

Is there a conflict of goals between law and economics in the European competition law?

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1. INTRODUCTION

Rather cynical opinion (which might therefore be quite close to the truth) on the inertia of old theories was expressed by J. M. Keynes in his book on the general theory of employment, interest, and money in 1963. He said that the ideas of the economists

and political philosophers are stronger than is usually supposed. Practitioners who are usually considered to be immune towards any intellectual influence are in fact often slaves of dead economists. Powerful men that "hear voices" in fact, according to Keynes, distil the lunacy uttered a few years ago by some academic scribblers. He also waspishly remarked that in the area

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of economic and political philosophy it is not probable that there are many people older than twenty-five or thirty that would follow new theories, so that the thoughts of officers, politicians, or even propagandists applied in topical situations are probably not much newer. However, he did not consider the interests to be the most dangerous factor, but the permeation of ideas,¹ so he (remark by JB) did not rely much on the psychologically and sociologically conditioned inertia of interest. Without the elegance of Keynes, it may even be suggested that the ideas cannot be genetically separated from the interests.

The background of interests is also apparent in the change of the access to the European competition law in the last few years. The debate goes around the emphasis of the economic viewpoints (*more economic approach*)² and on the suppression of the normative approach. This trend of economisation is also in the background of the so-called modernisation package of European competition law. Its motives, however, were more complex, although it is necessary to admit that they were probably not complex enough, that they were not sufficiently theoretically substantiated, and that their main motive was the pragmatic one.³ On the other hand, we can convincingly argue even then that no theory of economic competition has ever been more convincing than the legal norms coming out of it and based on it. Irrefutable scientific proofs of economic theories do not exist (in general as well as in the case of competition theories), and therefore (as always in the area of competition law) the starting point was the massive political support of the new approach, based on the acceptable theoretic arguments, but especially enforced by the competition-policy reality and its feedback, which signalled malfunction of the current system.

European competition law has for many years been, in fact since its origin, exposed to the conflict of two principal approaches: the so-called "economic approach" on one hand, and the so-called "systemically

theoretic one" on the other.⁴ The economic approach emphasises the influence of economic competition on the production, allocation, and dynamic efficiency; it is based on the hypothesis that there is a causal relationship between the structure of the market, market behaviour, and the results reached on the market, and poses the question whether the real competition is workable (essential, effective, intensive). The market situation is measured against some kind of propagated ideal norm and it is studied whether in practice there are deviations from this norm. In the practice of competition policy, this approach is manifest through the study of the market results, setting the norms of acceptable competition behaviour, and interference with the market structure.

The system-theoretic approach, on the other hand, considers the main (if not the only) function of the competition to secure freedom. It does not see the causal relationships among the structure of the market, the behaviour on it, and the results reached, but it claims that good economic results are directly dependent only on the freedom of competition. It does not ask the questions concerning efficiency, intensity, or essential character of the competition, but is only interested in the fact whether the free market exists and whether the desired freedom of competition is not being limited. From the point of view of competition policy, this becomes manifest in the prohibition norms on the behaviour in the market.

In both cases, however, the approach is normative from the practical point of view, even though in the case of economic approach, there were more norms and in the system-theoretic framework less (while relying on the auto-regulation of the free markets).

The emphasis on the economic viewpoints while judging the situation in the market and for the application of competition law does therefore not mean some abandonment of normative points of view and their substitution with some purely "economically opportune" approach "case by case".

¹ Quoted freely according to Vickers, J.: *Competition Economics and Policy*, E.C.L.R. 3/2003, pp. 95, 102.

² On this compare e.g. VICKERS, J.: *Op. cit.*, p. 95 and following; HUTCHINGS, M.: *The Competition between Law and Economic*, E.C.L.R. 9/2004, pp. 531-533; NITSCHKE, R. - THIELERT, J.: *Die ökonomische Analyse auf dem Vormarsch - Europäische Reform und deutsche Wettbewerbspolitik*, WuW 3 / 2004, pp. 250 and following; BÖGE, U.: *Der more economic approach und die deutsche Wettbewerbspolitik*, WuW 7-8/2004, pp. 726 and following; HILDEBRAND, D.: *Der more economic approach in der Wettbewerbspolitik*, WuW 5/2005, pp. 513 and following; MAAHS, CH.: *Wettbewerbschutz und Verbrauchinteressen im Lichte neuerer ökonomischer Methoden*, WuW 1/2005, pp. 49 and following.

³ Compare e.g. the very reserved, or even critical and rejecting reactions to the planned modernisation of the European competition law after the so-called "White Book" was issued in 1999, especially from the part of the representatives of the German ordoliberal school of competition law. These views are summarised e.g. by L. TICHÝ in his article "The change of the paradigm of the European competition law and its significance for the Czech Republic", *Právní rozhledy* 2/2004, pp. 61 [in Czech] and following. From the informative publications on this topic in Czech we should mention especially MUNKOVÁ, J.: *The reform of the European competition law and its influence on the competition rules and the decision-taking by the Authority and courts of justice in the Czech Republic* [in Czech], *Právní rozhledy* 7/2003, pp. 18-21, by the same author: *Directives on the monitoring of the merges of companies No. 139/2004 EC* [in Czech], *Právní rozhledy* 12/2004, p. 458-463; FIALA, T.: *Competition law of the European communities* [in Czech], *Právní rádce* 4/2004, Appendix "A practical manual"; NERUDA, R.: *Modernisation of the European competition law and its impact on the Czech competitors* [in Czech], *Právní fórum* 7/2004 (pp. 263-272) and 1/2005 (pp. 19-25); BEJČEK, J.: *Decentralised application and modernisation of the European competition law* [in Czech], *Proceedings of the XVth Karlovarské právnícké dny Linde*, Praha, 2005, pp. 32-51.

⁴ Compare HERDZINA, K.: *Wettbewerbspolitik*, 4.A., G. Fischer Verlag, Stuttgart 1995, pp. 114 ff.

2. "AUTOMATIC" VERSUS "REASONABLE" PROHIBITION IS NOT EQUAL TO "NORMATIVE" VERSUS "ECONOMIC APPROACH"

Basically, it is possible to distinguish between two approaches from the normative point of view:

- the prohibition of anti-competition process without any further remarks, "automatically", prohibition "as such"
- the so-called *conditional* prohibition on the basis of judging concrete circumstances of the individual case and especially the relation between the advantages gained and the level of threat to the economic competition

The terms that are being used for these methods in English and internationally are the *per-se rule* and the *rule of reason*.

Distinguishing between the *per-se rule* and the *rule of reason* is based on the American Common Law that considered some of the limitations of market competition unacceptable and prohibited, unless they were, with regard to the concrete circumstances, necessary as a marginal agreement to the main subject of the contract (so-called *ancillary restrictions*).⁵

The advantage of the *per-se* method lies especially in greater legal certainty, easier situation for evidence (it is only necessary to file evidence of the existence or accomplishment of the elements of the *per-se* prohibited procedure) and the elimination of the arbitrary decision making of cartel offices.

The disadvantage, on the other hand, lies in the certain schematic and rigid character of decision making, because it is not the matter of fact that is judged, but that things are only "filed" and deviations in specific cases, which are exceptionally desirable from the point of view competition policy, are not allowed. These advantages and disadvantages must be balanced.

If the approaches of the competitors may be ambivalent (both beneficial and harmful) from the point of view of competition policy, but from the statistical point of view the harmful effects prevail, preventive control is justified. On the other hand, if in the marginal cases the conformist effects with the aims of com-

petition policy prevail, the subsequent control is more effective.

Advantages and disadvantages of the *rule of reason* method are an opposite mirror reflection of those of the *per-se* method. The *rule of reason* method is functionally equivalent to the *per-se* method of prohibition, connected with the possibility of exceptions and can be used in ambivalent cases from the point of view of competition policy, where the compatibility of behaviour with the aims of competition policy usually prevails. It provides greater space for administrative bodies to judge individually, but this diminishes the legal certainty and predictability of the parameters necessary for the businessmen.

