Merger Regulations and Ethics in the European Union: the Legal and Political Dimensions

OVUNDA V. C. OKENE, PhD, Rivers State University of Science and Technology, Port Harcourt, Nigeria

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The exclusive right of the Regulatory Commission to review merger activities within the EU states. Such activities will also include acquisition and joint venture businesses.

The Regulation makes it compulsory for any merger deals to be notified to the Commission. The Commission has set standards regarding the size for mergers that it considers to be subject to mandatory notification to the Commission.

The consistent application of competitive-based criteria for M&A. The Commission considers third parties in cases of dispute to make oral presentations and encourages interested bodies to play active roles in EU merger regulations.

The provision of a legal framework to govern any merger activities. It also enjoys exclusive jurisdiction on merger regulations though its decisions are subject to judicial review by the member state courts.

Levy asserts that since the institutionalisation of the merger regulation, the Commission has given unconditional approval for over 1,800 applications of merger-related deals; 50 others have been turned down; another 50 have been referred for consideration by the EU member countries. While 95 merger transactions have received conditional approval during the first phase of the Commission, 18 others have been prohibited with three of such prohibitions overruled by a member country court. About 80 applications to the Commission have also been withdrawn during phase two of the Commission and 20 merger deals have been given unconditional approval.

The Commission has worked towards ensuring that its enforcement standard is adhered to by member countries. To this end, the Commission issued a Draft Horizontal Mergers Notice to explain how mergers should be analysed and identifying various factors that may impede a fair competitive atmosphere. The adoption of this Draft has other wider implications and benefits to the EU states. At least, it creates a platform to achieve standard through an assessment of M&A transactions.

Cross border acquisitions have been hampered by different regulatory frameworks across countries. La Porta et al. posit that investor protection is highest in English common law colonies as well as in Scandinavian, German and French civil-law territories. Such legal environment influences cross border acquisitions. Efficient cross border acquisitions will take place where an acquirer from a high investor protection country acquires a target from a low
investors protection country. Information asymmetric may also slow the performance of cross border acquirers due to restrictions imposed by the regulatory regimes.4

The present study examines crucial challenges of the regulatory framework of the European Commission, its judicial arm and enforcement agencies. Previous studies have reviewed the structure of the EU merger regulatory and review processes but not much attention has been devoted to the challenges of the Commission considering the ethi cal milieu it operates in. The political and national interests of member states are often in conflict with the tenets of the shareholder protection ideology, on which basis the ECMR is unfortunately established.

EC merger control legislation

The development of the EC merger control, or control of concentrations, has been solidified with the gradual creation of an European single market. European competition policy has historically revolved around EC arts 81 and 82.5 Since the EC Treaty is silent on the control of mergers, the supervision of concentrations was in the early stages of the Union restricted to the Commission’s control of compliance with art.82. In the precedent set by the Continental Can case,6 when the European Court of Justice (ECJ) held that an undertaking abuses its dominant position if it strengthens its position in such a way that the degree of dominance reached substantially letters competition, the way was clear for the EC to rule on M&A.

The limited supervision implied by the treaty provisions was problematic since it restricted the control of mergers to those that were made between dominant undertakings. It is interesting to note that the Commission, as early as the 1960s, had realised this shortcoming.7 However, it would take another 30 years until a legal instrument dealing solely with concentrations was agreed upon by the EU member countries. The reason for this delay might partly be explained by the political importance that is linked to an instrument through which mergers between undertakings may be restricted or prohibited. Massive lay-offs, new investments or withdrawn investments are in many cases very tangible results of mergers. The governments of the European Union were reluctant to surrender these powers to the Union.

