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**MERGER REMEDIES IN THE EU – THE CURRENT CONDITIONS
FOR EX-POST MODIFICATION AND WAIVER**

Bachelor's thesis

Programme HAJB 08/14, specialisation European Union and International law

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Tallinn 2019

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The document length is 11 378 words from the introduction to the end of the summary.

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The paper conforms to requirements in force

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Chairman of the Defence Committee:

Permitted to the defence

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ABSTRACT

The thesis aims to determine the prevailing conditions for an ex-post waiver, modification, and substitution of merger remedies within the European Union. In May 2018, the General Court annulled Commission's decision to restrain from waiving of merger remedies. It was the first judgement concerning the waiver of merger remedies and indicated that the legal framework for review of remedies might be inaccurate. As the Commission has exclusive jurisdiction in merger control procedures and is rarely subject to a judicial review, it is essential to determine the conditions under which remedies can de facto be waived or modified. The issue is topical because an increasing number of mergers are cleared subject to remedies.

In the thesis, the author will examine what are the required conditions for ex-post waiver or modification of merger remedies, and how the conditions are interpreted. The author will assess whether the EU case law, and the recent Commission's decisions and guidelines can provide more comprehensive information regarding the review process. Furthermore, the author will attempt to determine the issues which are not sufficiently clear in the Commission's proceedings.

The research hypothesis is that the legal framework for an ex-post waiver, modification, or substitution of merger remedies is not sufficiently precise and need to be regulated further. The methodology used is theoretical, qualitative research. Primary sources are the EU legislation, including Council Regulation (EC) No 139/2004, and the EU case law. Secondary sources consist of academic literature concerning the topic, and the recent Commission's decisions and guidelines.

Keywords: Internal Market, Competition, Merger Control, Remedies

LIST OF ABBREVIATIONS

Austrian Airlines	Austrian Airlines AG
Brussels Airlines	Brussels Airlines SA
The Commission	The European Commission
EEA	The European Economic Area
EU	The European Union
The General Court	The General Court of the European Union
LOT	LOT Polish Airlines – Polskie Linie Lotnicze LOT S.A.
Lufthansa	Lufthansa German Airlines – Deutsche Lufthansa AG
Merger Regulation	Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 024, 29.01.2004, p. 1 – 22.
Remedies Notice	Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 OJ C 267, 22.10.2008
SAS	Scandinavian Airlines System Denmark- Norway-Sweden
Swiss	Swiss International Airlines AG
TFEU	The Treaty on the Functioning of the European Union

INTRODUCTION

European Union merger control plays a significant role in guarding the effective competition within the internal market. According to the statistics, in under 30 years, there have been over 10 000 merger notifications to the Commission, and the trend is growing. A significant part of mergers is cleared as compatible with the internal market. However, an increasing number of merger clearances are being given subject to the condition that the parties offer suitable commitments which remedy the competition concerns deriving from the transaction. Since commitments are merger remedies, the terms commitments and remedies are used interchangeably in the thesis, and it is also in accordance with the general practice.

The current competition commissioner Margrethe Vestager has established a strict reputation in regards of the merger clearances. Because merger remedies are inevitably a burden for enterprises it is essential to follow strict rules governing the procedure to achieve the legal certainty. The current legislation covers the essential elements of the procedure; however, it is notably silent on the review process of the merger remedies. The ambiguity of review procedure can be underlined by the fact that on May 2018, the General Court partially annulled the Commission's decision to refrain from waiving the commitments requested by Lufthansa. The case provides important clarifications for the process of ex-post facto waiver or modification of merger remedies. Hence, it is worth assessing the subject more closely.

Since remedies are determined based on estimated market development which may not always come true, the market development towards unexpected direction may render the imposed remedies ineffective. It is fundamentally vital that there is an option to review merger remedies in order to secure efficient competition and the freedom to conduct business. Therefore, the merger remedies may be waived, modified, or substituted ex-post the merger clearance when certain conditions are satisfied. What are the conditions that need to be satisfied? Firstly, exceptional circumstances or a radical change in market conditions may justify waiver, modification, or substitution of commitments in cases where parties can demonstrate that the market conditions have substantially and permanently changed. Secondly, modification, substitution, and waiver of merger remedies can take place in situations where parties can demonstrate, based on their

experience gained from the application of the commitment, that the aspired result can be better achieved by amending details of the commitment. However, the question remains, how to establish what constitutes exceptional circumstances or radical change in market conditions and what are the factors considered in such procedure.

The objective is to determine when the merger remedies can be ex-post facto waived, modified or substituted and what are the factors that need to be considered in such a procedure. Furthermore, the author will analyse whether the case law has provided complete and accurate rules for ex-post waiver or modification of merger remedies. The objective is to point out current issues obstructing consistent merger remedy review process. Also, the aim is to clarify the current conditions for modification, substitution or waiver of the commitments.

The research method used is qualitative. The qualitative method includes the EU legislation and the EU case law as primary sources. Secondary sources consist of academic literature and the Commission's publications. Academic literature contains books and articles written by various legal scholars specialised in competition law. In addition, the author has examined the Commission's web pages to acquire the most recent information concerning the merger control procedure.

Chapter one provides an introduction to the topic by generally explaining what a merger is and what is regarded as a merger within the meaning of the EU merger control. Further, the author will explain why merger control is a necessary procedure in today's internal market and what are the objectives of the EU merger control. Besides, the author will determine the relevant jurisdiction governing the merger control. The chapter will also briefly describe the merger control procedure.

Chapter two is dedicated to explaining merger remedies in detail. In chapter two, the author will clarify the purpose of the merger remedies. Furthermore, the legal basis for the merger remedies will be assessed, including the Commission's Remedies Notice. Lastly, chapter two will provide information about the classification of the merger remedies as it is essential in order to understand the difficulties in the merger remedies review process.

Chapter three is focused on the modification, substitution and waiver of the merger remedies. Chapter three introduces the concept of the review clause, as it provides the basis of the review process. Following the review clause, the author will assess the de facto conditions for modification, substitution and waiver of the commitments. Firstly, the thesis will cover the

extension of the deadline which may enable the modification of the remedies. Secondly, the author will provide a detailed assessment of exceptional circumstances or radical change in market conditions which allow the modification, substitution, or waiver of the remedies.

Chapter four brings out the issues emerging in practice. The author will assess the recent Lufthansa case and examines the essential features of it. Further, the author indicates and discusses the issues the General Court has found in the Commission's assessment concerning the Lufthansa case. The discussion and analysis will focus on the lack of proper assessment, lack of clearly established procedural framework and lack of transparency. Finally, the author will provide a few specific recommendations for businesses which may facilitate to overcome the issues regarding the review process.

The expected outcome of the thesis is that the legal framework concerning the merger remedy review process is not sufficiently clear. The assessment will focus on the specific issues deriving from the lack of a legal framework and how it affects in practice. The most desirable solution would be to discover that the case law has provided comprehensive guidance on the issue.

1. EU MERGER CONTROL

1.1. What is a Merger?

Prior to becoming absorbed in the issue of merger remedies, it is essential to clarify what constitutes a merger. A merger is a business transaction by which at least two formerly independent companies unite.¹ Hence, it is a change in the companies' relationship.² The unification of two or more entities can take place through various transactions.³ For instance, a merger could occur by the acquisition of another business or by the formation of an entirely new company.⁴

The EU Merger Regulation does not explicitly define a merger, but it applies namely to concentrations.⁵ The term "concentration" covers mergers in a broad understanding. According to the Merger Regulation, a concentration can be formed through mergers, acquisition of direct or indirect control, or by the acquisition of joint control of a full-function joint venture.⁶ Control can be exercised by one company or a person, or jointly by several companies over another.⁷ Control is best defined as exercising decisive influence over another enterprise.⁸ In practice, a decisive influence could also arise from purchasing securities or shares of another enterprise.⁹ However, the mere ability to determine other undertaking's financial strategy is an indication of acquiring such decisive influence and control falling under the scope of the Merger Regulation.¹⁰ According

¹ Jones, A., & Sufrin, B. (2011). *EU Competition Law: Texts, cases, and materials*. 4th ed. Oxford: Oxford University Press, p. 855.

² Capobianco, A. (2014). OECD paper on definition of merger control transaction: What companies need to know. – *Journal of European Competition Law & Practice*, Vol. 5, No. 4, 210–212, p. 210.

³ Jones, A., & Sufrin, B. (2011). *supra nota 1*, p. 855.

⁴ Dorresteyn, A. F., Teichmann, C., Monteiro, T., Werlauff, E., & Pocher, N. (2017). *European corporate law*. 3rd ed., Vol. 5. Alphen aan den Rijn: Kluwer Law International B.V. p. 71.

⁵ Craig, P., & Búrca, G. D. (2017). *EU law: Text, cases, and materials*. 6th ed. Oxford: Oxford University Press, p. 1093.

⁶ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 024, 29.01.2004, p. 1 - 22. art 2, p. 6-7.

⁷ *Ibid.*, art 2, p. 6-7.

