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Introduction

In a globalised economy, outsourcing transactions are an important part of everyday corporate life as companies restructure their business operations in order to compete more efficiently.[1] Despite the economic importance, the practice of the Commission of the European Communities (the Commission) lacks a clear and consistent approach to outsourcing transactions under Regulation 139/2004 (the Merger Regulation).[2] The Commission appears—as do national competition authorities—to have difficulty in implementing a reliable policy whether outsourcing transactions have a structural impact on a given market and should thus be subject to merger control.[3] In light of recent outsourcing transactions decided under the Merger Regulation[4] and taking into account the thinking of the Commission as laid down in the Consolidated Jurisdictional Notice (the CJN),[5] the purpose of this article is to analyse the Commission's approach towards outsourcing transactions and to attempt to provide some practical guidance.

Outsourcing

Outsourcing has been an integral part of achieving a competitive advantage in international business since the late 1980s, when executives of integrated companies began to realise that the growing size of their company often created inflexibility and resulted in diseconomies of scale.

The economic rationale behind outsourcing

The traditional reasons for outsourcing relate to cost savings and cost restructuring by transforming fixed costs into variable costs while at the same time freeing up invested capital. Consequently, one competitive strategy has been to identify and focus on core competencies and to promote efficiencies by transferring the management or day-to-day execution of an entire business function to an outsourcing service provider (e.g. information technology (IT) outsourcing). This conventional business rationale has gradually expanded as executives have recognised the full strategic potential of outsourcing. Instead of simply offloading non-core activities from in-house operations, today companies are increasingly using outsourcing as a tool to facilitate rapid organisational change or substantially improve their performance.[6] Such strategies enable outsourcing customers to more efficiently use their own resources while at the same time leveraging the operational expertise of specialised outsourcing service suppliers. As a result outsourcing has evolved from simply outsourcing supporting tasks to outsourcing

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1 John K. Halvey and Barbara Murphy Melby, *Business Process Outsourcing: Process, Strategies, and Contracts*, 2nd edn (John Wiley & Sons, 2007), p.3 *et seq*.

2 Regulation 139/2004 on the control of concentrations between undertakings (the Merger Regulation) [2004] OJ L24/1.

3 See André Fiebig, "Outsourcing under the EC Merger Control Regulation" [1996] E.C.L.R. 123.

4 For example in the Decision of 14 December 2007 declaring a concentration to be compatible with the common market according to Regulation 139/2004 (COMP/M.4981-*AT&T/IBM*), the Commission regarded the outsourcing of Global Telecommunication Services with the additional transfer of employees and certain assets as a concentration under the Merger Regulation.

5 Consolidated Jurisdictional Notice of 10 July 2007 under Regulation 139/2004 on the control of concentrations between undertakings paras 24–27 and 163.

6 Jane C. Linder, "Transformational Outsourcing" (2004) 45(2) *MIT Sloan Management Review* 52. For further reading see also Jane C. Linder, *Outsourcing for Radical Change: A Bold Approach to Enterprise Transformation* (Amacom, 2004) p.26 *et seq*.

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business activities at the core of a company's business operations.[7]

Various types of outsourcing

Outsourcing is a broadly defined term in economic literature and basically involves subcontracting a business function to an external service provider.[8] The outsourcing customer and an external provider (hereinafter referred to as the outsourcing service supplier) enter into a contractual agreement that defines the transferred services and sets out the time period during which the customer agrees to procure the services from the supplier. In addition, the agreement sometimes includes terms according to which the outsourcing customer transfers employees, assets and other resources. For the purposes of merger control various types of outsourcing can be distinguished.[9]