As in many other fields of Community law, it was a judgment of the ECJ that put an end to the power squabble. In the BAT-Reynolds merger dispute, the Court conferred competence on the Commission to supervise mergers under art.81 EC (in addition to art.82 EC) which created an atmosphere conducive for the adoption of the merger control regulation

It was Regulation 4064/1989 [1989] OJ L395/1 that introduced the basic principles upon which the current merger control as contained in Regulation 139/2004 (2004) OJ L24/1 (European Commission Merger Regulation (ECMR)) is based. Regulation 4064/1989 clearly spelt out the Commission’s exclusive jurisdiction to clear or prohibit concentrations with a Community dimension. It introduced the “one-stop-shop” mandatory notification procedure for the concentrations that fell within its jurisdiction as well as market-oriented, competition-based criteria. The Commission was empowered to impose fines and competence to restore competition by ordering the undoing of a prohibited merger transaction. The strict deadlines for decision-making provided for legal certainty for the parties to the concentration. Finally, decisions of the Commission are subject to scrutiny by the Community courts.

These principles manifest themselves also in the current merger control legislation particularly ECMR 139. However, developments in case law and the limited resources of the Commission has led to some reforms, among the most important include the possibility of referral to national authorities of concentrations with a community dimension under art.9 of the ECMR and a reformed substantive test which allows for the intervention against more types of anti-competitive mergers.

Nonetheless, the system of ex ante administrative control of mergers and the Commission’s wide powers of investigation and enforcement established by the Merger Regulation is ever still the foundation of the Community’s merger control. The introduction of the merger regulations meant that the Commission’s authority to supervise mergers was explicitly laid down in Community legislation. Similarly, the establishment of an administrative system of merger control has important implications on the role of the Community courts and the standard of judicial review they ought to apply.8

If the BAT-Reynolds merger dispute was the starting point for a more extensive control of concentrations, the merger Regulation 4064/1989 provided the Commission with a foundation to build the extended control on. However, as conventional in EC law, the performance of the Community courts finally shape and determine the application and interpretation of legislation.

EU bank reforms and merger regulation amendments

The EU Merger Regulation came into effect on September 21, 1990 through the enactment of the EC, which has the robust powers of enforcing EC arts 81 and 82. The Treaty
was enacted to prevent the perceived unfair competition and abuse of the strong market forces in any mergers acquisitions deals. The art.82 highlights what constitutes abuse as when there is a limit placed on the production, markets or technical developments to the prejudice of the consumers by an unfair trading of a member state. This also includes any perceived unfairness in the fixing of prices in a business transaction.

The article also explains that any condition that could place any party in an advantageous condition, which at the same time disadvantages another party or places the party in a more competitive position, is considered "unfair". The approval or rejection of merger activities within the European Court is usually the responsibility of the EC. Where a merger has been rejected, there is an internal procedure of obtaining a remedy through the European Court of First Instance (referred herein as CFI). The CFI makes an independent investigation and reviews decisions either by giving approval to the merger or rejecting its execution. Any further remedy sought is usually referred to the European Court of Justice (ECJ) which serves as the court of final instance for all merger issues.

The underlying principle applied by the EC in considering approval for banks mergers is usually based on the Commission's basic litmus tests: the extent of the transparency of the deal; availability of deterrent mechanism in place to prevent any unfair conduct by parties and reactions of the undertakings which do not participate in the co-ordination, as such the current or future competitors and the customers are required to avoid acts that can hamper the deal.

In the United States however, the law for approving or rejecting a merger deal seems to have clearer guidelines than in the European Union. The law requires the merging banks to obtain clearance from either the Department of Justice (DOJ) or the Federal Trade Commission (FTC). Unlike the EC system where third or interested parties are allowed to appeal against the Commission's decision, the US system does not make provisions for such. In fact, neither the DOJ nor the FTC gives provisions parties the opportunity to know any reasons for their decisions, as such decisions are not published. Harris' points out that, while United States are more cautious in handling outside merger interest through their regulations, the European Union allows more freedom from third parties as long as sufficient interests have been proven.

Several reforms have been undertaken by the Econmic Commission to overhaul the merger process in the European Union. Byowitz et al. outline some major areas of the EU merger-control regulation. Specifically, the reform includes the following areas substantive; procedural; jurisdictional and administrative reforms. The substantial reform is based on the concept of the dominance criteria used in assessing the impact and market powers of mergers. The EC has upheld the principle of the dominance test rather than the substantial lessening of competition peculiar to the US system.