⁸ Rusu, C. S. (2010). *European merger control: The challenges raised by twenty years of enforcement experience*. Austin: Wolters Kluwer Law & Business, p. 14.

⁹ Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 concerning mergers of public limited liability companies, OJ L 110, 29.4.2011, p. 1 – 11. art 5, p. 4.

¹⁰ Rusu, C. S. (2010). *supra nota 8*, p. 14.

to the Regulation, a concentration shall be deemed to arise where there is a change of control on a lasting basis.

There are various types of concentrations. Conglomerate mergers are those between the companies which do not have a connection with each other on any product or service market. They rarely raise any competition concerns. From a competition law perspective, the most relevant mergers are horizontal and vertical mergers. In horizontal mergers, the parties to the transaction are each other's competitors.¹¹ They operate on the same commodity market or at the same stage of the commodity processing chain.¹² In other words, the competitors produce goods or services which in principle are substitutable for their customers. The horizontal mergers are the most probable to cause competition concerns. However, also vertical mergers may have adverse effects on competition. In vertical mergers, the parties operate on a different stage of the processing chain.¹³ Nonetheless, such acquisitions may also significantly impede competition. This may be the case, for instance, when a company acquires essential sources of supply or distribution channels of which competitors are also dependent.¹⁴ In exceptional circumstances, also de-mergers can trigger competition concerns and be subject to merger control.¹⁵

Consequently, the acquisition of above-mentioned control over another undertaking may evoke several adverse effects on competition within the market. In this thesis, the word merger will cover all acts forming a concentration within the meaning of the Merger Regulation. The focus will be on the competition concerns raised by mergers, and more specifically, on the remedies which aim to restore competition on the markets regardless of such transactions.

1.2. Objectives of the EU Merger Control

Business transactions which form above-mentioned concentrations may substantially change market structures and hence potentially result in anti-competitive effects.¹⁶ Thus, forming such

¹¹ Megginson, W. L., & Smart, S. B. (2009). *Introduction to Corporate Finance*. Mason, Ohio: South-Western Cengage Learning, p. 572.

¹² *Ibid.*, p. 572.

¹³ *Ibid.*, p. 572.

¹⁴ Kilpailu- ja kuluttajavirasto (2011). Accessed: <https://www.kkv.fi/globalassets/kkv-suomi/julkaisut/suuntaviivat/fi/suuntaviivat-1-2011-yrityskauppavalvonta.pdf> , 20 March 2019.

¹⁵ *Ibid.*

¹⁶ Calvino, N. (2011). When do Mergers Raise Concerns? An Analysis of the Assessment Carried out by the European Commission under the New Merger Regulation. – *Journal of European Competition Law & Practice*, Vol. 2, No. 6, 521–528, p. 521.

concentrations without any control could cause market distortion.¹⁷ Therefore, it is of great essence to control mergers to secure effective competition within the markets. Effective competition can, for example, be described as a process of rivalry between enterprises or absence of competitive restraints which consequently enhance economic efficiency.¹⁸

Merger control is part of the European Union competition policy.¹⁹ The objective of the competition policy is to secure effective competition within the EU.²⁰ Thus, it is a vital part of ensuring beneficial functioning of the internal market in general.²¹ The effective competition gives rise to the promotion of consumer welfare, as well as, efficient allocation of resources and competitiveness of the European economy in global markets.²² Contrariwise, lack of competition may cause market distortion which affects disadvantageously in various ways. For instance, market distortion can cause an increase in prices, and reduction of output of goods and services, or even impairment in the quality of commodities and hindrance to innovation.²³ In conclusion, competition policy aims to enhance the competition and safeguard the interests of individuals, companies, and society. As a part of competition policy, merger control has the same objectives. However, it is focused on eliminating anti-competitive effects resulting from mergers.²⁴

Merger control takes place as ex-ante supervision of competition.²⁵ The purpose of the merger control is to secure the competitive structure of the internal market by assessing the competitive effects in advance of concluding the transactions.²⁶ Mergers may reduce competition on the internal market by creating or strengthening a dominant market position for merged entities.²⁷ De facto this causes a decrease of competition on that particular product or service market to the extent where the concentration in that dominant market position could determine prices and qualities of

¹⁷ Council Regulation (EC) No 139/2004. *supra nota 6*, p. 1 - 22. Recital 2.

¹⁸ Bishop, S., & Walker, M. (2018). *Economics of EC Competition Law: Concepts, Application, and Measurement*. University ed. London: Sweet & Maxwell, p. 19.

¹⁹ Kilpailu- ja kuluttajavirasto (2019). *supra nota 14*.

²⁰ The European Commission (2019). Accessible: http://ec.europa.eu/competition/general/overview_en.html , 12 March 2019.

²¹ *Ibid*.

²² Craig, P., & Búrca, G. D. (2017). *supra nota 5*, p. 1001.

²³ Whish, R., & Bailey, D. (2012). *Competition law*. 7th ed. Oxford, United Kingdom: Oxford University Press. press, p. 3.

²⁴ Sjödin, C. (2017). Hutchison 3G Italy/WIND/JV: The Return of Coordinated Effects in EU Merger Control. – *Journal of European Competition Law & Practice*, 105–107, p. 107.

²⁵ Jones, A., & Sufrin, B. (2011). *supra nota 1*, p. 827.

²⁶ Kilpailu- ja kuluttajavirasto (2019). Accessible: <https://www.kkv.fi/en/facts-and-advice/competition-affairs/merger-control/> , 12 March 2019.

²⁷ White Paper COM(2014) 449 final. Towards more effective EU merger control, paragraph 7–9.

goods and services without facing any competitive pressure to reduce the prices or increase the quality of products or services.²⁸ Merger control aims to prevent the situation from emerging.

Significance of the EU merger control can be best demonstrated by looking at the statistics. From 1990 until February 2019, there have been over 10 000 merger notifications to the Commission for ex-ante competition control and the trend is growing. A major part of the mergers is cleared as compatible with the internal market. However, many mergers are cleared compatible with the internal market subject to commitments which aim to remedy competition concerns, and very few mergers are prohibited.²⁹

1.3. Jurisdiction and Procedure

The legal competence for competition control within the EU derives from the Treaty on the Functioning of the European Union Articles 101 and 102.³⁰ However, the articles of TFEU does not explicitly mention merger; hence, TFEU applies to mergers indirectly.³¹ Consequently, mergers are mostly dealt with under the secondary legislation, but in some cases, it is possible to use Articles 101 and 102 TFEU.³² EU merger control is mainly based on the Merger Regulation.³³ It is the primary instrument which governs the control of mergers forming concentrations within the EU and EEA.³⁴ The Merger Regulation's objective is to prevent market structures that are contrary to the efficient competition.³⁵ In addition, to the legislation, Commission's notices and guidelines, such as Remedies Notice,³⁶ provide a comprehensive and sophisticated framework for the assessment of the mergers.³⁷ Other guidelines are not considered in this thesis as they do not provide any rules for review of the merger remedies.

²⁸ Kilpailu ja kuluttajavirasto (2019) Accessible: <https://www.kkv.fi/en/facts-and-advice/competition-affairs/competition-restraints/abuse-of-dominant-position/> , 20 March 2019.

²⁹ The European Commission (2019). Accessible: <http://ec.europa.eu/competition/mergers/statistics.pdf> , 15 March 2019.

³⁰ Craig, P., & Búrca, G. D. (2017). *supra nota 5*, p. 1090.

³¹ Geradin, D., Layne-Farrar, A., & Petit, N. (2012). *EU competition law and economics*. 1st ed. Oxford: Oxford University Press, p. 39.

³² Craig, P., & Búrca, G. D. (2017). *supra nota 5*. p. 1090.

³³ Macnab, A. (2013). *Bellamy and Child - European Community law of competition*. 2013 ed. Oxford: Oxford University Press, p. 615.

³⁴ Bellamy, C., Child, G. D., Bailey, D., & Rose, V. (2013). *European Union Law of Competition*. Oxford: Oxford University Press, p. 514.

³⁵ Noë, S. (2012). *Directory of EU Case Law on Merger Control: "The Merger Brick"*. Alphen aan den Rijn: Wolters Kluwer Law & Business, p. 21.

³⁶ The European Commission (2019). Accessible: <http://ec.europa.eu/competition/mergers/legislation/legislation.html> , 20 March 2019.

³⁷ Calvino, N. (2011). *supra nota 16*, p. 521.