With this method, also both the preventive and subsequent control is possible, and the burden of proof may be carried both by the cartel office and the businessman. There is no reason for using only one of the methods, either the *per-se* or the *rule of reason* method, for a certain kinds of anticompetitive behaviour. The possibility of exceptions, preventative or subsequent character, and possible transfers of the burden of proof give these instruments a large extent of flexibility. Legal orders, bans, or permissions are not as far away from each other as it may seem at first glance.

The *rule of illegality* asserted by the *per-se* method is suitable only in the cases when it only concerns behaviour that would *evidently and under all circumstances* be (or that almost always is) anticompetitive. The *rule of reason* method analysis is used in the cases when the competitive behaviour cannot be filed in the so-called *per-se* category. Then the danger of such behaviour for competition must be examined in the individual, quite individualised and concrete, case. This is an utterly value-concerned analysis that helps us to find a way out and a solution of conflicts of interest.⁶

The *per-se* method covers the area that we might call the "*hard-core*" cartels, as price fixing agreements and agreements on the division of the market. For cooperation agreements endangering competition and for vertical contracts limiting the competition, the *rule of reason* analysis is used more often. Certain groups of such *per-se* prohibited behaviour are formulated and are usually accompanied by a list of ex-

⁵ For more on this, compare BEJČEK, J.: *Existenční ochrana soutěže*. MU BRNO 1996, pp. 114 and following.

⁶ In 1972, B. Sangmeister still wrote (Die *rule of reason* und das *per-se* Konzept in der Rechtsprechung des Supreme Court der USA zu § 1 Sherman Act, Carl Heymans Verlag KG, Köln 1975, p. 29) that the price agreements, agreements on the division of customers and area, agreements on production limits, profit and loss pools (dividing the risk) and group boycotts belong to the category of *per-se* prohibitions - all these as horizontal agreement, and as vertical agreement to a certain extent also the limitations of the customers and areas. Already in 1990, this was no longer true and the sphere narrowed down to horizontal price agreement, tied transactions were already assessed also according to the *rule of reason*, decisions on group boycott were also taken on the basis of *rule of reason*, and the same kind of assessment won in vertical price agreement (compare Toepke, U.P.: *Per-se Verbot und die Rule of reason: Der Wandel vom Automatismus des Kartellverbots in Section I Sherman Act zur "Per-se perhaps" Regel des United States Supreme Court*, WuW 7-8/1990, pp. 578-592). It is also stated (*ibid.*, p. 588) that the "golden age of anti-trust law with its automatism when applying the 'per-se' principle does not exist any more" And further shift towards the loosening of the strict *per-se* rules in the decision making practice of the Commission and the European courts in the following years up to now is evident.

⁷ For example, horizontal price agreements were traditionally considered to be a crystal clear and typical example of cartel, where

ceptions from the prohibition (both conditional and unconditional).⁷

With market structures endangering the competition, the situation is more complex – according to the traditional opinions, they should not even be allowed to originate, and therefore the per-se method of prohibition was recommended.⁸ However, it is hard to identify whether the merger of companies will really bring with it a threat to the competition (and to what extent), or a comparable compensatory or even prevailing advantage. This issue is much more complex than the judging of cartels.

Neither the general prohibition of mergers, nor the overall effort to make them more difficult may be recommended, but the same holds for the general resigning over the level of concentration in industries. Therefore the rule of reason method is much more suitable with the reservation that mergers from a certain dangerous borderline market power of the participant (the so-called “elephant marriages”) can be subordinated to the per-se prohibition with the possibility to examine the declared specificity in the procedure on granting the exception with the burden of proof on the part of the business people.

Preventing practices can be, according to the degree of seriousness, classified as belonging to the group adequate for the per-se prohibition (boycott, discrimination) and/or into the sphere of competence of the rule of reason (abuse of market power by refusing a contract) with the ex-post check up.

It has already been stated⁹ that the controversy around the per-se method and the rule of reason is not solvable by an “either-or” answer, but rather “it depends” kind of answer (*es kommt darauf*), depending on considering all the positive and negative effects of competition.

The rule of reason method helps to overcome the dilemma of draconic (not economically rational) thinking. The per-se approach with the absolutist attitude, impossibility of exceptions, and wide application could also be called the “*per-se unreasonableness*”. It is exactly the per-se method that is (should be) only another (shorter, generalised, operational) expression of the economic and social rationality and it should not eliminate, but complement its other expression (namely the rule of reason principle).

The analysis from the point of view of rule of rea-

son and the approach according to the per-se method are in its essence nothing else but two different methods of determining whether the limitation imposed on the competition is “*unreasonable*”, i.e. whether its anti-competition effects will be balanced with the pro-competition ones, or not.

The automatism during the application of the per-se method steps back into the background more and more often to the assessment of a concrete case and its impact on the competition. It is often even stated¹⁰ that nowadays, there are only a few areas where it would be uniquely and without any further examination by the relevant court of justice necessary to follow the suit of the per-se rule.

I think that this development may be caused by the increasing complexity of economic life, to which the shortened and simplified form of rationality modelled by the per-se method does not suffice, but that it requires more detailed examination of all the circumstances and connections. After all, even Sherman Act in Article 1 contained only one prohibition and had only one purpose, to whose fulfilment the courts gradually began to use a different method (rule of reason). The controversy on the method of regulation of cartel law may thus be reduced to the controversy on the *literal* explanation of the law, or a *teleological* one.

In a state that respects the rule of the law, however, this is not a question to be trivialised. Preference for the purpose-based explanation of the law (or even thinking of it) is a dangerous and pernicious process for legal certainty and in this area also for the basic legal guarantees of economic prosperity. Reducing a norm in the teleological way is easier for an American judge than for the continental one, not even speaking of a continental officer at the respective antitrust authority.

The problem of the choice of the method against the anticompetitive conduct, and strategies was originally created as a result of a too general clause of Section 1 of Sherman act, to which a practically usable content had to be given. The problem of approach according to the rule of reason has at least one other important social dimension. If an independent court is deciding about the application of the antitrust regulations, the rule of reason method is better protected against abuse from the part of lobby groups, than

there is no space for exceptions, and where the per-se prohibition could be used, even *ex ante*. However, the tendencies to implement the rule of reason also into the areas where nobody thought of it in the past (even in the horizontal price agreements, group boycotts, and tied transactions), are apparent.

⁸ See MÖSCHEL, W.: Der Oligopolmißbrauch im Recht des Wettbewerbsbeschränkungen, J.C. B. Mohr (Paul Siebeck), Tübingen 1974, p. 23. However, it must be emphasised that the complication lies in the solution to the end conflict, to which the absolute per-se method does not provide many possibilities. The “*Vivat comcurrentia, pereat mundus*” cannot hold. The most recent development of European law heads also in this area quite unmistakably to the assessment on the basis of the “rule of reason” (compare the implementation of new substantive test with merger with European impact commented upon below, i.e. the so-called test of substantial impediment to effective competition SIEC).

⁹ Compare ULMER, P.: Rule of Reason im Rahmen von Artikel 85 EWGV, *Recht der internationalen Wirtschaft* 7/1985, p. 524.

¹⁰ See Toepke, op. cit., p. 592.

when these issues were dealt with by an administrative body within the framework of administrative consideration. This circumstance is an indirect argument for keeping the *per-se* method in the countries with such system of decision making. The *per-se* method, on one hand, is more rigid, but on the other hand, it provides more exact limits to the so-called administrative consideration and to a certain extent it probably prevents the change of the rule of reason into the "*rule of lobbyism*".

This dilemma of the two seemingly incompatible methods is rather artificially presented as critical, as if the rule of reason and *per-se* methods were quite different, whereas they are only two different manifestations of the pro-competition rationality. As if rational competition policy could only be secured by the application of the *per-se* rules, and as if the *per-se* rule did not make a space for administrative consideration and rational (*reasonable*) competition policy.

