-67.) In *De Beers/LVMH*, where the creation of the proposed joint venture was found to be based on "*efficiencies and cost reductions in diamond production, and broad based brand equity and on LVMH's experience and support in international retail sales, operations and marketing*", these factors -- rather than being considered positively -- were deemed to enable the joint venture to become the leading player in branded high-end jewelry retailing. (Commission decision of July 25, 2001, case COMP/M.2333, *De Beers/LVMH*, at 102-05.) The transaction was nevertheless authorised because the Commission considered that the joint venture would not significantly strengthen De Beers' already dominant position. Equally, in *Agfa Gevaert/DuPont*, the transaction was found to lead to improved capacity utilisation, scale efficiencies in production and sales, and "*the most competitive cost conditions for any growth in output.*" Due to this improved position, however, potential competitive constraints were deemed insufficient to prevent dominance. (Commission decision of February 11, 1998, case IV/M.986, *Agfa-Gevaert/DuPont*, at 61-62.) A further example can be found in AT&T/NCR, where the Commission considered that "*[I]t is not excluded that potential advantages flowing from synergies may create or strengthen a dominant position.*" (Commission decision of January 18, 1991, case IV/M.50, AT&T/NCR, at 30.)

More recently, in *GE/Honeywell*, the high-profile transaction blocked in Europe despite approval in the US, the Commission explained that price efficiencies brought about by the transaction could take the form of various packaged deals offerings (Commission decision of July 3, 2001, case COMP/M.2220, *GE/Honeywell*, at 350 et seq.). According to the Commission, the parties would be able to grant discounts on packaged deals enabling it to market complementary products together at a lower price than separately. The Commission explained that the new entity would be able to finance such lower prices by cross-subsidising its various complementary activities. It took this as a sign that the transaction would result in harm to less efficient competitors.

Evidently, if efficiencies are passed on to consumers in the form of lower prices, competitors are "harmed" in the sense that they will likely lose market share. Whether such "harm" should be deemed anticompetitive is another matter. Some authors have argued that efficiency gains of this type normally create desirable incentives for competitors to reduce costs and/or improve their product offering. (Matthias Pflanz & Cristina Caffara, *The Economics of GE/Honeywell*, European Competition Law Review, 23(3), p. 115 (2002).) In contrast, the Commission's theory was that losses to the more efficient new entity would erode competitors' revenues, making it uncertain that they could cover production costs (*GE/Honeywell* decision, at 402) and reducing incentives to invest in R&D (*Id.*, at 403). This, the Commission argued, could ultimately result in market exit and foreclosure. The decision is subject to appeal.

2. Merger Remedies

(a) Definition

The EC Merger Regulation refers to remedies as "commitments" offered by the merging parties to modify the concentration (EC Merger Regulation, recital 30). Their object is to "*reduce the merging parties' market power and to restore conditions for effective competition which would be distorted as a result of the merger creating or strengthening a dominant position.*" (Commission Notice on Remedies Acceptable under Council Regulation 4064/89, OJ 2001 C 68/3 (hereinafter, the "Remedies Notice").) Remedies must be designed to remove any competition concern the Commission may have.

As a general principle, remedies must be proportionate to and fully eliminate the identified competition problem (EC Merger Regulation, recital 30). This means that commitments offered in Phase I must eliminate any "serious doubts" about the transaction's competitive impact, and that commitments proposed in Phase II must eliminate the concerns which led the Commission to open an in-depth investigation and which, as the case may be, have been detailed in a statement of objections.

(b) Evolution of the Commission's approach to remedies

The Commission's approach to remedies has evolved over time. In the early years of EC merger control, the Commission went beyond the letter of the original EC Merger Regulation by accepting commitments in Phase I. This practice was ultimately integrated in the 1997 EC Merger Regulation amendment.

The scope of acceptable remedies has also evolved, from a strict stance in favour of structural remedies (*i.e.*, divestitures) to an increasing willingness to consider certain behavioural remedies. In essence, behavioural remedies focus on the way assets are managed rather than on their mere ownership. They include commitments to terminate exclusive agreements, or commitments to grant access to a given technology on a non-discriminatory basis, or even outright licensing arrangements (*Id.*, at 26-30).