It is important to emphasise that competition concerns deriving from mergers are primarily solved at the national level of the Member States.³⁸ EU merger control concerns only mergers which have a significant cross-border effect on trade between the Member States and can potentially cause a significant impediment of effective competition in the internal market. Such mergers are namely mergers with the EU dimension.³⁹ In a more integrated EU, an increasing number of mergers have EU dimension and hence fall within the Commission's jurisdiction.⁴⁰

Merger Regulation gives the Commission a sole jurisdiction to deal merges with the EU dimension.⁴¹ The company acquiring control over another is obliged to notify the considered merger to the Commission in cases where the turnover thresholds are exceeded.⁴² The general threshold for notice obligation is declared in the Merger Regulation.⁴³ All mergers whose annual combined worldwide turnover exceeds €5 000 million, and at least two of the undertakings forming the concentration have over €250 million turnover within the EU, shall be notified to the Commission.⁴⁴ These thresholds are cumulative. Merger Regulation and the threshold apply to merger regardless of whether the companies are established in the EU or not. It is merely sufficient that the merger has a significant impact on the internal market.⁴⁵ Concentrations with lower turnover are investigated at the national level by national competition authorities subject to certain exceptions not covered in this thesis.⁴⁶ However, EU merger control is closely monitored by the Member States' National Competition Authorities, and hence it influences also mergers without the EU dimension.

For determining the effects of the proposed merger, the Commission assesses whether the acquisitions significantly impede effective competition (SIEC-test) in the internal market or a substantial part of it.⁴⁷ The significant impediment of effective competition usually ensues from creation or strengthening a dominant market position for the concentration in question.⁴⁸

³⁸ Kilpailu- ja kuluttajavirasto (2019). *supra nota 14*,

³⁹ Council Regulation (EC) No 139/2004. *supra nota 6*, recital 9.

⁴⁰ Tosato, G. L., & Bellodi, L. (2015). *EU competition law. Antitrust, merger, state aid*. 2nd ed., Vol. 1. Deventer: Claeys & Casteels. p. 319.

⁴¹ Council Regulation (EC) No 139/2004. *supra nota 6*.

⁴² Craig, P., & Búrca, G. D. (2017). *EU law: Text, cases, and materials*. 6th ed. Oxford: Oxford University Press. p. 1099.

⁴³ Council Regulation (EC) No 139/2004. *supra nota 6*.

⁴⁴ *Ibid.*, art 1, p. 6.

⁴⁵ The European Commission (2019). Accessible: http://ec.europa.eu/competition/mergers/overview_en.html , 20 February 2019.

⁴⁶ *Ibid.*

⁴⁷ Commission Notice on remedies acceptable under the Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ C 267, 22.10.2008, p 1 – 27, paragraph 4.

⁴⁸ Kilpailu- ja kuluttajavirasto (2019). Accessible: <https://www.kkv.fi/Tietoa-ja-ohjeita/kilpailuasiat/lainsaadanto-ja-suuntaviivat/eun-kilpailusaannot/> , 20 February 2019.

Concentrations which are caught by the SIEC-test are as a rule incompatible with the internal market and cannot be cleared.⁴⁹ However, where such competition concerns arise, parties may modify the concentration, for instance, by offering commitments to restore the effective competition on the market to get the clearance decision.⁵⁰ Contrary, mergers which do not restrict competition are generally approved unconditionally.⁵¹ This is, however, subject to certain derogations not covered by this thesis.

Mergers cannot be conducted without the clearance decision from the Commission. Therefore, the proposed mergers which exceed the turnover threshold are subject to compulsory pre-notification to the Commission.⁵² After the notification to the Commission, the phase I investigation begins. A major part of the proposed mergers is cleared after the phase I has been concluded, that is within 25 working days.⁵³ However, if the proposed merger raises competition concerns which require further investigation, the Commission opens phase II investigations. During the investigation phases, the Commission attempts to assess the future market effects of the proposed merger.⁵⁴ Phase II investigation designate an in-depth analysis of the merger's effects on the market.⁵⁵ Timeframe for phase II is 90 working days after which the merger is either cleared, approved subject to remedies or prohibited.⁵⁶ The Commission has the power to prohibit mergers in their entirety.⁵⁷ Despite the Commission's extensive jurisdiction, the procedure and decisions are subject to judicial review.⁵⁸

⁴⁹ Commission Notice on remedies (2008) *supra nota 47*, paragraph 4.

⁵⁰ *Ibid.*, paragraph 5.

⁵¹ Baudenbacher, C., & Bremer, F. (2010). European State Aid and Merger Control in the Financial Crisis From Negative to Positive Integration. – *Journal of European Competition Law & Practice*. Vol. 4, No. 1, 267–285. p. 282.

⁵² The European Commission (2019). Accessible:

http://ec.europa.eu/competition/publications/factsheets/merger_control_procedures_en.pdf, 20 February 2019

⁵³ *Ibid.*,

⁵⁴ Kilpailu- ja kuluttajavirasto (2019). *supra nota 14*.

⁵⁵ The European Commission (2019). Accessible:

http://ec.europa.eu/competition/publications/factsheets/merger_control_procedures_en.pdf, 20 February 2019

⁵⁶ Whish, R., & Bailey, D. (2012). *supra nota 23*, p. 830.

⁵⁷ *Ibid.*, p. 830.

⁵⁸ The European Commission (2019). Accessible:

http://ec.europa.eu/competition/publications/factsheets/merger_control_procedures_en.pdf, 20 February 2019

2. MERGER REMEDIES

2.1. Purpose of Merger Remedies

Mergers that form concentrations resulting in a significant impediment of efficient competition within the internal market are prohibited or cleared subject to merger remedies.⁵⁹ Merger remedies are commitments which remedy the anticompetitive impact deriving from the mergers.⁶⁰ Remedies have particular importance since a major part of merges which raise competition concerns are rather cleared subject to remedies than prohibited.⁶¹ Merger remedies are described as artificial measures established to assuage the competition concerns deriving from mergers.⁶² The objective is to maintain the competition on the markets regardless of such transaction.⁶³ Merger remedies aim to guarantee that the pre-merger existent incentives for competition and the competitive ability of other entities continue to subsist on the relevant market after the concentration has been approved.⁶⁴

The requirements for merger remedies are set out in the Remedies Notice and the Commission's decisions: appropriate remedy must entirely remove the anticompetitive impact raised by the merger. In addition, remedies must be comprehensive and effective from all points of view and be capable of being implemented effectively within a short period.⁶⁵ Such remedies must erase the competition concerns permanently and have to be comprehensive and efficient from every perspective.⁶⁶ Additionally, the remedies should not be more complicated than the concentration

⁵⁹ Kilpailu- ja kuluttajavirasto (2019). *supra nota 26*.

⁶⁰ Whish, R., & Bailey, D. (2012). *supra nota 23*, p. 830.

⁶¹ Kilpailu- ja kuluttajavirasto (2019). *supra nota 26*.

⁶² Cook, C., Novak, V., & Frisch, S. (2016). Recent Developments in EU Merger Remedies. – *Journal of European Competition Law & Practice*, Vol. 7, No. 5, 349–365. p. 349.

⁶³ Whish, R., & Bailey, D. (2012). *supra nota 23*, p. 824.

⁶⁴ The European Commission (2019). Accessible:

http://ec.europa.eu/competition/publications/factsheets/merger_control_procedures_en.pdf, 20 February 2019.

⁶⁵ Faull, J., & Nikpay, A. (2014). *Faull & Nikpay, the EU law of competition*. 3rd ed. Oxford: Oxford University Press, p. 759.

⁶⁶ Commission Notice on remedies (2008) *supra nota 47*, paragraph 9.

plan itself.⁶⁷ This is because the implementation of the remedies is monitored and it becomes unduly difficult in case of unnecessarily complicated remedies.⁶⁸ Therefore, the Commission may refuse from imposing such remedies.⁶⁹

During recent years, the trend of clearing mergers subject to conditions has increased at the EU level.⁷⁰ Besides the growing level of concentrations within the EU, this is due to a strengthened approach to the examination of mergers' competition effect.⁷¹ Consequently, the current Competition Commissioner has established a reputation for strict inspection.⁷²

2.2. Process of Imposing Merger Remedies in the EU

Whereas the proposed merger raises competition concerns, the Commission allows parties to offer alteration to the original merger plan, namely merger remedies.⁷³ Merger remedies can be proposed either during the phase I or phase II investigations of the merger control.⁷⁴ The Commission cannot unilaterally impose remedies which have not been offered as a solution by the merging entities.⁷⁵ Hence, the parties are responsible for formulating appropriate remedies which resolve the concerns proportionally and permanently.⁷⁶ Nonetheless, the Commission may attach conditions and obligations to proposed remedies to ensure that the commitments are compiled on time and effectively.⁷⁷ Parties are also responsible for providing all the information necessary for the Commission to assess the suitability of the proposed remedies and whether it removes the adverse effects on competition.⁷⁸ Only remedies which shape the concentration to become compatible with the internal market can be accepted.⁷⁹

⁶⁷ Brevart, C., & Chassaing, É. (2014). Post-clearance modification and waiver of EU merger remedies: When the hardest may be yet to come. – *Competition Law Journal*, No. 3, 54–67. p. 63.

⁶⁸ Commission Notice on remedies (2008) *supra nota 47*, paragraph 14.

⁶⁹ *Ibid.*, paragraph 14.

⁷⁰ Cook, C., Novak, V., & Frisch, S. (2017). Recent Developments in EU Merger Remedies. – *Journal of European Competition Law & Practice*, Vol. 8, No.5, 341–360, p. 341.

