ARTICLE 101 AND THE MERGER REGULATION: A SINGLE ANALYTICAL FRAMEWORK?

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These brief remarks comment on a paper delivered by Carles Esteva Mosso, the Deputy Director-General for Mergers of the European Commission's Directorate-General for Competition, at a February 2016 conference organized by the Global Competition Law Center. In that paper, Mr. Esteva Mosso posits that, as a consequence of the EU's adoption of the significant impediment to competition ("SIEC") test under the Merger Regulation in 2004, together with developments in the analytical framework applied by the Commission under Article 101, "*the concepts of 'restriction of competition' in Article 101 TFEU and of 'SIEC' in Article 2 of the Merger Regulation are today, arguably, substantially similar.*" As a result, so he suggests, the Commission's analyses under Article 101 and the Merger Regulation have narrowed to a point where "*a single analytical framework*" is applied both to collaborative arrangements falling under Article 101 and to concentrations reportable under the Merger Regulation, thereby resulting in "*substantially the same level of intervention.*"

There are several reasons why the thesis advanced by Mr. Esteva Mosso would be desirable and welcome, provided of course it could safely be relied upon. Irrespective of whether antitrust rules seek to penalize anti-competitive agreements or to prevent anti-competitive combinations, their principal objective is common: to maximize consumer welfare. The notion that mergers generate more substantial efficiencies than collaborative agreements and should therefore be treated more leniently than transactions that effect a lasting structural change on the market is, as Mr. Esteva Mosso recognizes, "*a very theoretical construct, difficult to support empirically.*" In these circumstances, it is "*difficult to explain*" why "*a distribution agreement between companies holding a 30% market share could be caught by Article 101 while a merger between the same companies could*

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be cleared unconditionally." There are also sound practical reasons why similar levels of intervention should be applied both to collaborations and to concentrations, including the abundant jurisprudence that today exists under the Merger Regulation (relative to Article 101) that could assist companies and their counsel in self-assessing the lawfulness of collaborations that fall outside of the Merger Regulation's jurisdictional ambit.

The central question raised by Mr. Esteva Mosso is, therefore, whether, by adopting a substantive test under the Merger Regulation that is "*conceptually more similar*" to the "*restriction of competition*" test under Article 101, by explicitly recognizing in the Merger Regulation that the anti-competitive effects of a concentration may be outweighed by efficiencies (a balancing exercise not dissimilar to that mandated under Article 101), and by applying to Article 101 the same "*concepts and methodological approaches*" as are routinely applied under the Merger Regulation, counsel can be confident that the Commission will reach a broadly similar conclusion in respect of a collaborative arrangement assessed under Article 101 as would be reached were that arrangement reportable under the Merger Regulation.

In the view of this author, it is difficult to assume the same level of intervention by the Commission (still less by a national agency or court) under Article 101 and the Merger Regulation given the paucity of Commission decisions under Article 101 over the past decade, in particular decisions applying Article 101(3), together with the long-standing jurisprudence of the EU Courts and the Commission's 2011 Guidelines on the applicability of Article 101 to horizontal co-operation agreements (the "Horizontal Co-operation Guidelines"), both of which apply the notion of a "restriction of competition" broadly. Should, however, the Commission develop a more extensive body of case law that routinely approved under Article 101 collaborative arrangements involving companies with broadly similar market shares to those cleared under the Merger Regulation, counsel would have greater confidence that intervention levels under Article 101 and the Merger Regulation had indeed converged to a point where they were "*substantially similar.*"

I. Contribution of merger control to antitrust

Mr. Esteva Mosso rightly observes that the Merger Regulation has played a transformative role in EU practice, even if not all of the changes that have accompanied or been associated with the Regulation can necessarily be

attributed to it. Some would likely have happened anyway, although possibly not as quickly. Two distinct types of change may be identified – those relating to how we think about anti-competitive harm and those relating to how counsel should determine whether harm has occurred.