The first step in reorganising a corporate group involves centralising certain business processes or support services (hereinafter referred to as group outsourcing). As exemplified in *Computer Sciences Corp (CSC)/Royal Mail Business Systems (RMBS)*,[10] Royal Mail initially concentrated their in-house IT services within the company.[11] However, management experts have been of the opinion that, in the long term, group outsourcing does not lead to sufficient efficiency gains and may even result in diseconomies of scale.[12] Therefore, the next step generally involves outsourcing an outsourcing service supplier. For instance, in the aforementioned case, Royal Mail eventually decided to incorporate their concentrated in-house IT division as a new subsidiary for the purpose of outsourcing it to CSC.[13] While outsourcing transactions essentially involve the conclusion of a supply agreement with an outsourcing service supplier (hereinafter referred to as simple outsourcing), such supply agreements are accompanied by the ancillary transfer of personnel and/or assets to the outsourcing service supplier associated with the customer's in-house provision of the relevant business activities (hereinafter referred to as transfer outsourcing).[14] Finally, companies are increasingly engaging in hybrid organisational forms such as partial acquisitions and joint ventures (hereinafter referred to as joint venture outsourcing).[15] These mechanisms allow companies to cut costs without exiting a business segment entirely and risking the associated loss of institutional knowledge.[16]

EU Merger Control

In Europe, outsourcing transactions are subject to merger control under the Merger Regulation, if the transaction:

- constitutes a concentration within the meaning of Art.3 of the Merger Regulation; and
- has a Community dimension as defined in Art.1 of the Merger Regulation.

The question of whether an outsourcing transaction constitutes a concentration is, therefore, essential in determining the Commission's jurisdiction under the Merger Regulation and distinguishes structural transactions subject to control under the Merger Regulation from those to which Arts 81 and 82 EC

7 Halvey and Melby, *Business Process Outsourcing*, p.3 *et seq*. See also Linder, "Transformational Outsourcing" (2004) 45(2) *MIT Sloan Management Review* 52, 58.

8 "Offshoring" is a term closely related to outsourcing. However, it is important to note that these terms are by no means completely interchangeable. Offshoring encompasses the transfer of an organisational function to another country regardless of whether the work is still done within the transferring corporation or by a third party.

9 For the various types of outsourcing for the purposes of merger control see also Fiebig, "Outsourcing under the EC Merger Control Regulation" [1996] E.C.L.R. 124.

10 Decision of 27 May 2003 declaring a concentration to be compatible with the common market (IV/M.3171-*Computer Sciences Corp/Royal Mail Business Systems*).

11 See Decision of 27 May 2003 declaring a concentration to be compatible with the common market according to Regulation 4064/89 (IV/M.3171-*Computer Sciences Corporation/Royal Mail Business Systems*) at [4].

12 See Bennett Harrison, *Lean and Mean: The Changing Landscape of Corporate Power in the Age of Flexibility* (Basic Books Inc, 1994).

13 See Decision in IV/M.3171-*Computer Sciences Corporation/Royal Mail Business Systems* at [4].

14 See for example Decisions in COMP/M.4981-*AT&T/IBM* and IV/M.3171-*Computer Sciences Corporation/Royal Mail Business Systems*. However, both decisions lack any reasoning as to the decisive factors for finding a concentration.

15 See for example Decision of 12 March 2003 declaring a concentration to be compatible with the common market according to Regulation 4064/89 (IV/M.3097-*Maersk Data/Eurogate IT/Global Transport Solutions JV*) at [5]; Decision of 29 June 2001 declaring a concentration to be compatible with the common market according to Regulation 4064/89 (IV/M.2478-*IBM Italia/Business Solutions JV*) at [14]; Decision of 11 May 1995 declaring a concentration to be compatible with the common market according to Regulation 4064/89 (IV/M.560-*EDS/Lufthansa*); see also Fiebig, "Outsourcing under the EC Merger Control Regulation" [1996] E.C.L.R. 124.

16 See Randall S. Kroszner *et al*., "Economic organization and Competition Policy" (2002) 19 *Yale Journal on Regulation* 544.

apply.[17] While some types of outsourcing transactions (i.e. group or simple outsourcing transactions) pose serious questions with regard to whether a given transaction constitutes a concentration, the Commission has so far struggled to identify clear criteria to address outsourcing transactions that involve the transfer of assets and/or employees.

