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Third Party Rights to Appeal Merger Decisions according to EC
and Swedish Rules

Thesis in European Law
20 points

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Summary

The legal framework and principal provisions of EU merger control are set in the EC Merger Regulation (ECMR).¹ The ECMR allocates competence between national and Community authorities in a way that concentrations with a Community dimension are exclusively governed by EC law and those without fall under the scope of national law, in which case Community law does not apply.

Judicial review of merger decisions is governed by Article 230 of the EC Treaty, as the ECMR does not provide specific rules of appeal. According to the fourth paragraph of Article 230, third parties have a right to appeal a decision if they demonstrate that they are directly and individually concerned by the decision. The criteria of direct and individual concern have been extensively interpreted in the case law and different categories of applicants have been admitted to appeal merger decisions, including competitors and employee's representative institutions. However, it is not obvious what is required to satisfy the direct and individual concern criteria in order to challenge the decision. According to the case law it seems that the Community courts have been generous in admitting competitors to challenge merger decisions, in particular major competitors but also potential competitors and competitors acting in the neighbouring markets. It seems that the test of direct and individual concern is strict and requires almost a unique position of the applicant. However, in recent cases the CFI has even admitted third parties who are affected by the conditions attached to an authorisation decision, which may indicate an extension of the circle of parties entitled to challenge merger decisions.

According to Swedish rules on merger control, which are set out in the Competition Act, the Swedish Competition Authority has the authority to clear mergers. However, only the Stockholm District Court (at first instance) and the Market Court (on appeal) are empowered to block concentrations. Under Swedish rules clearance decisions are not subject to appeal neither by the addressees of the decision nor by third parties. The

¹ The Council Regulation (EC) 139/2004 (The EC Merger Regulation) which replaced Council Regulation (EC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings.

rationale behind this rule is the idea of maintaining the legal certainty of the individuals. As regards the decisions of Stockholm District Court prohibiting mergers, third parties have no right to appeal prohibition decisions. The judicial review is governed by the Swedish Code of Judicial Procedure and the general principles of procedural law, according to which only parties to the proceedings at the District Court have the right to appeal.

The current Swedish rules, according to which merger decisions are not challengeable by third parties, may be questioned. The effectiveness of judicial control of merger decisions and of legal security will be enhanced in a system where merger decisions and clearance decisions in particular are subject to judicial review. This is particularly so given the fact that third parties have a justified interest in opposing mergers. The rationale behind the rule that clearance decisions are not challengeable is the concern for the legal certainty of individual. This motivation does not seem to provide a very strong argument, given that positive decisions in the context of building permissions are subject to appeal. The purpose of admitting third parties to appeal merger decisions would be to ensure that the competition on the market is not distorted.

Although both the EC and Swedish procedural rules have their own advantages and disadvantages in the field of mergers, there are several reasons to bring these rules into conformity. In my opinion, harmonising Swedish rules would make them more effective because the application of uniform procedural rules would achieve a uniform substantive law. Even though adopting EC procedural rules may lead to significant delays in procedure by increasing the length of proceedings, it would be possible to mitigate this problem by improving the investigating procedure of the SCA.

Preface

This thesis focuses on the rights of third parties to appeal merger decisions according to EC and Swedish law. I decided that this subject would provide an interesting area for exploration given that there are significant differences between the two sets of procedural rules in the EC and Swedish legal systems in the field of merger control. The main difference is that third parties cannot challenge clearance decisions according to Swedish law. Especially given the fact that the number of mergers and acquisitions has increased significantly in recent years, the reasons behind the form of the Swedish legal order is a matter of particular interest for me.

I would like to thank my supervisor Eva Edwardsson, LL.D. in European law at Uppsala University, for the guidance and encouragement. My thanks also go to Roschier law firm for all help and advice I received there.

1. INTRODUCTION

1.1 Subject

Merger control rules belong to the area of law where no harmonisation between EC and national law has occurred. All Member States have their own merger, which in some cases substantially differ with regard to jurisdictional thresholds, notification requirements, procedure and the substantive test. The Swedish substantive merger control rules are based on the EC rules and are therefore almost identical. However, the rules of procedure differ, especially the rules regarding appeal by third parties.

According to EC law, third parties are allowed to appeal merger decisions especially competitors have been successful in this respect. Third parties have the right under certain circumstances to appeal not only prohibition but also clearance decisions. On a Community level the extent to which third parties should enjoy the standing to challenge competition decisions, and in particular decisions in the merger field, has been subject for debate. Several commentators have suggested that third party rights to appeal should be extended. In contrast to EC law, third parties have very limited rights to appeal merger decisions under Swedish law. On the basis of this, the question arises whether there is a need to widen the circle of parties who may challenge merger decisions under Swedish law.

1.2 Purpose

The purpose of this thesis is to examine the judicial review of decisions by the European Commission and Swedish competition authorities in the field of mergers. This thesis focuses, in particular, on the right of third parties to appeal merger decisions and analysis the differences between the EC and Swedish systems.

Furthermore, the advantages and disadvantages of both systems are examined together whether there is a need to reform the rules. The third party rights to appeal merger decisions cannot be understood fully without taking into account the general context of

merger proceedings. The thesis therefore, includes a brief introduction of the merger proceedings under EC and Swedish law. The main difference between Swedish and Community law is that third parties cannot challenge decisions by the Swedish Competition Authority that clear concentrations. In contrast, under Community law clearance decisions may be appealed by third parties and thus to set a stop for a concentration. A good recent example where interested third parties successfully appealed the Commission's decision to clear a merger is the Sony/BMG case. The work examines the implications of this case on the actions of annulment.

In conclusion, the thesis also presents suggestions for reform of the rules of appeal of merger decisions at the national level and at the Community level, in particular the possibility of bringing Swedish rules in conformity with EC rules. This is examined from three perspectives, namely whether the harmonisation would make Swedish rules more effective, whether it would increase legal certainty and whether it would be more suitable to apply uniform procedural rules to achieve uniform substantive law.

1.3 Scope

As the most common procedures before the Community courts in merger field concern actions for annulment of Commission decisions, this thesis concentrates on such actions and is limited to possibilities of third parties to annul such decisions. As regards Swedish law, the thesis focuses on appeal of decisions of the Swedish Competition Authority (SCA) and the Stockholm District Court.

The examined decisions are all decisions by which the Commission and the Swedish competition authorities close a merger case by stating on its merits or by a refusal to open such a case. The decisions adopted in the course of the procedure fall outside the ambit of this thesis.

1.4 Material and method

The material, which this thesis is based on, is derived mainly from the basic bibliography on mergers and competition, EC and Swedish administrative law,

including the relevant case law, preparatory work, legal doctrine, statutes and the treaties. The method used in this thesis is the traditional legal method.

2. EC MERGER CONTROL

2.1 Overview

2.1.1 Scheme of the ECMR

The legal framework and principal provisions of EU merger control are set in the EC Merger Regulation (ECMR).² The ECMR is based on the principle of a precise allocation of competences between national and Community authorities.³ The ECMR applies exclusively to concentrations with a Community dimension, in other words, the concept of a ‘Community dimension’ allocates responsibility over concentrations between the Commission and the Member States. Concentrations with a Community dimension should, as a general rule, be reviewed exclusively at the Community level through the application of a ‘one-stop shop’ system⁴ and national competition law does not apply. Concentrations that do not have a Community dimension are assessed under the jurisdiction of the Member States, wherein the Commission has no jurisdiction.⁵

Pursuant to Article 21(1) ECMR, the ECMR is the piece of legislation that alone shall apply to concentrations. However, as the ECMR is secondary legislation, it cannot exclude Commission powers under Article 85 of the EC Treaty to investigate possible infringements of Articles 81 and 82.⁶

As stated in Recital 9 of the ECMR, the scope of the application of the Regulation should be defined according to the geographical area of activity of the undertakings concerned and be limited by quantitative thresholds in order to cover those concentrations which have a Community dimension. Article 1 of the ECMR defines concentrations with a “Community dimension” in terms of the worldwide and

² The Council Regulation (EC) 139/2004 (The EC Merger Regulation) which replaced Council Regulation (EC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings.

³ C-170/02 P Schlusserverlag J. S. Moser and Others v Commission [2003] ECR I-9889 para 32.

⁴ Recital 8 ECMR.

⁵ There limited exceptions under Articles 4(5) and 22 ECMR.

⁶ The Commission has stated that it normally does not intend to use these provisions (see Commission Notes on Council Regulation 4064/86). In practice the Commission has not intervened against any concentration on this basis.

Community-wide turnover achieved by the participating undertakings and irrespective of the physical location of those undertakings' assets or of where the undertakings are legally incorporated.

The ECMR sets out a preventive system of merger control with mandatory notifications. According to Article 4 (1) of the ECMR, all concentrations with a Community dimension must be notified to the Commission before their implementation. They are subject to a suspension obligation, i.e. they may only be implemented once the Commission has cleared the merger, either by an explicit decision or as a result of the expiry of the legal deadline (if the Commission fails to issue a decision). As regards notification, the Commission is obliged to assess whether or not the concentration falls within the scope of the ECMR and, if it does, whether or not it raises serious doubts about its compatibility with the common market. This is known as Phase I of the merger procedure. The vast majority of the cases receive clearance during Phase I leading to a decision pursuant to Article 6 of the Regulation. If the Commission believes that the concentration raises serious doubts as to its compatibility with the common market, it will launch an in-depth investigation to analyse whether or not this is the case. This is known as Phase II procedure. The procedure ends with the adoption of a final decision under Article 8 of the ECMR.

2.1.2 Objectives of the ECMR

The ECMR should be seen as an instrument in instituting “a system ensuring that competition in the internal market is not distorted” for the achievement of the aims of the Treaty.⁷ The aims are stated in Article 2 of the EC Treaty. Achieving this goal requires the consistent application of market-oriented, competition-based criteria. The creation of the internal market is facilitated by providing a level-playing field for transactions having a Community dimension. As stated in Recital 4 of the ECMR, concentrations should only be acceptable to the extent that they are in line with the requirement of dynamic competition and capable of increasing the competitiveness of the European industry, raising the standard of living in the Community.

⁷Article 3(g) EC Treaty, Recital 2 ECMR.

2.2 Appeal

2.2.1 Jurisdiction of Appeal

There is a right to appeal the Commission decisions initially to the Court of First Instance (CFI) and subsequently, on points of law, to the European Court of Justice (ECJ). The ECMR does not contain specific rules under which the Commission merger decisions can be brought before the Community courts. It only states in Article 21 (2) that the Commission decisions are subject to review by the ECJ. Reference is also made in Article 10 (5) which envisages a specific procedure to be followed in case of annulment of the whole or part of a Commission's decision by the CFI. Article 16 of the ECMR confers on the CFI unlimited jurisdiction with respect to fines. The Community courts' jurisdiction is set out directly in the EC Treaty and thus, there is no need for additional provisions in the ECMR. Article 230 is the basic provision in the Treaty dealing with the right to judicial review of the acts of the Council and the Commission. Therefore judicial review of merger decisions by the Commission is based on the same principles as the principles of judicial review of other Commission acts, namely pursuant to the general rules of the EC Treaty stated in Article 230 EC.

2.2.2 Grounds of Appeal

Article 230 of the EC Treaty provides that the CFI has the power to review the legality of the acts of the Commission on four grounds: lack of competence, infringement of essential procedural requirement, infringement of the EC Treaty or any rule of law relating to its application and misuse of power. In practice these grounds have lost their individual importance because of the flexible approach to Article 230 adopted by the Community courts.⁸ The courts pay less attention to the formal classification of the grounds and have been more concerned with the substance. Infringement of the Treaty or of any rule of law relating to its application basically comprises the other two grounds and can be pleaded either in alternative or in addition to one another.

In relation to judicial control of merger decisions, the categorisation of the grounds of an appeal may be particularly complicated owing to the special features of the merger decisions and the role of the CFI.⁹ First, the CFI has to provide interpretation of the law applicable to the EC merger control regime as well as on matters of substance, including giving meaning of the provisions of Regulation and its terms, such as a “Community dimension”. Second, the CFI’s role is to guarantee procedural rights such as due process and the rights of defence. Here the Court is particularly concerned about the deadlines under which the Commission has to operate. Although it has been established that the principles governing access to file in Article 81 and Article 82 cases are applicable to cases under the ECMR, the Court has recognized that these principles ‘may reasonably be adopted to the need for speed’.¹⁰ Third, the CFI’s role is to evaluate the Commission’s substantial assessment of concentrations. It has been recognized that the Commission, subject to some limits, has a margin of discretion in its appraisal. This is particularly so regarding the complicated economic assessments, since merger cases require *ex ante* analyses and differ from *ex post* analysis in case of Articles 81 and 82.¹¹

2.2.3 Standard of judicial review

The CFI applies the so-called judicial review standard or “manifest error” standard of review. Judicial review standard means that the Court reviews the legality of the decisions and does not have jurisdiction to retry the case. According to the manifest error standard, the CFI will scrutinise the Commission’s decision for correct application of the law and the correctness of the underlying primary facts. The CFI will allow the Commission a considerable margin of appreciation, particularly with regard to economic matters, and will only annul a Commission decision where it finds that the Commission has committed manifest errors of appreciation.¹²

⁸ Faull & Nikpay, *The EC Law of Competition*, p. 581.

⁹ Cook, *EC Merger Control*, p. 373.

¹⁰ Case T-221/95, *Endemol*, para. 68.

¹¹ See the CFI’s approach in Case T-34/99, *Airtours v Commission*, para 294; Case C-12/03P *Commission v Tetra Laval* paras. 39, 42-43.

¹² C-68/94 *Kali & Salz*, paras. 223-224.

The issue of the appropriate standard of review was expressly addressed by the ECJ in the Tetra Laval case.¹³ The ECJ confirmed that the standard of review remains the manifest error standard. However, the ECJ did not accept the Commission's view that the CFI had exceeded this standard by reviewing particularly closely the Commission's assessment of the Tetra Laval/Sidel merger. The ECJ stated that "whilst the Court recognises that the Commission has a margin of discretion with regard to economic matters that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of economic nature. Not only must the Community Courts, *inter alia*, establish whether that evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess the complex situation [...]."¹⁴

In the subsequent judgments such as *General Electric and Impala*, the CFI clearly referred to the standard of review set out by the ECJ in *Tetra Laval*. Whereas *General Electric* concerned a prohibition decision, *Impala* concerned a Commission authorisation decision. In *General Electric* the CFI held that "effective judicial review is all the more necessary when the Commission carries out a prospective analysis of developments which might occur on a market as a result of a proposed concentration"¹⁵. In the *Impala* judgment the CFI showed clearly that even when reviewing the legality of an authorisation decision, it may scrutinize the Commission's evidence, reasoning and assessment closely.¹⁶ These cases appear to indicate a marked shift towards closer scrutiny of Commission decisions. However, in the number of other cases which followed *Tetra Laval*, the CFI referred to the traditional manifest error standard of review¹⁷. It seems to be unclear whether the CFI has changed the intensity of judicial review in merger cases and replaced the classical manifest error standard with more stringent standard. It appears that commentators are of the opinion that it looks like the standard of review has become more stringent. However, the circumstances of each particular case might be decisive for the outcome of the case.¹⁸

¹³ Case C-12/03 P, *Commission v Tetra Laval*.