If the rule of reason is applied, the expert bodies should be involved in the assessment of the economic competition rationality, as not even the court is the best equipped body for the assessment of the complex economic competition connections. The question of the choice of the so-called method cannot be artificially exaggerated. Even the requirement of the adherents to the free market that (if the *laissez-fair* situation itself is not installed) the competition rules should have the *per-se* form is ill-conceived. If the purpose lies in the prevention of decisions within the framework of discretion consideration of the relevant administrative body, another consideration (albeit prejudicial and dogmatic) is already contained generally in the legal *per-se* rule, which might be harmful for competition. It is, on one hand, true that the fiction of a rational legislator holds and that in the legislative process, group interests are asserted worse than in the *ad hoc* decision taking, but such cases exist. Then, paradoxically, the adherents of the *per-se* method as the lesser evil would in fact be in favour of competition interference with a normative incorrect measure of the state with the weak consolation that the result is at least known in advance.

3. THE PHASE OF THE "MORE ECONOMIC APPROACH" IN THE EUROPEAN COMPETITION LAW

The preceding more general approach may serve as a support for keeping the methodically sceptical

view to the most recent development in the area of European competition law that – at the legislative level as well as in the decision making practice – significantly emphasises the economic evaluation of the impact of the competitors' behaviour at the market, than the formerly so frequent more formal assessment of the accord or disaccord with unconditionally prohibitive norms.

In a rather simplified way, it can be said that the lawyers identified competition law with the application of the principles given by the law and did not seek the answer to the question as to which solution is economically correct, but which one is in accord with the explanation of the given rules. Economists think differently and for them, it is not the legal principle that is the essence, but the market situation and the practice with which they are confronted.¹¹

At the same time, economic methods in the competition policy cannot be identified with the quantification of the competition problems; they provide especially the possibility to find factually well researched and objective decisions on the basis of a number of modern analytical methods, including the economic simulation modelling, to which the "formal juristic optics" often presented an obstacle¹². This is of course no breakpoint, because, after all, even the "*per-se*" rules were determined on the basis of economic analysis standing in the background of the regulation of competition delimited by the law; when, however, it was considered to be only a tool for "statistical justice", the economic approach allows for better assessment and evaluation of the *concrete* situation of the *concrete* competitors at a certain time and their impact on the competition environment. We could probably even speak of a "more casuistic method".

This economising approach was not introduced "out of nowhere", but is rather a name of the greater significance of the economic substantiation of the decision of the Commission, which was gradually required by the European Court of Justice, or by the Court of First Instance¹³. The Commission, as a result of this development, also began to put more weight to the prudent economic analysis, which should have led to greater legal certainty.¹⁴ Economisation of the decision making on the basis of "ad hoc" economic analyses will, however, probably not lead to greater legal certainty; higher transparency of decision making could also be questioned, because what is valid for one case under concrete conditions need not be relevant in another case. Moreover, the compilation of various econo-

¹¹ Compare HUTCHINGS, op. cit., p. 531.

¹² Compare HILDEBRAND, op. cit., p. 513.

¹³ The triple cancellation of the decision of the Commission is typical (in the controversies regarding mergers: the case of Airtours, the case of Schneider Electric, and the case of Tetra Laval) by a first-instance court in 2002 exactly for the reasons of insufficient economic reasoning in favour of the decision.

¹⁴ Compare MONTI, M.: EU Competition policy after May 2005, Speech 03/489, Fordham Annual Conference on International Antitrust Law and Policy, New York, October 24th 2003. In: CHRISTIANSEN, A.: Die Ökonomisierung der EU-Fusionskontrolle: Mehr Kosten als Nutzen?, WuW 3/2005, p. 285.

mic analyses will probably lead to greater costs for the participants of the proceedings as well as for the Commission.¹⁵ There are even warnings against the "battle of assessments"¹⁶. More justice in the individual case will mean greater costs in the individual case; a question, which can hardly be solved economically ex ante, remains whether the sum of the costs will not charge the overall balance to such an extent that the "more economic approach" will in the end not be economically efficient. There is also another factor, the factor of time (higher time demand for economically more sophisticated decision making), which especially with the assessment of the mergers can lead to the fear of the parties to join at all; rather than to undergo a lengthy decision making process with an uncertain verdict; the parties might prefer another investment alternative.

The uncertainty connected with decision making in the individual case will never be removed completely, not even with wider use of economic methods, models, simulations, and calculations. The theoretic base of the competition policy will even so have to provide hypothetical instructions.

In the end, the declared approach requires only a *more* economic approach, not an *only* economic approach. We are thus dealing only with the shift on an imagined scale between the per-se method and the *rule of reason* towards the latter pole and to the accent on the concrete circumstances of the individual case.¹⁷

4. WHAT IS "ECONOMIC"?

The situation is by far not such that we would move from the vague, unclear, uncertain, not transparent criteria of the legal assessment of competition behaviour to clearly defined, transparent, and predictable economic criteria. It is well known, almost notoriously well known, that the aims of legal regulation are not only complementary, but also competing ones.¹⁸ Similarly, however, even the economic approach is not free of inner differentiation and internal contradictions of the economically seen objectives, so that even the economic objectives are subordinated to hierarchy and optimization balance.¹⁹ The unclear definition of the notion of efficiency itself corresponds to this, for the definition of efficiency is necessarily connected with some theoretic notion (i.e. also a value standpoint). The notion of efficiency in itself is considered questionable in the works of eminent authorities.²⁰ Even in the question of economic dimension or efficiency of a certain solution (it is irrelevant whether it is casuistic in the single example, or normative), time is the ultimate judge. Value and conventionalist criteria are not only a privilege of the legal regulations, but are inherent to any concept of economic efficiency. Efficiency as such has hardly any value in itself, if it is not based on the agreement of the people involved.²¹ Even within the framework of the so-called "more economic approach", it is necessary to find balance between various aspects of economic phenomena and their assessment.

¹⁵ Compare CHRISTIANSEN, op. cit., p. 292.

¹⁶ Compare the cited report Maahs, Ch., p. 53.

¹⁷ No one would probably question that even the economic methods are not self-saving and that they are liable to fashion and unpopularity. An illustrative example may be found in the decision taken by the British anti-monopoly office (stated in the cited article by M. Hutchings, p. 532), in which it said in 1979 that the production exclusivity of freezing boxes is in accord with the public interest (the producers were allowed to ask the purchasers to fill the boxes supplied with their ice-cream only – the ice-cream supplied by the producer). In 1994, exactly the same decision was issued. However, in 1998, the opinion changed and it was concluded that such exclusivity limits the economic competition. The conditions had changed within those 4 years, but not significantly (the market share of the main supplier of freezing boxes rose from 66 per cent in 1994 to 70 per cent in 1998, so the dominance could not have been the main criterion in decision taking). From the point of view of transparency and legal certainty, a clear normative solution would have been more adequate (an overall prohibition of exclusivity). No sufficient explanation as to why the decision had changed or why the previous decision had been wrong was given (insufficiency of the institutional memory). A similar case of different assessment was described by FIALA, T. (The advantages and risks resulting for businessmen from the new system of asserting the competition rules within EU [in Czech], VOX, Praha 2004, p. 8): In 2003, the Czech Office for the Protection of Competition prohibited the agreements on the exclusive right to buy beer on the basis of the threat to competition; Plzensky Prazdroj exceeded the market share of 30 per cent. In 2002, the Dutch Competition Bureau, on the other hand, consented to the agreement for exclusive purchase of beer for the Heineken Company, although the market share of Heineken exceeded 50 per cent. For the Dutch Authority, it was sufficient that around 40 per cent of the pubs were not bound by these exclusive contracts, which was enough for preserving the competition. The dominant position in the market in itself thus does not automatically have to signify an interference with the competition and the decision is rather dependent on the fact whether the procedure is more or less formalist or on the basis of an overall economic context of the agreement.

¹⁸ Compare e.g. the objectives of equality and protection of the weaker party, objectives of the protection of competition and competitors' protection, the aim of supporting innovation, support of fair and equal competition, and so on.