⁷¹ *Ibid.*, p. 341.

⁷² Cook, C., Novak, V., & Frisch, S. (2018). Recent Developments in EU Merger Remedies. – *Journal of European Competition Law & Practice*, Vol. 9, No. 6, 403–420, p. 403.

⁷³ Jones, A., & Sufrin, B. (2011). *EU competition law: Texts, cases, and materials* (4th ed.). Oxford: Oxford University Press, p. 970.

⁷⁴ *Ibid.*, p. 971.

⁷⁵ Commission Notice on remedies (2008) *supra nota 47*, paragraph 6.

⁷⁶ Jones, A., & Sufrin, B. (2011). *supra nota 65*. p. 970.

⁷⁷ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 024, 29.01.2004, p. 1 – 22, recital 30.

⁷⁸ Commission Notice on remedies (2008) *supra nota 47*, paragraph 7.

⁷⁹ *Ibid.*, paragraph 9.

In case the remedies do not eliminate the concerns, the Commission has no other option than to prohibit the concentration.⁸⁰ If the remedies are accepted and the merger declared by the Commission, the commitments will become binding, and they cannot be challenged afterwards unless the whole merger clearance is challenged.⁸¹ However, merger remedies can be open for an ex-post review if certain exceptional conditions discussed below are met.

2.3. The Commission's Remedies Notice

The legal basis of merger remedies is quite narrow. The Commission issued the first guideline concerning the merger remedies in 2001.⁸² It clarified which commitments can resolve the competition concerns related to mergers and provided general principles applicable to merger commitments.⁸³ Besides, it provided rules for procedure and guidance on implementing the commitments.⁸⁴ The current Commission Notice on merger remedies is a reviewed version of its previous ones. It was once again revised due to the new Merger Regulation enforced in 2004 and studies published in 2005 regarding the effectiveness of merger remedies.⁸⁵ The modified Commission Notice on Remedies was adopted in 2008.⁸⁶ The Notice provides general principles governing remedies acceptable under the Merger Regulation, the types of commitments which may remedy to competition concerns, the detailed requirements that commitments must fulfil in investigation phases I and II, and rules governing the implementation of merger remedies.

There are only a few Commission's guidelines concerning the merger remedies in addition to Remedies Notice. For example, the Commission only provides the model text for the divestiture commitments.⁸⁷ It is essential to point out the fact that the Remedies Notice and other guidelines are notably silent on the ex-post facto review process of the commitments. They merely provide guidance on drafting the review clause. Remedies Notice does not impose any rules governing the review process of merger remedies. For instance, it does not establish any instructive timeframe for the review process nor specific conditions for modification, substitution or waiver of the commitments.

⁸⁰ Commission Notice on remedies (2008) *supra nota 47*, paragraph 6.

⁸¹ The judgement of the General Court (Sixth Chamber) 16 May 2018, *Deutsche Lufthansa AG v the European Commission*, T-712/16, EU:T:2018:269, paragraph 43

⁸² Commission Notice on remedies (2008) *supra nota 47*.

⁸³ Jones, A., & Sufrin, B. (2011). *supra nota 65*. p. 972.

⁸⁴ *Ibid.*, p. 972.

⁸⁵ *Ibid.*, p. 972.

⁸⁶ Commission Notice on remedies (2008) *supra nota 47*.

⁸⁷ The European Commission (2019). Accessible:

http://ec.europa.eu/competition/mergers/legislation/notices_on_substance.html , 15 March 2019.

2.4. Classification of Merger Remedies

It is essential to briefly explain the classification of merger remedies since waiver, modification, and substitution of remedies varies depending on the class of the remedy. Moreover, different types of remedies require different assessment during the review process. Remedies are often divided into structural remedies and non-structural remedies.⁸⁸ A structural remedy could be, for instance, an obligation to sell a particular business or a part of it, or an obligation to sell production capacity, patent or sometimes a trademark.⁸⁹ Obligation to terminate specific cooperation agreement also qualifies as a structural remedy.⁹⁰

Other than structural remedies may be related to access commitments, for instance, access to technology.⁹¹ There are also remedies concerning the future conduct of the company, namely behavioural remedies.⁹² By way of illustration, this could mean licensing a technology or to agree to deliver certain products to another player on the market.⁹³ Access and behavioural remedies may bind the concentration for a long time.⁹⁴ Category of “other remedies” may also consist of combinations of the above-mentioned structural and behavioural commitments. Non-structural remedies are often imposed in situations where the competition problem is temporary and most likely to disappear after a certain period of time has passed.⁹⁵ For instance, in the EU, behavioural remedies are commonly imposed on air carriers since due to the nature of the mergers the structural remedies do not offer a solution to the concerns.

The Commission aims to preserve its preference to impose structural remedies when possible.⁹⁶ The decision Unilever/Sarah Lee demonstrates the Commission’s approach. The merging parties offered several non-structural commitments which did not satisfy, according to the Commission, satisfy the competition concerns.⁹⁷ Nonetheless, the Commission approved the commitment to divest a part of the brand related to business in Europe.⁹⁸ This is because their implementation is

⁸⁸ Kilpailu- ja kuluttajavirasto (2019). *supra nota 14*.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ Merger Remedies Study DG COMP, European Commission October 2005 p. 114.

⁹² *Ibid.*, p. 114.

⁹³ Kilpailu- ja kuluttajavirasto (2019). *supra nota 14*.

⁹⁴ Rutsch, C., & Rohling, F. (2011). European Commissions First Waiver of Behavioural/Non-divestiture Commitments in the Absence of a Review Clause. – *Journal of European Competition Law & Practice*, Vol. 3, No. 1, 47–49. p. 47.

⁹⁵ Kilpailu- ja kuluttajavirasto (2019). *supra nota 14*.

⁹⁶ Cook, C., Novak, V., & Frisch, S. (2018). *supra nota 72*, p. 403.

⁹⁷ Decision of the Commission, 17 November 2010, Unilever/Sarah Lee Body Care, M.5658.

⁹⁸ *Ibid.*

more straightforward – the implementation does not require constant monitoring.⁹⁹ In addition, they remove competition concerns permanently and are easily verified while non-structural remedies' effect does not necessarily appear clearly and are therefore harder to verify.¹⁰⁰ Despite the preference, the Commission has been forced to imposed sophisticated merger remedies during the past years in order to remove the adverse effects on competition.¹⁰¹ Such remedies are more complex to monitor than standard divestitures and may not remedy all anti-competitive effects.¹⁰² Hence, effective ex-post review of merger remedies raises its significance.

⁹⁹ Kilpailu- ja kuluttajavirasto (2019). *supra nota 14*.

¹⁰⁰ Rutsch, C., & Rohling, F. (2011). *supra nota 95*, p. 47.

¹⁰¹ Concurrences Antitrust Publications & Events (2019) Accessed: <https://www.concurrences.com/fr/revue/issues/no-2-2019/dossier/which-industrial-policies-for-the-new-eu-commission-en#nb3-283> , 5 May 2019.

¹⁰² *Ibid.*

3. MODIFICATION, SUBSTITUTION, AND WAIVER OF THE MERGER REMEDIES

3.1. Review Clause

The Commission grants ex-post waivers, modifications or substitutions of the commitments only in extraordinary circumstances. As Remedies are imposed based on estimated market development which may not always prove correct, the market development towards unexpected direction may render remedies ineffective.¹⁰³ In order to secure efficient competition and the freedom to conduct business, it is fundamentally important that there is an option to review merger remedies when certain conditions are satisfied. Review of mergers must be reasonably requested by the parties to a merger, after which the Commission shall carefully assess the merger remedies.¹⁰⁴ In some instances, the Commission may amend the remedies by its initiative.¹⁰⁵ Commonly, mergers are reviewed in order to extend the deadlines for their implementation.¹⁰⁶ However, the Commission may also modify, substitute, or waive remedies which are no longer appropriate.¹⁰⁷ The modification of divestiture remedies is particularly unusual since exceptional circumstances justifying the modification rarely occur before the conclusion of such commitment.¹⁰⁸ In practice, merely the deadlines for divestiture commitments are modified. Contrary, due to the same reasoning, non-divestiture commitments are more relevant in regard to waiver, modification, or substitution of the merger remedies.¹⁰⁹ Modification of commitments is enforced on ex nunc – basis; in other words, they do not have retrospective effect and do not justify the breach of merger remedies which occurred before the modification or waiver decision.¹¹⁰

¹⁰³ Breuvar, C., & Chassaing, É. (2014). *supra nota* 67. p. 55.

¹⁰⁴ Commission Notice on remedies (2008) *supra nota* 47, paragraph 71.

¹⁰⁵ *Ibid.*, paragraph 75.

¹⁰⁶ *Ibid.*

¹⁰⁷ Whish, R., & Bailey, D. (2012). *supra nota* 13. p. 888.