As to the first category – how we think about anti-competitive harm – there has been an important evolution in our appreciation of the circumstances in which anti-competitive harm may be expected to arise. As to Article 101, the Commission has increasingly applied an analytical framework similar to that applied under the Merger Regulation, including by defining markets more rigorously, thoroughly assessing an agreement's competitive effects, and considering the counterfactual. As to the Merger Regulation, the SIEC test adopted a decade ago did more than merely plug a gap in the Merger Regulation's ambit: it articulated an analytical framework that advanced the way in which we think about the objectives of merger control. In particular, as Mr. Esteva Mosso explains, the emphasis under the SIEC test on the assessment of a concentration's likely effects, the closeness of competition between the merging companies, and the competition that would be lost, is closer to Article 101's focus on the historic effects of an agreement or practice than the dominance test applied previously under the Merger Regulation. The adoption of the SIEC test has therefore led to a degree of convergence in the types of inquiry conducted by the Commission under Article 101 and the Merger Regulation, both employing economic principles to market definition and both focused on evaluating the effects of the conduct or transaction in question.

It is also clear that, following the adoption of the SIEC test in 2004, the treatment of efficiencies under the Merger Regulation is now closer to that employed under Article 101. As Mr. Esteva Mosso explains, the reformed Merger Regulation adopted in 2004 requires positive account to be taken of efficiencies, overturning a perception, borne out in the Commission's early decisional practice, that efficiencies could be cited as evidence of dominance. This change was significant, not because it resulted in the EU's approving a large number of transactions that would otherwise have blocked (it did not), but rather because it aligned the EU with U.S. antitrust law and signalled the Commission's readiness to view efficiencies positively in its assessment of concentrations. In practice, however, efficiencies have only occasionally played an important role under the Merger Regulation, not least because they are considered only in cases that raise material substantive issues that cannot be remedied. By contrast, the assessment of efficiencies is integral to, and often critical in, the analysis of agreements and concerted practices under Article 101, in part because

Article 101 is framed in a way that anticipates an integrated balancing of restrictions and efficiencies and in part because of the broad scope of application given to Article 101(1). The treatment of efficiencies under Article 101 and the Merger Regulation has therefore converged somewhat less than Mr. Esteva Mosso suggests.

As to the second category of change – how we go about determining whether harm has occurred – there has, as Mr. Esteva Mosso recognizes, been an important evolution in the way in which the Commission conducts investigations under Article 101 and the Merger Regulation. The following elements of that evolution can be identified:

- A recognition of the importance of sound data and hard economics;
- An appreciation of the probative value of quantitative evidence over intuition;
- A healthy scepticism about what competitors say and a reluctance to speculate about future conduct; and
- An appreciation of the need for checks and balances in an administrative system.

These changes in investigative practice, which have their origins largely in the package of reforms to the Merger Regulation adopted in 2004, have influenced the way in which conduct is analysed by the Commission under Article 101, thereby contributing to a convergence of the kind suggested by Mr. Esteva Mosso.

II. Are levels of intervention similar under Article 101 and the merger regulation?

Mr. Esteva Mosso's principal thesis is that levels of intervention under Article 101 and the Merger Regulation have converged to a point where they are now "*substantially similar*." The implication of this thesis is that counsel may safely assume that the Commission and its national counterparts will challenge agreements between competitors under Article 101 only in circumstances where they could be expected to prohibit a merger between the companies concerned. As mentioned above, this situation would be welcome. The question is whether it is correct. I have three main observations.