¹⁴ Case C-12/03 P, *Commission v Tetra Laval*.

¹⁵ Case T-210/101, *General Electric v Commission*, para. 64.

¹⁶ Case T464/04, *Impala v Commission*, paras. 284 et seq.

¹⁷ Case T-177/04 *EasyJet v Commission*, para. 44; Case T-87/05 *EDP v Commission*, para. 152.

¹⁸ Faull & Nikpay, *The EC Law of Competition*, p. 591.

2.2.4 Challengeable acts

Article 230 EC states that the CFI shall review the legality of acts adopted by the EC institutions, other than recommendations and opinions. Only measures producing binding legal effects, so as to affect the interests of the applicant by bringing about a distinct change in his legal position, should constitute acts or decisions within the meaning of article 230 EC and can be challenged before the CFI.¹⁹ It is well established that Commission decisions in merger proceedings pursuant to Article 249 EC fall within the term “acts”. However, a Commission decision which has merely a preliminary or preparatory function²⁰ or confirms a previous decision cannot be appealed under Article 230 EC.²¹

2.3 Final decisions on the substance of the case

2.3.1 Introduction

The main decisions adopted by the Commission under the ECMR are challengeable acts as they produce binding legal effects. The following acts can be challenged under Article 230 EC: the Article 6(1)(b) and Article 6(2) decisions (clearance of a concentration in Phase I, with or without conditions); the Article 8(1) and Article 8(2) decisions (clearance of a concentration in Phase II, with or without conditions; and the Article 8(3) decision (prohibition of a concentration); the Article 8(4) decision (order to dissolve a concentration). The decisions adopted pursuant to Article 6(1)(a) of the Regulation (that a notified transaction does not constitute a concentration with a Community dimension) can also be appealed, which has been indirectly recognized by CFI in *Air France*.²² The Article 6(1)(c) decision to initiate proceedings is regarded as a

¹⁹ Case 60/81, *IBM v Commission*, para. 9, in the merger field, Joined cases C-68/94 *France and others v Commission (Kali & Salz)*, para. 62, T-125/97, T-127/97 *Coca-Cola v Commission* [2000] ECR II-1733 para. 77.

²⁰ Case 60/81, *IBM v Commission*, paras. 10-12.

²¹ See C-480/93 *Zunis v Commission*, para. 14.

²² T-3/93 *Air France v Commission*, paras. 43-54 and 57-60.

preparatory step and does not constitute a final decision, and thus, should not normally be subject to appeal.²³

The Commission's approval of undertakings entered by the notifying parties constitutes a positive act and is reviewable only if it satisfies the requirements of a challengeable act, i. e. that it produces binding legal effects and is final as stated in the IBM case.²⁴

The approval is considered to produce binding legal effects because it influences the final outcome of the case and affects the legal position of the notifying parties. The Commission's approval does not constitute a provisional measure and is a measure which definitely lays down the position of the Commission and therefore fulfils the 'final' criterion.

The Commission's refusal constitutes a negative act since the Commission decides not to act as requested by the notifying parties. In the Zunic Holding merger case, the CFI stated that a letter from the Commission indicating that it did not intend to review the matter in question was appealable as an act producing legal consequences: "it follows from the case law of the Court of Justice that when an act of the Commission amounts to a rejection it must be appraised in the light of the nature of the request to which it constitutes a reply. [...] In particular, the refusal by a Community institution to withdraw or amend an act may constitute an act whose legality may be reviewed under Article 173 of the EEC Treaty only if the act which the Community institution refuses to withdraw or amend could itself have been contested under that provision".²⁵

In order to determine whether the act is challengeable it seems to be irrelevant whether the act is called a 'decision' provided that it may affect the legal position of the addressee. In the Air France case, the statement of the spokesman for the Commissioner for Competition that a merger is compatible with the common market constituted a definitive decision.²⁶ Although the statement was oral and unsupported by written documentation, the CFI recognized that the form of the act is immaterial as regards the question whether it is challengeable under Article 230 EC provided it fulfils the criteria

²³ It has been confirmed by the CFI in an Order declaring an action against a Commission Article 6(1)(c) decision inadmissible (see Faull and Nikpay p. 584).

²⁴ Case 60/81, IBM v Commission, paras. 9-10.

²⁵ Case T-83/92 Zunic Holding and Others v. Commission, para. 31.

of the IBM case.²⁷ The statement was made by the Commissioner responsible for competition and publicly committed the Commission as a whole and had the same effects as a decision under Article 6(1)(a) of the Regulation.

2.3.2 Locus standi

There are different categories of applicants who can challenge final decisions of the Commission under the ECMR. The following sections will examine *locus standi* of each of the categories using the categorisation suggested by G. Conte.²⁸ There are “privileged applicants” who are always entitled to appeal a challengeable Commission decision. These are Member States, the Council and the European Parliament, though this category falls outside the ambit of this work. Other categories, that might be distinguished, are the parties to the concentration, the shareholders of the concentration, the recognized employees’ representatives of the undertakings concerned, the competitors of merging companies, third parties affected by the conditions attached to an authorization decision and the companies acting as buyers on the markets affected by the concentration. Emphasis here will be given to third party complainants.

The fourth paragraph of Article 230 EC provides that: “Any natural or legal person may ... institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former”. Thus, under this provision, addressees of decisions, such as the parties to a merger prohibited by the Commission, may initiate proceedings. Insofar as the decision is addressed to them, the parties to a concentration do not need to fulfil any additional requirements in order to have standing. It seems that the parties who seek to challenge acts which are addressed to them have no problems with instituting the proceedings.

Other applicants who are not addressees of the decision, e.g. third parties, have a right of appeal only if they demonstrate that they are directly and individually concerned by

²⁶ Case T-3/93, *Air France*, 1994 ECR II-124, paras. 50-51.

²⁷ Case T-3/93, *Air France v Commission*, paras. 43-54.

²⁸ See EU Competition Law, Mergers and Acquisitions, pp. 943-944.

the decision they are challenging. Thus, the right of appeal of third parties is limited by the ‘direct and individual concern’ criteria. There is extensive case law and theory on the interpretation of these criteria also in the context of merger decisions.

2.3.3 Individual concern

The test for deciding whether a person is individually concerned in a decision was established in the Plaumann case: “Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in case of the person addressed”.²⁹

2.3.4 Direct concern

A Commission decision is of direct concern to the applicant when it “directly affects the legal situation of the individual and leaves no discretion to the addressees of that measure who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules”.³⁰ Thus, the decision must directly affect the legal and factual position of the applicant, without the need or adoption of any additional measures. It seems that, in order to demonstrate direct concern, the Court concentrates on the effects of the decision to the legal position of third parties in the course of the relevant proceedings, as well as to their economic position within the market concerned.³¹

²⁹ Case 25/62, Plaumann & Co v. Commission.

³⁰ Cases C-24/01, C-25/01, Glencore Grain Ltd v. Commission, para. 43.

³¹ Kekelekis, *The EC Merger Control Regulation: Rights of Defence*, p. 211.

2.3.5 Categories of applicants

2.3.5.1 *Parties to the concentration*

One category consists of notifying parties, target undertakings and sellers. As mentioned above, notifying parties are addressees of a decision and are always entitled to challenge it. Target undertakings and sellers are directly and individually concerned by a decision on the concentration in which they are involved, and therefore have right to challenge it.

The undertakings concerned are able to challenge the Commission's decision as they have a sufficient interest to bring an appeal even in the case where a purchase agreement lapses before the proceedings have begun.³² In *Gencor*, the CFI stated that the Commission's decision could have produced effects during the period when the agreement was in force and that those effects were not necessarily eliminated by its repeal.³³

The only requirement which the parties to the concentration have to fulfil is to show that they have the interest in bringing an action. It appears that the parties do not have any interest to challenge an unconditional authorization decision.³⁴ In the *Coca-Cola* case, the CFI examined whether a party to a concentration which had been declared compatible could bring an appeal. In that case, *Coca Cola* instituted proceedings against the Commission's finding that *Coca Cola* held a dominant position although the Commission did not impose any conditions on the transaction. The CFI found that *Coca Cola* could not challenge an aspect of a decision as the Commission's finding did not impose any conditions and obligations on *Coca Cola* and therefore did not create legal effects which could be the subject of appeal. The CFI stated that an aspect of a decision which was not essential to the operative part of a decision could not be reviewed.³⁵

³² Cook, *EC Merger Control*, p. 367.

³³ Case T-102/96 *Gencor Ltd v Commission*.

³⁴ See *EU Competition Law, Mergers and Acquisitions*, p 944.

³⁵ Cases T-125/97, T-127/97, *The Coca Cola Company v Commission*.

In a situation where the parties have abandoned the concentration after having initiated proceedings, the CFI ruled in the Kesko case that the parties had an interest where the abandonment was not voluntary, but was a direct result of the prohibition decision.³⁶

It appears that parties might have an interest in challenging a prohibition decision in order to bring a subsequent action for damages. This question has not been expressly considered by the Court. In Kali & Salz, the CFI mentioned that even if the parties lacked the interest to bring action because the merging parties had already complied with the conditions, which was not the case in Kali, the annulment would still constitute an interest at least as the basis for a possible action for damages.³⁷

2.3.5.2 Shareholders

The position of shareholders has been examined in the Zunis case³⁸. In the case, the minority shareholders of one of the notifying parties, Generali, brought a challenge against the Commission's Article 6(1)(a) decision that the concentration fell outside the scope of the Merger Regulation. The CFI found that the applicants did not satisfy the requirements of direct and individual concern. Regarding the requirement of direct concern, the CFI stated that, despite being shareholders of one of the notifying parties, the applicants' legal and factual position had not been affected by the Commission's decision. The CFI pointed out that the Commission's decision that the transaction fell outside the scope of the Merger Regulation "is not of such a nature as by itself to affect the substance or extent of the rights of shareholders of the notifying parties, either as regards their proprietary rights or the ability to participate in the company management conferred on them by such rights".³⁹

As regards the question of individual concern, the CFI stated that the Commission's decision did not concern the shareholders individually by virtue of any special attributes which differentiated them from all the other minority shareholders. The Court noted that

³⁶ T-22/97, Kesko v Commission, paras. 59-65.

³⁷ Joined Cases C-68/94, France and Others v. Commission, para. 74.

³⁸ Case T-83/92, Zunis Holding v Commission.

³⁹ Case T-83/92 Zunis Holding v Commission, para. 35.

the decision had affected the shareholders in the same way as any other of the numerous shareholders of the party in question. The CFI stated that the applicants were not individually concerned “in particular because their respective shareholdings in the capital of Generali at the material time each represented less than 0,5 per cent of the share capital and because they failed to prove that by reason of that decision they were placed in a different position to that of any other shareholder”.⁴⁰

The CFI’s ruling is not clear, but it appears that shareholders will normally not be able to show that they are directly and individually concerned.⁴¹ The Court did not elaborate, but it seems that it might be possible for the minority shareholders to satisfy the direct and individual concern criteria under particular circumstances. First, it appears that the minority shareholder must show that the Commission decision has some material effect on the substance or extent of the proprietary or voting rights attached to its minority shareholding. Secondly, the minority shareholder has to prove individual concern by showing special circumstances which distinguish that shareholder from all the other minority shareholders. There is an opinion that such a distinction might arise if the shareholder was the only minority shareholder in the undertaking concerned, or by virtue of a very substantial holding, particularly if it has the power to appoint directors.⁴²

2.3.5.3 Competitors of the merging parties

In a general context, the ECJ has stated that the mere fact that a measure may exercise an influence on the competitive relationships existing on the market in question is not enough to allow any trader in any competitive relationship with the addressee of the decision to be regarded as directly and individually concerned by that measure.⁴³

The status of competitors in the context of mergers was evaluated in the Air France case.⁴⁴ An appeal was brought by Air France concerning the merger of British Airways (BA) with Dan Air, and a Commission’s spokesman made a statement declaring that the

⁴⁰ Case T-83/92 *Zunis Holding v Commission*, para. 36.

⁴¹ Faull & Nikpay, *The EC Law of Competition*, p. 585.

⁴² Brown, *Judicial Review of Commission Decisions under the Merger Regulations*, p. 298.

⁴³ Cases 10 & 18/68 *Societa Eridania Zuccherifici v Commission*, para. 7.

operation did not have a Community dimension. The CFI stated that the statement was of direct concern to the competing undertakings engaged in the international civil aviation market because it would allow the parties to implement the transaction immediately which would lead to a change of the state of the market.⁴⁵ If the transaction would be declared to have a Community dimension, no implementation of the transaction would have taken place, and Air France could have been heard under Article 18(4) of the ECMR. Thus, the statement had the effect of depriving Air France from its procedural right to be heard. On these grounds, the statement was found to be of direct concern to competitors in the civil aviation market.

As regards the question of individual concern, the CFI held that the position of Air France was “clearly different” from other airlines. The impact of the merger on Air France could be distinguished from the effect on all other airlines. The merger would make the position of BA on certain routes significantly stronger whereby the position of Air France would be highly affected. The Court’s reasoning is not clear, but it seems that the decisive fact in this case is that Air France is a main competitor to BA on the routes which BA was acquiring from Dan Air, and so the impact of the merger would be greater on the position of Air France than on any other third party airline.

In the second Air France case,⁴⁶ an action was brought by Air France against the Commission decision declaring a concentration between BA and TAT to be compatible with the internal market. The CFI held that Air France, the main competitor, was individually concerned by the decision due to three reasons. Firstly, the Court referred to, the participation of Air France in the proceedings, particularly to the fact that Air France submitted observations and statistical data. Secondly, the Court thought that Air France’s competitive position was crucial to the assessment of the relevant markets. Thirdly, Air France was obliged, four months before the notification of the merger, to give up its interest in TAT.⁴⁷

⁴⁴ Case T-3/93, *Air France v Commission*.

⁴⁵ Case T-3/93 *Air, France v Commission*, para. 51.

⁴⁶ Case T-2/93, *Air France v Commission*.

⁴⁷ Case T-2/93, *Air France v Commission*, paras. 44-46.

In this case, the CFI gave clearer reasons as to why Air France was individually concerned than it did in the first Air France case. It seems that the Court placed emphasis upon the fact that the competitor was involved in the Commission's procedure. There is an opinion that this criterion should not be determinative⁴⁸, however, the ARD case⁴⁹ shows that it is not without importance. In this case, the CFI illustrated that it is ready to look in detail at not only the participation of the applicants in the administrative procedure but also the extent to which they commented on key issues which the Commission dealt with in order to determine whether the competitors were individually concerned.⁵⁰

The position of competitors was also examined in the Babyliiss case⁵¹, which concerned a Commission's decision approving, subject to conditions, the concentration between SEB and Moulinex. In the case, the CFI found that Babyliiss was directly concerned partly because it was a potential competitor in an oligopolistic market with high barriers to entry. Babyliiss was also found to be individually concerned as it had actively participated throughout the Commission's investigation. Babyliiss, although it was not situated in an affected market for the purpose of the application of the Regulation, was found to be a potential competitor because it was a leading player in personal care products generally and intended to enter into the EU markets, and finally, because the applicant had previously made attempts to buy Moulinex.