¹⁰⁸ Commission Notice on remedies (2008) *supra nota* 47.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

The Review clause is the main instrument enabling the ex post facto review process of the merger remedies. Concept of the review clause was introduced in the Best Practice Remedies Guidelines in 2003 for the first time.¹¹¹ Later, The Remedies Notice published in 2008 urged to include review clauses to all merger commitments.¹¹² Consequently, regardless of the type of commitment, merger remedies commonly include a review clause which permits the Commission to review the remedies in the future.¹¹³ As a result, it enables the Commission to waive, modify, or substitute merger remedies in exceptional cases where parties show a good cause.¹¹⁴ The good cause indicates that parties shall demonstrate that they are unable to implement the commitments in a timely manner due to circumstances that are beyond their responsibility.¹¹⁵

Review Clause plays a particular importance in the case of behavioural remedies since divestiture remedies usually solve the competition problem efficiently and permanently. The ability to review remedies is essential since especially non-structural remedies often bind the parties for a long time. Consequently, where the market development renders commitments inappropriate, it can potentially restrict the freedom to conduct business and become burdensome for concentrations.¹¹⁶ The review enables removing the obstacles to pursuing freedom.

De facto, there are several issues concerning the review clause. The Commission provides a standard review clause which may be used in all sorts of merger commitments. Nonetheless, the Commission does not commonly approve a modification of the commitments under the general review clause and has interpreted the review clauses very narrowly.¹¹⁷ In theory, it is possible to insert more targeted review clause precisely drafted to cover specific situations.¹¹⁸ Inclusion of such review clause facilitates the possible future review process.¹¹⁹ However, the Commission has been reluctant to approve such review clauses.¹²⁰

There are, however, certain exceptions to the general rule. Since the review clause was introduced relatively little time ago, all merger clearances subject to commitments do not comprise review clauses. In 2011 the Commission waived for the first time a behavioural commitment in the

¹¹¹ Breuvar, C., & Chassaing, É. (2014). *supra nota* 67, p. 55.

¹¹² Commission Notice on remedies (2008) *supra nota* 47, paragraph 71.

¹¹³ Whish, R., & Bailey, D. (2012). *supra nota* 23, p. 888.

¹¹⁴ Commission Notice on remedies (2008) *supra nota* 47, paragraph 71.

¹¹⁵ Breuvar, C., & Chassaing, É. (2014). *supra nota* 67, p. 56.

¹¹⁶ Rutsch, C., & Rohling, F. (2011). *supra nota* 95, p. 47.

¹¹⁷ Breuvar, C., & Chassaing, É. (2014). *supra nota* 67, p. 56.

¹¹⁸ Commission Notice on remedies (2008) *supra nota* 47, paragraph 73.

¹¹⁹ Breuvar, C., & Chassaing, É. (2014). *supra nota* 67, p. 56.

¹²⁰ *Ibid.*, p. 56.

absence of a review clause.¹²¹ In the decision Hoffmann La-Roche, the Commission enabled a waiver of specific non-structural remedies Hoffmann La-Roche had committed to in 1998 merger.¹²² The concept of review clause was not introduced at the time of the merger. The Commission was able to waive the remedies as it concluded that the conditions for waiver declared in Remedies Notice were fulfilled.¹²³ Roche decision is significant as it serves as a crucial decision providing the basis for waiver or modification of commitments concluded absence review clause in cases the commitments have become obsolete or disproportionate due to the market development.¹²⁴

Ultimately, there is also a possibility of including a clause to commitments which establish a right for the Commission to trigger limited modifications to the commitments. Such clause enables the Commission itself to modify conditions and obligations imposed on remedies after hearing the parties.¹²⁵ De facto this situation may occur where remedies do not efficiently remove the competition concerns and hence have failed to reach the expected outcome.¹²⁶ However, such a clause is enforced very rarely.

3.2. Extension of Deadline

The most typical situation for modifying commitments is to extend the deadline of their implementation.¹²⁷ Possibility to extend the deadline is essential particularly for divestiture commitments, where finding a proper buyer might turn out to be challenging.¹²⁸ It is important to note, that the extension of deadline can be granted only during the first divestiture period.¹²⁹ In the second divestiture period, the responsibility of divestiture transfers to the monitoring trustee and the extension of deadline cannot be granted.¹³⁰ This is not the sole reason to request the extension of the deadline in a timely manner. The deadline for divestiture is instead considered as a condition for a merger rather than an obligation.¹³¹ In other words, if the deadlines are not respected the

¹²¹ Rutsch, C., & Rohling, F. (2011). *supra nota 95*, p. 47.

¹²² Decision of the Commission, 11 May 2011, Hoffmann-La Roche/Boehringer Mannheim, 98/526/EC in Case IV/M.950.

¹²³ Rutsch, C., & Rohling, F. (2011). *supra nota 95*, p. 48.

¹²⁴ Decision of the Commission (2011) Hoffmann-La Roche. *supra nota 126*.

¹²⁵ Commission Notice on remedies (2008) *supra nota 47*, paragraph 75.

¹²⁶ Breuvar, C., & Chassaing, É. (2014). *supra nota 67*, p. 60.

¹²⁷ *Ibid.*, p. 56.

¹²⁸ *Ibid.*, p. 56.

¹²⁹ Breuvar, C., & Chassaing, É. (2014). *supra nota 67*, p. 56.

¹³⁰ Commission Notice on remedies (2008) *supra nota 47*, paragraph 72.

¹³¹ Commission Notice on remedies (2008) *supra nota 47*, paragraph 20.

Commission has the power to impose fines and dissolve the merger.¹³² The extension of deadline should be requested no later than one month before the divestiture deadline, and in very exceptional cases during the last month before the expiry.¹³³

The Commission always considers an extension of a deadline on a case-by-case basis where it takes into account all reasonable factors affecting the divestiture.¹³⁴ However, the extension of the deadline shall be requested by the parties showing a good cause.¹³⁵ Good cause requires that the parties shall demonstrate they cannot divest the business within a short period of time due to circumstances that are beyond their responsibility.¹³⁶

3.3. Exceptional Circumstances or a Radical Change in Market Conditions

Modification, substitution, or waiver of commitments can be granted where parties show a good cause and demonstrate that the requirements of exceptional circumstances are fulfilled.¹³⁷ Such a situation rarely occurs in the case of divestiture commitments since divestiture commitments are usually implemented within a relatively short time and solve the competition concerns permanently.¹³⁸ Contrary, modification, substitution, or waiver of commitments based on exceptional circumstances or a radical change in market conditions often concerns continuous remedies, such as access or behavioural remedies.¹³⁹

Modification, substitution, and waiver can be justified with two types of exceptional circumstances. Firstly exceptional circumstances or a radical change in market conditions may justify waiver, modification, or substitution of commitments in cases where parties can demonstrate that the market conditions have substantially and permanently changed.¹⁴⁰ This requires that sufficient time has passed from the Commission's merger clearance decision.¹⁴¹ The case Hoffmann La-Roche provides an excellent example for interpretation of the exceptional circumstances, and it is the most commonly referred case. In the decision Hoffmann La-Roche,

¹³² Breuvar, C., & Chassaing, É. (2014). *supra nota* 67. p. 56.

¹³³ Commission Notice on remedies (2008) *supra nota* 47, paragraph 72.

¹³⁴ Breuvar, C., & Chassaing, É. (2014). *supra nota* 67. p. 56.

¹³⁵ *Ibid.*, p. 56.

¹³⁶ Breuvar, C., & Chassaing, É. (2014). *supra nota* 67. p. 56.

¹³⁷ *Ibid.*, p. 56.

¹³⁸ Commission Notice on remedies (2008) *supra nota* 47, paragraph 73.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*, paragraph 74.

¹⁴¹ *Ibid.*, paragraph 74.

the Commission applied the test of a significant change in market conditions. According to the Commission, the conditions of the test were met. One of the reasons was the increase of substantial players on the particular market and the decrease of Roche's market share to approximately the same percentage it was before the merger.¹⁴² This was due to the licensing commitments implemented on behalf of Hoffmann La-Roche.¹⁴³ Furthermore, La-Roche's patents were already or were about to expire shortly, and a large amount of new alternative technologies had entered the relevant market.¹⁴⁴ The Commission found that the change in market conditions was permanent and that the position of contemporary licensees was not affected by the waiver decision.¹⁴⁵ Lastly, third parties agreed to the waiver,¹⁴⁶ and also the requirement of a sufficient period of time between the merger clearance and the review was satisfied.¹⁴⁷ Consequently, the Commission concluded that the commitments had fulfilled their role and could be waived.¹⁴⁸ The decision provides useful guidance for interpreting the significant change in market circumstances.