The current reforms define dominance to include some oligopolies that raise competition issues which tend to differentiate its policy from the United States. The merger reform gives a guideline that helps to identify grey areas in which mergers can be considered as anti-competitive. These include: the establishment of the paramount market position which arises when the combined market share is more than 50 per cent or when there are reasonable grounds to believe that despite having a lower percentage share, a party will still exert a stronger market power. Motta, Polo and Vasconcelos also highlight some remedies put in place by the EC to address any forms of anti-competitive practice or any merger that will create a dominant position as a result of effective competition would be greatly affected. They argue that the use of dominance test rather than the US application of substantial lessening of competition criteria is more useful in addressing any adverse competitive tendency.

Another guideline is in the area of elimination of constraints on the ability of suppliers to unilaterally alter prices which is a form of non-collusive oligopoly. There are also reforms against any increased risk of co-ordination among competitors in the market which is a form of collusive oligopoly. The EC guideline is to give priority to efficiency in the consideration of merger analysis. The EC merger reforms consider efficiency as

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10 Several merger reviews have been undertaken by the CFI over the years. Some of these decisions have set a precedent in the merger rulings in EU countries. Their jurisdiction is not only limited to bank M&A but includes all other forms of consolidations, On July 13, 2006, the CFI made a landmark judgement by putting a stop to the merger of Sony-BMG, which would have been the second largest music company in the globe. Some mergers that have been cleared by the EC have also been challenged in the CFI. Also in 2003, the EC objected to the General Electric and Honeywell merger even when it has been cleared by the US Department of Justice. The companies appealed against the decision of the EC asking for the removal of the prohibition by the CFI rejected the appeal. (See General Electric Co v Commission of the European Communities (T210B) [2005] E.C.R. II-5975. [2006] 4 C.M.L.R. 15)
11 Levy, "EU Merger Control" (2003) 26(2) World Competition 195 narrates that since the Merger Regulation came into force, the EC has rendered more than 2,200 decisions, of which over 1,800 (86 per cent) have unconditional approval decision; 50 (3 per cent) found the Merger Regulation to be inapplicable; 50 (2 per cent) referred concentrations notified under the Merger Regulation in whole in part to the government of EU countries; 95 (5 per cent) approved transactions subject to undertakings given at the end of the initial investigation period; 20 (1 per cent) unconditional approved transactions during phase II; around 60 (3 per cent) had approved concentrations subject to undertakings given at the end of phase II and had rendered prohibition decisions with respect to 18 (0.5 per cent) transactions, of which three of which were subsequently overturned by the Community courts on appeal. More than 80 operations had been withdrawn, of which around 20 (2 per cent) withdrew following the opening of in-depth investigations, in many instances to avoid prohibition decisions. Thus, around 2 per cent of all transactions notified under the Merger Regulation have been either prohibited or abandoned in the course of in-depth investigations. The Commission's challenge rate is broadly comparable to those of other major jurisdictions.
15 C.P. Byowitz et al, EV Proposes Comprehensive Changes to Merger Regulations (Venulex Legal Summaries, December 20, 2002).
a vital ground for merger initiation. The essence of the argument is that the consumers benefit more where the system is efficiently developed and are unlikely to create monopolistic tendencies. The Commission also proves mergers on the basis of imminent failure of the firm when the target would have likely been forced out of the market and where there is no suspicion of any anti-competitive acquirers.

The European Commission’s competence to vet mergers at the Community level is primarily derived from the Merger Control Regulation (MCR) 1997, which established a concentration architecture based on separate, non-overlapping jurisdictional spheres for Member States and the Commission, with the Commission alone having jurisdiction over concentrations. Under the MCR, Community impact is determined by the two Community dimension tests employing a numerical form-based approach. Thus, Davison examines the Commission’s 2000 report on aspects of the MCR, particularly the appropriateness of the key Community dimension tests in guaranteeing that all concentrations with a Community impact are centralised to the Commission, while those for national impact are dealt with at the Member-State level. His study reveals that the tests are ineffective and undermine the goal of the concentration architecture and advocates for separate jurisdictional spheres where the Commission and Member States competition authorities form a network of co-operation to regulate concentrations.