2.3.5.4 Factors taken into account

It is clear that the case-law establishes that a competitor has a standing to challenge the Commission's decision under the ECMR where the requirement of direct and individual concern is satisfied. Concerning the requirement of direct concern, the CFI seems to state that the requirement is fulfilled when the decisions would bring about an immediate change in the market situation as the transaction could be carried out immediately. Regarding individual concern, it appears to be unclear which elements the

⁴⁸ Cook, EC Merger Control, p. 371.

⁴⁹ Case T-158/00 *Arbeitsgemeinschaft, etc v Commission*.

⁵⁰ Case T-158/00 *Arbeitsgemeinschaft, etc v Commission*, paras. 63-72.

⁵¹ Case T-114/02 *Babyliiss v. Commission*.

CFI considers as important to establish the admissibility of the application. It seems that the Court examines two main elements: the competitive relation between the applicant and the merging parties and the applicants' participation in the administrative procedure.

In some cases the applicant was the main or one of the main competitors.⁵² In *Babyliss*, a potential competitor was admitted to bring an appeal. In the *ADR* case, the CFI found that a company active only on neighbouring markets might be individually concerned by an authorization decision, particularly because there was an interaction between the two markets and it could not be excluded that the concentration would affect the applicant's position in another neighbouring market.

The competitor's participation in the Commission's procedure was examined in almost all the judgments. However, in *Air France*, this element was not considered. The CFI did not have the opportunity to consider it as the Commission declined its competence beforehand. According to case-law, it is unclear whether the mere fact that the applicant is a main competitor is sufficient to satisfy the individual concern test. The reasoning of the CFI in the first *Air France* case is imprecise on this point. In addition, it appears that the Court places a particular importance on the applicant's participation in the Commission's investigation procedure as it is repeatedly emphasized in case-law.

The value of the participation element was evaluated in *Babyliss*. In that case, the CFI stated that participation in the procedure, in itself, is not sufficient to satisfy the requirement of individual concern. However, the CFI stated that active participation in the administrative procedure, in conjunction with other elements, is an element regularly taken into account in order to establish the admissibility of the action.⁵³

It seems to be unclear whether a competitor may challenge the Commission's decision without having taken part in the Commission's procedure. According to the opinion of G. Conte it should be possible, given the analogous case-law in the field of anti-

⁵² Case T-3/93, *Air France v. Commission*.

⁵³ Case T-114/02 *Babyliss v. Commission*, para. 95.

competitive agreements and state aid.⁵⁴ According to the case-law referred to above, it seems that the participation criterion might not be determinative, but it is unclear whether it is so or not, the competitors wishing to challenge the Commission's decision should bear that in mind. In addition, the elements such as participation in the Commission's decision and the competitive relation with merging parties, the CFI has in some cases taken into account such elements as an applicant's attempts to acquire the target company⁵⁵ and giving up participation in the target company.⁵⁶

2.3.5.5 *Employee's representative institutions*

The possibility of employee representative institutions and trade unions to bring an action under Article 230 EC to challenge a Commission's decision was tested in the *Perrie* cases.⁵⁷ The CFI found that in substance the decision was not of direct concern to the applicants, particularly because it could not have an effect on the status of the employee's representative organizations and job losses, and changes in social benefits were not an inevitable consequence of the merger. Nonetheless, the applicants were found to be directly and individually concerned by the decision. The Court ruled that the mere fact that the representative bodies were expressly and specifically mentioned in Article 18(4) of the ECMR was enough to differentiate them from all other persons, regardless of whether or not they had made use of their rights during the administrative procedure.⁵⁸ Regarding the element of direct concern, the CFI stated that the applicant employee representative organizations were entitled to bring proceedings to exclusively examine whether their right to be heard during the administrative procedure had been infringed.

⁵⁴ EU Competition Law, Mergers and Acquisitions, p. 951, reference to Joined Cases T-528/93, T-542/93, T-543/93, *Metropole Television and Others v Commission*, paras. 61-62.

⁵⁵ Case T-114/02, *Babyliss v Commission*, paras. 108-116.

⁵⁶ Case T-2/93, *Air France v Commission* [1994] ECR II-323, para. 46.

⁵⁷ Case T-96/92 *CCE Vittel and Others v. Commission* and Case T-12/93 *CCE Grandes Sources and Others v Commission*.

⁵⁸ Case T-96/92 *CCE Vittel and Others v. Commission*, para. 46.

2.3.5.6 Third parties affected by the conditions attached to an authorisation decision

In some circumstances, the authorisation decision may have a direct impact on third parties because of the conditions attached to the decision. In *Kali & Salz*, the question arose whether a third party could challenge the Commission's decision even though the conditions of the implementation decision were not directly imposed on the third party. In this case, the implementation of the conditions laid down in the authorisation decision could affect, in law and in fact, the third parties. Third parties challenged the decision specifically with respect to those conditions. As regards the question of whether the applicant third parties were directly concerned by the decision, the ECJ said that the conditions could affect the third parties' interest only if these conditions were implemented by the parties to the concentration. The ECJ stated that the undertakings were firmly obliged to comply with the conditions, especially taking into account the fact that in the case of a breach, the Commission could revoke the decision.⁵⁹ Regarding the element of individual concern, the ECJ ruled that the applicants were individually concerned by the conditions in question. The Court stated that as the applicants participated in the administrative procedure and the observations of the parties were taken into account, the applicants' situation with respect to the concentration was clearly differentiated from that of other companies considered. In addition, the conditions had an impact on the applicants' interests and were liable to have an appreciable effect on their market position.⁶⁰

2.3.5.7 Undertakings acting as buyers in the markets affected by the concentration

In *Verband der freien Rohrwerke*, the question arose whether a buyer in a market affected by the concentration was directly and individually concerned. The CFI ruled that the buyer was individually concerned by the decision because it acquired raw material necessary to operate on a downstream market from one of the merging parties.⁶¹ An important fact was that the applicant actively participated in the

⁵⁹ Joined Cases C-68/94 and C-30/95 *France and Others v Commission*, paras. 49-59.

⁶⁰ Joined Cases C-68/94 and C-30/95 *France and Others v Commission*, paras. 54-58.

⁶¹ Case T-374/00 *Verband der freien Rohrwerke and Others v Commission*, para. 51.

administrative procedure, and, at the same time, was a competitor of the merged entity on the downstream market.

The question whether undertakings which are not competitors of the parties, but buyers in markets affected by the concentration, may also challenge the decision has been raised in doctrine. G. Conte is of the opinion that even this category of applicants may be directly and individually concerned. He explains that the buyers in the markets affected by a concentration would be particularly harmed by a possible increase of prices as a result of concentration. The buyers would be directly concerned because of the change of market structure which would lead to a price increase. G. Conte suggests that these applicants would be individually concerned where they have participated in the administrative procedure, and where only a limited number of buyers are active on the market in question and where the applicant is one of the most important ones.⁶²

2.3.5.8 Summary of categories of applicants

It is clear that the addressees of the Commission decision have always a right to appeal that decision. The position of third parties is not so straightforward. It is clear that competitors, who can establish that they are directly and individually concerned, have a right to appeal Commissions decisions in the merger field. However, it is not obvious what is required to satisfy the direct and individual concern criteria in order to challenge the decision. So far, the right to appeal has been awarded to major and potential competitors, but also to competitors acting in a neighbouring market.

The above-mentioned cases seem to suggest that the position of competitors to challenge the Commission decision is stronger than the position of minority shareholders, as it is easier for the competitors, especially for major competitors, to satisfy the test of direct and individual concern. Whereas minority shareholders are generally few out of a large number of similar minority shareholders, the fact that main competitors or potential competitors are fewer in number differentiates them from other

⁶² EC Competition Law, Mergers and Acquisitions, p. 955.

competitors. It seems that the test is quite strict and the applicant has to establish that a decision affects him in an almost unique way.

However, according to the commentators in the legal doctrine, the different approach can be justified.⁶³ The concerns of a major competitor are closely connected with the Regulation's underlying objective of maintaining effective competition in the relevant market. The minority shareholders often do not play any role in maintaining competition. Further, employees seem to be in a special position, simply because they are expressly provided the right to be heard in Article 18 EC. Brown is of the opinion that although employees enjoy protection under employment law, they might merit additional safeguards.

The case law also establishes that third parties affected by the conditions of the decision may challenge this decision. The CFI has recognized the right of third parties who act as buyers and are competitors in the downstream market to challenge the Commission decision in certain circumstances. Even an undertaking which is neither an actual nor a potential competitor might be individually concerned by a decision if it operates in related markets to that in which a dominant position is being strengthened.⁶⁴ It is possible that the CFI is willing to widen the categories of applicants. In older cases the right to appeal was only given to competitors of the merging parties, whereas in recent cases the CFI has accepted an appeal from parties who are potential competitors or competitors acting on a neighbouring market. Although it is not excluded that the CFI extended the categories of applicants, the cases highlight the difficulties faced by third parties who seek to bring such action. It seems that the test of direct and individual concern remains very strict and requires almost a unique position of the applicant.

2.4 Time limits

According to Article 230 (5) EC, an action for annulment has to be instituted within two months of the publication of the measure, of its notification to the plaintiff, or, in absence thereof, of the day on which it came to the knowledge of the latter. The period

⁶³ Brown, p. 305.

of two months is extended on account of distance by a single period of ten days,⁶⁵ with the consequence that the time limit is in fact always two months and ten days. Regarding Commission decisions in the merger field, it should be noted that Articles 6 and 8 of the ECMR state that the Commission shall notify the decisions adopted pursuant to these provisions to the undertakings concerned and the competent authorities of the Member States without delay. Article 254 provides that all Commission decisions shall be notified to those to whom they are addressed. Thus, when the period starts running depends on who is making an appeal.

In case where an addressee of the decision brings an action, the time limit runs from when the addressee is notified of the decision or if it is not notified, the time that the addressee becomes aware of the decision.

In case where third parties bring an action, the situation is not so straightforward. If a decision is not published in the Official Journal (OJ), the time limit starts running from when the third party acquires actual knowledge of the decision. If a decision is not published in the OJ, the time limit runs from the date of publication. According to a recent judgment of the CFI in the state aid field the criterion of notification is not applicable, when the applicant is not the addressee of the decision.⁶⁶ According to this formalistic interpretation of Article 234, a non-confidential version of the decision which is sent to the applicant before its publication in the OJ, does not start the period for bringing action. However, publishing the full text of a decision on the Commission's web-site, combined with the publication of a summary notice in the OJ (which allows identifying the decision and mentions the possibility of access via the Internet), should be considered as a publication for the purpose of Article 230 (5) EC.⁶⁷ However, there are no cases confirming that the same rules apply to merger control cases. The issue is particularly relevant if a third party wants to challenge a decision clearing a merger in Phase II, as these decisions are available on the Internet a long time before they are published in the OJ. This order could significantly extend the period in which third

⁶⁴ Case T-158/00, *Arbeitsgemeinschaft, etc v Commission*, para. 78.

⁶⁵ Article 102(2) CFI Rules of Procedure.

⁶⁶ Case T-17/02 *Olsen v Commission*, para.76 (judgment in the state aid field).

⁶⁷ Case T-17/02 *Olsen v Commission*, para. 80; T-321/04 *Air Bourbon v Commission*, para 34 (judgment concerned a case in the state aid filed).

parties can bring action and, thus, create problems with regard to legal certainty.⁶⁸ It has been suggested, until Community Courts clarify the rules, third parties should consider the time limit to run from when they acquire actual knowledge of the decision⁶⁹.

2.5 Outcome of appeal

Article 231 EC provides that if the appeal is well founded, the relevant Community Court will declare all or part of the decision void. Where the CFI annuls a Commission decision under the ECMR, it has a judicial review role and cannot authorise or prohibit the merger itself. Pursuant to Article 10 of the ECMR, if the Court gives a judgment that annuls the whole or part of a Commission decision, it is for the Commission to re-examine the concentration in the light of the current market conditions with a view to adopt a decision under Article 6 of the ECMR. The procedure of re-examination always starts in Phase I. This means that the parties must either submit a new notification, a supplement to the original notification, or where the notification has not become incomplete, a certification stating that there are no changes.⁷⁰

Regarding partial annulment, the Court will be able to annul part of a decision only when this part is severable from the whole decision. The CFI stated in *Kali & Salz*, that the partial annulment of a decision of authorisation with conditions, where only the conditions are challenged, is only possible if the conditions can be severed from the rest of the decision. Where the conditions challenged are, on the other hand, the result of a negative assessment of the concentration at issue, and viewed by the Commission as essential for its authorization, a partial annulment is not possible.⁷¹

⁶⁸ EU Competition Law, Mergers and Acquisitions, p. 963.

⁶⁹ Practical Law Company, www.competition.practicallaw.com/7-207-2303.

⁷⁰ Article 10(5) ECMR.

⁷¹ Joined Cases C-68/94 *France and Others v Commission*, paras. 256-258.

2.6 Timing

Appeal in competition cases regularly takes more than two years and in many cases even longer. For example, Airtours had to wait for almost three years before the CFI annulled the Commission's decision prohibiting its proposed merger⁷². The lapse of time may result in that merging parties choose not to submit the merger for a reassessment. The delay in appeal decisions is seen as one of the main obstacles to effective judicial review. The fact that an appeal before the CFI can take two to three years and longer if there is an appeal to the ECJ can be discouraging. There is only a limited possibility to appeal under the fast-track procedure, which will be examined below in a detail. Merger reviews using fast-track procedure have taken between seven and 19 months and on average approximately 11 months.⁷³

In cases where the Commission's decision has been annulled by the Court and the Commission has to adopt a new decision on the substance of the case, the Commission may take an article 6(1) or Article 8(1) to (3) decision without being bound by time limits. Deadlines are not applicable in cases where the Commission has to take a new decision after the original clearance decision under Article 6(1)(a), 6(1)(b), 8(1) or 8(2) has been revoked⁷⁴ and in cases where a concentration has been implemented in violation of a condition that was attached to a clearance decision.⁷⁵ In the above cases the Commission's original decision has become ineffective either by revocation or by non-compliance with a condition. Since the parties are responsible for the circumstances that have caused the original decision to lose its effect, it is justified that a Commission is not bound by any deadline when re-assessing the case.

2.7 Expedited procedure

As an expedited procedure was designed to deal with cases of a particularly urgent nature, it is particularly suited to decisions made with regard to the control of mergers

⁷² T-212/03, *Association de la presse internationale ASBL (API) v Commission of the European Communities*.

⁷³ Only review in T-464/04, *Impala v Commission*, took 19 months.

⁷⁴ Article 6(3) and (4), Article 8(6) and 7(b) EUMR.

⁷⁵ Article 8(7)(a) EUMR

and takeovers,⁷⁶ as they are characterized by the need for a rapid resolution. According to Article 76(a) of the CFI Rules of Procedure, the CFI “may, on application by the applicant or the defendant, after hearing the other parties and the Advocate General, decide, having regard to the particular urgency and the circumstances of the case to adjudicate under an expedited procedure”.

A decision granting the expedited procedure has two main procedural effects. First, the case is given priority over the other cases. Second, the written procedure is simplified and is generally shorter than in other cases, given that it is a single exchange of pleadings. Emphasis is placed on the oral procedure.