Fulfillment of the prerequisites of exceptional circumstances or a radical change in market conditions does not always have to be complicated. For instance, the most recent approvals for modification of merger remedies have concerned commitments regarding key personnel. The case Honeywell from 2016,¹⁴⁹ provides a simple example of the condition of exceptional circumstances. In the case, the acquiring company agreed to the divestment of part of the business which included key personnel.¹⁵⁰ Key personnel were necessary to ensure the viability and competitiveness of the divested business.¹⁵¹ However, due to confidential exceptional circumstances, one person who was included in the transferring group of key personnel was not returning to work for reasons beyond the divestiture.¹⁵² According to the Commission, the parties had shown good cause, and the Commission regarded that granting the modification was appropriate.¹⁵³

The second possible justification of modification, substitution, and waiver of merger remedies concerns the exceptional situation where parties can demonstrate, based on their experience gained from the application of the commitment, that the aspired result can be better achieved by amending

¹⁴² Rutsch, C., & Rohling, F. (2011). *supra nota 95*. p. 48.

¹⁴³ Rutsch, C., & Rohling, F. (2011). *supra nota 95*, p. 48.

¹⁴⁴ *Ibid.*, p. 48.

¹⁴⁵ *Ibid.*, p. 48.

¹⁴⁶ Breuvar, C., & Chassaing, É. (2014). *supra nota 67*, p. 58.

¹⁴⁷ Rutsch, C., & Rohling, F. (2011). *supra nota 95*, p. 48.

¹⁴⁸ *Ibid.*, p. 48.

¹⁴⁹ Decision of the Commission, 22 April 2016, Honeywell/Elster, M.7737.

¹⁵⁰ *Ibid.*, paragraph 9.

¹⁵¹ *Ibid.*, paragraph 9.

¹⁵² *Ibid.*, paragraph 11.

¹⁵³ *Ibid.*, paragraph 17.

the details of the commitment.¹⁵⁴ The case where Bayer merged with Monsanto, provides an example of such a situation.¹⁵⁵ Due to the acquisition, Bayer committed to divest assets and parts of the business to another company.¹⁵⁶ In 2018, Bayer requested to amend the commitments so that it could divest different assets as proposed in the original commitments. The Commission concluded that revised commitments would solve the competition concerns at least as effectively as the initial commitments. As the commitments were appropriate and parties were showing a good cause, the Commission replaced the original commitments with the modified commitments. Besides the above-mentioned exceptional circumstances, academic literature has suggested that exceptional circumstances can also comprise unintentional deficiencies in commitments, which constitutes a possibility of ex-post correction.¹⁵⁷

In order to be entitled to modification or waiver due to the exceptional circumstances, the change in market conditions must be substantial, enduring and unforeseeable.¹⁵⁸ In addition, the change in market conditions must render the imposed remedies unavailing, for example, in cases where the objective of the remedies has been achieved permanently. Alternatively, the market conditions must change to the extent where modified remedies will achieve the aimed result more effectively.¹⁵⁹

Whenever the review of merger remedies takes place, the Commission will also consider the effects of modification of commitments on the position of third parties, and thus assess the overall effectiveness of the commitment.¹⁶⁰ In addition, it is necessary to assess the impact the modifications can have on the rights of third parties which have been acquired after the enforcement of the commitment.¹⁶¹ Third parties must agree to the modification of the commitment and confirm that it does not affect their rights negatively.¹⁶²

¹⁵⁴ Commission Notice on remedies (2008) *supra nota* 47, paragraph 76.

¹⁵⁵ Decision of the Commission, 11 April 2018, Bayer/Monsanto, M.8084.

¹⁵⁶ *Ibid.*

¹⁵⁷ Breuvert, C., & Chassaing, É. (2014). *supra nota* 67. p. 58.

¹⁵⁸ *Ibid.*, p. 58.

¹⁵⁹ *Ibid.*, p. 58.

¹⁶⁰ Commission Notice on remedies (2008) *supra nota* 47, paragraph 74.

¹⁶¹ *Ibid.*, paragraph 74.

¹⁶² *Ibid.*, paragraph 74.

4. ISSUES EMERGING IN PRACTICE

4.1. Lufthansa Case Study

The recent Lufthansa case demonstrates the practical issues emerging from the current narrow legal framework concerning the waiver, substitution or modification of the merger remedies. The controversial case concerns the assessment of review clauses and exceptional circumstances or a radical change in market conditions. On May 2018, the General Court partially annulled the Commission's decision to restrain from waiving commitments imposed on Lufthansa. The commitments were imposed to remedy adverse effects on the competition when Lufthansa acquired another airline Swiss in 2005.¹⁶³ Lufthansa proposed behavioural commitments as it agreed on fare reductions on routes which raised competition concerns, namely Zurich – Stockholm, and Zurich – Warsaw.¹⁶⁴ The commitments obliged Lufthansa to reduce fares on the controversial routes every time it applied fare reduction on a comparable route.¹⁶⁵ The pricing commitments were of an indefinite period of time, and the commitments included review clauses.¹⁶⁶

As Lufthansa did not operate on either of these routes, the competition concerns were related to the acquired enterprise Swiss and its competitors SAS and LOT.¹⁶⁷ However, the commitments were justified by the argument that post-merger the incentives to compete on the respective routes operated by Swiss, SAS and LOT would substantially diminish.¹⁶⁸ The concern arose due to the bilateral agreements between Lufthansa and SAS, and agreement between Lufthansa and LOT according to which LOT agreed in cooperation with Lufthansa's fares, flight planning, and

¹⁶³ Benditz, R. (2018). *Deutsche Lufthansa v Commission: All (Good) Remedies Must Come to an End.* – *Journal of European Competition Law & Practice*. Vol. 9, No. 8, 513– 515. p. 513.

¹⁶⁴ The judgement of the General Court (Sixth Chamber) 16 May 2018, *Deutsche Lufthansa AG v the European Commission*, T-712/16, EU:T:2018:269, paragraph 7.

¹⁶⁵ *Ibid.*, paragraph 9.

¹⁶⁶ *Ibid.*, paragraph 9.

¹⁶⁷ Benditz, R. (2018). *supra nota* 167. p. 513.

¹⁶⁸ The judgement of the General Court (2018), *Deutsche Lufthansa AG v the European Commission*, *supra nota* 164, paragraph 6.

network.¹⁶⁹ The cooperation was part of the airline alliance agreement which is regarded as a joint venture. Since Lufthansa acquired Swiss, the Commission considered imposing commitments necessary on Lufthansa in order to prevent the anti-competitive effect of the merger by which the Swiss was acquired.¹⁷⁰

Four years later, the Commission's policy regarding mergers between airlines and bilateral agreements changed. In a subsequent merger clearance decision where Lufthansa acquired Brussels Airlines and Austrian Airlines, the Commission considered that the mergers would not hinder competition which was contrary the Commission's findings four years earlier in Lufthansa/Swiss case. The Commission stated that the bilateral agreements with SAS and LOT were unlikely to affect the new Lufthansa affiliate. Hence, for example, the Lufthansa/Brussels Airlines merger was cleared subject to commitments which were imposed to facilitate entry of new air carriers on the respective route but did not include equivalent fare reduction commitments.¹⁷¹

In 2013, Lufthansa requested the Commission to waive the fare reduction commitments imposed in 2005 merger clearance when it acquired Swiss.¹⁷² Lufthansa's requested the waiver based on the termination of the joint venture agreement with SAS in 2013. The merger clearance decision Lufthansa/Swiss included the necessary review clauses for the future review process. According to the first review clause, the Commission may waive, modify or substitute the merger commitments in response to a request by the parties justified by exceptional circumstances or a radical change in market conditions, such as the operation of a competitive airline on a particular identified European or long-haul city pair. The second review clause stated that the commitments submitted herein may be waived, modified, or substituted by the Commission due to long-term market development, especially the commitments regarding the availability of slots shall be waived to the extent that the Commission finds that the contractual relationship resulting in decreased incentive for competition between merged entity and the Lufthansa alliance air carriers in the merger clearance decision (2005) has changed in a way which remove the concerns identified during the merger clearance.¹⁷³ Despite the review clauses, the termination of the joint-

¹⁶⁹ The judgement of the General Court (Sixth Chamber) 16 May 2018, *Deutsche Lufthansa AG v the European Commission*, T-712/16, EU:T:2018:269, paragraph 3.

¹⁷⁰ *Ibid.*,

¹⁷¹ *Ibid.*, paragraph 343.

¹⁷² Benditz, R. (2018). *supra nota* 167. p. 513.