¹⁹ Compare e.g. the criterion of short-term and long-term efficiency, micro- and macroeconomic efficiency, etc.

²⁰ E.g. ROTHBARD, M.N. (Comment: The Myth of Efficiency, p. 90, cited acc. to ŠÍMA, J.: *Ekonomie a právo* [Economy and the Law], VŠE Praha 2004, p. 77) states that "... as nobody can ever have perfect information on the future, nobody's action can be called effective. We live in the world of uncertainty. Therefore, efficiency is only a chimera."

²¹ Paraphrasing the quotation of J. BUCHANAN, cited acc. to ŠÍMA, J., op. cit., p. 80.

Following relationship that cannot be quantified and probably also modelled is joined with this: relationship of economic and extra-economic objectives, such as society welfare, sustainable harmonious development, quality of life, but also (in the European law the first objective) of economic convergence, which inevitably requires the accepting of sub-optimum ("not economic") topical decisions in the interest of further optimum development or state.

If the objective of European competition law is (apart from the support to the creation of the unified market) to support and protect business competition and through it the economic efficiency, it is necessary to start from certain *theoretic* differences between the various forms or aspects of efficiency – its legal definition is not at the disposal.

Generally, three kinds of efficiencies are recognised²²:

- *allocative* efficiency, which corresponds to the situation in which the services and goods are allocated to the consumers (in the wide sense of the world, i.e. not only the end consumers, but also the so-called production consumers) according to the prices which they are willing to pay; these prices will not be higher than the marginal costs of the production. This efficiency will become true in the situation of perfect competition, where the producer cannot influence the market price by limiting the production, and therefore is not interested in doing so.²³ Situations are called ineffective with regard to allocation, when the strong subjects in the market have the ability to influence the price by limiting the production and the price will be higher than marginal costs²⁴. Agreements or mergers that are directed towards strengthening the market force may stimulate the tendencies towards allocative inefficiency.²⁵
- *productive* efficiency, which stands for the production of goods and providing services with the lowest possible costs. Market output is maximized through the best combination of inputs, which means that the least possible volume of sources (common richness) is used for the production of the given goods or providing the given services.²⁶

- *dynamic* efficiency is reached when the producers constantly innovate and develop new products as a part of the fight for market shares by gaining new customers.

In an ideal case, competition should support economic efficiency in its allocative form and also in its productive form and at the same time, it should support innovations. The problem lies in the fact that the three components of efficiency mentioned need not necessarily be consistent and during an assessment of an agreement between competitors or their behaviour, tensions might arise.²⁷

For example, mergers can contribute to savings due to extent and range of goods (*economies of scale and scope*) and thus fulfil the productive efficiency. On the other hand, the merged subject might reach higher market power, and thus also the ability to reach "over-competitive" prices, which interferes with allocative efficiency. Market power may further lead the strong subject to the neglecting of innovations (as e.g. high barriers to entry the market discourage possible interested persons). Then it is necessary to consider whether the advantage of productive efficiency (the costs saved by the merger) will be passed on to the consumer (which would be a compensation of the disadvantageous consequences of a higher market concentration), or whether they remain in the hands of the merged subject in the form of higher profit.

Similarly controversial is also the doctrine – created by the European case law – on the access to the so-called *essential facilities*, owned or operated by a monopoly or a dominant subject. On one hand, such enforced access strengthens the competition in subsequent (subordinate) markets (e.g. access to the distribution electrical network strengthens the competition in the market of electricity distribution), but on the other hand, it might hinder the motivation of the dominant operator of the network to innovation, which might weaken the dynamic efficiency.

Innovation motives might, however, be arguments for those who struggle to have access to the essential facilities, as well as for those who own these facilities and thanks to the savings due to the size reach higher productive efficiency and can thus invest part of the higher profit into innovations and the development of new technologies.

²² Compare e.g. ARREDA, P./KAPLOW, L.: *Antitrust Analysis*, Aspen Law & Business, 5th ed., New York 1997, pp. 5 and following.

²³ Compare BISHOP, S. – WALKER, D.: *The Economics of EC Competition – Concepts, Application and Measurement*, 2nd ed., Sweet & Maxwell, 2002, pp. 20–21.

²⁴ Marginal costs are the increase of the costs necessary for the production of another supplementary unit on the output (or by lowering the overall costs as a result of diminishing the output by one unit). Compare Samuelson – Nordhaus, *Ekonomie, Svoboda*, Praha 1991, p. 974.

²⁵ GERADIN, D.: *Efficiency claims in EC competition law a sector-specific regulation*, draft paper, Workshop on Comparative Competition Law (The Evolution of European Competition Law – Whose Regulation, Which Regulation?). Firenze November 12th to 13th 2004, p. 3.

²⁶ Compare WHISH, R.: *Competition Law*, Butterworths, 4th ed., 2001, p. 3.

²⁷ As illustriously shown by Gerardin, *op. cit.*, pp. 3–4, whose examples I am taking over.

An inevitable and very uneasy task of the anti-trust authorities thus lies in performing a comprehensive test that would consider all possible effects and their consequences. "Consumer welfare", which is used as the first aggregate criterion of the European competition law²⁸, seems to suggest rather that it is the allocative efficiency that is looked upon in the first place (so that the consumers get a significant part of the efficiency growth)²⁹ – the profit of the producer in itself is not sufficient as a consequence of higher efficiency.

On top of that – apart from the notion of consumer welfare, indefinite already by its qualitative essence – there is also a problem of the transfer of real and alleged welfare and guarantees and instruments of securing the declared transfers of substantial part of the profit for the consumers in the future. At the same time we have to be careful in not preferring the short-term transfers of the savings to the consumer (short-term consumer welfare); the successful subjects have to be granted sufficient resources for investment and future innovations³⁰.

Although the main objective of the European Union is considered³¹ to be the creation of an unified internal market without any barriers to the free movement of goods, people, services, and capital between the member states, the value of competition is not competing with this objective, although the objective of the internal market integration may sometimes lead the Commission to such a decision that would prohibit even such restriction of economic competition that would bring economic advantages.³² The unified internal market in itself is namely a tool of economic efficiency – removing the barriers of free movement on one hand stimulates competition between producers

and thus contributes to allocative efficiency; the size of the integrated market makes it possible to profit from the advantages of the economies of scale and thus contribute to productive efficiency; further, the size of the integrated market is stimulating for the spread of innovations in member states, by which it contributes also to the dynamic efficiency.³³

5. A "MORE ECONOMIC APPROACH" IN ASSESSING ANTICOMPETITIVE AGREEMENTS

The combination of the prohibition principle of Article 81, par. 1 CEC³⁴ with the exceptions under Article 81, par. 3 CEC³⁵ is an example of using the "rule of reason" approach when assessing the agreements restricting competition. The prohibition of anti-competitive elements stated in par. 1 are considered in confrontation with the pro-competitive elements contained in par. 3. Although the text of Article 81 CEC did not change, it was possible to put greater emphasis on the economic justification of the agreements restricting competition not only through the judiciary and the so-called exclusions *en bloc* from the prohibitions of agreements restricting competition³⁶, but also with the help of Guidelines³⁷. In a more general way than in the exclusions from the prohibition of cartel agreements *en bloc*, the economically reasonable exclusions from the prohibitions of such agreements are regulated in Art. 81 par. 3; by supplementing with the exclusions *en bloc* and with interpretation principle in the Guidelines, the "reasonable" solutions become normative, whether it be as "hard law" or "soft law". The guidelines contain a lot of standpoints and recommendations and

²⁸ Compare BISHOP – WALKER, *op. cit.*, p. 24.

²⁹ See GERADIN, *op. cit.*, p. 3.

³⁰ Compare BISHOP – WALKER, *op. cit.*, p. 26.

³¹ See Article 3 par. 1, letter c) of the European Convention.

³² Similarly GERADIN, *op. cit.*, p. 4.