If the execution of a merger will help to sustain the survival of the target bank assets, the Commission would be obliged to grant the merger on the basis of efficiency. The procedural reforms include the striking off of the requirement that the parties in a merger file intention within a week from the conclusion of a binding agreement between the merging banks. The reform adopts the US style of an ex-ante merger notification and also requires the merging parties to make a submission notifying its intentions before the execution of a legal agreement.

The procedural reforms can also extend the time periods to a further 30 working days for the completion of the merger review where the parties have proposed remedies to address any competitive concerns raised. This can also be further extended to additional 15 days in complex cases. In addition, EC reforms increased the amount of both the fines and penalties of the parties where they are found to have made any misleading submissions or any such issues raise during the Commission’s inquiries. The Commission is also empowered to seal the premises of the offending parties during an investigation.

The jurisdictional reforms focus on simplifying the system of referring transactions from the Economic Commission to the EU member countries which may be affected by the merger. The reform therefore proposes a pre-notification system which allows the merging banks to seek referral of a merger transaction to any EU country involved or affected by the merger. The reform also permits the process of acquiring exclusive jurisdiction over any merger deals involving cross border parties.

Issues included in the administrative reforms include: the creation of office of the Chief Competition Economist; the appointment of a peer-review panel to undertake investigations, outside interests in a merger conflict. The reform also includes regular meetings with interest groups in event of conflict in the merger with a view of resolving the issue.

The EU Merger Regulation and political interference

Since the introduction of the EU merger control, analysts have spotted several fundamental institutional flaws in operation and procedures of seeking redress in the European Commission. Drahé argues that the responsibility for final decision-making lies with a primarily political body and its affiliate bodies (the CFI and the ECI) whose members are potentially exposed to influence from firms and from governments of member countries. For example, firms can deliberately seek to influence antitrust proceedings at the expense of their competitors.

One possibility is the prevention of mergers between competitors which could lead to competition-relevant efficiency benefits. This constitutes a form of rent-seeking
which, if successful, results in type-II errors in the sense of the "error cost approach". On the other hand, political influence can be exerted, especially by national governments, aimed at securing approval for certain mergers despite reservations about the effects on competition. Under the banner of "industrial policy", Stevenson and Fillipino opine that there is a strong interest in building "champions" for the global markets or securing special treatment for sensitive industries. However, by and large, there are no sound theoretical arguments to justify this. Moreover, the empirical experience is mostly negative. Consequently, approvals granted in exceptional cases for industry policy reasons are false decisions of type 1. Hence, in both cases, there is the risk of welfare losses, which are highly relevant to the discussion of the "more economic approach".

During the initial years of the introduction of the EU merger control, Christiansen argued that there were a number of questionable decisions in which influence of this kind played a role. For instance, in Germany during the Boeing/McDonnell Douglas merger dispute, it was believed that the Airbus consortium exerted influence on the Commission. But there are also allegations of massive intervention by the Member-State governments and in some extreme cases, the members of the Commission were divided among themselves. One of the circumstances leading to the collapse of the European banking sector in the recent financial crisis is the extent of political interest of members even at the expense of shareholders. Fassin and Gosselin highlight the alterations between the Dutch and Belgian governments over the control, acquisition and sales of ABN AMRO and subsequent liabilities following the financial upheavals of the banks. There were allegations that the Dutch Government influenced the resale of the banks at a knockdown price, a situation that left the bank management with various difficulties.

A sensible institutional solution to this problem would be, in the first place, to create an independent antitrust authority at the European level which would have sole responsibility for protecting competition and could build up an appropriate reputation. However, proposals to this effect met with massive resistance and have receded more and more into the background. In the present reform discussion this fundamental institutional aspect is receiving little or no attention.