¹⁷³ The judgement of the General Court (Sixth Chamber) 16 May 2018, *Deutsche Lufthansa AG v the European Commission*, T-712/16, EU:T:2018:269, paragraph 11.

venture agreement with SAS and the Commission's changed policy, the Commission rejected to waive the fare reduction commitments imposed on Lufthansa.¹⁷⁴

Lufthansa appealed against the decision, and as a result, the General Court partially annulled the Commission's decision to refrain from waiving the fare reduction commitments.¹⁷⁵ As Lufthansa's pleas concerning misuse of powers and principle of good administration did not succeed, the third plea concerning the proper assessment of the case resulted in the General Court judgement to reverse the Commission's decision.¹⁷⁶ In the same court decision, the General Court confirmed that the Commission holds certain discretion for determining what constitutes exceptional circumstances or a radical change in market conditions.¹⁷⁷ In addition, the General Court recalled that the applicant is not entitled to question the Commission's decision on the ground that the decision varies from previously made decisions, even in case the markets in question are identical.¹⁷⁸ Commission's discretion is not affected by the fact that the General Court found, following the Monitoring Trustee's opinion, that the termination of the joint venture agreement with SAS was a substantial change in market condition. The General Court merely declared that the Commission failed to analyse the influence of the termination of the joint venture agreement on the Stockholm – Zurich route properly.¹⁷⁹ In other words, the case was not reversed due to the substantial change in market conditions but rather due to an inadequate assessment conducted by the Commission. Furthermore, the General Court did not find errors in the Commission's decision not to waive commitments concerning the respectful route of Zurich – Warsaw.¹⁸⁰ The case was returned to the Commission for further examination.¹⁸¹ The case points out several issues regarding the merger review processes conducted by the Commission. The issues are addressed below.

4.2. Lack of Proper Assessment

As Lufthansa case is the first court judgement concerning the merger review process, the author will focus on analysing the particular case. The Lufthansa case indicates several issues relating to

¹⁷⁴ Benditz, R. (2018). *supra nota* 167. p. 513.

¹⁷⁵ The judgement of the General Court (Sixth Chamber) 16 May 2018, *Deutsche Lufthansa AG v the European Commission*, T-712/16, EU:T:2018:269, paragraph 139.

¹⁷⁶ *Ibid.*, paragraph 139.

¹⁷⁷ *Ibid.*, paragraph 41.

¹⁷⁸ *Ibid.*, paragraph 83.

¹⁷⁹ *Ibid.*, paragraph 66.

¹⁸⁰ *Ibid.*, paragraph 75.

¹⁸¹ *Ibid.*,

the proper assessment in the merger remedies review process conducted by the Commission. The case provides useful information concerning the process while simultaneously establishing case law which clarifies certain aspects for the future review procedures.

Firstly, the General Court determined the standard of review applying in merger remedy review processes.¹⁸² According to the General Court, the Commission must verify that the evidence it receives is factually correct, dependable and coherent.¹⁸³ Furthermore, the General Court established an obligation for the Commission to assess whether the evidence contains all information prerequisite to examine the complicated situation.¹⁸⁴ The Commission must additionally be able to rationalise the decision drawn from the above-mentioned evidence.¹⁸⁵ In the Lufthansa case, the Commission failed to properly rationalise why there was not a substantial change in market conditions establishing justification for the waiver.¹⁸⁶

Secondly, the General Court emphasised that all relevant factors should be carefully considered.¹⁸⁷ In the Lufthansa case, the Commission did not rebut all arguments expressed by Lufthansa.¹⁸⁸ There were several errors the Commission conducted regarding the Lufthansa case. Firstly, the Commission failed to assess the factual effect of the termination of the joint-venture agreement between SAS and Lufthansa which was a central element in the contractual relationship of the enterprises.¹⁸⁹ Secondly, the Commission failed to consider the oral proposition of Lufthansa in which it suggested substitutable remedies for the fare reductions.¹⁹⁰ The Commission did not assess the effects of the proposition merely because they were given orally.¹⁹¹ Regarding this issue, the Commission should have enquired Lufthansa to give concrete expression concerning the proposition, but the Commission failed to do so.¹⁹² Thirdly, even when the Monitoring Trustee's opinions do not bind the Commission, the Commission ought to analyse the Monitoring Trustee's

¹⁸² The judgement of the General Court (Sixth Chamber) 16 May 2018, *Deutsche Lufthansa AG v the European Commission*, T-712/16, EU:T:2018:269.

¹⁸³ *Ibid.*, paragraph 39.

¹⁸⁴ *Ibid.*, paragraph 39.

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*, paragraph 67.

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*, paragraph 66.

¹⁹⁰ *Ibid.*, paragraph 72.

¹⁹¹ *Ibid.*, paragraph 71.

¹⁹² *Ibid.*, paragraph 72.

assessment.¹⁹³ Moreover, the Commission should have to take a stance and mention the Monitoring Trustee's opinion in the final decision.¹⁹⁴

Ultimately, the General Court declared that even the Commission is not bound by its previous decisions, the change in its policy should have resulted in a more close look at the matter.¹⁹⁵ As a result, the General Court concluded that the Commission failed to concretely justify the decision to reject the waiver of the commitment, and it did not declare the reason behind the competition concerns deriving from the new relationship between SAS and Lufthansa. The case was somewhat solved on speculative factors.¹⁹⁶

As a result, the General Court provided guidance concerning the burden of evidence.¹⁹⁷ The burden of evidence does not solely lie in the hands of the parties where the evidence provided by the parties does not sufficiently demonstrate the possibility for the modification or waiver of the remedies.¹⁹⁸ According to the General Court, in such situations, the Commission is obliged to request for additional information which it considers as a prerequisite for the careful assessment of the waiver or modification of the remedies.

4.3. Lack of Clear Procedural Framework

Remedies Notice is a comprehensive guideline which deals with various aspects of merger remedies. However, the Remedies Notice does not establish a clear procedural framework for the review process and, the modification and waiver of the commitments. Neither does the Merger Regulation impose detailed rules for the review procedure. As the EU law provides detailed rules for the investigation phases I and II, it would be desirable to provide rules also for the review process.¹⁹⁹ The absence of such regulation results in several procedural issues addressed below.

¹⁹³ The judgement of the General Court (Sixth Chamber) 16 May 2018, *Deutsche Lufthansa AG v the European Commission*, T-712/16, EU:T:2018:269, paragraph 66.

¹⁹⁴ *Ibid.*,

¹⁹⁵ *Ibid.*,

¹⁹⁶ Kluwer Competition Law Blog (2019). Accessible:

<http://competitionlawblog.kluwercompetitionlaw.com/2018/06/07/eu-court-annuls-commission-rejection-lufthansas-request-waive-merger-commitments/> , 9 March 2019.

¹⁹⁷ *Ibid.*,

¹⁹⁸ *Ibid.*,

¹⁹⁹ Breuvar, C., & Chassaing, É. (2014). *supra nota* 67. p. 61.

Firstly, there are no deadlines for the remedy review process which bind the Commission.²⁰⁰ Consequently, a lengthy period of time may pass before the decision is declared.²⁰¹ The time period may prolong to last over a year before any decisions are made.²⁰² This inevitably results in high costs for the concentration either due to the unnecessary application of the commitments or due to sanctions in cases of non-compliance with the commitments.²⁰³ The issue seems to be controversial also with the principle of good administration.²⁰⁴ The significance of this problem increases additionally due to the Commission's discretion regarding the merger clearance decisions and the review process. Secondly, as established in the case law,²⁰⁵ the Commission is not bound by its previous decisions even when the conditions are identical.²⁰⁶ This imposes the additional need to establish a clear procedural framework governing the review process in order to achieve legal certainty. Thirdly, according to the Remedies Notice, the Commission will consider the view of third parties in case of any waiver, modification, or substitution of commitments.²⁰⁷ However, there is no explicit obligation for the Commission to conduct market testing, which is required in phases I and II.²⁰⁸ Hence, the review process is unclear also when considering the opinions of third parties. As the rights of third parties are always taken into account in the review process, there should be some consistency how the rights and opinions are assessed.

4.4. Lack of Transparency

Remedies Notice declare that the Commission may either merely take note of the satisfactory amendments of the remedy by the parties which results in legally binding obligation for both parties instead of adopting a formal decision for any waiver or modification of remedies.²⁰⁹ However, the Remedies Notice does not provide any further guidelines or distinction when such procedure can be implemented.²¹⁰ Consequently, this leaves a significant margin of discretion regarding the form of the review process for the Commission. This affects the transparency, as informal processes are not published.²¹¹

²⁰⁰ Breuvar, C., & Chassaing, É. (2014). *supra nota* 67. p. 61.

²⁰¹ *Ibid.*, p. 61.

²⁰² *Ibid.*, p. 61.

²⁰³ *Ibid.*, p. 61.

²⁰⁴ *Ibid.*, p. 61.

²⁰⁵ The judgement of the Court of First Instance (Second Chamber) 14 December 2005, *General Electric Company v Commission of the European Communities*, T-210/01, EU:T:2005:456.

²⁰⁶ *Ibid.*

²⁰⁷ Commission Notice on remedies (2008) *supra nota* 47, paragraph 74.

²⁰⁸ Breuvar, C., & Chassaing, É. (2014). *supra nota* 67, p. 62.

²⁰⁹ Commission Notice on remedies (2008) *supra nota* 47, paragraph 76.

²¹⁰ Breuvar, C., & Chassaing, É. (2014). *supra nota* 67, p. 60.