As the CFI may grant the application once “particular urgency” is demonstrated, the CFI enjoys a wide discretion as to whether or not to grant the expedited procedure. In practice, the EC Courts seem to exercise their discretion on a case-by-case basis, which makes it difficult to find consistent guidelines. According to the information Note of the CFI, in deciding whether to grant a request for expedited procedure treatment, the Court will have regard to the urgency of the case and the question as to whether – owing to the complexity and the volume of the pleadings lodged - the case lends itself to essentially oral argument. Merger cases are by their very nature complex cases involving substantial economic analysis and it is not clear how the CFI will exercise its discretion when looking at the complexity of a case. *Tetra Laval*⁷⁷ and *Schneider*⁷⁸ are cases that demonstrate that the CFI has been prepared to grant the expedited procedure in cases which have included complex economic analysis. However critics claim that the expedited procedure, which is a simplified procedure, may not be adequate in complex cases as applicants due to the simplified procedure may not be able to challenge a Commission decision on all matters.

As noted by the President of the CFI, “the grant of an application for a case to be decided under an expedited procedure lies within the discretion of the Court... and requires that account also be taken of other circumstances, including the impact which

⁷⁶ Information Note regarding the amendment of the Rules of procedure of the CFI with a view to expediting proceedings (‘the CFI Information Note’) (www.curia.ei.int).

⁷⁷ T-5/02, T-80/02 *Tetra Laval v Commission*.

⁷⁸ T-310/01, T-77-02 *Schneider v Commission*.

the grant will have on the length of the proceedings in other cases”.⁷⁹ As a result, the expedited procedure delays the treatment of all other cases before the CFI. Some commentators noted that, as a consequence, in the absence of a genuinely exceptional urgency, there is as a consequence a risk that the CFI may be prepared to dismiss applications if several cases being dealt with by way of the expedited procedure are already pending.⁸⁰ Critics of the expedited procedures point out that owing to their negative distributive effects on other cases, they should remain exceptional.⁸¹

The expedited procedure may provide an effective and speedy judicial review of merger decisions. However most critics emphasise that for the expedited procedure to be really effective, the CFI would need to be able to deliver judgments in a very short period of time, such as 4-5 months. It is noted that in most merger cases, an 8-9 month delay in Court might result in the failure of most commercial deals.

2.8 The Sony/BMG case

In *Impala v Commission*, the CFI annulled the Commission’s decision to clear the Sony BMG joint venture because the Commission’s analysis was imprecise, unsupported and indeed contradicted by other observations in the decision. The applicant, the International Music Publishers and Labels Association (Impala) (representing 2500 independent music production companies) who actively participated in the Commission investigation and participated in the hearing, brought a challenge against the Commission’s decision before the CFI.

Although it is not the first merger clearance decision to be annulled by the CFI, the case is unique because it is the first unconditional clearance decision to be annulled in whole.⁸² The case is also interesting because of the ruling’s impact on the Commissions merger procedure and third parties’ possibilities to challenge the authorisation decision.

⁷⁹ Order of 11 April 2003 in T-392/02 R Solvay Pharmaceuticals, para. 104.

⁸⁰ E.B.De la Serre, Accelerated and expedited procedures before the EC Courts: A review of the practice, p. 807.

⁸¹ E.B.De la Serre, Accelerated and expedited procedures before the EC Courts: A review of the practice, CMLR 43, 2006, p. 811.

The decision was appealed by the competitors of the merging parties and the Commission did not question Impala's standing before the CFI, possibly because the Community Courts have been generous in granting standing to this category of applicants. Some have argued that the Impala judgement may give further encouragement to third parties in merger cases to challenge Commission decisions.

The case appears to have an impact on the legal certainty of the merging parties. The case leads to the result that from the merging parties' perspective, there is now less certainty that a clearance decision will be permanent and less predictable as to the outcome of the case. Further, there might be more interested third parties who want to challenge the Commission decision and a higher risk that the annulment of the clearance decision may lead to parties having to modify or even undo a transaction which they have already closed.

The judgment may influence the Commission's merger procedure. The ruling may have the effect that the Commission will require even more information, evidence and documentation from the merging parties than it has to date in order to make an assessment and adopt a decision able to withstand scrutiny. This, in turn, may lead to an even more intensive and time consuming notification process in the EU than exists today. The amount of information that must be provided by the parties in a merging proceeding is already much greater than in most national merger control jurisdictions. At the same time, a greater amount of information required from the parties may result in greater opportunities for the parties to defend their conduct or proposed transactions, particularly against third party challenges.

Sony and BMG have re-applied for merger clearance from the Commission and appealed against the removal of clearance to the ECJ. In October 2007, the Commission decided to clear the merger to create SonyBMG as a result of the re-examination of the concentration after the Commission's first clearance decision was annulled by the CFI. Therefore it remains to be seen whether the appeal of the CFI's decision will be pursued given this positive outcome for the parties and whether Impala will lodge a second

⁸² See Case T-156/98, RJB Mining v Commission, Joined Cases C-68/94 & 30/95 France v Commission and T-114/02, Babyliiss v Commission.

appeal against this new decision. The outcome of the appeal is important not only for the parties concerned, but to the industry in general.

It can be speculated that the CFI's annulment decision remains important for the rights of third parties to appeal the Commission clearance decisions as the new decision was taken in the light of current market conditions, taking into account developments since 2004, including the increasing sales of online music.

3. RECENT DEVELOPMENTS IN EU LAW

3.1 Introduction

The recent case law shows that several developments have occurred in European law on the standing of third parties to bring annulment actions against decisions of the Commission in the merger field. It seems that the trend is towards the extension of possibilities of third parties to annul Commission decisions. Developments indicate that the Commission is more willing to grant *locus standi* to third parties. To summarise, it seems that the circle of third parties who may appeal decisions has been widened. Although the Commission has been strict in the interpretation of the concepts of direct and individual concern, it has been recently more generous in granting *locus standi* not only to major competitors but even to potential competitors and to third parties who are affected by the Commission decision. It also appears that there has been a development in the standard of judicial review whereby the CFI seems to be more prepared to review the Commission's economic assessment in merger cases. As mentioned, recent judgments fully demonstrate that the European Courts will not be shy in carrying out a thorough analysis of the merits of the case put to them no matter how complex the issues involved. The Impala case shows that the CFI is willing to scrutinise not only prohibition but even clearance decisions. These developments seem to increase the possibilities available to third parties to challenge merger decisions.

3.2 Implications

The extension of third parties' opportunities to challenge Commission decisions may lead to significant delays in investigation and appeal procedures and these delays may in turn introduce significant uncertainties to commercial decisions. It is a fact of business life that when a merger is wrongly prohibited by the Commission a judgment annulling the decision will rarely allow the deal to survive if it is delivered as much as two years after the lodging of the application. Recent scrutiny of clearance decisions by third parties has resulted in commercial uncertainties owing to the fact that an authorised concentration may be forced to be undone two to three years after the notification. As a consequence of recent developments, it appears that increase of third parties' right to appeal Commission decisions may lead to significant uncertainty for the merging parties as regards whether or not the original decision will stand or not, but also as regards the commercial stability as a whole.

3.3 Need for reform

Speedy resolution of disputes as mentioned above is particularly important in the field of mergers. The parties will be keen to obtain a final judgment of the case as quickly as possible so that they can proceed with their case. Few companies are able to keep the deal alive for the length of time that the CFI needs for the adjudication of the merger case. In clearance decisions in particular, the merging parties will need quick resolution to avoid having uncertainty hanging over a completed transaction for a prolonged period. Third party applicants appealing Commission decisions will also require speedy proceedings as they will usually be able to show that the negative effects of the merger are immediate. As the delay in appeal decisions is seen as one of the main obstacles to effective judicial review, the reform should deal with the question of how to speed up the appeal process. As one of the goals of EC law is to maintain competition on the common market and third parties' appeals play an important role in the achievement of this goal, it is not an option to narrow the third parties' opportunities to challenge Commission decisions.

3.4 Suggestions for reform

As mentioned, the expedited procedure was introduced to speed up resolution of disputes in the merger field. However, as it has negative distributive effects on other cases and as according to the commentators it should be used in limited circumstances; it does not mitigate the problem of the length of proceedings. Commentators claim that, in order to eliminate uncertainty in transaction the optimal time for the expedited procedure should be 4-5 months.⁸³ Expedited procedure does not allow for this period at present. It is suggested that to reduce the time that the procedure takes, it is necessary for the CFI to have available the appropriate resources. One solution would be to change aspects of the CFI's internal procedures, for example those proceedings intended to shorten the significant time lost owing to translations.

Apart from improving the appeals system, another focus of attention might be to amend the administrative system to ensure against an increased volume of merger cases reaching the appeal stage⁸⁴. The Impala decision serves as a useful example for merging parties of the important role that third parties are able to play in merger proceedings. Therefore the Commission may consider carrying out its proceedings in a more effective way. An option may be a greater use of "triangular meetings" where the Commission believes that it is preferable to hear the views of third parties at the administrative rather than appeal stage.⁸⁵ Introducing a more extensive administrative stage might be burdensome for the Commission, but if appeals by third parties can be avoided as a result, then it may lead to enhanced legal security of the parties.

According to the view of some commentators, another solution would be the creation of specialised judicial panels, which would remove from the CFI's jurisdiction a number of cases in other specific areas such as those relating to trade marks under Article 225 (a) EC might be one of the solutions. This would significantly alleviate the CFI's case load and would under this system enable CFI to use the expedited procedure in merger cases more frequently and more effectively. The Civil Service Tribunal has already

⁸³ Fountoukakos, *Judicial review and merger control: The CFI's expedited procedure*, p 12.

⁸⁴ J. Davies, R. Schlossberg, A. Mordaunt, *Judicial Review of Antitrust Agency Merger Clearance Decisions, Getting the Deal Through – merger control 2008*, p 8.

⁸⁵ Davies & Schlossberg, & Mordaunt, *Judicial Review of Antitrust Agency Merger Clearance Decisions, Getting the Deal Through – Merger Control 2008*, p 8.

been created. However, as it has been running for a very short time it is too early to draw any conclusions regarding its effectiveness.

Another solution could be to create specialised chambers for competition cases within the existing CFI.⁸⁶ In this case there would be some chambers with a focus on competition cases. The advantage of this system would be that, under the current system's rules, it would be relatively easy to implement. The disadvantage could be that chambers may be over or under-utilised depending on the workload of competition cases.

A more far-reaching solution, according to B. Vesterdorf, would be to establish a specialised competition Tribunal, which would have competence to hear appeals against the Commission's decisions in merger and antitrust cases.⁸⁷ Vesterdorf suggests that the appeals would then be the responsibility of the CFI and very exceptionally, of the ECJ. The fact that the judges will possess special knowledge and have considerable practical experience in the area of competition law would enable to shorten the proceedings and strengthen the quality of legal control. However, such a system would only shorten proceedings if both adequate resources were provided to the Competition tribunal and the rules of procedure were adapted to deal specifically with merger cases.

3.5 Right to be heard versus right to appeal

The extent to which third parties should enjoy the standing to challenge competition decisions - and in particular decisions in the merger field - has been subject for a debate. The subject of the debate concerned mainly the issue of whether it should be a link between the right to intervene before the authority and the right to seek judicial review of the authority's action. The question that arises is whether the concept of "direct and individual concern" of Article 230 EC can be equated to the concept of "sufficient interest" of Article 18(4) of the Regulation.

⁸⁶ E.B. De la Serre p. 815, B. Vesterdorf p. 487.

⁸⁷ Vesterdorf, Reflections on the Role of the Community Courts in the EC System of Competition Law, p. 487.

Article 18 is a provision which governs the hearing of the parties and third persons. Article 18(1) states that parties concerned are entitled to be heard. Article 18(4) states that in so far as the Commission or the competent authorities of the Member States find it necessary they may also hear natural or legal persons that show a sufficient interest. The provision means that third parties with a sufficient interest shall be entitled, upon application, to be heard. According to Article 11 of the Implementing Regulation, third parties with a sufficient interest include in particular members of the administrative or management bodies of the undertakings concerned or the recognized representatives of their employees and consumer associations, where the proposed concentration concerns products or services used by final consumers. Regarding the concept of a “sufficient interest”, the Court has not set a clear definition of the concept for the purposes of the ECMR. It seems that it is necessary to show an economic or legal interest, which may be detrimentally affected by the notified concentration.⁸⁸ According to Kerse’s view, a general interest in the clarification of the law may not be enough. Something more defined and related to the subject of the case may be needed.⁸⁹ It appears that the Commission has discretion to decide whether to acknowledge that the person has a right to be heard or not and in practice, the Commission acts on its own initiative. According to Kerse, the question of what is sufficient interest is academic as, in practice, the Commission may hear third parties if it considers it necessary to do so and is unlikely to refuse to hear any person who wishes to give relevant information or assistance.⁹⁰

It seems that the definition of the concept “sufficient interest” is significantly wider than the concept of “direct and individual concern”. In contrast to “sufficient interest”, the concept of “direct and individual concern” has been defined by the Community courts and appears to be narrower. The reason of the wide discretion of the Commission to hear the third parties may be the wish of the Commission to conduct the complete investigations and concern of the collection of the necessary info for that purpose. Third parties may sufficiently contribute to the Commission’s investigation process by providing information and comments.

⁸⁸ Kerse, EC Antitrust Procedure, p. 194.

⁸⁹ See the position of the CCBE IN case 155/79 A.M. & S Europe Ltd v Commission [1982] E.C.R. 1575.

⁹⁰ Kerse, EC Antitrust Procedure, p. 194.

The Court has recognized that a person who has a sufficient interest in competition administrative proceedings may be entitled as a person directly and individually concerned to appeal the Commission's decision and institute proceedings before the Community courts under Article 230 (4). In *Pierre* cases, which were mentioned above, the CFI found that the employee representative institutions and trade unions were directly and individually concerned particularly because they were expressly mentioned in Article 18(4). The CFI stated that "it must be noted that as a general rule where a regulation gives procedural rights to third parties, they must have a remedy available for the protection of their legitimate interests [...] On this point, it must be stated in particular that the right of specified third parties to be properly heard, on application by them, during the administrative procedure can in principle be given effect to by the Community judicature only at the stage of review of the lawfulness of the Commission's final decision".⁹¹

In *Deutscher Komponistenverband*, Advocate General expressed his opinion about the concepts of "direct and individual concern" and of "sufficient interest": "it is clear that these two proceedings are governed by different criteria: with regard to the hearing it is sufficient to establish an interest, whereas with regard to bringing an action it is necessary that the contested decision should be of direct and individual concern to the applicant".⁹²

There are different views regarding the question of whether the concept of direct and individual concern can be equated to the concept of sufficient interest. One of the arguments for merging these concepts is that it would serve in the interest of both effective individual protection and of legal certainty.⁹³ On the other hand there is an opinion that the incorporation of the concept of direct and individual concern under Article 230(4) EC into the merger proceedings would cause serious delays and undermine the effectiveness of the proceedings if all potentially interested third parties with sufficient interest were entitled to bring proceedings.⁹⁴ The need for speed is

⁹¹ Case T-96/92 *CCE de la Societe Generale des Grandes Sources and Others v Commission*, para. 46, Case T-12/93 *CCE Vittel and Others v Commission*, para. 59.

