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I. INTRODUCTION

The mantra of international merger control has been cooperation, convergence, and comity. Within the European Union, coherence is another widely accepted objective. Taking stock of the situation in the European Union the results are very positive: The level of coherence between the practices of the EU Commission and national competition authorities is generally very high, cooperation is mostly intensive and close (also between the national authorities, e.g. on the basis of the recent Best Practices of the EU Merger Working Group (2012)), and convergence is constantly increasing.

In contrast, the terms "conflicts" and "conflicting rules" normally designate undesirable incidents which occur when substantive and/or procedural rules diverge and when this leads to problems; for example, if jurisdictions overlap and come to different results with regard to the same facts. In the context of EU vs. national merger control such incidents are extremely rare.

In addition, it should be clear that not all differences between competition regimes are necessarily detrimental to the effective and proportional protection of competition. In many instances the differences have to be understood in the context of each legal system and may also reflect the institutional design of the particular competition authority. In private international law, the term "conflicts" does not have a negative connotation. "Conflict of laws" simply describes the legal rules that determine which substantive law is applicable to a particular set of facts that is linked to more than one jurisdiction.

In this article, the following issues will be addressed briefly in the context of EU and national merger control: (i) conflict of merger laws—which rules apply?, (ii) conflict of jurisdictions—which competition authority will deal with a merger?, (iii) conflict of substantive rules—are there substantial differences and do these create any problems?, and (iv) conflict of procedural rules—are there substantial differences and do these create any problems?

Two recent developments make it particularly timely and worthwhile to discuss these issues. First, the EU Commission has just published a consultation document on merger reform entitled *Towards more effective EU merger control* (June 20, 2013). The document addresses areas where the Commission has identified a need for reform. The Commission plans to extend EU merger control to non-controlling minority interests and to facilitate referrals between the Members States and the EU Commission. Second, the reform of the Germany competition law

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was adopted only two weeks earlier (June 6/7, 2013). It will bring significant changes, in particular in the area of merger control—notably the adoption of the SIEC-test.

II. CONFLICT OF LAWS—WHICH RULES APPLY?

As a rule, EU and national merger laws cannot be in conflict. Either the European Merger Control Regulation ("EMCR") or national merger control rules apply. According to Art. 21(3) EMCR, "no Member State shall apply its national legislation on competition to any concentration that has a Community dimension." This is very different from the context of competition enforcement outside mergers where Art. 101 and 102 TFEU are often applied by national competition authorities in parallel. They are obliged to apply the European rules in parallel if trade between Member States may be affected. Regulation 1/2003 sets out that, in these cases, national competition law can neither be more strict nor more lenient when it comes to agreements and concerted practices (Art. 3(2) Reg. 1/2003). With regard to unilateral conduct, national rules may be stricter.

Whether a concentration has an EU dimension depends mainly on whether the turnover thresholds for worldwide and Community-wide (and in some cases also national turnover in the same three Member States) are exceeded (Art. 1 EMCR). These criteria are simple and easy to handle. In most cases, net sales are a good proxy whether a merger could have significant cross-border effects or whether it will mainly concern only one or two Member States.

However, in a small but significant number of cases, the thresholds point in the wrong direction and do not attribute jurisdiction to the best-placed authority. The rules in the EMCR that deal with referrals (Art. 4(4), 4(5) and 9 EMCR) provide the merging parties and the competition authorities with an instrument to correct the initial allocation of the case. In addition, the applicable substantive (and procedural) rules also change as a consequence of a referral, i.e. each authority applies the rules of its own jurisdiction.

The Commission's consultation paper does not seek to change the general framework for the allocation of cases to the EU or national level. This is probably the right approach.

III. CONFLICT OF JURISDICTION—WHICH COMPETITION AUTHORITY WILL DEAL WITH A MERGER?

As we have seen, the turnover-based rules on jurisdiction in the EMCR do not only determine which law applies but also which competition authority deals with a case. Therefore, it is not surprising that conflicts of jurisdiction are rare. Still, there is some potential for conflict in a limited number of cases. EU jurisdiction requires that certain turnover thresholds are exceeded—there is usually no difference of opinion on this issue—and that the transaction gives rise to a "concentration," i.e. a legal merger, the acquisition of sole or joint control, or the establishment of a full-function joint venture. It can be a very complex and intricate exercise to determine whether the rights of an acquirer are sufficient to amount to joint control. Whether a new joint venture meets the requirements of a full-function joint venture often raises similar complexities.