³³ *Ibid.*

³⁴ Article 81, par. 1 CEC (Convention on European Communities) prohibits all agreements between undertakings, decisions by their associations and concerted practices, which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

³⁵ Article 81 par. 3 CEC excludes the following agreements from the prohibition according to Article 81, par. 1:

- agreements which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit
- agreements that do not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives
- agreements that do not afford such undertakings the possibility of eliminating competition in respect of substantial part of the products in question.

These conditions hold *cumulatively* and their list is *exhaustive*. Exemptions from the prohibition according to Article 81 (3) apply only in the above-mentioned cases; i.e. they do not apply e.g. for an agreement that would increase the employment rate in one of the countries of European Union, which is not a competitive aim.

³⁶ Compare the Commission Regulation 2658/2000, 2659/2000, 2790/, 772/2004.

³⁷ Guidelines on the application of Art 81 (3) of the Treaty, O.J. C 101 of April 27th 2004.

present a kind of "soft norms", derived from the case law³⁸ and their aim is among others "keeping the balance between the prohibitive rule and the rule for the exemption from prohibition"³⁹.

Exemptions of certain categories of agreements from the prohibition *en bloc* as well as the Commission Guidelines offer, after closer inspection⁴⁰, a well-founded conclusion that the economisation of the approach to the agreements restricting competition is a long-term and intentional trend by which the European law is governed. It is said⁴¹ that even the economic approach to Art. 81 does not mean that the compensation of interference of competition with extra-competitive objectives was made possible beyond the framework of the exemptions in Art. 81 par. 3⁴². Pro-competitive and anti-competitive effects of the agreements are judged separately for each case, but they should essentially be balanced on the basis of the same geographically relevant markets⁴³. The sign of the economic approach that cannot only emphasise the topical effects without their relations to future development is the requirement⁴⁴ that the agreement of the competitors and its effects were judged in *context*, i.e. not exclusively according to the *moment* in which it was reached. Exclusive judgement according to the *ex ante* state would not be justified and also the factors arising after reaching the agreement must be taken into account.

Bearing in mind that the judgement of economic contributions and advantages is not an exact science, but that it is necessarily *to a certain extent* always connected with arbitrariness, at least general rules for the assessment of economic advantages and efficiencies⁴⁵ can be defined, which are contained in Art. 81 CEC, in a few *en bloc* exemptions and in the Commission Guidelines, which set the borders for the arbitrariness

of economic analysis; in connection with the decision making practice of the Commission and of the European courts, they are gradually softened.

These rules may serve also as a general guideline for the people in practice who are moving on "thin ice" of the economically "interesting" agreements restricting competition topically or potentially. For most competitors, it is beyond their powers to dig out independently the rules of correct action (by combining primary legislature, *en bloc* exemptions, Commission Guidelines, all this while bearing in mind the significant level of casuistic mode and range of these regulations, which are on top of it modified by the decision taking practice of the Commission and the European courts).

- The advantages must be *justified*. Vague references to future contribution that appear as effects of the restriction of competition are not taken into account.
- The advantages must be *objective*, i.e. based on trustworthy economic data, and not on the subjective assessment of the parties of the contract.
- Limiting the competition must be *inevitable* in order to reach the proclaimed advantages; i.e. that the advantage is not reachable by an agreement that would restrict competition less (a less restrictive alternative does not exist)
- The declared advantages must *overweight* (not just "balance") the restriction of competition brought on by the judged agreement. The overall net impact must be economically positive.
- The consumers (in the wider, not just "consumerist" sense of the word) must receive a *significant part of the profit* resulting from the re-

³⁸ Thus e.g. in Art. 18, the Guidelines anchor two tests by which it is examined that the agreement restricts actual or potential competition, which would otherwise exist without that agreement or without a concrete contractual limitation contained in the tested agreement.

³⁹ KJOLBYE, L.: The New Commission Guidelines on the Application of Article 81 (3): An Economic Approach to Article 81, E.C.L.R. 9/2004, p. 570.

⁴⁰ Which was done in specialised literature especially by the cited authors Kjolbye and Geradin and with whose partial analyses I do not burden the reader, but refer only about the overall conclusions.

⁴¹ KJOLBYE, op. cit., pp. 570 and following.

⁴² In connection with this it is adequate to note that the notion of *effective* competition does not mean the protection of economic liberty as a "value in itself". Effective competition is characterised by its effect on the consumers' welfare, it cannot be led by the motto "fiat competio, pereat mundus". It seems that it is this relation between the protection of economic liberty as an indirect tool for securing long-term economic welfare of the consumers which is left aside in the thoughtful essay by Kindl, J.: The notion of interference of business competition – general standpoints and concrete applications [in Czech]. *Právní rozhledy* 10/2005, p. 343 and following. No theoretician, and even less so the anti-monopoly authority, would seriously assert the freedom of competition as a formally aesthetic *per se* purpose ("the competition must be free, because it falls well within the speculative normative concept and it looks nice?"); the freedom of competition is a tool corresponding to the economic rationality and welfare. The shift in the standpoints of the Commission as well as in European legislature towards the "*more economic approach*" in recent years means especially less reliance on these long-term effects of free competition and the willingness to judge *ex ante* the positive contributions of the limitations of free competition to that basic objective of competition, which is evidently not the formally in a fundamentalist and paranoid way judged "purity of the tool" (i.e. *free* competition), but reaching the objective – the economic welfare (of consumers in the wide sense of the word).

⁴³ Compare Art. 43 of the Guidelines on the application of Art. 81 par. 3.

⁴⁴ Art. 44 and 45 of the Guidelines.

⁴⁵ I take over and paraphrase the list by D. Geradin in op. cit., pp. 19–20.

levant restriction. It thus does not have to be a transfer of each single advantage on the consumer, it is enough if its significant part is transferred. Consumer may, as a result of the restrictive agreement, suffer also a disadvantage (e.g. higher price), which will, however, be compensated by another advantage (e.g. higher quality of the product). The transfer of advantages to the consumer will be directly proportional to the elasticity of the demand (a significant decrease in the price as a result of a restrictive agreement might, with elastic demand, lead to the transfer of the advantage resulting from it on a higher number of consumers).

- There must be a *direct proportion* between the intensity of restricting competition on one hand and the size of advantages for the consumers resulting from it on the other. The more damage is done to the competition by the agreement, the higher advantage must be passed on to the consumer.⁴⁶
- There are no such advantages that would justify *complete* exclusion of competition. The Commission recognises that the rivalry between competitors is a basic prerequisite and a stimulator of efficiency. The elimination of competition at a certain commodity market might, on one hand, bring some visible short-term contributions that would, on the other hand, be outweighed by long-term losses. In contrast to the previous approach of the Commission, which put an equality sign between the exclusion of competition and getting dominant position, this formal test has been abandoned within the framework of economic assessment of the agreements limiting the competition. From the Guidelines it follows that Art. 81 (3) CEC may be used also for the agreements of competitors with dominant position.⁴⁷ It is not an a priori question of threshold values of the share of the relevant market. The Guidelines thus consciously do not provide a "safe haven" for the acceptability of a restrictive agreement and thus emphasize the necessity of a more detailed analysis of the concrete circumstances.
- The advantages and contributions resulting from the restrictive agreement must be market specific, i.e. they have to relate to the *same market* and their anticompetitive impact is assessed also at the same market. Negative effects on the consumer on one market cannot be outweighed (overweighed) by consumer be-

nefits on another market, unless the markets were interconnected (then, of course, the markets would not be separate and would belong to the same group of consumers).

- Assessment according to Art. 81 par. 3 depends on the eventual *changes* of the decisive facts; it is not done once for ever, but only for the period of time in which all required conditions are fulfilled cumulatively.
- The proclaimed advantages *cannot* follow from carrying out market power. Thus e.g. the savings of costs caused by a restrictive agreement cannot be a result of the use of market power (then that agreement would be not necessary from the point of view of higher efficiency, as the costs savings would be reached by a subject strong in the market anyway and at the same time, the competition would not have to be restricted – it would even violate the above-mentioned principle of inevitability).