⁹² Case C-8/71 *deutscher Komponistenverband* 1971 ECR 705, opinion in the context of Regulation 17, whose principles apply equally to the ECMR.

⁹³ Nehl, *Principles of Administrative Procedure in EC Law*, p. 95.

⁹⁴ Kekelekis, *The EC Merger Control regulation: Rights of Defence*, pp. 21-22.

particularly important in merger proceedings as the Commission and the Courts are required to adopt their decisions under stringent time limits. It is also important to stress, although the Commission's investigation procedure is not the subject of this work, that besides the impact on the procedure of the appeal of the Commission's decision, the incorporation of the concept of "direct and individual concern" into the merger proceedings would cause significant delays to Commission's investigations as the Commission would be required to add an additional step into its assessment procedure.⁹⁵

It should be noted, that third parties have their own interest in seeing that a concentration is either blocked or implemented in a revised manner and the Commission has been criticized for taking third parties' views without further questioning.

4. SWEDISH LAW

4.1 Introduction

4.1.1 The scheme of Swedish merger control

Swedish rules on merger control are set out in the (1993:20) Swedish Competition Act (Competition Act) and form a legal system similar to that of the ECMR. Theoretically, there are no formal rules that require convergence between Swedish and Community competition law in merger field.⁹⁶ However, according to preparatory work, the intention of the Swedish legislators was to create substantive rules in the merger field reflecting Community rules. Thus, in order to interpret Swedish substantive merger rules, guidance may be found in the case law of the ECJ.⁹⁷

However, the present Swedish substantial merger rules differ from EC rules in respect of the substantive test which is used to assess whether a concentration impedes the

⁹⁵ Kekelelis, *The EC Merger Control regulation: Rights of Defence*, p. 21.

⁹⁶ Compare art 3 in Reg 1/2003.

⁹⁷ Prop 1998/99:144, p. 44.

competition to such an extent that it should be prohibited. Therefore it is unclear to which extent interpreting Swedish law guidance may be found in EC law. According to the Competition Act a concentration may be prohibited if it creates or strengthens a dominant position as a result of which competition would be significantly impeded in the Swedish market or a substantial part of it. Thus, the creation or strengthening of a dominant position is a prerequisite for a concentration to be prohibited according to the Swedish rules. The test is defined as the “dominance” test and is modelled on the EC dominance test which was applicable under the original Merger Regulation.⁹⁸ The substantive test under the ECMR is the “substantial lessening of competition” (“SLC”) test, according to which it should be assessed whether a concentration will significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.⁹⁹ The SLC test does not require the creation or strengthening of a dominant position. The wording establishes that a merger may be prohibited even if it does not create or strengthen a dominant position if a significant impediment to effective competition is established. However, by referring to the creation of or strengthening of a dominant position, the ECMR preserves the previous decisional practice and case law of the ECJ.¹⁰⁰ The Commission takes the view that “it is expected that most cases of incompatibility of a concentration with the common market will continue to be based upon a finding of dominance.¹⁰¹ Therefore the guidance may be found in the case law of the ECJ for the interpretation of current Swedish rules. The Swedish preparatory works confirm that there are no significant practical differences between the dominance and the SCL tests, but in order to bring Swedish substantive test into conformity with EC test it has been suggested to replace the dominance test with the SLC test¹⁰²

As regards Swedish procedural rules, the EC law does not contain any rules which concern the harmonization of national procedural rules. Swedish procedural rules are based on Swedish tradition. In order to interpret procedural rules guidance is found in Swedish preparatory work and legal doctrine.¹⁰³ The recent Government Official

⁹⁸ Article 2(3) Council Regulation (EEC) 4064/89.

⁹⁹ Article 2(3) ECMR.

¹⁰⁰ Jones & Surfin, EC Competition Law, p. 915.

¹⁰¹ Horizontal Merger Guidelines, para. 4.

¹⁰² SOU 2006:99 p. 410.

¹⁰³ SOU 2000:4 p. 83 f; Wetter, Konkurrensrätt p. 891.

Reports has stressed that the Competition Act should continue to reflect Swedish legal culture with regard to procedures at authorities and in the courts.¹⁰⁴

As the merger rules are exclusive, they are the only rules which are applicable to mergers.¹⁰⁵ This means that when the concentration does not fall under the notification rules of the Competition Act, it cannot be examined under the Sections 6 and 19 of the Competition Act either.

The Swedish merger control system requires mandatory notification where jurisdictional thresholds are met.¹⁰⁶ There are no time limits by which the parties must notify the merger. In principle, it is possible to implement a concentration before it is approved by the Swedish Competition Authority (SCA). However, in practice, parties are normally subjected to a standstill obligation once they notify. According to section 42(2) a prohibition or obligation may not, however, be imposed more than two years after a concentration has occurred. There are no penalties for failure to notify or delay in notifying. However, if a party fails to make a mandatory notification, the SCA can issue an order for notification, subject to civil fines.

The SCA is responsible for merger control and has the authority to clear mergers with or without conditions. Within twenty-five working days of receipt of a complete notification, the SCA has to decide whether to initiate an in-depth investigation (Phase II investigation) in respect of the concentration. If not, the concentration is deemed cleared. During this period, a standstill obligation prohibits any action from the parties towards completion of the concentration.¹⁰⁷ If the parties breach the standstill obligation the SCA can order them to stop completion, and if necessary, impose a fine. If requested by the SCA, the Stockholm District Court can prohibit the parties and other participants from taking any measure to put the concentration into effect until a final decision has been made.

¹⁰⁴ SOU 2006:99 p. 34.

¹⁰⁵ Prop 1998/99:144 pp. 59-60.

¹⁰⁶ Section 37, the Swedish Competition Act.

¹⁰⁷ Section 38, the Swedish Competition Act.

The prohibition of concentrations and the imposition of fines, fall within the competence of the Stockholm District Court on the request of the SCA. The decision of the Stockholm District Court may be appealed to the Market Court. Thus, only the Stockholm District Court and the Market Court (on appeal) are empowered to block concentrations.

4.1.2 Relevant legislation

Judicial review of the SCA's decisions is governed by the (1986:223) Administrative Procedure Act and the Competition Act. The former contains general rules on appeals of administrative decisions. According to section 3 of the Administrative Procedure Act, where an act or an ordinance contains a provision that is inconsistent with this Act, that provision shall prevail. This means that in case there are special provisions that govern the question of appeal of the SCA, these provisions shall apply instead of the provisions in the Administrative Procedure Act. The Competition Act contains special provisions (sections 60 and 62) which govern appeals against the decisions taken by the Competition Authority under the provisions of the Competition Act. Section 63 concerns appeals against judgments and decisions of the Stockholm District Court.

As the rules of appeal in the Competition Act are *lex specialis* of the Administrative Procedure Act, first the general rules of appeal of administrative decisions will be briefly examined.

4.1.3 Objectives of the Swedish Competition Act

The purpose of the Competition Act is to eliminate and counteract obstacles to effective competition in the production of and trade in goods and services¹⁰⁸. According to the preparatory work, the ultimate aim of the legislation is to promote growth and efficiency in the Swedish market.¹⁰⁹

¹⁰⁸ Section 1 SCA.

¹⁰⁹ Prop 1992/93:56 p. 15.

4.2 Appeal according to the Administrative Procedure Act

4.2.1 In general

The right to appeal an administrative decision is not clearly defined in Swedish law. The general rule is stated in section 22 of the Administrative Procedure Act. The content of the section corresponds with section 33(2) of the (1971:291) Administrative Court Procedure Act.¹¹⁰ According to section 22 a person whom the decision concerns may appeal against it, provided that the decision affects him adversely and is subject to appeal. Thus, a person is entitled to appeal against an administrative decision if the decision is subject to appeal and the decision concerns the person and affects him adversely. The wording of the provision indicates that the question whether the decision is subject to appeal has to be answered before the question who has a right to appeal.¹¹¹

4.2.2 Decisions subject to appeal

There are no general rules on determination whether the decision is subject to appeal or not. The question whether the decision is challengeable or not is governed by special statutes and in the absence of special regulations by general principles established in the case law.¹¹² In order for the decision to be challengeable it has firstly to fulfil certain formal requirements to constitute the decision. Secondly, the decision has to produce certain not insignificant effects on the parties and others.¹¹³ The requirement is that the decision should produce certain minimum effects.¹¹⁴ This requirement is generally fulfilled where the decision is legally binding. However, even the fact that the decision produces negative personal or financial effects on the person affected by the decision may be enough.¹¹⁵

¹¹⁰ Wennergren, Förvaltningsprocesslagen – en kommentar, p. 331.

¹¹¹ Hellners & Malmqvist, Förvaltningslagen med kommentar, p. 245.

¹¹² Hellners & Malmqvist, Förvaltningslagen med kommentar, p. 247.

¹¹³ Hellners & Malmqvist, Förvaltningslagen med kommentar, p. 250.

¹¹⁴ Strömberg, Allmän förvaltningsrätt, p. 188.

¹¹⁵ Strömberg, Allmän förvaltningsrätt, p. 188.

4.2.3 Locus standi

The circle of those who are entitled to bring an appeal is not clearly defined in section 22. The provision states that a person whom a decision concerns, provided that the decision affects him adversely may challenge the decision. According to the case law, a person who is party to the authority's proceedings has a right to appeal provided that he is affected adversely by the decision. The person who makes a complaint to an authority against another person as a rule has no right to appeal against authority's decision.¹¹⁶ According to the general principles of administrative procedure even persons who are not parties to the proceedings may be entitled to bring an appeal where the decision affects the person's interests. Thus, whether a person has a right to appeal or not depends on the effects of the decision. According to the legal doctrine all persons with significant interests should be given the opportunity to appeal the decision. However not every interest can be a ground for appeal. ¹¹⁷ Wennegren emphasizes that the Supreme Administrative Court stating that a person has no right to appeal sometimes uses the definition as "the decision does not affect the person to such an extent that he has right to appeal". The definition means that the person is affected by the decision to some extent, but it is not enough to grant a right of appeal. Mere inconvenience that the decision may lead to is not enough as bad treatment in general. ¹¹⁸ According to doctrine, a too wide circle of parties who are entitled to initiate proceedings would lead to practical problems as it would be difficult to determine when the decision becomes legal.¹¹⁹ The commentators stress that to decide whether a person has *locus standi* can be a complicated task, as on the one hand the authority has to give an opportunity to all parties with significant interests to review the decision and on the other hand the authority should not allow the circle of parties entitled to appeal to be too wide. In order to limit the circle of parties who may bring an appeal, it is generally required that the interest is recognized in the legal order. ¹²⁰ The recognition may occur through the rules which state that the person should be heard before making the decision or that some

¹¹⁶ RÅ 1977 ref. 115, Wetter p. 878.

¹¹⁷ Hellners & Malmqvist, Förvaltningslagen med kommentar, p. 260 (In this context, significant means beaktansvärd).

¹¹⁸ Wennegren, p. 333.

¹¹⁹ Strömberg, Allmän förvaltningsrätt, p. 192, SOU 2006:99 p. 453.

¹²⁰ Strömberg, Allmän förvaltningsrätt p. 192, Ragnemalm p. 113.

interests should be taken into account when making a decision. ¹²¹ In some cases there are no express rules requiring taking into consideration particular interest, but it can be apparent from the preparatory work.

According to the case law, the right to appeal is not limited to the addressees of the decision. Even the persons who are not the addressees of the decision has been recognized the right to appeal against the decision which affected their interests. Even positive decisions which affect in a legal order recognized interest may be challenged by a third party. For example, a decision of the Local Building Committee granting a building permit may be challenged by the owner or tenants of a property located in a neighbourhood in case where the interests of these persons are affected. ¹²² In RÅ 1992:81 the Supreme Administrative Court held that the owners of the premises situated 550 m from the planned wind-power stations were entitled to challenge the decision of the Local Building Committee, as it affected the owners of the premises, particularly by to the noise and the position of the power stations.

Tenants, although not parties to the proceedings, where affected negatively by the decision were found to be entitled to appeal authority's decision which was addressed to another party in several cases.¹²³ Even the competitors have been entitled to appeal administrative decisions in cases where there were legal rules stipulating that competitors should be heard or where it followed from the statute or was in the nature of things that the account should be taken to the consequences that the decision may have for the competitors.¹²⁴ The position of the competitors was examined in RÅ 1994:30 which concerned the appeal of the decision granting the permission for radio transmission. The decision granted permission to one applicant but was appealed by another applicant. In this case the Supreme Administrative Court found that the interests of the applicants were affected to such an extent that they had right to appeal. The Court's motivation of its decision is not clear. According to the commentators, the case shows that the competitors have right to appeal the decisions particularly in case where

¹²¹ Strömberg, Allmän förvaltningsrätt p. 192.

¹²² RÅ 1976 ref. 112, RÅ 1992 ref. 81, Hellners & Malmqvist, pp. 268-269, Strömberg, Allmän förvaltningsrätt, p. 193.

¹²³ RÅ 1963 ref. 20, RÅ 1946 ref. 50.

¹²⁴ SOU 2006:99 p. 454, RÅ 1994 ref. 30 (the decision affected the applicants' interest to such an extent that they had right to appeal).

the special legislation states that the account should be taken to the impact of the decision on the competitors.¹²⁵ The parties to the agreement have been granted right to appeal where the decision affected them.¹²⁶ However, interest organizations have on a several occasions been found not to have right to appeal.¹²⁷

Thus, the case law shows that according to the Administrative Procedure Act even third parties where negatively affected by the authority's decision to a certain extent have right to appeal.

4.2.4 Adverse effect of the decision

As mentioned, another requirement to appeal the decision is that the decision produces negative effects on the parties or others. According to the case law this requirement is not treated as a separate requirement and is fulfilled where it has been established that the party has an interest which entails the right to appeal.¹²⁸

4.3 Decisions by the Swedish Competition Authority

4.3.1 Challengeable acts

According to section 60 of the Competition Act, decisions taken by the Competition Authority under the Competition Act may be challenged only in the cases specified in that provision. The section which concerns substantial decisions in the merger field is section 60(1)(2). The provision states that an appeal may be brought against the decisions that issue a prohibition or an obligation to the parties to a concentration and other participants in order to ensure compliance with the prohibition to put the concentration into effect during the SCA's 25 working days special investigation

¹²⁵ Wetter p. 978, Hellners & Malmqvist pp. 268-269, Wennergren, Förvaltningsprocess, pp. 264-277.

¹²⁶ RÅ 1982 ref. 2:27, a seller has been given right to appeal against the decision not to grant the permit to acquire addressed to the buyer.

¹²⁷ RÅ1976 ref. 50, Wetter, p. 879, Hellners & Malmqvist, p. 268-269.

¹²⁸ Hellners & Makqvist, Förvaltningslagen med kommentar, p. 280.

pursuant to section 38(2). According to section 60(1), this type of decisions may be appealed to the Market Court.

According to section 62, decisions taken by the SCA – other than those stated in section 60 under the provisions of the Competition Act - are not challengeable. Principally, the SCA's failure to act under the Competition Act is not subject to appeal. Examples of non-challengeable decisions include the decision to request a party to a concentration to notify the concentration pursuant to section 37(2), the decision to start an investigation pursuant to section 38 and the decision to request the Stockholm District Court to prohibit a concentration. According to sections 60 and 62, the decision of the Swedish Competition Authority to clear the concentration is not challengeable. This rule seems to represent the main difference between Swedish competition law and EU laws in the merger field.