First, as Mr. Esteva Mosso recognizes, there remain important conceptual differences between Article 101 and the Merger Regulation. Restrictive agreements that limit the competitive freedom of market players are

unlawful and void under Article 101. By contrast, the Merger Regulation takes a positive view of concentrations, which are considered to be "*in line with the requirements of dynamic competition and capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the Community.*" As a result, the Merger Regulation places the burden firmly on the Commission to adduce compelling evidence that a given concentration will significantly impede effective competition. By contrast, under Article 101, because of the broad scope given to the notion of a "restriction of competition" under Article 101(1), the burden of demonstrating that the conditions justifying the grant of an exemption under Article 101(3) are met shifts much earlier to the companies in question. Also, as Mr. Esteva Mosso acknowledges, Article 101 applies to restrictions that are anti-competitive "by object," as well as restrictions that are anti-competitive "by effect," relieving the Commission of the need to prove that a given practice or agreement has in fact resulted in anti-competitive harm (or, so the Court has implied, is even capable of doing so). Further, consistent with the EU's Single Market policy objective, Article 101 is applied formalistically to vertical restrictions that impede parallel trade, irrespective of whether they have a material effect on competition.

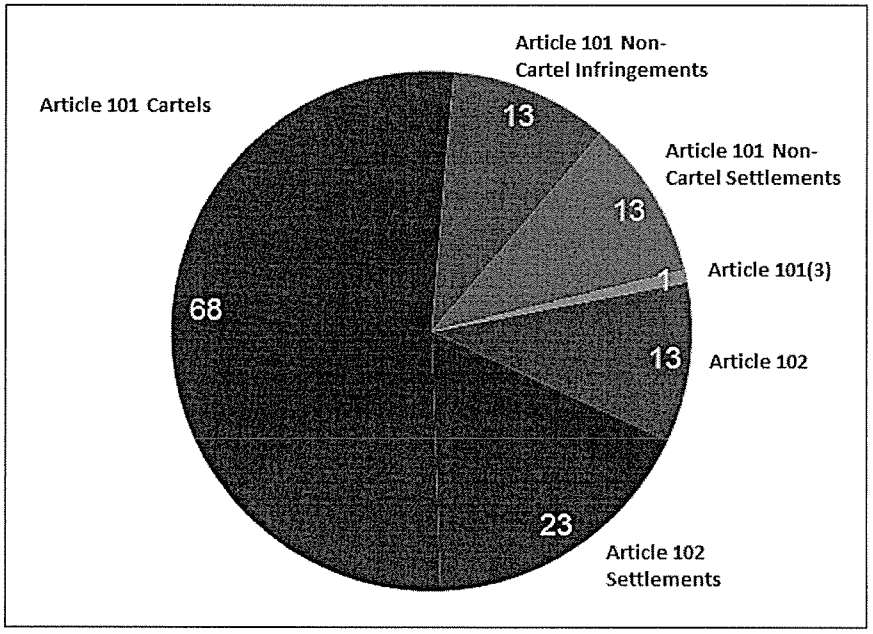
Second, the Commission's Horizontal Co-operation Guidelines make clear that collaborative arrangements between competitors accounting for market shares as low as 15% can run afoul of Article 101(1). Shares of this magnitude are well below levels that have in the past provoked intervention under the Merger Regulation, where transactions involving companies with combined shares of 20% are eligible for simplified procedure because they are presumed not to raise competition concerns. And, even shorn of the requirement that dominance be demonstrated as a pre-requisite for challenging a concentration under the Merger Regulation, the SIEC test has in practice been applied only rarely to market shares below 40% and then only in already-concentrated markets where there is strong evidence that significant competition will be lost through the merger. This suggests that the Commission considers the notion of a "restriction" under Article 101 to be broader than the notion of an "impediment" under the Merger Regulation and the notion of an "appreciable" restriction to be broader than the notion of a "significant" impediment.