Admittedly, political factors have been found to play a lesser role in recent years in merger resolutions by the EC. But this does not suggest by any means that it is no longer an issue. Rather, there are two further points which need to be considered. The increased focus on economic analysis can be interpreted as an attempt on the part of the supporters of a purely competition-oriented approach within the Competition Directorate-General to shield themselves from attempts to exert external political influence. The greater complexity of the economic argumentation before the reform has doubtlessly been a contributing factor. Thus, the more economic approach oriented would lend to a more a logical refinement of a strategy which has already been pursued.

These measures of reforms are geared at giving a transparent and fully compatible rationale in merger deals independent of any political-economic aspects of merger control. Consideration for industrial policy or other non-competitive factors would be in no way compatible. Perhaps in order to reduce political influence, there should be great measure of independence of the competition authority; this includes the stronger orientation of merger control to more general rules so as to reduce the room for discretionary decisions and thus the exposure to influence. This could also quash the contention that in its more recent decisions, as in the GE/Honeywell merger for instance, the European Commission is allowing itself to be influenced by an underlying anti-American sentiment-and thus again by non-competitive factors.

Secondly, the fact that political intervention has been successfully pushed back in recent years does not imply that the problem has been resolved once and for all. Rather, it has to be assumed that the inclination towards anti-competitive intervention at the political level will continue to exist, at least latently. This was clearly indicated by the initiative on the part of France and Germany for a pan-European industry policy while on the subject of Germany, there was a special ministerial...
powers exercised in the E.ON and Ruhrgas merger dispute or the heated debate over Springer-Verlag’s acquisition of Pro Sieben Sat.¹

So, for this reason, too, there is still a need to give thought to institutional safeguards to shield the ED merger-control process from (industry policy-related) political influence. At the same time, the increasing orientation towards case-by-case analysis within the framework of the "more economic approach" also creates new possibilities for discretionary decisions. Given this ambiguity the incentives for firms and politicians to exert influence could be increased again." That this aspect has gone largely unnoticed to date points once more to an overly narrow focus of the discussions on the new approach.

Some principal provisions of the EU merger regulations

Levy" classifies the powers of the European Commission on Merger Regulations (ECMR) under four basic areas namely: the exclusive competence of the Commission to review concentrations of Community dimension; the mandatory notification of such concentrations; the consistent application of market-oriented as well as competition-based criteria; and the provision of legal certainty through timely decision making. In fact, he noted the following cardinal provisions of the Regulation:

The Merger Regulation applies to concentrations or changes in control of the process. The concept of a concentration includes mergers, acquisitions, and the formation of jointly controlled, autonomous, full-function joint ventures. The concept of control is defined as the possibility to exercise "decisive influence". All concentrations that meet certain "size" tests are deemed to have Community dimension and, as such, are subject to mandatory notification under the Merger Regulation, irrespective of whether they have any effect in the Community. The Commission has exclusive jurisdiction over such transactions (the "one-stop-shop" principle). Transactions that fall below these thresholds may be subject to national competition rules. In exceptional circumstances, an ED member country may request either that the Commission refers a concentration of Community dimension to its national authority or that the Commission review a concentration that does not have a Community dimension.

Transactions must be notified on a prescribed form according to mandated time periods, a waiting period must be observed before notifiable transactions can be put into effect, and the Commission must render a decision no later than five months (90 working days) following notification. Fines may be imposed for failure to notify, late notifications, or the provision of incorrect or misleading information. Where reportable transactions have been implemented prior to having received approval, the Commission may take remedial action. The Merger Regulation provides considerable scope for third parties to comment on notified concentrations, including the right to be heard orally. The Commission encourages customers, competitors, suppliers, and other interested parties to play a active role in ED merger control.