The Commission's view in *Gencor/Lonrho* that "*[t]he commitment offered is behavioural in nature and cannot therefore be accepted under the Merger Regulation*" (Commission decision of April 24, 1996, case IV/M.619, *Gencor/Lonrho*, at 216) was expressly rebutted by the CFI, which considered that:

"*It is true that commitments which are structural in nature, such as a commitment to reduce the market share of the entity arising from a concentration by the sale of a subsidiary, are, as a rule, preferable from the point of view of the Regulation's objective, inasmuch as they prevent once and for all, or at least for some time, the emergence or strengthening of the dominant position previously identified by the Commission and do not, moreover, require medium or long-term monitoring measures. Nevertheless, the possibility cannot automatically be ruled out that commitments which prima facie are behavioural, for instance not to use a trademark for a certain period, or to make part of the production capacity of the entity arising from the concentration available to third-party competitors, or, more generally, to grant access to essential facilities on non-discriminatory terms, may themselves also be capable of preventing the emergence or strengthening of a dominant position.*" (Case T-102/96, *Gencor v. Commission*, 1999 ECR II-753, at 319.)

This position has now been reflected in the Remedies Notice and the Commission's decisional practice.

3. The Interaction of Merger Efficiencies and Remedies

Remedies - *i.e.*, commitments offered to solve competition issues - interact with merger efficiencies in several situations. Ideally, efficiencies arguments avoid the need for remedies. If not, remedies should not undermine any efficiencies the transaction is designed to achieve. The interplay between remedies and efficiencies is particularly interesting in two specific situations, *i.e.*, when a transaction generates efficiencies on certain markets and anticompetitive effects in others, and situations in which efficiencies are deemed to reinforce market power and need to be remedied.

(a) The coexistence of pro-competitive efficiencies and remedies

The effect of efficiencies on remedies is not a new issue. For instance, in *Air France/Sabena*, a merger in the air transport sector, the Commission crafted remedies so as not to disrupt expected efficiencies (Commission decision of October 5, 1992, case IV/M.157, *Air France/Sabena*, at 32). One of the effects of the formation of the proposed joint venture was the creation of a shuttle between Paris and Brussels, thus adding to the flight frequencies and benefiting customers. A distinction was therefore made between the Brussels-Lyon and Brussels-Nice routes on the one hand, and the Brussels-Paris route on the other. Whereas the Commission imposed that one of the parties abandoned its slots on the former, it accepted that competitors merely be provided a number of slots equal to the parties to the transaction in the Brussels-Paris route. The Commission justified the lighter remedy based on imperfect substitutability between air and railroad travel between Brussels and Paris, and the necessity to ensure the creation of the shuttle, an efficiency which would directly benefit customers.

(b) The "no cutting-across markets" rule

Under the Horizontal Merger Guidelines, efficiencies do not, "in principle," cut across markets. The trade-off inherent in the Commission's assessment of potential impediments of effective competition is made on each relevant market, separately, (Horizontal Guidelines, at 79), and efficiencies created in one market cannot in principle redeem harm to consumers on another. Therefore, there may be cases where part of a transaction poses problems warranting remedies, while other aspects of the same transaction induce desirable efficiencies.

Some authors have argued that the Commission's reluctance to trade off efficiencies across markets is justified because there is no practical formula to guide antitrust enforcers in trading off market power gained in one relevant market with economies realised in another. (See, in the US context, Robert Pitofsky, *Efficiencies in Defense of Mergers: 18 Months after*, speech available at http://www.ftc.gov/speeches/pitofsky/pitofeff.htm (1998).) In addition, fairness considerations arguably preclude harming consumers in one market to the benefit of consumers in another market. (*Id.* See also, in the EC context, James S. Venit, *The Role of Efficiencies in Merger Control, in EC Merger Control, A Major Reform in Progress*, ed. by Götz Drauz & Michael Reynolds (2004)).