Third, the Commission's enforcement practice under Article 101 (other than in respect of cartels) has been less consistent than was anticipated when Council Regulation 1/2003 was adopted, generating few decisions evidencing the thesis advanced by Mr. Esteva Mosso that intervention

levels under Article 101 are "*substantially similar*" to those under the Merger Regulation. At the time Council Regulation 1/2003 was adopted, it was envisaged that "*the number of individual prohibition decisions can be expected to increase substantially.*" In practice, as detailed below, this prediction has failed to materialize, largely because the Commission has adopted few non-cartel infringement decisions, exemption decisions under Article 101(3), and inapplicability decisions under Article 10 of Council Regulation 1/2003. Instead, the Commission has come to rely on commitment decisions rendered under Article 9 of Council Regulation 1/2003 as its principal enforcement mechanism under Article 101 (and, to an even greater extent, Article 102). Because commitment decisions are brief and only lightly motivated, and do not involve findings of fact or law, they cannot readily serve as legal precedent and typically provide only general guidance on the Commission's thinking, making it difficult for companies, national agencies, and courts to determine the Commission's reasoning, in particular as to the probative value of economic evidence in a particular situation and/or whether a given agreement or practice will benefit from an individual exemption.

While the legal obligation on the Commission under the Merger Regulation to render a motivated decision at the end of every case that is not eligible for simplified treatment has created a rich jurisprudence that enables counsel to understand how markets have been defined and why transactions have been approved, the absence of a similarly extensive body of case law under Article 101 makes it harder to provide reliable guidance on situations where the Commission may be expected not to take action. In addition to rendering few decisions of general application, and contrary to expectations at the time Council Regulation 1/2003 was adopted, the Commission has issued almost no opinions, informal guidance, or "no action" letters that might have developed the law or set out the Commission's position on novel issues. Also, the Commission's Annual Report on Competition Policy, which for many years provided valuable insight into cases that were not the subject of formal decisions, including because they were closed, has become increasingly condensed over the past decade and no longer discusses individual cases in a way that provides guidance to national courts, national agencies, companies, and counsel. It is therefore difficult to assess what may be among the most interesting cases from a practitioner's perspective, namely cases that the Commission chose not to pursue under under Article 101(1) because it determined that the conditions for an exemption under Article 101(3) were met.

Since the 2004 reforms entered into force, the Commission had rendered more than 4,000 decisions under the Merger Regulation as of September 30, 2016, of which more than 2,000 were detailed and motivated. By contrast, as the following chart shows, the Commission's output under Articles 101 and 102 has been much more modest:



Of the 130 decisions rendered over this period, 50% have concerned cartel-like conduct that has attracted fines, many based on "by object" infringements, which Mr. Esteva Mosso acknowledges are an exception to his thesis. Around 25% of Commission decisions and settlements over this period involved breaches of Article 102, where, as is well known, the Commission does not consider itself legally required to demonstrate anti-competitive effects. Of the 25 non-cartel Article 101 infringement and settlement decisions, two concerned vertical restraints and many of the remainder were so fact-specific as to provide little general guidance, in particular on the circumstances where an exemption under Article101(3) may be available. Indeed, it is notable that one of only two Article 101 cases cited by Mr. Esteva Mosso in support of his thesis – *BHP Billiton/Rio Tinto*, a transaction involving two leading producers of iron ore that the Commission came close to prohibiting under both the Merger Regulation and Article 101 – did not result in a formal decision under either regime.

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Mr. Esteva Mosso is surely right when he says that Article 101 and the Merger Regulation should in principle apply similar methodologies and support similar levels of intervention. The question, however, is whether the case law under Article 101 is sufficiently extensive and sufficiently clear to allow practitioners to safely assume that the Commission's assessment of collaborative arrangements will indeed follow a similar analytical framework to that employed under the Merger Regulation. Given the few decisions rendered over the past decade demonstrating levels of intervention under Article 101 that are similar to those applied under the Merger Regulation, it is, in the view of this author, difficult to assume "*substantially similar*" intervention levels under the two regimes. To confidently rely on the thesis advanced by Mr. Esteva Mosso, the Commission would need to issue more guidance explaining the circumstances in which Article 101(1) applies and an exemption under Article101(3) will be available. The Horizontal Co-operation Guidelines should also be updated to more closely align them with enforcement practice under the Merger Regulation. Absent these initiatives, the enforcement of Article 101 and the Merger Regulation will likely continue to converge, but may not for some time have converged to a point where intervention levels are understood to be "*substantially similar.*"