Concentration

According to Art.3(1)(b) of the Merger Regulation, a concentration arises where a change of control on a lasting basis results from the acquisition, by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings. According to Art.3(2) of the Merger Regulation, control is defined as the ability to exercise decisive influence on an undertaking. Such influence exists if an undertaking can determine the business policy and strategic decisions of another undertaking.[18]

Group outsourcing

Group outsourcing transactions involve the creation of a subsidiary or business unit within a corporate group to assume responsibility for producing a particular product or providing a particular service.[19] In this instance no change of control occurs since the new entity continues to be solely controlled by the ultimate parent of the group. Accordingly, a purely internal outsourcing transaction does not constitute a concentration within the meaning of Art.3(1)(b) of the Merger Regulation.[20] Moreover, intra-group supply agreements with the new entity fall outside the scope of Art.81 EC.[21]

Simple outsourcing

Cases of simple outsourcing do not involve any transfer of assets or employees to an outsourcing service supplier. Employees are either transferred to another part of the outsourcing customer or laid off and existing infrastructure is dismantled or used for different purposes within the company.[22] Such an outsourcing transaction does not involve the acquisition of control within the meaning of Art.3(1)(b) of the Merger Regulation over parts of another undertaking and is, thus, considered to be outside the scope of the Merger Regulation.[23] Even if the outsourcing service supplier acquires a right to direct relevant assets and employees of the outsourcing customer, no concentration arises if the assets and employees will be used exclusively to provide services to the customer.[24]

Transfer outsourcing

What is less clear is where the outsourcing agreement involves the transfer of assets and/or employees associated with the customer's in-house provision of the relevant business activities. Whether employees and/or assets constitute a part of an undertaking within the meaning of Art.3(1)(b) of the Merger Regulation depends on whether "those assets constitute . . . a business with a market presence, to which a market

17 Johannes Lübking and Daniel Dittert in Götz Drauz and Christopher W. Jones (eds), *EU Competition Law, Volume II, Mergers and Acquisitions* (Belgium: Claeys & Casteels, 2006), p.41 *et seq*.

18 Regarding the concept of control see Consolidated Jurisdictional Notice of 10 July 2007 under Regulation 139/2004 on the control of concentrations between undertakings para.11 *et seq*.; see also Morten Broberg, "The Concept of Control in the Merger Control Regulation" [2004] E.C.L.R. 741 *et seq.;* and Wesseley and Wegner in Günther Hirsch, Frank Montag, Franz Jürgen Säcker (eds), *Competition Law: European Community Practice and Procedure*, 1st edn (London: Sweet & Maxwell, 2008), Rn.5-5-22 *et seq*.

19 See for example the Decision in IV/M.3171-*Computer Sciences Corporation/Royal Mail Business Systems* at [4].

20 See Consolidated Jurisdictional Notice of 10 July 2007 under Regulation 139/2004 on the control of concentrations between undertakings para.51; see also Lübking and Dittert in *EU Competition Law, Volume II, Mergers and Acquisitions* (2006), p.55.

21 Article 81(1) EC does not apply to agreements between undertakings that form a single economic entity; see *Viho Europe BV v Commission of the European Communities* (T-102/92) [1995] E.C.R. II-17, upheld by the ECJ in *Viho Europe BV v Commission of the European Communities* (C-73/95 P) [1996] E.C.R. I-5457; on the similar position under US law, see *Copperweld Corp v Independence Tube Corp* 467 US 752 (1984).

22 It is important to note, however, that a transfer of employees may be required by Directive 2001/23 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L82/16; according to Art.4(1) the transfer of an economic entity as defined in Art.1(1)(b) shall not in itself constitute grounds for dismissal.