However, according to the section 26 of the Administrative Procedure Act, the SCA may correct its own decision if it contains manifest error in writing, calculation or any other similar oversight by the SCA or someone else.¹²⁹ Before a correction takes place the SCA shall give the parties an opportunity to express themselves on the issue, provided that the matter concerns the exercise of public power in relation to someone and the measure is not unnecessary. This provision is applicable only in respect of typographical errors. A reconsideration of substantial errors is possible according to section 27 of the Administration Procedure Act, which states that the SCA because of new circumstances or other reasons shall correct a manifestly wrong decision, provided that this can take place rapidly and simply and without any detriment to the party. As stated in section 27(2) the duty shall not apply if the authority has sent the case-documents to a superior instance or if there are other special reasons against the authority altering the decision. Where all the requirements of section 27 are fulfilled the SCA has an obligation to correct ex officio.¹³⁰ It seems that the role of section 27 in the context of mergers is not so significant. Basically, the application of section 27 is possible mainly to correct negative decisions into positive.¹³¹ As the SCA is only able to clear a merger and one of the requirements to correct a decision is that it should be

¹²⁹ Wetter, p. 865.

¹³⁰ Strömberg, Allmän Förvaltningsrätt, p. 162.

¹³¹ Strömberg, Allmän Förvaltningsrätt, p. 162.

without detriment to the party, it seems not possible to correct clearance decision pursuant to section 27. To sum up, according to the current rules, it appears that the SCA's clearance decisions will stand, as there is no opportunity to challenge positive decisions or to reconsider them to the detriment to the party.

However, there is a limited possibility to review a decision taken by the Stockholm District Court or the Market Court not to take any action with respect to a concentration, i.e. in situations where parties to a concentration or other participants have provided incorrect information about matters which are of material importance in making the decision.¹³²

4.3.2 Locus standi

As mentioned, the only decisions that the SCA takes under the Competition Act on the substance of the case in the merger field are decisions pursuant to section 60(1)(2), i.e. an appeal against the decisions that issue a prohibition or an obligation to the parties to a concentration and other participants in order to ensure compliance with the prohibition to put the concentration into effect during the SCA's 25 working days special investigation pursuant to section 38(2). Section 60(2) does not specify the circle of parties who may bring an appeal of this type of decisions and in the absence of specific regulations in the Competition Act the rules of the Administrative Procedure Act applies. As examined above, according to section 22 of the Administrative Procedure Act the decision may be appealed by a person whom the decision concerns provided that the decision affects him.

As mentioned, according to the case law right to appeal is not limited only to the parties of the proceedings. Third parties who are not addresses of the decision have been granted right to appeal where they were adversely affected by the decision.

¹³² Section 43(2), Competition Act.

4.4 Decisions by the Stockholm District Court

4.4.1 Introduction

As mentioned above, the decision to prohibit a concentration falls within the competence of the Stockholm District Court upon the request of the SCA and may be appealed to the Market Court (MC). Actions before the Stockholm District Court may only be brought following a decision by the SCA's to carry out a special investigation.¹³³ In other words, where the SCA does not institute the investigation, there is no opportunity for the Stockholm District Court to block the concentration.¹³⁴ According to section 64 of the Competition Act, provisions of the (1942:740) Swedish Code of Judicial Procedure concerning disputes where settlement out of court is not permitted shall be applicable upon appeal of the decisions of Stockholm District Court.

4.4.2 Challengeable acts

Section 63 states that the decisions by the Stockholm District Court may be appealed to the Market Court. The section provides the list of the decisions which may be challenged. The list seems not to be exhaustive as the Market Court has accepted appeal of the Stockholm City Court's decision that was not mentioned in section 63.¹³⁵ As regards the substantial decisions in the merger field, the decision of the prohibition of a concentration pursuant to section 34(a) and the decision that requires a party to a concentration to divest an undertaking or a part of an undertaking or to take some other measure having favourable effect on competition pursuant to section 36 are challengeable acts according to section 63. Even a decision by the Stockholm District Court not to take any action with respect to a concentration where a party to a concentration or other participants have provided incorrect information about matters which are of material importance in making the decision is challengeable¹³⁶. As it was mentioned above, the rules of the Swedish Code of Judicial Procedure are applicable on the appeal of the above named decisions.

¹³³ Section 39(1), Competition Act.

¹³⁴ Prop 1992/93 :56 p. 103.

¹³⁵ Å 8-151-96, posten Sverige AB/KKV (1996-12-03), Wetter, p. 880.

4.4.3 Locus Standi

According to Chapter 11 section 1 of the Swedish Code of Judicial Procedure, any person may be a party to litigation. As regards the substantial decisions in the merger field, only the SCA may initiate the proceedings in the Stockholm District Court. The opponent is an undertaking or undertakings which are subject to the SCA's claim. The right of appeal of merger decisions taken by the Stockholm District Court is governed by general principles of Swedish procedural law. According to the general principle, only the parties to the proceedings in the district court have the right to appeal the decision of the court. The outcome of the rules is that third parties, particularly competitors, have no standing to appeal the substantial merger decisions taken by the Stockholm District Court.

4.4.4 Outcome of appeal

The consequence of a decision to prohibit a concentration is that a transaction which constitutes part of a concentration shall be void.¹³⁷ The nullity applies only from the day on which the judgment prohibiting the concentration takes effect¹³⁸.

4.4.5 Time limits

A decision of the Stockholm District Court can be appealed by the parties to the decision to the Market Court within three weeks from the date when the appellant was notified of the decision.

¹³⁶ Section 43, Competition Act.

¹³⁷ Section 35, Competition Act.

¹³⁸ Prop 1992/93:56 p. 101, Prop 1998/99:144, p. 90.

4.4.6 Timing

According to section 42 (3) of the Swedish Competition Act if an appeal is made against the judgment of the Stockholm City Court, the Market Court shall make a ruling within three months of expiry of the period for appeal.

4.4.7 Principle to apply less extensive obligations

The prohibition of the concentration shall be used as a last resort. If there are other less extensive measures sufficient to eliminate the adverse effects of a concentration, these measures should be preferred.¹³⁹ Section 36(2) expressly states that the measure may not be more extensive than is required to eliminate the harmful effects of a restriction on competition. In other words, it should be proportionate to the competition problem. This rule is applicable even in cases where the Court in principle has competence to prohibit the concentration. In this respect, Swedish rules differ from the Community rules. The ECMR does not contain a correspondence to the section 36 provision. The Commission has no obligation to apply the less radical measure in situations where the less radical measure is enough to restore the competition. According to ECMR the Commission may, as mentioned above, either clear or prohibit the concentration. The clearance decision may be with or without conditions; however the difference is that the clearance decision with conditions may be imposed only if the parties make voluntary commitments. As stated in Recital 30 of the ECMR, the Commission shall take into account the fact that the commitment should be proportionate to the competition problem and shall totally eliminate it.

5. DIFFERENCES BETWEEN EU AND SWEDISH LAW

5.1 In general

As it was mentioned above, Community and Swedish competition law in the merger field is not harmonized. As a result, several differences between national and EU law

¹³⁹ Prop 1992/93:56 p. 46.

regarding the question of a third party's right to appeal merger decisions remain. The main differences are outlined in the sections below but can be summarized as follows.

The systems of court hierarchy in the two legal systems differ. In the EU the merger control system is administrative, whereas in Sweden it is prosecutorial.

The main difference between EU law and Swedish law is that clearance decisions under Swedish law are not challengeable. According to EC law third parties who establish that they are directly and individually concerned by the decision may challenge the decision. According to Swedish law, such clearance decisions may not be appealed.

The admissibility of third parties to bring the proceedings against prohibition decisions under Swedish law is significantly more limited than under the Community law. According to Swedish law only parties to the SCA's claim have *locus standi*, which means that competitors and suppliers are unable to challenge the prohibition decision. According to EC law, the third parties that are directly and individually concerned have a right to appeal the prohibition decision and it appears that, competitors in particular have good opportunities to challenge the Commission's decision.

5.2 Administrative versus prosecutorial control system

In the EU the merger control system is administrative, where the Commission acts as investigator and decision-maker and where all decisions, both positive and negative, taken by the Commission are subject to judicial review. Commission decisions may be appealed to the CFI and on points of law to the ECJ. This feature clearly distinguishes EC merger control from a prosecutorial system, such as it is in place in Sweden, where the Competition Authority investigates a case and decides whether or not to initiate litigation in the Court, whilst only the Courts have jurisdiction to block a transaction. In contrast to the EU, the Swedish Competition Authority is entitled only to authorize concentrations, with or without conditions, whereas the power to prohibit concentrations has only the Stockholm District Court as a first instance empowered to block concentrations. Administrative decisions of the SCA can be appealed to the

Market Court without further possibility of appeal. The Stockholm District Court decisions can be appealed to the Market Court as the final instance.

The systems are clearly different and both have its positive and negative sides. The respective advantages and disadvantages of administrative and prosecutorial systems of merger scrutiny have been discussed as a result of the three CFI decisions overturning Commission decisions prohibiting mergers.¹⁴⁰ The main advantage of a prosecutorial system is generally seen in that a separation between the roles of investigator and decision maker increases objectivity of the process and forces the competition agency to thoroughly check whether it has a case that it can successfully defend in Court. On the other hand, an administrative system such as in the EU, where both positive and negative decisions are subject to appeal, is likely to provide a higher degree of transparency and legal certainty of the overall application of the relevant substantive rules.¹⁴¹

5.3 Appeal of positive decisions

Swedish law draws a distinction between clearance and prohibition decisions and the respective rights of third parties to appeal these decisions. The rules are governed by the general principle of Swedish administrative procedure, that positive decisions are not challengeable neither by addressees of decisions nor by third parties. The rationale behind this rule is the idea of maintaining the legal certainty for individuals. An individual should be able to know that the authority will not change its decision and that they can act in accordance with this decision. According to Swedish law there is only a very limited opportunity to review a positive decision of administrative authority, namely where the parties provides incorrect information about matters which are of material importance in making the decision. The approach chosen in Swedish law may be questioned. Theoretically it is possible that the authority is mistaken during taking its decision and that this in its turn leads to an incorrect decision. In this case the question

¹⁴⁰ T-342/99 *Airtours v Commission*, T-310/01 *Schneider Electric v Commission*, T-5/02 *Tetra Laval v Commission*.

¹⁴¹ EU Competition Law, Mergers and Acquisitions, p. 489.

is whether it is justified that in order to maintain legal certainty of an individual, the incorrect decision should stand without any opportunity of appeal.

There is no explanation in the preparatory work regarding the rule that a merger clearance decision is not challengeable. The governmental proposal to reform the Competition Act is silent on this point. To explain the motive behind the prohibition of appeals of the SCA's clearance decision guidance may be taken in a government proposal on the appeal of the administrative authorities' decision.¹⁴² As summarized in this proposal, there are varied reasons why some administrative decisions may not be challenged¹⁴³, namely that in some cases the decision does not have a legal effect to an extent that it justifies the appeal of the decision. In other cases the purpose is to speed up the procedure and this is achieved by the allowing the appeal in only one court instance. It has also been stated that in some situations there is lack of a more appropriate higher court able to carry on the assessment that the decision requires.

An explanation of a different approach adopted under Swedish and EC law regarding the challenge of clearance decisions, might be that the objective of the EC law is to ensure that the Community law is observed. As even the positive decisions may be appealed, it seems that under the Community law the objective of ensuring that competition is not distorted is given priority over the legal security of merging parties. It can be argued that the rules which give third parties, such as competitors, a right to appeal a clearance decision facilitate the achievement the objective of ensuring that competition on the internal market is not distorted. Third parties may have an interest to oppose the formation of the concentration which may lead to anti-competitive effects and different points of view and objections which may influence the outcome of merger decision.

5.4 Admissibility of third parties

According to EC law, third parties may challenge a decision which is addressed to somebody else if it is of direct and individual concern to them. The direct and individual

¹⁴² Prop 1997/98:101 p. 49.

concern requirement applies equally to clearance and prohibition decisions. Thus, the standing of third party to bring proceedings against a decision which is not addressed to him will turn on the question of direct and individual concern. This rule leaves much to the discretion of the Court. The case law is evidence to the way in which interpretation of the direct and individual concern requirement has evolved significantly as the Community has developed. A good example of the development of interpretation is the case-law concerning admissibility of competitors. The cases show that whereas previously only competitors to merging parties could challenge the decision, presently even competitors acting on neighbouring markets and undertakings affected by the conditions of the decision may appeal. It seems that the standing of third parties depends on the immediacy of the effects that the decision places upon them.

It appears that the Community Courts are guided in the interpretation of the legal and individual concern criteria by the objective to achieve the aims of the Treaty. For the achievement of the aims of the Treaty, the objective of instituting a system ensuring that competition within the internal market is not distorted should be followed.¹⁴⁴ The Court has expressly stated that the conditions of admissibility of third parties should not be interpreted restrictively. In *Plaumann v Commission* the ECJ said in relation to Art 230 that “provisions... regarding the right of interested parties to bring an action must not be interpreted restrictively”. In *ERTA case*¹⁴⁵ the Court observed that the objective of the action for annulment was to ensure that the law was observed in the interpretation and application of the Treaty. The Court said that it would be inconsistent with that objective to interpret the conditions under which the action is admissible restrictively. It has been suggested that the aims and objectives of the Treaty influence the interpretation of the substantive law to a significant extent¹⁴⁶.

According to Swedish law, a party who has no interest in a case cannot institute proceedings against a decision prohibiting a concentration. Only the parties to the proceedings may challenge the decision. The outcome of this restrictive approach is that competitors and suppliers and other interested third parties have no right to appeal a

¹⁴³ Prop 1997/98:101 pp. 50-51.

¹⁴⁴ Article 3(1)(g) EC Treaty

¹⁴⁵ Case 22/70, *Commission v Council*, paras. 40-41. The case is relevant as comments relate the Article 230.

¹⁴⁶ Andersson, *Rättsskyddsprincipen*, pp. 282-288.

decision which prohibits a concentration. As a consequence, third parties are inadmissible to annul decisions of the SCA, neither clearance decisions, as mentioned in the section above, nor prohibition decisions. The result of such rules is that third parties are not able to obtain judicial review of merger decisions.

The strict approach taken in Swedish law may be questioned on the grounds that the objective of the Competition Act might not be observed. The objective of the Swedish Competition Act is - as stated in section 1 - to eliminate and counteract the obstacles to effective competition in the field of the production of and trade in goods, services and other products. The question is whether this objective is attained by rules which enable only the parties to the proceedings in the District Court to challenge a prohibition decision. Another thing which may be worth mentioning is that the SCA's decision addressed to other undertakings may cause the third parties, such as competitors, disadvantage. The decision may affect the competitor's right to free economic activity in the same manner as the decision affects the addressees of the decision, therefore third parties may have particular interest to challenge SCA's decision. It can be argued that participation in proceedings before the SCA is not sufficient to protect the interests of third parties. As a consequence of the order according to which annulment actions by third parties are inadmissible, third parties are never able to obtain judicial review of the SCA's decisions and this order may be found unsatisfactory as regards the effectiveness of judicial protection.