The Bundeskartellamt usually does not second guess the Commission's assessment whether a particular merger case falls within its jurisdiction under the EMCR. When DG Competition comes to the conclusion that a transaction does not meet the threshold for a concentration, the Bundeskartellamt will normally accept a notification, even if the Commission's assessment is not necessarily shared.

The idea is that negative conflicts of jurisdiction should be avoided if at all possible. Merging parties should be able to obtain legal certainty. A case should not end up in no-man's-land. If the relevant turnover thresholds are exceeded, one authority should investigate the case and make sure no competition issue arises. In principle, the same applies if the Commission assumes jurisdiction, provided that the Commission has the legal power to intervene against all aspects of the merger that it claims are covered by its jurisdiction. The rationale is again the same. The focus is that competition issues should be dealt with by one authority and that gaps are avoided.

As outlined above, there are cases where the application of the turnover thresholds does not lead to a situation in which the case is allocated to the authority best placed to deal with the case. For example, if a case mainly concerns one Member State, the national competition authority is normally best placed to deal with the case. It is closer to the markets, can investigate locally with more ease, and is more familiar with the preferences of customers. This applies even more when local markets are concerned. For example, in 2012 twelve cases were referred to national authorities on the merging parties' request, and another two cases on request of the national authorities concerned.

In addition, national procedures may sometimes be more adapted to the national scope of a merger. The EMCR system is designed for big cases with a Union perspective. It requires a lot of information upfront. Extended pre-notification contacts are part of the usual procedure. At the national level, the procedures are often less burdensome because they are tailored rather to smaller cases and less to the "global mega-mergers." The Commission's current Merger Simplification project (2013) aims to reduce these burdens by extending the scope of Short Form notification.

Referrals from the Member States to the EU Commission can also be used to re-allocate a case to the best-placed authority. When notifications in many Member States are necessary, a one-stop shop treatment at the EU level can be a real advantage. Often parties apply for an Art. 4(5) referral before notification (in 2012 twenty-two cases were referred to the Commission on the request of the merging parties). A disadvantage from the perspective of the companies may be that, after a referral, the Commission has jurisdiction for the whole of the European Union, even if the concentration was not notifiable in all Member States. Whether an Art. 22 referral (two referrals in 2012) has the same effect is not as clear. It seems that jurisdiction extends only to the territory of all Member States that have joined the referral request. In its consultation paper, the Commission proposes to bring Art. 22 in line with Art. 4(5) in this respect.

What is more important from the perspective of the merging parties is the Commission's plan to speed up the referral process. The Commission proposes to start the process directly with a notification to the Commission that includes a referral request. This speeds up the process considerably by merging two steps into one. Member States that have to give up their jurisdiction in a particular case as a result of a referral retain a veto right. This enables them to make sure that the right cases are referred to the Commission and that the referral system is not abused in order to centralize merger control in cases that are better dealt with at a national level. In this context, it would be necessary to provide the Member States concerned with the necessary information as early as possible, i.e. during pre-notification (the consultation raises this question and mentions the submission of a draft Form CO as a possible triggering event).

Referrals in the other direction, i.e. from the Commission to Member States should also be facilitated. On this point, the consultation paper is far less detailed, but at least it raises this issue as well. It appears equally useful to merge the two steps of the referral process and to allow merging parties to notify a case directly to a national authority. In this case, the Commission and the other Member States concerned should obtain some basic information on the case in order to be in a position to assess whether the case mainly concerns the notified Member States and whether a referral makes sense.

It would also appear useful to lower the threshold for a referral to bring Art. 4(4) in line with Art. 4(5). Asking for referral because "the concentration may significantly affect competition in a market within a Member State …" (Art. 4(4)) appears a bit awkward for merging parties that will always want to argue that their case does not raise any substantial competition issues. This may have a "chilling effect," deterring merging parties from asking for a referral in a case where it would make sense to do so otherwise. The referral notice has interpreted this threshold in a modest way:

> [the] transaction is liable to have a potential impact on competition on a distinct market in a Member State, which may prove to be significant, thus deserving close scrutiny. Such indications may be no more than preliminary in nature, and would be without prejudice to the outcome of the investigation. While the parties are not required to demonstrate that the effect on competition is likely to be an adverse one, they should point to indicators which are generally suggestive of the existence of some competitive effects stemming from the transaction.

Maybe it is time to use an approach that is easier to handle in practice, e.g. "the case does not mainly concern markets in another Member State." It also makes sense to refer cases to a national competition authority if the case is not likely to raise some kind of competition issue. In such cases procedures will often be more swift and leaner at the national level. This is helpful for the parties and should also be an advantage from the perspective of the Commission.