23 See Consolidated Jurisdictional Notice of 10 July 2007 under Regulation 139/2004 on the control of concentrations between undertakings para.25.

24 See Consolidated Jurisdictional Notice of 10 July 2007 under Regulation 139/2004 on the control of concentrations between undertakings para.25; frequently, outsourcing agreements have provisions that prohibit the use of certain assets (including in particular customer premises equipment) for other customers or at least require prior approval of the outsourcing customer.

turnover can be clearly attributed".[25] Accordingly, the transfer of an internal business unit or subsidiary already engaged in the provision of services to third parties constitutes a concentration.[26] In some circumstances the transfer of a client base[27] or an exclusive licence for intangible assets such as brands, patents or copyrights can constitute a concentration, if this in itself leads to the transfer of a turnover-generating activity.[28]

However, if there is no supply of goods or services to third parties the question arises whether an outsourcing service supplier acquires control over parts of another undertaking, i.e., a business with access to the market. According to the Commission, this is dependent on whether:

> ". . . [T]he assets previously dedicated to in-house activities of the seller will enable the outsourcing service supplier to provide services not only to the outsourcing customer but also to third parties, either immediately or within a short period after the transfer."[29]

Accordingly, the fact that a supplier of outsourcing services must also rely on its own resources in order to create a business with a market presence does not preclude the Commission from finding a concentration. In this context, however, it is important to note that an outsourcing service provider will almost always be able to complement any transferred assets and/or employees with its own resources to service third parties.[30] Therefore, this criterion has to be interpreted in the light of the underlying rationale of the Merger Regulation to permit effective control of all concentrations in terms of their effect on the structure of competition within the Community.[31] A transfer outsourcing transaction can thus only qualify as a concentration under the Merger Regulation if the transferred assets and/or employees are such as to appreciably strengthen the market position of the outsourcing service supplier.[32] Hence, the transferred assets have to include elements that would allow the outsourcing services provider to extend its market position without taking into account the supply relationship with the outsourcing customer. Depending on the type of business outsourced this may include existing contracts or brands, relevant know-how (such as the relevant personnel and intellectual property), licences for patents or copyrights, real estate ownership or leases, production and research and development facilities and above all marketing facilities and personnel.[33] Thus, a transfer outsourcing agreement exclusively involving the transfer of employees and related office equipment previously engaged in the provision of in-house activities such as IT or telecommunication services cannot be regarded as an acquisition of a business with a market presence and, thus, does not represent a concentration under the EC Merger Regulation.[34]

25 See Consolidated Jurisdictional Notice of 10 July 2007 under Regulation 139/2004 on the control of concentrations between undertakings para.24; see also Decision of 22 December 2005 declaring a concentration to be compatible with the common market according to Regulation 139/2004 (COMP/M.3867-*Vattenfall/Elsam and Energi E2 assets*) at [8].

26 See Consolidated Jurisdictional Notice of 10 July 2007 under Regulation 139/2004 on the control of concentrations between undertakings para.26.

27 See Decision of 23 December 2002 de renvoyer l'affaire aux autorités nationales compétentes de la Belgique en vertu de l'article 9 du Règlement 4064/89 (COMP/M.2857-*ECS/IEH*) at [9]; in COMP/M.4981-*AT&T/IBM* the Commission seemed to have misinterpreted the third party relationship resulting from the transaction as a transfer of direct relationships with IBM's customers.

28 See Consolidated Jurisdictional Notice of 10 July 2007 under Regulation 139/2004 on the control of concentrations between undertakings para.24; a transfer outsourcing transaction confined to intangible assets without additional assets only constitutes a concentration only if the licenses are exclusive at least in a certain territory.

29 See Consolidated Jurisdictional Notice of 10 July 2007 under Regulation 139/2004 on the control of concentrations between undertakings para.26; depending on the conditions of the market such a start up period will normally not exceed a period of three years, see Consolidated Jurisdictional Notice of 10 July 2007 under Regulation 139/2004 on the control of concentrations between undertakings para.97.