The substantive test under the Merger Regulation is whether a transaction creates or strengthens a dominant position as a result of which effective competition is significantly impeded in the common market. The Commission’s appraisal under the Merger Regulation has two main elements: (i) definition of the relevant market; and (ii) competitive assessment of the transaction. The Commission generally focuses first on unilateral exercises of market power and then on whether a transaction creates or strengthens a position of collective or oligopolistic dominance. Horizontal mergers (i.e. those involving firms active in the same markets) have accounts for the large majority of challenged transactions, although the Commission has also examined (and, on occasion, prohibited) mergers that have had vertical or conglomerate effects.

The Commission is not empowered to exempt or authorise, on public interest or other grounds, concentrations that are considered incompatible with the common market. This lack of legal authority on the Commission has led to some judicial imbroglio between politics and the courts; such as in the Fortis-gate which Fassin and Gosselin" observed built an immense tension between the Dutch and Belgian governments of Europe. The Commission may peg its approval of transactions on undertakings or commitments offered during the initial investigative periods. An appraisal under art.S1, which

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prohibits anti-competitive agreements, may also be warranted under the Merger Regulation where a full-function joint venture gives rise to spill-over effects between its parent companies. Non-full-function joint ventures fall outside the Merger Regulation and may be subject to arts 81 or 82, which prohibits abusive conduct by dominant companies, as well as national competition rules. Any decisions of the Commission are subject to judicial review by the Community courts.

The US and EU merger regulations

There is a sharp contrast in the pattern of merger regulation and the economic environment of the European Union and the United States. Rad and Beek noted that the EU Member States are very heterogeneous. The differences in culture, legal and economic systems are substantially more diverse than in the United States. But this also has some impacts on any merger transactions. It strengthens the diversifications caused by the loose integration in economies of member nations.

There is also the fear that economies of scale will be difficult to exploit in a cross-EU merger. The difference in the legal operations of the domestic country implies that in an occasion of a merger, the merged bank will need to readjust to the demands of the local legislations. However the United States offers a less stringent measure in the legal requirement of laying off staff in event of a merger. In the European Union, the labour laws are tight and almost difficult to allow banks to shade off their staff strength as a costs saving measure. The protections under the EU regulations are thus stronger.

There is also the issue of limitations on the investment ventures businesses such as banks, can be allowed to explore. Willie the United States seems restrictive, the European Union is more liberal on the range of activities banks can undertake. For example, banks are not allowed to undertake commercial and investment banking. But the EU regulations allow banks to undertake either or more such as insurance. This inadvertently gives EU banks a measure of economies of scale and scope in comparison with the United States.

Bank merger and acquisition and the current economic crisis

The current global economic crunch has adversely affected the trend of mergers and acquisitions particularly in the European market. The economic impasse has hit very hard on the bank sector leading to over 16 large failed, unsuccessful and cancelled mergers and acquisitions in the sector.” In general terms, the crunch has cramped the private-equity model as there have been smaller and fewer deals. Young observes that owing to the economic crunch, the number of the M&A deals reduced by half in 2008 and the biggest value of M&A in the chemical industry, for instance, was valued at a maximum of €100 million. Banks want much more security before giving credits or loans. This has slowed down the ability of the banks to lend.

However, the effect of the credit crunch and the global economic meltdown has not been so badly felt in all European countries. The German banking system has shown remarkable resilience in the face of the global financial crisis. Dammers observes that despite the collapse of the IKB Industriebank and SachsenLB mergers which was among the earliest signals of the severity of the credit crunch, the Germany banking system has remained quite steady and resilient.

But despite its steadfastness, the German banking industry has been faced with its share of the financial storm leading to the government to introduce broad measures such as bailouts involving liquidity debt guarantees and recapitalisation of the banks in addition to the introduction of the Financial Markets Stabilisation Funds to streamline successful takeovers. Consolidation has been argued as the panacea to the meltdown in the banking sector. Some German banks are also mapping out strategic models to neutralise the financial crisis such as geographical diversification into eastern and central European countries, scaling down public-sector lending and increasing commercial banking for small businesses by a higher percentage.

Interestingly, at the start of the credit crunch, some financial analysts had envisaged the impending credit squeeze in the global economy which would invariably affect bank acquisitions. Shearer outlined that the impending credit crunch facing dealmakers in the M&A markets in 2006 would have dire consequences for the deals. Tightening of the credit cycle, reliance on the traditional funding sources such as the leveraged loans were among the strategic options for the banks.