It would also be worthwhile to reflect on how to facilitate Art. 9 referrals (on request of Member State). This issue is not addressed in the Commission's consultation paper, but lowering the referral threshold would equally make sense. Is it necessary to require the Commission to adopt a fully reasoned referral decision? Possibly no, because a veto against a referral is sufficient. Decisions intervening against a merger can be challenged in court, irrespective of whether the case was dealt with by a national or the EU Competition authority. All national courts are bound by the European Convention on Human rights. Therefore, it does not seem necessary to reserve the transfer of jurisdiction to a decision that can be challenged before the European Court of Justice.

IV. CONFLICT OF SUBSTANTIVE RULES? ARE THERE SUBSTANTIAL DIFFERENCES AND DO THESE CREATE ANY PROBLEMS?

Conflicting results of investigations at the EU level and national levels can be ruled out, because normally there are no parallel investigations relating to the same concentration. Partial referrals under Art. 9 EMCR are an exception, but it's hard to imagine that the Commission would refer part of a case to a Member State if the investigation of that part related to the same market.

Can the substantive merger rules conflict? This is a situation that can occur in antitrust law and is addressed by the rules in Art. 3(2) Regulation 1/2003. A similar situation can be excluded in the area of merger control. For both the Commission and the national authority, each will apply its own substantial rules.

Sometimes it is claimed, however, that referrals may raise problems because they may lead to a change in the substantive test that is applied, i.e. the SIEC-test at the EU level and, in a number of Member States, the dominance test at the national level. Are there important differences? And, if yes, would it matter?

To address the second question first: The possibility of a referral is clearly predictable in most cases, the likelihood of a referral usually is. For example, if a case is notifiable at the EU level but concerns only (or mainly) one Member State, an Art. 9 referral request by the Member State concerned is not unlikely if the case potentially raises any competition issues. For example, in the *Liberty/Kabel BW* (M. 5900) case concerning cable networks in Germany, it appears that it did not come as a surprise to the merging parties when Germany asked for a referral, which the Commission granted. The investigation by the Bundeskartellamt was closed with a clearance with commitments (B7-66/11). (The parties could have accelerated the procedure by asking for a referral before notification under Art. 4(4) EMCR, but chose not to do so.)

A referral in the direction of the EU Commission is not far fetched if a merger is notifiable in a large number of Member States, concerns a European-wide market, and has the potential to raise a competition problem. For example, Procter & Gamble‘s acquisition of Sara Lee’s air refreshening business (Air Care) required notifications in more than 10 Member States, with horizontal overlaps of the merging parties activities in some of those. The parties decided against an Art. 4(5) referral before notification, but the Bundeskartellamt (after consulting the other competition authorities concerned) requested a referral under Art. 22 that was joined by many Member States. The Commission adopted a referral decision and subsequently cleared the case without commitments in the first phase (M.5828). It is apparent that merging parties cannot claim a legitimate expectation that their case will not be referred to the Commission or to a national competition authority.

Sometimes it is also claimed that differences in merger control regimes within the European Union would hinder a level playing field for companies. In the author’s opinion this argument is flawed. Merger rules apply irrespective of the location of companies’ headquarters or where they are incorporated. They also apply to “foreign” companies that have sufficient business in a Member State and therefore trigger the thresholds for merger control. Therefore, if there are substantial differences, this does not necessarily lead to substantial difficulties.

Another question is whether the tests are really substantially different. Conceptually the answer is yes. But, in terms of outcome, in most cases the answer is no. If one takes a closer look at these issues, it turns out that the intensive debate about the tests—a debate that is necessary and helpful—may give the wrong impression. In reality, a thorough investigation and market analysis will normally lead to comparable results in the vast majority of cases.

It should be noted that the practice in merger cases has developed a lot. This is true for the European Union as well as for the national level. For example, in Germany the reworked merger guidelines (2012) reflect the case practice that has evolved substantially over the last 10 years or so. It is in line with economic concepts and methods. The analysis focuses on the changes brought about by the merger in comparison to the counterfactual. The economic incentives of market players are analyzed with great care. Therefore, the test change that was adopted in Germany last month, and will probably apply as of mid July, is far from a revolution. As was the case at the EU level, many changes of the decision practice had occurred already well before the adoption of the new test.

In fact, the SIEC-test is a good compromise. Dominance is kept as a scenario that is always sufficient to meet the threshold for an SIEC. In systems like Germany's, that have worked with the dominance tests for a longer period, this hybrid test enables authorities and courts to rely on a solid body of precedents on many issues of substantive merger assessment; case law that has been built up over many years. At the same time, the SIEC-test makes it easier to address non-coordinated effects in narrow oligopoly markets; in particular, when the merger does not concern a combination with the leading player but, for instance, of a No.2 with a No.3. This is not a very common scenario, but it happens in real life, not just in textbooks.