30 Outsourcing contracts frequently provide for constraints for the outsourcing service supplier to use transferred assets with other third parties. This becomes also important in situations where an outsourcing customer changes its external outsourcing service provider ("second generation outsourcing").

31 See Regulation 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation) recital 6 and 20 [2004] OJ L24.

32 See Wesseley and Wegner in *Competition Law: European Community Practice and Procedure*,(2008), Rn.5-5-58; This is also consistent with the approach in Germany. According to the case law of the Federal Court of Justice (*Bundesgerichtshof*), acquired assets are considered substantial for the purposes of merger control if they are capable of changing the market position of the acquiring undertaking, thus where they are substantial in terms of quality (see *WuW/E BGH* pp. 1570, 157—*Kettenstichnähmaschinen; WuW/E BGH* pp. 1763, 1771—*Bituminöses Mischgut*).

33 See Consolidated Jurisdictional Notice of 10 July 2007 under Regulation 139/2004 on the control of concentrations between undertakings para.26.

34 Indeed, in cases where the Commission considered the requirements of "concentration" to be met, there was, in addition to the transfer of personnel, also transfer of material assets allowing access to the market. See Decision of 12 November 2001 declaring a concentration to be compatible with the common market according to Regulation 4064/89 (COMP/M.2629-*Flextronics/Xerox*) at [5]; Decision of 25 February 2000 declaring a concentration to be compatible

Joint-venture outsourcing

In some instances, an outsourcing customer may wish to retain some control over the outsourced activities while minimising costs at the same time. In this case, companies may choose to create a joint venture with an outsourcing service provider.[35] Such an outsourcing joint venture will be jointly controlled if both parent companies have the power to exercise decisive influence over the business activities of the joint venture post transaction. Unlike sole control, which confers upon a specific shareholder the power to determine strategic decisions, joint control is characterised by a deadlock situation resulting from the power of two or more parent companies to reject proposed strategic decisions.[36] For example in the *EDS/Lufthansa* case, EDS acquired a 25 per cent minority stake in Lufthansa Systems—a special IT service subsidiary of Lufthansa. Given that the shareholders agreement required unanimity for important strategic decisions, such as the annual budget and the business plan, the Commission assumed joint control.[37] In addition to the general requirement of joint control, according to Art.3(4) of the Merger Regulation a joint venture must perform on a lasting basis all the functions of an autonomous economic entity (i.e. full-function joint venture) in order to constitute a concentration.[38] In other words the joint venture must be able to operate independently of its parents on an identifiable market (such as IT services). This does not mean that the outsourcing joint venture should enjoy autonomy regarding the adoption of its strategic decisions, but that it is economically autonomous from an operational viewpoint.[39]

Given that the basic function of an outsourcing joint venture is normally to supply the outsourcing parent, the essential question is whether, regardless of these sales, the joint venture is able to play an active role on the market.[40] To this extent, it needs to be demonstrated that the joint venture deals with the outsourcing parent at arm's length on the basis of normal commercial conditions and will supply its goods or services to third parties in a revenue maximising manner.[41] Therefore, only an outsourcing joint venture that—in addition to supplying the outsourcing parent—has significant sales to third parties will be regarded as a full-function joint venture within the meaning of Art.3(4) of the Merger Regulation. Depending on the specific circumstances, the fact that an outsourcing joint venture relies almost entirely on sales to the outsourcing parent during a start-up period does not affect its full functionality character if it has sufficient resources to build up such a market presence within a reasonable time frame.[42]