6. ABUSE OF A DOMINANT POSITION

Not even this sector of European competition law could have been left aside of the trend of stronger position of the economic methods of assessment. The situation is even more complicated, as in this case – in contrast to the agreements restricting competition – no exemption from the prohibition of the abuse of a dominant position exists. The problem of abandoning the rigid and formalist approach in favour of the "more economic approach" is thus reflected in the quest for the answer to the question as to what exactly the abuse (albeit in the form of exploitation or elimination) is, and this is to be done through economic analysis. The *per-se* prohibition, however, does not go down well with the assessment of *concrete* circumstances of an individual case, which is necessary for the economic analysis.⁴⁸

The criteria for the judgement of what an abuse is can be created normatively only with difficulties (at most as examples), and so they usually originate continuously as results of the procedures of the Commission and of the European courts; they gain the "normative power of the factual approach" (Jhering) by its convincing nature and as a result of the assertion of the requirement of predictability and taking similar (the same) decisions in similar (the same) cases.

The dominant competitors, in contrast to the merged subjects, have earned their market position by a better market output and were thus successful wi-

⁴⁶ We speak of *sliding scale* here.

⁴⁷ The same opinion is expressed by KJOLBYE, *op. cit.*, p. 576.

⁴⁸ Similarly GERADIN, *op. cit.*, p. 25. Some commentators even deny the dominance of the "automatic" prohibition rules (e.g. LÖWE, B.: "We have to tackle each abuse in its specific context, and we have to also look at the particular motivation and context of abuse", Fordham Antitrust Conference, Washington 2003, cited according to Hildebrand, *op. cit.*, p. 517).

thin the framework of the competition process. Therefore (because it is their own economic success that leads to market dominance) their behaviour should be assessed with a great care, so that the successful subjects are not regulated in the cases when it is not necessary. Distinguishing between "normal" conduct (in the conditions where dominance or monopoly are normal) and "abusive" conduct, where the behaviour of the dominant subject should be "taxed afterwards", is impossible with the use of the *fixed* (per-se) rules.

Thus, casuistic is the main method. Recently, the tendency towards economic analysis appeared in the European competition law e.g. when judging discounts provided by the dominant subject. Such discounts are per-se thought to be a kind of prohibited and abusive behaviour, unless economic compensation is associated with them.⁴⁹ The principle that while fidelity and aim discounts present an essentially anti-competitive abuses of the dominance, quantity discounts are not, developed as a per-se rule of the judicatory kind.⁵⁰ The Commission is preparing methodical Guidelines also for the area of discounts.

The problem with introducing so-called predator prices is still open especially because it is not easy to find evidence of the fact that the dominant subject supplying the goods for a price below the variable costs will in future (be able to or want to or both) compensate the losses from the period of "combat prices". In this direction, both the Commission and the ECJ have up to now held the position (in fact close to the per-se rule) that the supplies for prices below variable costs almost always indicate the intention of the dominant subject to push the competition out of the market.

The use of comparable markets (*benchmarking*) or the monitoring of the costs might be an objectivising economic method. It is not out of the question that the use of such methods might lead to the confirmation, softening, cancellation of the per-se methods (although respected only on the basis of habit according to the case law), or even to the creation of new, more sophisticated per-se rules⁵¹. The case law of European

courts provides only a very general "per-se" rule for the assessment of the abuse of dominant market position, which says that the prohibition of such behaviour relates also to the activity that is not "objectively justifiable".⁵² There is probably no better tool than an in-depth economic argumentation that would present the objective view of the action and that would be capable of convincing about its justification.

Just as it is not possible to conclude that the dominance was abused in the prohibited way solely on the basis of higher prices, it is not possible to do so with the tied transactions. Tied selling of products and services is effective in a number of cases and on the contrary, selling the items separately would lead to the decrease in quality and consumer comfort.

7. MERGER CONTROL

It is generally accepted that if the merger control has any influence or contribution to the public interest at all, it lies exactly in the preserving of procompetiti conditions.⁵³ From this point of view, merger control presents a very important part of the EU competition policy. The motivation of the change that has found its expression in the Regulation No. 139/2004 was among others the effort to strengthen competitiveness of European companies, to diminish the demands of the process on administration (with the prospects of massive EU-enlargement), and to decentralise the decision making process. The idea of creating "national champions" that would succeed better in the international world competition is not (in spite of some apparent concessions in the Commission's decision making practice) accepted as a part of European competition policy⁵⁴.

The Regulation brought with it some changes in the substantive law that are also an expression of strengthening of economic approach. It especially introduced a new definition of basic criterion for expressing the prohibition of a merger - instead of the former prohibition to allow the merging on the basis of the

⁴⁹ Compare e.g. the cases of Virgin/British Airways (2003), PO-Michelin (2003).

⁵⁰ Explicitly acknowledged e.g. in German competition law - compare Maahs, op. cit., p. 51.

⁵¹ For example, the a priori negative statement of the Commission to price discrimination is judged as not substantiated, as that discrimination has an internal structure. For more details compare Bishop/Walker, op. cit. p. 195.

⁵² Compare e.g. the examples of IMS Healths (2004) and Oscar Bronner (1998), mentioned in the cited work of Geradin, p. 27.

⁵³ Compare VICKERS, J.: op. cit., p. 98.

⁵⁴ Compare the presentation of the European commissioner Neelie Kroes on February 7th 2005 (accessible at <http://europa.eu.int/rapidpressReleasesAction.do>) in which she openly supports the idea that the companies that are exposed to strong competition environment in their country stand a chance in succeeding on the global scale and that the temptations of the politicians attempting to sell the dream of guaranteed international success in the times of hardships as a result of the creation of national and branch champions (p.3) have to be faced energetically. The existing system of monitoring of concentration (after accepting Directive No. 139/2004) is judged (p. 5) as mature, based on healthy economy and by the same standards as "most global jurisdictions", and incorporating the principles of proportionality and subsidiarity through adequate decentralisation of the decision taking of the national competition bureaus.

fact that the dominant position would be created or strengthened by it (the dominance test), there is now an unclear criterion of an important (significant) obstacle of the competition (the SIEC test – *significant impediment to effective competition*).⁵⁵

The former dominance test was built upon the criterion of the origination or strengthening the dominance position – a merger that was not leading to this supposed consequence was allowed regardless of the fact that it could nevertheless influence the competition negatively on the basis of one-sided or coordination effects⁵⁶. The dominance test is criticised for being based on the hardly applicable assumption that the dominance and sub-dominance can be clearly separated, while the test of significant lowering of competition enables us to predict whether the competition on the relevant market would decrease as a result of the merger to such an extent that the prices would go up or the output down. The significant lowering of or interference with competition detects rather the changes in the competition, while the dominance test is rather attempting to measure how much competition is still remaining in the market.⁵⁷ At other times, on the other hand, it is concluded that the significant lowering of the competition test (SLC test) provides the information on how much competition has been lost from the market, while the significant impediment to effective competition test (SIEC test)

is concerned about how much competition will remain on the market after the merger⁵⁸, i.e. with what was according to the previous opinion identified by the dominance test. However, the answer to the question as to how the merger will influence the competition, and not whether its realisation will surpass the limits of dominance, will be decisive.

Two conclusions follow from this for the practice:

- With the help of the SLC (or SIEC) test, it is possible to prohibit also such a merger that still not lead to the creation or strengthening of the dominant position. This, however, can even with dominance test be functionally substituted with the European construct of the so-called collective dominance.
- Second, it is possible, with the SLC test, not to prohibit a merger even when the dominant position is created or strengthened, a.o. when specific *efficiencies* that otherwise could not have been reached would result from the merger.

The admissibility of the so-called specific efficiencies of the mergers is now predicted also by European law⁵⁹, in contrast to the American law, where balancing the advantages and disadvantages of mergers, or “*trade-offs*” of lowering the competition with specific contributions were common a long time ago, while

⁵⁵ Only practical experience will show whether the optimistic conclusion that the European merger control is neither softer, nor harder, but clearer, is true.