²¹¹ *Ibid.*, p. 61.e

The Commission is somewhat reluctant to publish information concerning the grants of modifications, substitutions or waivers of the commitments.²¹² In addition, the decisions are not necessarily published within a reasonable period of time.²¹³ As a result, published merger remedy review decisions do not give a piece of comprehensive and integrated information about the Commission's interpretations and may even distort the image of the Commission's practice.²¹⁴ The lack of transparency complicates predictability of the factors considered in the process and the outcome of the review request. Consequently, it hinders companies' possibilities to adequately prepare for remedy negotiations and a potential review process in the future.²¹⁵ With this regard, it is also essential to mention that the database managed by the Commission is difficult to use and not all decisions are available in English. Thus, acquiring information about current conditions for modifying, substituting or waiving merger remedies is unduly difficult and challenging.

4.5. Recommendations to Overcome the Issues

Due to the absence of any legislation guiding the review process of the merger remedies, the simplest solution would be to extend the legislation and guidelines governing the investigation phases I and II to cover also the process of the review. This could be done, for example, by extending the same principles and rules stated in the Remedies Notice to govern also the review process. The first and the most effortless step would be to determine the cases when the Commission shall take the formal published decision concerning the waiver and modification. Such change in the procedural framework would provide a more comprehensive and reliable view on the Commission's practice. However, as there have not been any steps to fix the problem in the near future, some recommendations can be provided for businesses. The recommendations aim to facilitate a possible review process in situations where it becomes relevant.

First of all, to avoid any difficulties after the implementation of the remedies, the remedies should be drafted carefully. Precise remedies also facilitate the review process since they do not leave a room for different interpretations and conflicts deriving from disagreements. This may occur difficult and laborious due to complex and unforeseeable market changes. Therefore, it would be wise for the parties to invest time and resources to determine the market development as accurately as possible. Since the Commission has been reluctant towards targeted review clauses, the

²¹² Breuvert, C., & Chassaing, É. (2014). *supra nota* 67, p. 61.

²¹³ *Ibid.*, p. 61.

²¹⁴ *Ibid.*, p. 61.

²¹⁵ *Ibid.*, p. 61.

communication plays an important role in the process. The parties should attempt to provide legit and credible arguments to support the inclusion of a targeted review clauses into the merger decision.

Furthermore, even when the Commission does not have the power to dictate the commitments unilaterally, they usually have recommendations for appropriate commitments. Respecting the Commission's wishes and recommendations seem to be wise especially in cases there are no straightforward commitments which could remedy the competition concerns. Logically, consensus with the Commission facilitates the review process later as good communication has been established during earlier stages. Moreover, as the Remedies Notice requires, the remedies shall be capable of being implemented within a short period of time after the merger. This is because it is easier for the Commission to assess the market conditions from a shorter period of time. Hence, it would be wise to take this aspect into consideration while considering the possible merger remedies.

In order to save time and resources, and to avoid the phase II investigation, the parties to merger sometimes tend to offer commitments which occur to be disproportionate. By doing so, the parties usually offer too wide commitments. Disproportionate commitments may backfire later in the review process. First and foremost, the review process can be avoided by simply drafting proportionate remedies during phase II. Consequently, in the end, it saves more time and resources compared to going through the undetermined period of the review process. Going through the phase II investigation or lengthy pre-notification negotiations may seem burdensome, however; it results in a careful assessment of market conditions, competition concerns, future market development, and drafting proportional and targeted merger remedies. To conclude, going through the phases I and II during the merger control procedure might occur expensive at first due to financial or industrial demands. Nonetheless, resources and time will be saved if the review process can be avoided later.

Finally, parties to a merger should pay specific attention to drafting the review clause which would provide flexibility for the future review and consider the unique features of the case in question. This recommendation is in connection with the above as it also requires careful assessment of all aspects of the situation. However, the main point is to draft a review clause that it is able to cover also the unexpected situations and at the same time the review clause should not leave too much room for interpretation. Hence, the best advice is not to hurry towards the merger clearance decision. Instead, careful merger control procedure, including the phases I and II, and the desire to

go through the process peacefully and carefully, will in the long run assessment save the resources and in the most advantageous case, avoid the unregulated review process.

CONCLUSION

The paper assessed the prevailing conditions for the ex-post facto waiver, modification, and substitution of merger remedies within the European Union. More specifically the objective was to evaluate the legal framework and to point out issues emerging in practice. As the General Court of Justice had annulled the Commission's decision to restrain from waiving merger remedies, it proved potential issues deriving from the legal framework and a need for further legislative measures in the field. An increasing number of mergers are cleared subject to complex merger remedies; hence, it is of great importance to study the topic more closely and to attempt to clarify the conditions under which remedies can de facto be waived or modified.

Because merger remedy reviews are assessed on a case-by-case basis and market structures can be sophisticated, it is not desirable to establish an exhaustive list of factors justifying the ex-post waiver or modification of the merger remedies. The Commission's decisions have provided guidance on the basic elements under which an ex-post waiver, substitution or modification can be granted. The Commission has established certain factors which it assesses during the process which is justified by the arguments of exceptional circumstances or a radical change in market conditions. Consequently, today an ex-post waiver, substitution, or modification of the merger remedies is granted where the change in market conditions is permanent and the rights of stakeholders are not affected by the decision. In addition, third parties usually have to agree to waiver, modification or substitution. Lastly, the requirement of a sufficient period of time between the merger clearance and the review process has to be satisfied.

However, the image of what constitutes exceptional circumstances or a radical change in market conditions in practice can be distorted as not all decisions are published. There is no comprehensive and thorough information about the Commission's interpretations concerning justifiable ex-post waiver, modification, or substitution of merger remedies. The recently developed concept of the review clauses can at the best work as a flexible tool facilitating such assessment during the review process. However, the idea of review clauses does not work effortlessly due to the Commission's reluctant approach to approving specifically targeted review clauses covering individual cases. Hence, review clauses do not solve the problem completely.

The starting point for the study was the assumption that the terms which the Commission applies for the merger remedy review and ex-post waiver, modification, or substitution of merger remedies are not sufficiently precise. Also, the need for further regulation within the field was an expected result of the study. The final chapter considering the issues emerging in practice prove the hypothesis correct. However, the General Court's judgement on the Lufthansa case has clarified certain aspects of the review process, such as the standards regarding the proper assessment in the review on behalf of the Commission. Despite the clarifications established by the case law, there seems to be still a need for an established procedural framework. Several issues derive from the lack of clearly established procedural framework. Firstly, the lack of timeframe binding the Commission to review merger remedies within a specified deadline results in lengthy procedures which may prolong to last over a year. This inevitably raises costs for businesses.

Furthermore, requirements regarding the issue when the Commission can take an informal decision to modify merger remedies and when the decision shall be made formally should be established. Currently, the absence of such requirements results in the lack of transparency. Another issue concerns the opinions of the third parties in the merger remedy review process. The Commission considers the views of third parties before granting an ex-post waiver, modification, or substitution of merger remedies. However, there is no explicit obligation for the Commission to conduct market testing, as required in phases I and II. Hence, it is unclear how the opinions of the third parties should be gathered. As the opinions play an essential role in the procedure, there should be some consistency regarding how the rights and opinions are assessed.

As mentioned above, it is essential to leave certain discretion and flexibility to the Commission's practice. However, since the earlier decisions of the Commission are not binding, even when concerning identical cases, the lack of legal framework and transparency raises concerns. It hinders companies' possibilities to prepare for remedy negotiations and a potential review process adequately. Unnecessary merger remedies are economically burdensome for the companies as the enterprise must comply with commitments potentially restricting them to act to their full potential. Hence, the issue needs to be taken seriously. Moreover, the waiver, modification or substitution of merger remedies is essential in order to achieve the legal certainty and freedom to conduct business. In addition, the lack of procedural framework seems to be controversial with the principle of good administration. Consequently, it increases the need for legislative measures governing the procedure. The legal certainty appears to be inadequate in this respect.

The case law clarified the issue concerning the lack of proper assessment. However, as the case provided clarification on the matters regarding the assessment, it also pointed out that the Commission's practice is imperfect. Towards the end of the thesis, the discussion focused on the specific issues deriving from the lack of legal framework and transparency. Nonetheless, neither the case law nor the EU legislation provides an effective solution to the matter. It would be desirable to establish a procedural framework which would confirm, among other matters, timeframes, the distinction between formal and informal decisions, and how the third parties' opinions are requested. However, further research could be done regarding what instrument would be the most suitable to govern the review process. Also, the possible further research should assess what would be the optimal timeframes and technicalities concerning the framework.

Overall, it can be concluded that further regulation is needed; however, it remains unclear what would be the ideal process for the review. A possible solution could be to extend the rules governing phase I and II investigations to cover the review process. However, it would be necessary to assess what specificities should be added or removed from the existing rules governing the phases I and II. Also, the study could assess whether the already existing legal framework governing the merger control could be more efficient as regarding the appointment of commitments in general and the review process. Meanwhile, as a comprehensive legal framework does not exist, the businesses should focus on facilitating the review process otherwise. In conclusion, businesses should invest time and effort to agree on proportional commitments and to draft targeted review clauses, as well as, to establish good communication with the Commission.

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