Community dimension

It follows from the above that in certain circumstances transfer or joint venture outsourcing transactions can constitute a concentration. However, in order to fall under the Merger Regulation, a concentration must also have a Community dimension. The concept of a Community dimension, as laid down in Art.1 of the Merger Regulation defines the scope of competence of the Commission with respect to the control of concentrations based on turnover thresholds.[43] In

with the common market according to Regulation 4064/89 (COMP/M.1841-*Celestica/IBM (EMS)*) at [5]; Decision of 31 May 2000 declaring a concentration to be compatible with the common market according to Regulation 4064/89 (COMP/M.1968-*Solectron/Nortel*) at [3]; Decision of 29 February 2000 declaring a concentration to be compatible with the common market according to Regulation 4064/89 (COMP/M.1849-*Solectron/Ericsson*) at [3] *et seq*.; Decision of 2 April 1993 declaring a concentration to be compatible with the common market according to Regulation 4064/89 (IV/M.286-*Zürich/MMI*) at [4] *et seq*.

35 See Decisions in IV/M.3097-*Maersk Data/Eurogate IT/Global Transport Solutions JV* at [5]; IV/M.2478-*IBM Italia/Business Solutions JV* at [14]; IV/M.560-*EDS/Lufthansa*; see also Fiebig, "Outsourcing under the EC Merger Control Regulation" [1996] E.C.L.R. 124.

36 See Consolidated Jurisdictional Notice of 10 July 2007 under Regulation 139/2004 on the control of concentrations between undertakings para.62 *et seq*.

37 Decision in IV/M.560 *EDS/Lufthansa* at [7].

38 See Consolidated Jurisdictional Notice of 10 July 2007 under Regulation 139/2004 on the control of concentrations between undertakings para.91 *et seq*.; on the treatment of various types of joint ventures under the EU competition rules see also *Bellamy & Child: European Community Law of Competition* edited by Peter Roth and Vivien Rose, 6th edn (Oxford University Press, 2008), p.539 *et seq*.

39 See *Cementbouw Handel & Industrie BV v Commission of the European Communities* (T-282/02) [2006] E.C.R. II-319.

40 Decision in IV/M.560-*EDS/Lufthansa* at [9] *et seq*.; see also Consolidated Jurisdictional Notice of 10 July 2007 under Regulation 139/2004 on the control of concentrations between undertakings para.98.

41 See Decision of 3 July 1996 declaring a concentration to be compatible with the common market according to Regulation 4064/89 (IV/M.751-*Bayer/Hüls*) at [9] *et seq*.; Decision of 9 April 1996 declaring a concentration to be compatible with the common market according to Regulation 4064/89 (IV/M.556-*Zeneca/Vanderhave*) at [7].

42 Decision in IV/M.560-*EDS/Lufthansa* at [11]; see also Consolidated Jurisdictional Notice of 10 July 2007 under Regulation 139/2004 on the control of concentrations between undertakings para.97, depending on the conditions of the market such a start up period will normally not exceed a period of three years.

43 According to Art.1(2) of the Merger Regulation a concentration has a Community dimension:

cases where the outsourcing transaction involves the transfer of a business unit or assets previously engaged in third party business to an outsourcing service supplier the calculation of the relevant turnover follow the methodology set out in Art.5 of the Merger Regulation.[44] However, in cases where employees and/or assets transferred were previously exclusively (or at least mainly) used for servicing the customer's internal needs, the issue becomes more complex.

Calculation of turnover–transfer outsourcing

According to Art.5(2) of the Merger Regulation, with regard to the outsourcing customer only the turnover of the parts of the undertaking which are subject to the transaction shall be taken into account. However, pursuant to Art.5(1) of the Merger Regulation, the turnover calculation shall not include turnover between affiliated companies. Accordingly, the turnover taken into account on behalf of the outsourcing customer should only reflect transactions which take place between the outsourced part of the business and third parties.[45] Thus, it could be argued that in cases where the outsourced part of an undertaking previously produced or supplied services exclusively for the outsourcing company, the application of the Merger Regulation can be excluded entirely because it will never have a Community dimension.[46] This argument, however, fails to recognise the possible impact of the transaction on the market, if the relevant assets will be used for servicing third party costumers—a prerequisite for the finding of a concentration—and, thus, form the "real economic weight" of the transferred business. Therefore, the relevant turnover should normally be calculated on the basis of the previous internal turnover generated by the respective assets and/or employees.[47]