⁵⁶ *Not coordinated* (or also one-sided) effects of the mergers lie in the removal of the competitors from the market as a result of a merger, which will diminish the competitive pressure on those that remain on the market. Increasing the price by the connected subject will e.g. lead the customers to the subject standing outside of the merger, who might also increase the price to a certain level.

Coordinated effects of the mergers are explained as a consequence of the lower number of competitors on the relevant market, which might lead to collective dominance. The probability of the remaining competitors to behave without unnecessarily to resort to the prohibited conduct according to Art. 81 CEC is higher. Such coordination is probable especially on condition that the situation on the market is clear and the competitors can easily find out whether the other competitors are observing the conditions; that there is a trustworthy mechanism for discouraging from breaching that understanding between oligopolies; that the expected results of the coordination cannot be threatened from the outside, namely by the existing or future competitors who do not take part in the coordination of behaviour. Compare Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ 2004/C 31/03, especially items 24, 39–41.

⁵⁷ Compare BURGSTALLER, M.: Marktbeherrschung oder “Substantial Lessening of Competition”? WuW 7–8/2003, p. 732.

⁵⁸ Compare the perceptive remark by J.T. LANG in op. cit. VICKERS, J.: Merger Policy in Europe. Retrospect and Prospect, E.C.L.R. 7/2004, p. 460.

⁵⁹ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ 2004/C 31/03, items 76–78, explicitly state that the contributions of the merger might balance its (unfavourable) effects on the competition, especially its potential harmful effect on the competitors. In the overall competition assessment of the merger, also all the justified contributions of the merger are weighed, especially – *if they mean benefit for the consumer* – whether they are exactly only the *consequence* of the merger (whether they are merger-specific), and – *if they are verifiable*. These conditions must be fulfilled *cumulatively*. The assessment of the merger that results in the conclusion on significant interference or non-interference with the effective business competition at the common market or its substantial part is according to the Art. 2 of Directive 139/2004 based on several criteria. Even in those criteria, the technical and economic *development to the benefit of the consumers*, if it does not *prevent* business competition, is contained.

The role of these circumstances taken into account during the assessment is apparently different from the criteria stated in Art. 81 par. 3 CEC, which might “defeat” the prohibition stated in Art. 81 par. 1 CEC regardless of the economic judgements. The assessment of the criteria according to Art. 2 par. 1 of Directive 139/2004 is subordinated to the covering economic criterion that no obstacles to competition shall be created. The technical development itself cannot overweigh in the case of mergers above the requirement of no interference with competition. Art. 81 par. 3 CEC is slightly asymmetric – it makes it possible for an extra-economic requirement of technological advance to overweigh the competition viewpoints (worsening the conditions for competition is possible, because the prohibition according to Art. 81 par. 3 concerns only the *elimination* of competition with a significant part of the goods in question). Long-term untenability of this differing attitude is subject to criticism – compare Whish, R., op. cit., p. 156.

in European law, the opinion was based on the strict conception that structural damage to competition cannot be compensated with partial and mainly temporary specific advantages. European competition law has thus set free of the strictly normative structural approach and accepts a more pragmatic outlook also on other than just structural indicators.⁶⁰

The difference between these approaches to the basic test for allowing the merger is therefore not, as far as the result is concerned, of essential importance and in both cases it contains the economic assessment; sometimes it is even argued that it is a question of semantics.⁶¹ The sole fact of reaching dominance need not be a reliable reason for not allowing the merger and at the same time, there are examples when the merger was not approved, although no dominant position originated (and this was still in the time when the dominance test was valid).⁶² The arguments that removing the dominance test would diminish the legal certainty of the applicants as a result of the very wide space for considerations of the Commission, which then could exercise a policy with too many interventions⁶³, however, cannot be trifled with⁶⁴.

It is said that the significant impediment to effective competition (this, however, is, or can be, exactly the same as significant barrier to effective competition) provides the most useful viewpoint, as in many cases, there will be a dominant subject on the market

anyway and for many mergers, the relevant question would be whether the competition will grow or diminish through such a merger in the process of determining the dominant company.⁶⁵ The test of significant lessening of competition is considered to be more flexible and less rigid exactly when compared with the dominance test, as it is closer to the spirit of economically founded analysis of the merger⁶⁶ as a "harder" test for the applicant for the merger.⁶⁷

It is obvious that flexible application and reasonable decision making is possible also in the case when the concept of the dominance test is basically valid. Reaching or strengthening the dominant position through a merger is nowadays one of the possible ways that can significantly impede to effective competition. Further cases of such "significant impediment" without the origin or strengthening of the dominance can also be identified, but (with the restrictive interpretation of the notion expected) only in the cases of such anti-competitive consequences of the merger that follow from uncoordinated actions (one-sided effects) of the participating undertakings.⁶⁸

From the new more flexible test (from the point of view of the result, however, also less predictable) for assessment the compatibility of mergers with the common market, which makes it possible not to allow even such mergers that do not lead towards the creating or strengthening of the dominance at the market,

⁶⁰ This is evidently the influence of the tendency dominant in the U.S.A. towards the strengthening of economic viewpoints in the competition law ("more economic approach"). Compare also BISHOP, S. - RIDYARD, D.: Prometheus Unbound: Increasing the Scope for Intervention in EC Merger Control, E.C.L.R. 8/2003, pp. 357 and following. Compare also THOMPSON, R.: Goodbye to "the Dominance Test"? Substantive Appraisal under the New UK and EC Merger Regimens, Competition Law Journal, vol. 2, 4/2003-4, pp. 332 and following. From Czech authors see KINCL, J.: The Control of Concentration after the Accession of the Czech Republic to the EU [in Czech], Právní rozhledy 22/2004, pp. 816 and following.

⁶¹ Compare After, M.: Untersagungskriterien in der Fusionskontrolle (SLC - Test versus Marktbeherrschende Stellung - eine Frage der Semantik?) WuW 1/2003, pp. 20 and following. The German Bundeskartellamt stated already in October 2001 (Diskussionspapier: Das Untersagungskriterium in der Fusionskontrolle - Marktbeherrschende Stellung versus Substantial Lessening of Competition, pp. 35-37, accessible on the www.bundeskartellamt.de/w.Deutsch/publikationen) that the insufficiencies of the dominance test have not been confirmed and that no convincing reasons speak in favour of the transition from it towards the significant lowering of competition test. It might have been also for this reason that the compromise formulation of the substantial impediment to effective competition eventually won, especially as a result of the creation of the strengthening the dominant position (SIEC). The imaginary gap between the SLC test and the dominance test closed at least from the formulation point of view in Directive 139/2004. The decision taking practice of the Commission and of the national competition offices will of course be more important.

⁶² Compare the case Schneider electric SA versus Commission T-310/01, October 2001. A different situation is described by After, op. cit., p. 24: FTC USA (Federal Trade Commission of the USA) judged the proposal for a merger of two producers of baby food Heinz and Beech-Nut, which held the second and the third position on the relevant market (common share 35 per cent), on which the homogenous products producers Gerber dominated with the share of 65 per cent. Although both producers had their regional "strongholds", in which they had superiority (Gerber belonged to the two most often sold marks regularly), there was a lively competition going on between the second and the third producer in the market for the second place. It was exactly this reason, namely that the competition pressure between the two closest competitors of the dominant company would vanish, that eventually led (after an examination before the court) to the prohibition of the merger in 2001.

⁶³ Compare DRAUZ, G.: Vorstellungen der EU - Kommission zur Reform der europäischen Fusionskontrolle, in Schwarze, J.: Instrumente zur Durchsetzung des europäischen Wettbewerbsrechts, Nomos Verlagsgesellschaft, Baden-Baden 2002, p. 51.

⁶⁴ BISHOP, S. and RIDYARD, D. in op. cit. on page 363 claim (maybe a bit prematurely) that the economic framework of the concentration control is strengthened, but that the announcement on the assessment of horizontal mergers (today Guidelines 2004/C 31/03) have begun the path to a greater level of interventions of the Commission. It would probably be more important than the hypothetical possibilities how the Commission will judge the mergers in practice.