Do any differences between EU merger control and German merger control remain after the adoption of the SIEC-test? The most notable difference is probably whether efficiencies can, in principle, be taken into account. In the context of the dominance test this was clearly excluded—probably for good reasons. Efficiencies may not materialize due to the lack of sufficient competitive pressure. Furthermore, the issue whether any efficiency may be passed on to consumers to an extent which fully eliminates the anticompetitive effects of the merger is rather complex and by no means easy to be assessed properly with a sufficient degree of certainty. This is probably the reason why efficiencies have not played an important role in practice in dominance cases. In these cases the considerable transactions costs for taking efficiencies into account are probably disproportionate to the limited benefit linked to the more complex assessment, because it is highly unlikely that efficiencies will make a difference with regard to the outcome of the case when dealing with dominance.

In contrast, outside the creation or strengthening of a dominant position, i.e. in a "pure" SIEC case, it is worth considering whether an efficiency defense should be accepted, because efficiencies fit well into the concept of the SIEC test and may also be relevant in practice, even if not in so many cases.

V. CONFLICT OF PROCEDURAL RULES?—ARE THERE SUBSTANTIAL DIFFERENCES AND DO THESE CREATE ANY PROBLEMS?

There are major differences between the procedures for EU and national merger control; for example, ex-ante control (EU and most Member States) vs. ex-post control (U.K.); two-stage procedures, i.e. 1st phase/2nd phase (EU and most Member States) vs. one integrated stage (e.g. Poland); intensive pre-notification contacts (EU and several Member States) vs. notification without pre-notification contacts (e.g. Germany); etc. However, as is the case in the context of substantial merger control, the differences in procedures normally do not lead to any conflicts.

It should be borne in mind that the procedural rules have to match the institutional design of the respective competition authority. For example, the low information requirements for notifications and the absence of pre-notification contacts work well in the German context, because the German system is marked by flat hierarchies, quick decision-making structures, and a high retention rate of staff that is organized by industry and is able to build up know-how relating to its sectors over years.

Procedural rules also have to be seen in context. For example, the rebuttable market-share based presumptions of dominance in German law are the functional equivalent to the Commission's information requirements in Form CO and Short Form CO. The presumptions create an incentive for the merging parties to provide the necessary information to the authority if the investigation raises any issues, because, otherwise, if the investigation results in a *non liquet*, the merging parties carry the risk.

There is also a trend towards more convergence with regard to procedure, but it is not as strong as in substantive merger control. The recent reform of German merger control took up several solutions from EU merger control; for example, the exception from the suspension obligation for public takeover bids; stop-the-clock provisions in case of late, incomplete, or incorrect information supplied by the merging parties; an extension of the time limits after commitments have been offered by the merging parties; and a clarification that commitments must be proposed by the merging parties (and cannot be imposed by the competition authority against their will).

There is also movement on the part of the Commission. The merger simplification project (2013) extends the simplified procedure and the Short Form CO to a larger group of cases. The information requirements are lowered. This brings EU practice some steps closer to the German approach.

VI. CONCLUSION

Merger control in Europe is not marked by conflict between the EU and the national levels. The opposite is true. Cooperation and convergence are the major trends. In fact, merger control analysis throughout the European Union is quite similar. This is reflected in the coherence of the merger guidelines from the EU Commission, Germany, the United Kingdom, Ireland, and France. The high level of convergence has been achieved without harmonization. It is the result of an intensive exchange of experiences and the constant effort at all levels to improve the analysis and to reach, maintain, or improve the state of the art in merger assessment. Differences are limited and mainly concern procedure and the definition of concentrations that are caught by merger control rules.

The recent adoption of the SIEC-test in Germany (and also in other Member States during the last couple of years) is an example for the increasing convergence of substantive merger control within the European Union, with the EU concept of the SIEC-test as a benchmark.

The current reform debate relating to non-controlling minority interests may become another example for convergence, with the treatment of minority interests in Germany, Austria, and the United Kingdom as models. The challenge though will be to obtain a tool that is effective and works well. Currently, it seems that there is a risk that the Commission may settle for a mere transparency system without suspension obligation that is marked by some of the deficiencies that were also present in earlier versions of the German provisions, which had to be fixed. The Commission should begin its review of non-controlling minority stakes with an effective model from the start.