Given that outsourcing customers frequently operate the outsourced part of the business as a "cost centre", the determination of such an internal turnover is often difficult—if not impossible—without an unreasonable effort on behalf of the outsourcing customer. In addition, outsourcing transactions are based on the very premise that the services or goods can be supplied or produced more efficiently by an external outsourcing service provider and, therefore, the previous internal turnover does not correspond to a market valuation of the activities in question.[48] Nevertheless, in order to identify a market turnover that can be attributed to a previous internal (captive) business in transfer outsourcing transactions, the projected annual revenues that the outsourcing service supplier is going to receive from the outsourcing customer can be regarded as a suitable proxy.[49]

Calculation of turnover—joint venture outsourcing

Such problems do not arise in the case of outsourcing joint ventures since the outsourcing customer will retain (joint) control. Therefore, the undertakings concerned within the meaning of Art.5(1) of the Merger Regulation are both the outsourcing customer and the outsourcing service supplier. The same applies where only the outsourcing service supplier or the outsourcing customer contributes a pre-existing subsidiary or business unit to a newly created joint venture. Accordingly, the calculation of the relevant turnover includes the turnover of both parent companies or groups.[50]

The US approach

In today's global economy, many sizeable outsourcing transactions are likely to involve activities on both sides of the Atlantic.[51] Pre-merger notification in the

(i) if the combined worldwide sales revenues exceed €5,000 million; and
(ii) both parties have a European Union wide turnover exceeding €250 million; unless
(iii) each of the undertakings concerned achieves more than two-thirds of their Community-wide turnover within one and the same Member State.

Additional turnover thresholds are laid down in Art.1(3) of the Merger Regulation.

44 Consolidated Jurisdictional Notice of 10 July 2007 under Regulation 139/2004 on the control of concentrations between undertakings para.126 *et seq*.

45 Consolidated Jurisdictional Notice of 10 July 2007 under Regulation 139/2004 on the control of concentrations between undertakings para.167.

46 See also Fiebig, "Outsourcing under the EC Merger Control Regulation" [1996] E.C.L.R. 129.

47 See Consolidated Jurisdictional Notice of 10 July 2007 under Regulation 139/2004 on the control of concentrations between undertakings para.163.

48 Regarding the economic rationale for outsourcing see the section above.

49 The Commission as well as national competition authorities have been prepared to accept this methodology in various cases, e.g. Decision in COMP/M.4981-*AT&T/IBM*; see also Consolidated Jurisdictional Notice of 10 July 2007 under Regulation 139/2004 on the control of concentrations between undertakings para.163.

50 See Consolidated Jurisdictional Notice of 10 July 2007 under Regulation 139/2004 on the control of concentrations between undertakings para.139 *et seq*.

51 See also Joseph P. Griffin, "Antitrust Aspects of Cross-Border Mergers and Acquisitions" [1998] E.C.L.R. 12; US–EU Merger Working Group, *Best practices on cooperation in merger investigations*, para.1 *et seq*. See *http://ec.europa.eu/comm/competition/mergers/others/eu_us.pdf* [Accessed March 26, 2008]

United States is governed by the provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act).[52] Under the HSR Act, any transfer of voting securities, assets, or non-corporate interests may require pre-merger notification if certain statutory thresholds are satisfied. Currently, an acquisition may be subject to notification if the value of the voting securities, assets, or non-corporate interests to be held as a result of the transaction exceeds $63.1 million (the size-of-transaction test), and either the acquiring or the acquired person has annual net sales or total assets of $12.6 million and the other party has annual net sales or total assets of $126.2 million (the size-of-person test).[53] In the context of outsourcing transactions, the focus is generally on an acquisition of assets rather than voting securities. According to s.7 of the Clayton Act, the term asset has to be construed broadly to mean anything of value.[54] It encompasses all:

> ". . . property rights, real or personal, tangible or intangible, which are subject to transfer and which have been used by the seller and could be used by the buyer competitively."[55]

Not all goods, however, are considered assets under the HSR Act. For example, the grant of a non-exclusive licence to intellectual property does not constitute the transfer of an asset for HSR purposes. Rather, only the grant of an exclusive licence constitutes an asset transfer within the meaning of the HSR Act. Under the HSR Act, the value of assets to be transferred in connection with an outsourcing arrangement is equal to the fair market valuation of those assts, or, if determined and greater, their acquisition price.[56] In summary, only transfer outsourcing transactions involving assets exceeding the amount of $63.1 million are subject to review under US law.

Conclusions

Whereas in Europe the implementation of Directive 2004/39[57] has put outsourcing arrangements as a focus of many investment companies,[58] the possibility that outsourcing transactions could be subject to merger control appears not to be high on the agenda of the "deal teams" involved in outsourcing transactions.[59] While in the United States outsourcing transactions that do not involve the transfer of assets exceeding $63.1 million are not subject to merger control, the picture in Europe is still somewhat blurred. Even though the publication of the CJN has been a welcome step forward, there are open issues that warrant pre-notification contacts with the Commission and further clarification.[60] Such pre-notification discussion will likely centre on the question whether the transferred assets and/or employees will allow the outsourcing service supplier to supply third parties. With a view to the risks associated with the consequences of failing to file a notifiable transaction under the Merger Regulation and the often tight timelines for service commencement,[61] the parties to an outsourcing transaction are well advised to assess any potential pre-merger filing obligation at an early stage.[62] Because of the timing issues and due to the fact that outsourcing transactions rarely raise substantive competition concerns, decisions of the Commission regarding the qualification of an outsourcing transaction as a concentration are unlikely to be subject to review by the Community courts. In order to increase transparency, the authors therefore suggest that the Commission should follow the example of some national competition authorities and make publicly available informal no-jurisdiction letters sent to the parties of an outsourcing transaction.

52 For a more detailed analysis under US law, see Michael Moss and Timothy Walsh, "Outsourcing and Antitrust: Do Federal Premerger Notification Rules apply to Outsourcing Deals?" (May 1996) *Antitrust Litigation Reporter*.

53 See 15 U.S.C. §18a(a)(2).

54 *United States v Columbia Pictures Corp* 189 F. Supp. 153, 182 (S.D.N.Y. 1960).

55 See Trade Reg. Rep. (CCH) 4250, 7944.

56 See 16 CFR §801.10(b).

57 Directive 2004/39 on markets in financial instruments amending Directives 85/611 and 93/6 and Directive 2000/12 and repealing Directive 93/22 [2004] OJ L145/1.

58 See James Walsh and Simon Gamlin, "Markets in Financial Instruments Directive (MiFID) and Outsourcing: The principles in practice" [2007] 4 *European Business Law Journal*, 621.

59 As a matter of fact only few outsourcing transactions should constitute concentrations under the Merger Regulation as the transferred assets and/or employees normally do not "*noticeably strengthen the market position*" of the outsourcing services supplier or, as the case may be, do not "*operate independently of its parents*" on a given market.

60 Actually the Commission seems to interpret the calculation of the relevant turnover too broadly. Only the turnover that will actually be generated with third parties, as opposed to the expected annual turnover with the outsourcing customer, constitute the "real economic weight" of a transfer outsourcing transaction.

61 According to Art.14(2) of the Merger Regulation, failure to notify a concentration or implement a concentration before clearance may trigger a fine; See also James R. Modrall and Stefano Ciullo, "Gun-Jumping and EU Merger Control" [2003] E.C.L.R 424.

62 The extrapolation of the expected revenues for the purposes of turnover calculation as well as the preparation of necessary evidence such as substantiated business plans may be time consuming.