⁶⁵ LIND, R. C. - MUYSERT, P.: Innovation and Competition Policy: Challenges for the New Millennium, E.C.L.R. 2/2003, p. 92.

⁶⁶ Green Paper on the Review of Council Regulation (EEC) No. 4046/89, December 2001, p. 40.

⁶⁷ Compare GODDARD, G. - CURRY, E.: New Zealand's New Merger test..., E.C.L.R. 7/2003, p. 300.

⁶⁸ Compare "recital" No. 25 from the Preamble to Directive No. 139/2004.

certain tendency towards economic criteria of assessment is apparent. In contrast to the fixed principles of legal analysis, the economic assessment relies above all on the concrete situation on the market and to a great extent also on its hypothetical development in the future⁶⁹.

Neither mathematical methods, nor the use of the curves and other technological means of the symbolic "grasp" of the reality will of course eliminate the uncertainty of future development. It is hardly possible, in spite of using all these tools, to give a reliable answer to the question whether the single economic savings that are an unquestionable consequence of many mergers, will not be balanced in the middle and long-term perspective by not reached costs savings, which will not happen at all as a result of the absence or lessening of competitive pressure (I. Schmidt), and whether the more adequate way is not to secure the structural prerequisites for a stabile existence of such pressure in order to reach the general (not just undertaking's) economic optimum. The general a priori assumption that mergers lead to the increase of efficiency is not justified⁷⁰. It is further necessary to take into account also no small transaction costs connected with the assessment of the mergers, which might even discourage from the merging.⁷¹

It is out of the question that such a test will capture also such cases of uncoordinated or one-sided effects of the merger (certain control of the prices and other competition parameters) that the previous dominance criterion was not able to separate, unless of course the concept of "collective dominance" was not used. The criterion of strengthening or creating of the dominant position (which is rather a legal term) is nowadays subordinated to the rather economically approached criterion (test) of significant impediment to effective competition (SIEC).

It is of course again the concrete interpretation and application that will be of decisive importance, not the semantic exercises by academics.

8. CONCLUSION

The law supposes a prejudice in exchange for legal certainty. This regulatory prejudice is often insufficiently justified and not verified in practice, or the conditions since the time it had been introduced sometimes change to such an extent that the law does not respond to the practice.

Resigning to the prejudice means increasing legal uncertainty *generally*, but (maybe) increasing the hope in just decision in a *single* case, i.e. such that will take into account all important circumstances.

The second way is the creation of a topical normative prejudice with the risk of repeating the same development. The more flexible way of an adaptation not in leaps (by the change of the norms), but step by step (which persistently reminds us of the advantages of the system of *common law*) need not necessarily lead to the lessening of the legal certainty of the addressees of the norms.

The economic tools not rarely create only an illusion of exactness; the ability to quantify hardly quantifiable data may be useful when seeking answer to exactly formulated narrow questions, but it may be misleading when seeking answers to more complex questions.

The principle of competition should not be substituted by a principle of purely economic calculation that is an end in itself. The competitive pressure is a tool of rationalisation and of the economic behaviour of competitors in the right sense of the word that cannot be substituted. A single decrease in costs as a result of one merger might then be devaluated by multiple non-decreasing of costs, which was possible exactly because, as a consequence of the concentration of undertakings, the competition pressure has fallen down.⁷² European emphasis on the structure of the market (higher than in the USA) is not economically (and by no means empirically) unjustified. European scepticism towards spontaneous auto-corrections

⁶⁹ As M. HUTCHINGS (The Competition Between Law and Economics) stated (maybe too unambiguously and optimistically in favour of the economists), the lawyers, in contrast to the economists, are not good in speculating, and especially not in the issues of mergers, where the important thing is the estimate of the future market effects of the allowed merger on the basis of application of economic models.

⁷⁰ For more detailed treatment of the topic see LUESCHER, CH.: Efficiency Considerations in European Merger Control – Just Another Battle Ground for the European Commission, Economists and Competition Lawyers? E.C.L.R. 2/2004, p. 72 and following.

⁷¹ It is e.g. pointed out that the predictability of the decision and the length of the proceeding to allow the merger can influence the intention itself. Within the "*more economic*" approach, it is recommended to take in account also the "*truly economic*" approach, i.e. not only to approve of economic models, but also the fact that some procedures (e.g. the dominance test) require less sources than other, less economic procedures, and that it is further necessary to approve the general scarcity of the sources – for more details see VOIGT, S. – SCHMIDT, A: Switching to Substantial Impediments of Competition (SIC) can have Substantial Costs – SIC!, E.C.L.R. 9/2004, p. 587.

⁷² The idea of I. SCHMIDT in one of the commentaries in WuW, (2004 or 2005), which I could not identify further.

of the market (especially towards the possibility of new competitors entering the concentrated markets) has its good reasons – “a bird in the hand” in the form of today’s sufficient competitive pressure is preferred to “two birds in the bush” in the form of possible advantages and contributions.⁷³

The economic advantages are not even in the case of cartel agreements a result for exempting them out of the ban (although they might be substantial, permanent, and would bring benefits to the consumers), if they do not comply with the last cumulative criterion, which is, that agreements will probably not exclude the competition on a substantial part of the market.

I think that the conflict of aims between law and economics can hardly be spoken about, if we accept the standpoint (and possibly also a long-standing experience) that the competition increases efficiency. Legal regulation of competition is from this point of view a tool that secures the functionality of another tool (functioning of the competition) working to the benefit of economic efficiency. In some cases the legal (normative) approach, which (because of the lower complexity of the problem) can incorporate the economic contemplations into legal norms, is more suitable; in other cases (especially with mergers), economic casuistic assessment should be preferred to the clumsy effort of precise normative formulation of complex economic viewpoint.⁷⁴

The main problem lies in the delimitation of the space for the consideration of decisive anti-trust au-

thorities (the Commission and the courts, as well as national anti-trust bodies) to such questions that by their nature do not fall into the categories of economic objectivity and normalisation in the form of legal tests. The economic approach even here puts impediments of the type “transfer of substantial part of the advantages on the consumer”, “prevailing reached or declared advantages over disadvantages following from the limitation of the competition”, etc., to the arbitrary decision making. The economic efficiencies in themselves are often not much, if at all, more quantifiable (and thus also “measurable”) than the similarly uncertain legal notions⁷⁵ – they also depend (time-wise, value-wise, interest-wise, and in other ways) on the interpretations.

The effort to keep the economic (and thus also political) plurality, which was in the background of the so-called *ordo-liberal* approach, does not make the economic contributions absolute (which is the tendency in the USA). The more pragmatically (and probably also more short-term) oriented modernised European competition policy presents probably a certain amount of “competitive Darwinism”.⁷⁶ European Commission and the courts will hopefully keep this development within the limits after whose crossing there would be no return and the economy would be governed by oligopolies and monopolies under the nice motto of economic contributions to the welfare of the consumer.⁷⁷

⁷³ Paraphrasing the outstanding study on the role of “*efficiencies*” when assessing mergers in the USA and EU – GHIDINI, G.: A Tale of Two Cultures? Some Comments on the Role of “Efficiencies” on the Two Sides of the Atlantic, IIC, Vol. 35/2004, p. 538.

⁷⁴ Similarly HUTCHINGS, *op. cit.*, p. 532.

⁷⁵ Compare e.g. the contributions in the form of the approach to the new “know-how”, improvement of the selling conditions, abilities to increase the innovation activities, etc.

⁷⁶ GHIDINI, *op. cit.*, p. 542.

⁷⁷ In the last work cited, the author warns against the transition from the “winner takes more” principle to the “winner takes all” principle. He is afraid of the monopolisation spread under the motto of reaching “efficiencies” He does not believe even the substitution of the method for keeping the competitive structure of the market by the method of supervision of the “good behaviour” of the monopolists.