The rule, however, is not universal. The US Horizontal Merger Guidelines do provide for a limited exception to the "no cutting-across" rule in cases involving efficiencies occurring in a market "inextricably" linked to another. Such efficiencies will be considered when any remedy examined for the second market would sacrifice efficiencies brought about by the transaction in the first. According to the Guidelines, this is only likely to apply in the context of "great" efficiencies in one market, and "small" anticompetitive effects on the other. (Revised Section 4 Horizontal Merger Guidelines Issued by the U.S. Department of Justice and the Federal Trade Commission April 8, 1997, footnote 36.) By contrast, under Canadian law, the trade-off is conducted at the aggregate level, i.e., total efficiency gains in all markets concerned v. total anticompetitive effect. (See judgment of the Competition Tribunal of April 4, 2004, *Commissioner of Competition v. Superior Propane Inc.*)

It is unclear whether the use of the words "in principle" in the EU Horizontal Merger Guidelines will lead the Commission to make determinations akin to the exception provided under the US Guidelines. Nevertheless, the North-American regimes of merger control do underline the limitations of a strict "no cutting-across" rule. Implicit in the US Horizontal Merger Guidelines, is the notion that, although efficiencies may arguably arise in only one market, certain remedies do however cut-across relevant markets, with potential adverse effects on desirable efficiencies.

(c) Remedies to "efficiency offenses"

The notion of an "efficiency offense" refers to cases in which the new entity is considered "too" efficient, and thereby creates an impediment to effective competition. Therefore, merging parties may be requested to submit commitments to solve efficiency gains reinforcing their market power.

It remains controversial whether the increased efficiency of the new entity should be considered to create an impediment of effective competition. (Commissioner Monti publicly denied the existence of an efficiency offense. *See* Mario Monti, *Review of the EC Merger Regulation - Roadmap for the Reform Project*, speech of June 4, 2002.) Nevertheless, under Article 2(1)(b) of the EC Merger Regulation, the Commission must take the development of technical and economic progress into account, "provided that it is to the consumers' advantage and does not form an obstacle to competition." It is therefore the law that merger efficiencies can be deemed anticompetitive, and can consequently warrant remedies.

As explained above, this was arguably the approach taken by the Commission in some early cases, including mergers which would have resulted in firms pooling the market's leaders in R&D. In *DuPont/ICI*, the Commission explained that the parties led the market in terms of technical development of fiber products, and that "*the level of research and development of both Du Pont and ICI is above the nylon industry average.*" (Commission decision of September 30, 1992, case IV/M.214, *DuPont/ICI*, at 33. In addition, the Commission underlined the fact that the parties both sold a widely differentiated range of products, and that added vertical integration as a result of the merger would "*improve DuPont's cost base*." Due to the scale of DuPont's existing operations, the manufacturer was already considered the world's lowest cost producer. Therefore further improvement of its cost structure contributed to the company's competitive strength. *See id.*, at 35-36.). In *Shell/Montecatini*, the merger would have resulted in pooling together the two most attractive technology packages on the polypropylene technology market. The Commission emphasised that competition between both parties' technologies had been the main driving force in the propylene technology market. Yet, both companies were global licensors, which yielded "*licensing revenue which can support [the licensors'] future research and development efforts in the area of [polypropylene] technology*." (Commission decision of June 8, 1994, case IV/M.269, *Shell/Montecatini*, at 67.) Whereas it appears that the Commission meant that the licensing of one technology alone produced sufficient revenues to support future R&D expenditures, pooling both companies' R&D capabilities and revenues may have resulted in boosting research incentives for the merged entity, due to the increased ex-post source of revenue.

Nevertheless, in both cases, remedies were adopted in order to solve the concern created by the combination of the leading R&D capabilities and to force the parties to share those resources. In *DuPont/ICI* this took the form of the transfer of an R&D facility to a third party, (*DuPont/ICI*, *ibid.*, at 48), and in, *Shell/Montecatini,* the exploitation of one of the two main technologies in an entity independent of the parties and competing at arms length with the other main technology (*Shell/Montecatini, ibid.*, at 121).

More recently, the *GE/Honeywell* case shows that the Commission, when faced with *prima facie* positive price effects, will not just balance such efficiencies against anticompetitive effects otherwise created by the transaction, but will also analyse the adverse effects price efficiencies may have on competitors, in particular in the form of foreclosure effects. This raises a serious question for remedies because, contrary to the example of pooling of R&D resources, price efficiencies cannot be shared directly with competitors. It is a basic principle of competition that lower prices are generally desirable since they are immediately passed-on to consumers and create incentives for competitors to lower costs, or differentiate their products.