The increase in the bank interests by most banks in 2006 was a move to tighten lending and thus signaling a severe financial crisis. Flexibility in the M&A structures such that borrowers could have sufficient capital to withstand the liquidity reduction was the strategic way to deal with the credit crunch. The result has been the enormous pressure created on both the domestic, cross-border and opportunistic acquisition deals in the EU banking sector.”

The impact of the global economic crisis on banks M&A has a mixed effect in the United States. It has in fact generated a process of creating thriving banks out of many troubled ones; and thus opened the avenue for big bank mergers. Hage had alerted that mergers could create a handful of megabanks with an advantaged position of

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exploiting cross-border acquisitions and thus rejuvenating the bank sector. However, consolidation alone is not a panacea to the credit crisis. Both the United States and European Union have witnessed in the recent past bank consolidations leading to poor performance and returns.

However, costs cutting through mergers can be very helpful. Banks with low overheads earn higher profits and in turn attract more investors which increases the banks liquidity and loans to its customers. Two major issues in the banking sector are vital for the survival for the credit institution: the reforms in the banks and its credit-risk management system; as well as encouragement of survival of smaller banks who are known for their prudent lending.

Regulations that help create a better business environment often decrease transaction costs and help managers to become more efficient technically. On the other hand, regulations impose constraints that are likely to lead to inefficiency in the allocation of resources. Banking is undoubtedly one of the most regulated industries in the world. Because governments provide some sort of safety net for the banking system, whether is implicit or explicit, they need to limit the moral hazard and the adverse selection this safety net creates. De Young et al. compare the role of bank regulators to that of writing and monitoring debt covenants for depositors, whose debt is not protected by standard covenants. Safety and soundness covenants, such as minimum-capital ratios and loan-concentration limits, constrain banks' portfolios.

When such safety and soundness covenants become binding, regulators can enforce remedial covenants, such as restricting asset growth or raising additional equity capital WhIch can further constrain production of bank output. Asaftei and Kumbhakar affirm that though regulatory covenant enforcement can generate benefits it also imposes substantial costs on banks. Thus, the regulation burden must be carefully administered. They advocate that although prudential regulation is more critical in emerging economies, inadequate prudential regulation has led to severe problems even in EU countries. This has been amplified in the recent banking crisis that swept across most Member States.

Conclusion

The article addresses ethical issues in the regulatory framework of the European Commission on Merger Regulations. The Commission, as an arbiter on mergers, ensures equity and fairness on any deals among its members and those with outside parties. Although fairness in merger deals may be restrictive to the interest of the shareholders, it would imply an exchange of values with commensurate equality.

Regulatory bodies such as the ECMR have fiduciary responsibility for ensuring that appropriate merger information and ethics are strictly followed. They also have the task of enforcing contracts such that the parties to the business deals act co-operatively. Any failure to take actions in face of imminent unethical practice by parties involve will shift the liability resulting from such inactions to the regulators. The political pressures from EU Member States, notwithstanding, the ECMR must address fundamental institutional flaws in operation and procedures of seeking redress in merger transactions. Its guidelines on approval or rejection should be well spelt-out such that they are beyond doubts.

To ensure that the independence of the ECMR is guaranteed, it is instructive to create an independent antitrust authority at the European level which would have sole responsibility for protecting mergers and other competition and could build up an appropriate reputation. Although political intervention in merger transactions has been successfully pushed back in recent years, it does not imply that the problem has been resolved once and for all. Rather, it has to be assumed that the inclination towards anti-competitive intervention at the political level will continue to exist, at least latently. Thus, there is still a need to give thought to institutional safeguards to shield the EU merger-control process from political influence. Perhaps in order to reduce political influence, there should be great measure of independence of the competition authority; this includes the stronger orientation of merger control to more general rules so as to reduce the room for discretion ary decisions and thus the exposure to influence.