On the other hand it should be noted that aims of EC and Swedish law differ, which may influence the rules regarding the appeals of third parties. In the Swedish preparatory works it was noted that when applying competition rules an account should be taken of the differences in the aims of the legal systems.¹⁴⁷ Where one of the aims of EC law is creation and strengthening of the internal market and elimination of the trade obstacles on the internal market, Swedish law seems to lack this aim. Particular account should be taken of the special features and the size of the Swedish market, namely the fact that Sweden is remotely located from the central parts of Europe and is relatively sparsely populated area.¹⁴⁸ Giving the fact that market conditions differ, it may be argued that the competition is better preserved where the clearance decision will stand.

¹⁴⁷ Prop 1992/93:56 p. 20.

The situation where an authorized concentration have to be dissolved as a result of a successful appeal, may lead to negative effects on the structure of such a small market as Sweden and in its turn on the competition in Sweden in a whole. On the other hand, in the subsequent preparatory work it was stressed that the national competition law should as closely as possible reflect EC competition law even in the areas where only competition national law applies (where there are no effects on trade between the states.¹⁴⁹ According to the commentators, it is uncertain whether the discussed differences in the aims of the legal systems and the conditions of markets may impact the interpretation of Swedish rules.¹⁵⁰

5.5 Motivation of merger decisions

The ECMR does not place an explicit obligation of reasonableness placed upon the Commission when adopting its merger decisions. This principle constitutes a general principle of Community law as stated in Article 235 EC, which states that “regulations, directives and decisions adopted jointly by the European Parliament and the Council, and such acts adopted by the Council or the Commission, shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty”. According to the commentators, Community policy-making is a good deal more transparent than the national ones, partly owing to the duty contained within Article 235 EC.¹⁵¹ The Commission is under the duty to respect the principle of reasonableness. Failure to do so constitutes an infringement of the Treaty and provides a reason for appeal. According to EC law motivation rules applies equally to positive and negative decisions as both kinds of decisions are challengeable.

Under Swedish law according to section 20 of the Administrative Procedure Act, there is a requirement that an authority’s decision shall contain the reasons which settled the outcome. However, as stated in section 20(1), the reasons for the decision may be

¹⁴⁸ Prop 1992/93:56 p. 20.

¹⁴⁹ Prop 2003/04:80, p. 50.

¹⁵⁰ Wetter, *Konkurrensrätt*, p. 17.

¹⁵¹ Craig & De Burca, *EC Law: Text, Cases and Materials*, p 108.

omitted wholly or in part where the decision is not adverse to any party or where for some other reason it is obviously unnecessary to state the reasons. Thus, Swedish rules regarding motivation of decisions mean that the authority may not provide reasons for its clearance decision as it is not adverse to any party. According to section 20 of the Administrative Procedure Act, if the reasons for the decision are not given in the decision itself, the authority should at the request of a party set forth the reasons later. There is therefore a limitation of the obligation to provide reasons. The authority should provide reasons later only if it is possible. It is clear that the parties are less interested in the reasons for a positive decision and it is unlikely that they will request for the reasons. This means that in practice positive decisions do not contain motivation.

It is clear that there is no need to motivate a positive decision as it is appealable neither by the parties to the concentrations nor by third parties. However, it might be questioned whether the objective of legal certainty is obtained by the order where the decision does not contain the reasons for the decision. It is possible to argue, that Swedish order leads to the result that owing to the lack of the motivation of decisions there is no opportunity to evaluate the SCA's assessment and to analyze the correctness of the SCA's decision.

It seems that the Community system is more transparent in comparison with the Swedish system and it might be argued that the transparent order better serves the purpose of legal certainty. On the other hand, Community rules requiring such a detailed motivation might need more time and might be burdensome for the Commission particularly in merger decisions where the Commission has to act within stringent time limits.

5.6 Timing

It appears that under Swedish law there are more detailed rules regarding time limits for appeals of merger decisions and therefore appeals do not take as long as appeals under Community law. Whereas the ECMR contains detailed rules regarding Commission procedure, there are no such detailed rules regarding the appeal of Commission decisions. This order has led to appeals regularly taking more than two years with

exception for appeals under fast track procedure. The Swedish Competition Act, as mentioned, contains rules regarding the time limits for appeals and states that the Market Court shall make a ruling within three months of expiry of a period of appeal.¹⁵² Moreover, there is an absolute time limit for the SCA to prohibit a concentration. According to section 42(2) a prohibition or obligation may not be imposed more than two years after a concentration has occurred.

Delays in appeal procedures have been seen as one of the main obstacles to effective judicial review. Under Community law appeals may take such a long time that the conditions within the market where the merger is being contested change in a way that a merger is not of interest any longer to those who seek merger. As the CFI is empowered only to annul the Commission's decision, the lapse of time may lead to that the merging parties choosing not to submit the merger for a reassessment.

It seems that the efficiency of judicial review is undermined particularly when clearance decisions are annulled several years after the concentration has been authorized. Taking into account that according to Article 242 EC actions brought before the CFI do not have suspensory effect, theoretically it is possible that all transactions that were made after the clearance decision are void as a result of annulment of this decision.

As mentioned, the CFI has changed or has at least given the impression to have changed its view regarding the intensity of judicial review in merger cases. In recent judgments the Court annulling the prohibition and one authorization decisions was prepared to review the Commission's economic assessment in merger cases.¹⁵³ The Court showed a strong commitment to scrutinize the Commission's economic appraisal in order to verify, *inter alia*, whether it is supported by sufficiently convincing evidence. This development in the standard of judicial review may lead that there will be more third parties who want to appeal Commission decisions. The Community Courts' willingness to review the Commission's economic appraisal according to a more stringent standard, may act as an incentive to appeal.

¹⁵² Section 42(3) Competition Act

¹⁵³ T-372/99 *Airtours v Commission*, T-310/01 *Schneider Electric v Commission*, T-5/02 *Tetra Laval v Commission*, T-464/04 *Impala v Commission*.

6. SUGGESTIONS FOR THE REFORM OF SWEDISH LAW

6.1 Introduction

Under Swedish rules, third parties have right to appeal neither clearance nor prohibition merger decisions. In this respect, the rules and principles in Sweden which govern admissibility of third parties to appeal merger decisions do not differ from usual Swedish administrative procedural rules. However, there are differences between Swedish and European legal orders regarding the admissibility of third parties to appeal against merger decisions. The questions arise both as to whether a Swedish legal order should be amended and if it should, then in which way it should be amended. These questions will be examined from two perspectives. First, it will be considered whether the Swedish model of judicial control provides an adequate review of merger cases. Secondly, it will be considered whether the application of substantive rules would be more efficient if EC and Swedish procedural rules regarding third party rights to appeal were harmonised.

6.2 Reform at the national level

6.2.1 Right to appeal against the decisions of the SCA

As mentioned previously, according to the sections 60 and 62, the decisions of the SCA may be appealed only if it is expressly stated in the provisions. As regards the substantial merger decisions, the categories of SCA merger decisions which may be appealed are limited to the decisions where either a prohibition or an obligation is issued to the parties to a concentration and other participants in such a case. This is done in order to ensure compliance with the prohibition to put the concentration into effect during the SCA's special investigation pursuant to section 38(2). The right to appeal is governed by section 22 of the Administrative Procedure Act as sections 60 and 62 do not contain specific rules on the matter.

According to the case law, noted above, right to appeal pursuant to the Administrative Procedure Act has not been limited to the parties of the SCA proceedings. Third parties affected by the decision have been granted a right to appeal where the decision affects them adversely.

The question of the right to appeal against the SCA's decisions according to section 60 of the Competition Act has been examined in the Swedish Government Official Reports (Reports).¹⁵⁴ The Reports do not suggest any amendments of the rules in the context of mergers. According to the legal doctrine, when determining whether to grant the right to appeal or not, a balance should be achieved between the aim to grant everyone with significant interests the right to appeal on the one hand and on the other hand, the aim not to extend the right to the extent that it leads to unnecessary delays in the procedure. It would seem that, as the Reports do not consider the amendment, the current rules achieve such a balance. The result is that the affected parties - including third parties, whose interests are negatively affected to a certain extent, are entitled to bring an appeal. It should be noted that the decisions pursuant section 38(2) concern only the prohibition to complete a concentration during the SCA's investigation period and not the final merger decision. As there is a further judicial review opportunity of the final merger decision, it might be argued that the rules concerning appeal of final decisions should be given a priority.

6.2.2 Clearance decisions

Pursuant to sections 60 and 62 of the Competition Act SCA's clearance decisions are not challengeable. In my opinion, the current legal order might be questioned. Third parties, especially competitors may have a particular interest to block a concentration as concentration may influence their market competitiveness. The clearance decisions may affect competitors in a negative way. There is no motivation of such a legal order in the preparatory works and there seems to be no reason why clearance decisions should not be appealed by third parties. According to the legal doctrine, current rules are based on the general principle of administrative procedure that positive decisions should stand in

¹⁵⁴ SOU 2006:99.

order to preserve the legal certainty of the individuals. However, it seems that the argument is not a very strong one. Third parties affected by the positive decision have been granted the right to appeal in certain circumstances. As mentioned, decisions of the Local Building Committee granting a building permit may be challenged by the owner or tenants of a property located in a neighbourhood if the interests of those persons are affected.¹⁵⁵ By analogy with this case law in a context of building permissions, it might be argued that clearance decisions in the field of mergers should also be subject to appeal.

An argument for the appeal of clearance decisions might be that all parties with a significant interest should be given an opportunity of judicial review. The Reports demonstrate that competitors have a significant interest to appeal merger decisions. Moreover, according to the case law, the right of appeal has been granted to third parties, in cases where special legislation or preparatory work has stated that an account should be taken of the effects the decision may have on third parties. The fact that during its investigation into whether a potential concentration will impede competition or not, the SCA takes into account the opinion of third parties and competitors in particular, may indicate that the competitors have a considerable interest in the outcome of the decision.

According to the legal doctrine, the determinative for the question whether the decision is subject to appeal or not under section 22 of the Administrative Procedure Act is the strength and type of interest that the decision affects. As mentioned, the mere inconvenience that the decision produces is not enough to constitute an interest which entitles an appeal of the decision. It seems to be unclear whether the clearance decision may affect competitors' interest to the extent that the requirements of section 22 are fulfilled. The effect depends on the circumstances of the case. Given the fact that the interests of competitors have been recognized as significant in the Reports and are taken into account by the SCA during its decision-making procedure, it might be argued that affected competitors should be given the right to appeal. Guidance might be taken from EC law where all directly and individually concerned third parties have the right to

¹⁵⁵ RÅ 1976 ref. 112, RÅ 1992 ref. 81, Hellners & Malmqvist, pp. 268-269, Strömberg, Allmän förvaltningsrätt, p 193

challenge the Commission's decision. The debate is about extending this right to all parties with a significant interest.

Swedish law may be amended by adding a special provision governing the right of appeal of merger decisions to the Competition Act. Such a solution is possible as the Administration Procedure Act contains general rules of administration procedure and may be specified where needed in the special statutes and in this case in the Competition Act. However, there should be rules specifying the extent of the right of appeal so that not every consumer may challenge the decision, possibly by analogy with EC law which limits the right of appeal to those parties who are directly and personally concerned. Another alternative, which has been suggested by the commentators, is that it should be extended to all parties who have a sufficient interest.

Reference to third parties was mainly made with competitors in mind because of the effect decisions may produce on them. It is possible that other parties may also be affected by the decision so that they should be entitled to challenge it. It should be noted that the merger decisions may affect consumers and consumer organizations. This group of applicants was examined in the Reports. The Reports emphasized that the aim of the Competition Act is to ensure that the competition on the market is not distorted which, in turn, benefits the consumers. The Reports expressly state that consumers fall under the protection of the Competition Act. The question arises whether consumers should be granted the right to appeal. It might be argued that to grant the right of appeal to consumers would significantly widen the circle of parties who are entitled to appeal. The Reports seem to be negative as regards the extension of the right of appeal to the consumers. The Reports stress that the circle of parties who may appeal merger decisions should not be indeterminate and unlimited so that the purpose of the Competition Act should not be undermined. Given that the speed of the procedure is particularly important in the context of mergers, it is suggested that only those who are affected by the decision have right to appeal. It is doubtful that consumers may be affected by the decision to the extent that they should be entitled to challenge the decision. However, the possibility is not to be excluded as other legislations admit consumers with sufficient interests to appeal the merger decisions. It appears that consumers represent such a large group of many individuals it is, in my opinion, unlikely that there might be situations where a particular consumer is affected by the

decision in some concrete way. Although the consumers fall under the protection of the Competition Act and may have an interest to appeal, the Reports state that the right to appeal should not be extended to comprise consumers as it would lead to significant delays in the procedure.¹⁵⁶ Moreover, given that consumers can already assert their interests by initiating action for damages under the Tort Liability Act, there does not appear to be justification for protection of their rights to extend to merger control rules.

An argument for the amendment of Swedish rules of appeal of merger clearance decisions is the fact that in many legal orders third parties are admitted to challenge clearance decisions. Here, I will name some legal orders where third parties have the right to appeal, though these orders will be looked at without further examination of the requirements that third parties have to fulfill. According to German law, a third party whose interests will be sufficiently affected by the merger decision may, upon application, be admitted as an intervener and become a formal party to the proceedings and they can subsequently challenge a clearance decision in court.¹⁵⁷ It seems that under German law third party rights are particularly strong, as third parties admitted to merger proceedings as interveners are able to appeal the formal approval of an intended merger. In France, third parties with good standing, i.e. parties whose interests are affected by the decision can challenge the merger decision of the Competition Authority.¹⁵⁸ In the United Kingdom, the interested third parties may appeal against the Competition Commission's decision to clear or block a transaction.¹⁵⁹ Under Italian law any interested third parties may appeal against the Italian competition Authority's clearance and prohibition decisions before the Administrative Court.¹⁶⁰ In Portugal, the Competition Authority's decisions to clear or block concentration may be appealed by interested third parties.¹⁶¹ In my opinion, the fact that third parties are admitted to appeal against clearance decisions in many jurisdictions may indicate that there are sufficiently adequate reasons to grant third parties the right to appeal.

¹⁵⁶ SOU 2006 :99, p. 466.

¹⁵⁷ Practical Law Company : <http://competition.practicallaw.com/1-206-5027>

¹⁵⁸ Practical Law Company : <http://competition.practicallaw.com/2-206-9987>

¹⁵⁹ Practical Law Company : <http://competition.practicallaw.com/7-205-4016>

¹⁶⁰ Practical Law Company : <http://competition.practicallaw.com/6-207-7952>

¹⁶¹ Practical Law Company : <http://competition.practicallaw.com/8-207-0978>.

6.2.3 Appeal of prohibition decisions

As stated above, third parties have no right to appeal against the decisions of Stockholm District Court prohibiting mergers. The judicial review is governed by the Swedish Code of Judicial Procedure and the general principles of procedural law, according to which only parties to the proceedings at the District Court have right to appeal.