Finally, the Commission's practice was recently criticised for accepting behavioural remedies in the presence of an efficiency offense. In the recent *Piaggio/Aprilia* case, the Commission raised competition concerns on the Italian market for motorcycles below 50 cm3, considering that the merged entity would benefit from a large portfolio of well-established brands, covering various segments of the market and allowing it to offer a significant number of new, differentiated products (November 22, 2004, case COMP/M.3570, *Piaggio/Aprilia*, at 50). Such effects are presumably pro-competitive but were considered by the Commission as factors of dominance, leading to the adoption of a remedy consisting in a commitment of the new entity to give competitors access to its attractive 50 cm3 engine, for an unlimited period and at competitive conditions. Such a remedy has been criticised as disproportionate: in the worse case scenario, the new entity may have been able to enjoy some dominance on the market, and derived supra-competitive profits, thus creating an incentive for competitors to compete more aggressively (or to potential competitors to enter the market). (Patrice Bougette and Christian Montet, *Doutes sur les remèdes non structurels dans le contrôle des concentrations*, Revue Lamy de la concurrence, 2005, No. 2, p. 9.) This would have resulted in aggressive pricing and incentives to innovate and compete with the new entity's engine. However, such arguments, although valid as a matter of economics, ignore the fact that the Commission's task is to prevent anticompetitive distortions of the market, and in particular the creation of a dominant position, even if it might lead to pro-competitive effects in the long run. Even though supra-competitive pricing may create an incentive to market entry, the harm to consumers is immediate and the Commission, bound by the consumer welfare standard, is not allowed to trade it off against (uncertain) long term pro-competitive effects.

4. Conclusion

The Merger Regulation's new substantive test has been accompanied by a more receptive attitude, at least in rhetoric, to efficiencies arguments in support of a proposed merger transaction. The Commission has now formally stated that it will take account of substantiated efficiency claims that are merger-specific, verifiable, and beneficial to consumers. In theory, this shift in attitude provides merging parties with an additional layer of arguments to overcome a presumption of adverse competitive effects created by high combined shares. Time will tell whether such arguments can also make a real difference in practice. Together with the Commission's evolving practice as regards remedies, however, proper consideration of efficiencies arguments could help to ensure that constructive ways are found to support and salvage transactions that, on balance, can be expected to do more good than harm.

Robbert Snelders

Cleary Gottlieb Steen & Hamilton LLP
Rue de la Loi, 57
1040 Brussels
Belgium

Tel: +32 2 287 2000
Fax: +32 2 231 1661
Email: rsnelders@cgsh.com
URL: www.clearygottlieb.com

Robbert P. Th. Snelders is a partner based in Cleary Gottlieb Steen & Hamilton LLP's Brussels office. Mr. Snelders advises companies on a wide range of issues under European and national antitrust and merger control law, and represents clients before the European Commission and national antitrust authorities and the European Courts in Luxembourg. He has been involved in a broad array of leading competition cases, most recently including the EU review of the merger between Sony Music Entertainment and BMG, Alitalia's alliance with Air France, General Motors' appeal against a €43 million Commission fine for alleged export restrictions, and various merger and arbitration proceedings for ExxonMobil. Mr. Snelders joined Cleary Gottlieb in 1992 and became a partner in 2001. He graduated from Harvard Law School (LL.M.) in 1992, from the College of Europe in Bruges in 1991, and from the Rijksuniversiteit Leiden, with highest honours, in 1990. He attended a special programme for foreigners at the Institut d'Etudes Politiques de Paris in 1989. During 1996 and 1997, he worked as a référendaire for Judge Kapteyn at the European Court of Justice in Luxembourg. He is distinguished as a leading Competition/Antitrust lawyer by Chambers Global - The World's Leading Lawyers, and was included in Global Competition Review's "40 Under 40" survey of the world's brightest young antitrust lawyers.

Simon Genevaz

Cleary Gottlieb Steen & Hamilton LLP
Rue de la Loi, 57
1040 Brussels
Belgium

Tel: +32 2 287 2000
Fax: +32 2 231 1661
Email: sgenevaz@cgsh.com
URL: www.clearygottlieb.com

Simon Genevaz is an associate based in Cleary Gottlieb Steen & Hamilton LLP's Brussels office. His practice focuses on EC and French competition law. Mr. Genevaz joined the firm in 2004. He received an LL.M. degree from Harvard Law School in 2003 and law degrees, with distinction, from the Universities of Rennes I in 2001 and Paris I in 1999. He is also an alumnus of the Ecole Normale Supérieure, where he received an Agrégation in Economics and Management in 2002. Mr. Genevaz is a member of the Bar in New York, and an associate member of the Bar in Brussels (B list).