There seem to be no explanation in the preparatory work why clearance and prohibition merger decisions are governed by the different rules of judicial review. The Governmental Proposal to the Competition Act is silent on that point. It appears that the rules of appeal of merger decisions follow the general principles of Swedish procedure whereby appeals of the District Court decisions are governed by the Swedish Code of Judicial Procedure. The appeal of decisions prohibiting mergers are handled by the rules for actions not amenable to out of court settlement. The reason is that actions which concern prohibition of concentrations are seen as actions which may result in especially negative measures for the parties.¹⁶² However, it is unclear why the legislator did not choose to have special rules for the appeal of merger decisions in the Competition Act. As discussed above, there is a certain interest that not only parties to the proceedings have right to appeal. On the other hand, in merger cases where the speed is of particular importance, it might not be desirable to extend rights to appeal to third parties, given the amount of time that would be required for their appeals.

In my opinion, it seems that third parties and competitors in particular have a greater interest to appeal clearance decisions than prohibition decisions. The merger changes the market situation immediately after the concentration has been completed and in turn may immediately affect the position of third parties. Prohibition decisions seem not to have an immediate affect on third parties as the structure of the market remains unchanged. In my opinion, taking into account the fact that it is mainly in the interest of parties and not third parties to challenge merger prohibition decisions and that the need for fast settlement of merger cases, the current legal order of appeal against the decisions to block a concentration appears to provide a satisfactory judicial review.

¹⁶² Wetter, p. 890.

Moreover, a third party who wants to oppose prohibition decision has an opportunity to consider his interests by intervening into appeal proceedings. According to Chapter 14 section 9 a of the Swedish Code of Judicial Procedure (CJP), third party may appear as an intervener in the litigation on either the side of the plaintiff or the defendant. To be able to intervene, the third party has to show that the matter at issue bears on his legal right or obligation and probable cause for his statement. According to Wetter, the CJP's rules on intervention relate mainly to civil cases and therefore not suitable to competition cases. Wetter suggests that applying intervention rules in competition cases, consideration should be given to the fact that third parties often have significant interest in competition actions and their participation in the proceedings may contribute to making a substantially correct decision in accordance with the general objectives of the Competition Act.¹⁶³

6.3 Bringing Swedish rules in conformity with EC rules

6.3.1 Introduction

Regulation of mergers on the territory of the EC is based on the principle of the “one-stop shop”. The ECMR allocates competence between national and Community authorities in a way that concentrations with a Community dimension are exclusively governed by EC law and those without fall under the scope of national law and Community law does not apply. In other words, the applicable law is either EC law or national law. However, Swedish substantive rules are based on the ECMR and therefore are similar to EC substantive rules. The question arises, whether Swedish procedural rules of appeal of mergers should be harmonised with EC procedural rules to ensure that substantive rules are applied effectively. The issue will be discussed from three aspects, namely whether the harmonisation would make Swedish rules more effective, whether it would increase legal security and whether it would be more suitable to apply uniform procedural rules to achieve uniform substantive law.

It is established that the Member States have a procedural autonomy, which means that the Member States may apply their own national procedural rules when applying

¹⁶³ Wetter, p. 902.

Community law.¹⁶⁴ However, the procedural autonomy is not absolute. The ECJ has developed several limitations to this autonomy to avoid undermining the efficient application of Community law. If Community law contains procedural rules, the rules must be applied according to the same criteria of direct effect and supremacy, as are the substantive rules.¹⁶⁵ There are also several general legal principles that should be applied on the national level.

In general, EC law doesn't contain requirements on Swedish administrative procedure. According to the commentators, EC law may not have any significant impact on the Swedish administrative procedure as in contrast with traditional administrative procedure the Community law is concentrated on the creation and strengthening of the common market.¹⁶⁶ Some principles as regards the administrative procedure have been created by ECJ when interpreting the provisions of the EC Treaty, for example the access to file and the right to be heard when applying EC competition rules. These principles have direct effect and should take precedence over national procedural rules.¹⁶⁷ The Member States are under the obligation to uphold the principles when applying Community law on a national level. According to Article 249 EC, the EC regulations are binding and directly applicable to all parts. However, it is not so usual that EC regulations contain rules as regards the administrative procedure. In the context of mergers, Community law does not apply when national law is applicable which means that the Member States enjoy procedural autonomy. The ECMR does not contain any rules as regards the administrative procedure which Sweden should apply and according to the commentators Swedish administrative procedural law seems to be in conformity with EC's requirements.¹⁶⁸ The question arises whether Sweden should choose EC legal order regarding admissibility of third parties on its own accord.

¹⁶⁴ Case 26/62 Van Gend en Loos.

¹⁶⁵ Prop 1994/95:19 part 1 p. 486, 521, Hellners & Malmqvist p. 40.

¹⁶⁶ Hellners & Malmqvist p. 40.

¹⁶⁷ Prop 1994/95:19 part 1 p. 530.

¹⁶⁸ Hellners & Malmqvist p. 40.

6.3.2 Suitability

One argument for bringing Swedish and EC rules on the admissibility of annulment actions by third parties together, as pointed above, is the fact that Swedish substantive rules reflect Community rules and should be interpreted in accordance to the principles of EC competition law.¹⁶⁹ It can be argued that in order to achieve a uniform application and interpretation of the substantial rules, the same rules on admissibility are desirable. If Swedish prerequisites for application of substantive rules differ from EC's prerequisites, then there is a risk that the rules will be applied in a different manner and the uniform application will not be achieved.¹⁷⁰ There is a theoretical possibility that the SCA will arrive at an outcome opposite to that of the Commission despite remarkable similarities in the factual background. If it is a clearance decision, the decision will stand under current Swedish law despite the fact that it is not in conformance with EC law. Both to ensure legal certainty and to keep the administrative judges under control, it might be desirable that third parties are able to challenge clearance decisions.

By virtue of EC law, third parties, for example competitors, are awarded judicial protection when EC institutions apply EC competition law. Taking into account that the key provisions of the Swedish Competition Act are substantially the same as the corresponding EC provisions, it is odd that judicial protection is awarded to competitors where the EC rules are applied, but denied where only the Swedish Competition Act is concerned. There is an opinion that although the law governing the procedure before national courts is usually national law even where substantive EC law is applied, the contrast between EC law which admits competitors' challenges to Commission decisions applying competition rules and the national case law which denies the *locus standi* of competitors of decisions based on the same or similar rules highlights the denial of justice arising under national jurisprudence.¹⁷¹

An example of a legal order where national rules on admissibility of third parties have been changed because of the different EC rules is Italian legal order. The reliance on EC law concerning *locus standi* of third parties against Commission decision was one of the

¹⁶⁹ Prop 1998/99:144, p. 44.

¹⁷⁰ Reichel, God förvaltning i EU och i Sverige, p. 567.

arguments to bring the Italian law in line with EC law and allow the third parties to challenge the decisions of the Italian Competition Authority (ICA). The recent Italian case law has admitted, in certain circumstances, *locus standi* of third party challenges of ICA decisions overturning previous case law which had denied it.¹⁷² One of the arguments of admissibility of third parties was that under EC law third parties may challenge Commission decisions in the field of competition. All three judgments expressly relied on EC law. According to Malferrari the reference to EC case law is appropriate as the Italian Competition Law must be interpreted according to principles of EC competition law.¹⁷³ The main argument is that it is denial of justice to admit competitors' challenges to Commission decisions while denying the *locus standi* of competitors to ICA decisions which apply the same substantive rules.

An argument against harmonisation of Swedish rules of appeal of merger decisions by third parties is that as the administrative procedure differs, it might be practically difficult to establish common rules that will be effective both in the EC and Swedish legal orders. The national administrative procedural law is considered an area of law which is marked by national characteristics. Reichel stresses that in Sweden the administrative procedural rules are considered an instruction to public authorities how to handle cases whereas in EC the administrative rules are seen as individual rights.¹⁷⁴ Reichel states that differences in understanding impact the way in which the administrative procedural law is reviewed by the court. In Sweden the review is concentrated on substantial issues and violations of the rules need not necessarily affect the validity of the decision. In the EC the Community Courts review whether a public authority has upheld the rules in relation to the individual. The counter-argument is that the Member States' traditions are not unchangeable and trends of Europeanization in national legal orders have been seen already since Second World War. Reichel refers to the statement of Schwarze where he emphasises that although constitutional and administrative law have traditionally been shaped in a national context and although

¹⁷¹ L. Malferrari, Annulment actions by third parties against decisions of the Italian Competition Authority held admissible, p. 79.

¹⁷² Judgments of the CS(the highest administrative court in Italy) NO.3865 June 14, 2004; No.1113 March 21, 2005; judgment of TAR Latium (the Italian first instance administrative court) No.1715 February 24, 2004, (the first and third cases concerned anti-competitive cooperation, the third case concerned mergers). Competitors active in the same relevant market were granted locus standi.

¹⁷³ L.Malferrari, p. 79.

¹⁷⁴ J.Reichel, God förvaltning i EU och i Sverige pp. 561, 566.

national law systems differ widely across Europe an increasing number of common constitutional principles can be identified despite the great variety of types and forms which exist at national constitutional levels. This trend of Europeanization of national law has already been seen since the Second World War. ¹⁷⁵ According to Ragnemalm, although there are differences between Swedish and European administrative laws, the differences are in many respects not significant. ¹⁷⁶

6.3.3 Legal certainty

The current Swedish order according to which clearance decisions are not subject to appeal are created out of consideration of the legal certainty of the individual. However, it seems that the legal certainty argument may be questioned on the ground that while it is possible that the SCA can make an incorrect decision, that decision is not challengeable. In my opinion, the legal order according to which the decision will stand although it is wrong diminish legal security of the individuals. In my view, the argument that third party appeals would enable to review the clearance decisions and the reduction in the amount of incorrect decisions is one of the main arguments for harmonisation regarding legal security.

However, the disadvantage of the EC law is that it does not contain any concrete rules as regards the fundamental concepts. For example, in contrast with Swedish administrative law, where there are detailed rules as regards what constitutes a legal act, EC law lacks clear rules. As mentioned, an oral statement has been considered as legal act. Ragnemalm, stresses that stability and transparency of a legal system is reduced where rules are created from time to time.¹⁷⁷ On the other hand, in my opinion, the advantage of EC legal order is that it is flexible and able to evolve where needed. This has been the case – as examined above -with the rules on *locus standi*, which have been developed by the ECJ. Moreover, current Swedish rules on appeal are not clear as there are no clear rules in the statute as regards which decisions are challengeable and who may bring an appeal.

¹⁷⁵ Swarze, *Towards a Common European Public Law*, p. 228, Reichel, p. 569.

¹⁷⁶ H.Ragnemalm, *Är den europeiska förvaltningsrätten bättre än vår*, pp. 135-144.

¹⁷⁷ Ragnemalm, *Är den europeiska förvaltningsrätten bättre än vår*, p. 136.

6.3.4 Effectiveness

There is an argument that if annulment actions of third parties were always to be held inadmissible, third parties would never be able to obtain judicial review and that this would diminish the effectiveness of judicial protection.¹⁷⁸ It may be argued that third parties have an interest in opposing a decision by the SCA, as the decision, even though addressed to other undertakings, would cause them disadvantage by affecting their right to free economic activity. The effects of the decision put third parties, especially competitors, in a position which differentiates them from the general public.

It is possible to argue that the effectiveness of merger control will be increased if the same rules govern the procedure of appeal under EC rules and under Swedish rules. As mentioned, if Swedish prerequisites for application of substantive rules differ from EC's prerequisites, then there is a risk that the rules will be applied in a different manner and the uniform application will not be achieved.¹⁷⁹ The differences in interpretation of the same substantive rules may undermine effective control of merger decisions.

If Swedish rules of appeal against merger decisions were substituted by EC rules there is a risk that it would lead to delays in the procedure. The main disadvantage of EC merger control is the length of its proceedings and the uncertainty brought to parties in transaction, although it is possible to mitigate the problem by improving the Commission's and the SCA's internal investigation procedure and by use of expedited procedure.

6.4 Summary and discussion

EC law does not impose any requirements upon Swedish administrative procedure. However, there are several arguments for bringing into conformity with EC rules, the

¹⁷⁸ Malferrari, p. 79.

¹⁷⁹ Reichel, p. 567.

Swedish rules regarding admissibility of third parties to challenge merger decisions. In my opinion, the main argument in favour of such conformity is that, in order to achieve a uniform application of substantive rules, it is desirable to have the same procedural rules. Unwanted legal outcomes may otherwise occur despite the existence of the same or very similar substantive rules, when third parties have the right to appeal merger decisions according to EC procedural law but are denied that right according to Swedish procedural law.

The effectiveness of judicial control of merger decisions and the legal security will be enhanced in a system where clearance decisions are subject to judicial review. This is particularly so given the fact that third parties - especially competitors - have a justified interest in opposing mergers. It is true that the harmonisation of Swedish rules with EC rules may lead to a delay in procedure. According to the EC case law examined above, there seems to be a trend towards the extension of the possibilities of third parties to annul Commission decisions. Taking into account this tendency of EC law in the field of mergers and the *Impala* case in particular, third parties may be further encouraged to appeal merger decisions: an outcome which will in turn result in delays in appeal procedures. However, it is possible to mitigate the problem of the length of proceedings by improving the internal procedure of the SCA and through the use of expedited procedure. Given the fact that, according to other jurisdictions, third parties are admitted to appeal merger decisions, it might be argued that there are adequate reasons for amending Swedish rules and for admitting third party appeals.

The current Swedish rules, according to which positive decisions are not challengeable, are motivated by the concern of the legal security of individuals. However, this motivation does not seem to provide a very strong argument, particularly because of the legal precedent in the context of building permissions, where positive decisions are subject to appeal. As the competition rules are aimed towards maintaining the competition on the market, it seems that this aim is better achieved when third parties are allowed to appeal the merger decisions and contribute to preliminary investigations and taking the correct substantive decision.

There seems to be no practical barriers to the adoption of EC procedural rules regarding appeal by the Swedish legal order. Technically it would be possible to amend the

Swedish Competition Act and add special provisions which would govern the appeal of merger decisions. The current rules of appeal are governed by the general principles of administrative procedure and may be specified by *lex specialis*. Moreover, the legal principles regarding the appeal of the administrative decisions in Swedish law do not seem to be significantly different. The main difference is that in Sweden the administrative procedural rules are considered an instruction to public authorities on how to handle cases, whereas in the EC, the administrative rules are seen as individual rights. Therefore, the different ways of understanding administrative rules have an influence upon the form which appeal takes. As regards merger decisions, it seems to me that the more important question is whether or not the third parties should be allowed to appeal clearance decisions rather than what should be the form the appeal takes.

In my opinion, the legal order according to which third parties directly and individually affected by the decision may appeal the decision seems to be an advantageous one. It achieves the balance of granting rights of appeal to the parties who are sufficiently affected by the decision on the one hand and on the other hand limiting of the number of the parties with the right to appeal to ensure that the floodgates are not opened. While it appears not obvious what constitutes direct and individual concern according to the EC case law, the case law seems to indicate which factors are of particular importance in satisfying the requirement of direct and individual concern and it is quite possible that the ECJ will further clarify its position in subsequent cases. Therefore, in my opinion, the advantages of the EC third party appeal procedure outweigh their disadvantages and there are adequate reasons for bringing EC and Swedish procedural rules regarding the appeal of merger decisions into conformity.

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