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INTRODUCTION

The competition policy is the mean for the correct assignment of resources between enterprises and consumers. It promotes the economic growth and enhances consumer welfare by avoiding situations which can affect negatively the product/service quality, increase the prices or reduce the level of innovation.[1]

The promotion of innovation is one of the main objectives of the competition policy. The competitive concerns are especially important in the technologic-based industries, where the main factor of growth and economic success is the innovation, as result of the R&D processes. The innovation policy, like an instrument of economic development, is capital and not only the European Authorities but also the American Government have realised this. Recently, the US Congress has recognized the necessity to reform its innovation policy, and the European Commission is also aware about the need of an innovation friendly approach in all the European legislation, as it was proposed in the framework of the Lisbon Agenda.[2]

The European Commission knows the impact of the competition law in the innovation race among companies, especially between the *high-tech* based companies. Normally, these types of companies have high fixed costs in order to pursue R&D projects, which will permit the launch of successful innovative products. The *high-tech* companies usually carry out concentration operations, with the purpose to reduce the risk and innovation time, to reach new markets, benefit and exploit from other companies Intellectual Property rights and cover high pipeline costs. However, "a*lthough these transactions may be pro-competitive, they may also raise antitrust concerns and may therefore fall under competition rules".*[3]

It is likely that the concentration operations, and among them, the mergers, in the *high-tech* industry, fall within the scope of competition law. Because of this, it is necessary to adopt a dynamic competition practice, which is coherent with the industry reality. In the other case, the companies could not find incentives to pursue innovation activities, and the final result could be a challenge to the international industry competitiveness and to the consumer welfare. This consumer welfare danger is much higher in sensible sectors, like the pharmaceutical one, where there is the risk that consumer do not benefit from new, more efficient, safer and cheaper drugs for the diseases treatment.

Competition in innovative sectors has characteristics not found in the traditional industries. Are the standard competition procedures valid in the assessment of potentially anti-competitive concentration in the innovative sector? "*The question of appropriateness arises because competition in these industries displays features that are radically different from those encountered in traditional sectors of the economy.*"[4]

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[1] Frederic Jenny, "Razón de ser del Derecho de la competencia y misiones encomendadas a sus autoridades" Ekonomiaz: Revista vasca de economía, ISSN 0213-3865, Nº. 61, 2006, p. 40-55.

[2] Gómez-Acebo & Pombo and Ablondi, Foster, Sobin & Davidow, "Impact of EU Competition Legislation on Innovation."

[3] Ibid.

[4] David Encaoua and Abraham Hollander, Competition policy and innovation, Oxford Review of Economic Policy vol. 18, nº1.

In the European context, the Commission is taking a further step for an innovation approach in the Merger Control, studying not only competition *in the market* but also *for the market*. Competition *in the market* approach takes into account the existing products and considers the R&D efforts only like a part of the product market. Competition *for the market* assessment considers the R&D efforts like a separate market from the existing products. This approach is called "*Innovation Market",* and supposes that the projects for the development of new products/services are analysed as a different market. It has its origin in the American legislation.[5]

This paper will be focused in the Merger Control, where the "*Innovation Market"* appraisal is normally applied. When the antitrust authorities exam a merger between *high tech* companies, they must predict the future competition not only in products, but also the future competition in the research projects, and it is here where the analysis of the "*Innovation Market"* is especially relevant.[6]

Nevertheless, the application of the "*Innovation Market"* in the Merger Control, involves some difficulties. Firstly, concentration in product supply side is assumed to be negative for the consumers, but in the case of "*Innovation Market",* there is no proof that links concentration in research with less innovation output. Concentration in R&D projects could lead to more or less innovation results, depending on the case. Secondly, any anti-competitive reduction in the research competition, could suppose an increase in prices, decrease in diversity of products, less quality of the final product and less innovation.[7]

Competition authorities consider that only in some cases "*Innovation Markets*" are truly pertinent (as in the case of *high-tech* markets, where there are rapid changes and growth, due to significant innovation). Among them we can also find the pharmaceutical sector. Actually, the ethical drug sector offers more guarantees in the application of "*Innovation Market"* because, due to the testing process, (which is public and highly regulated), it is easier to discover the future overlaps between the pipelines than in other industries, where sometimes the projects are secret or hidden by the companies.[8][9] In the field of Merger Control between pharmaceutical companies, the American and European Authorities have developed consolidated practices, where the "*Innovation Market"* assessment is always included.

The objective of this paper is to expose the pertinence of the application of the "*Innovation Market"* in the framework of pharmaceutical mergers. Moreover, this thesis will discuss how the American Federal Trade Commission and the European Commission apply the "*Innovation Market"* analysis, through three different Merger Cases between pharmaceutical undertakings. The reason to choose these three particular cases is because they show how the European and American Authorities valued in a very different way the "*Innovation Markets*" and, consequently, the outcomes of their final decisions are the complete opposite.

The study is organized as follows:

1. Section 1 discusses the Merger Control in *high tech* markets dilemma, that means, the problems encountered by concentration operations between *high-tech* companies,

2. Section 2 provides an overview for a better understanding of the "*Innovation Market"* analysis,

[5] Gómez-Acebo & Pombo , op. cit. note 2.

[6] Directorate for Financial, Fiscal and Enterprise Affairs Competition Committee Merger Review in Emerging High Innovation Markets. Organisation for Economic Co-operation and Development 24-Jan-2003.

[7] Thomas C. Lawton, European Industrial Policy and Competitivenness-Concepts and Instruments, Edited by Thomas C. Lawton, Ed MacMillan business. Chapter 2: "Fostering invention and innovation: Europe's collaborative R&TD initiatives", p. 23-44.

[8] Lexicon http://www.ephmra.org/PDF/Lexicon%20Final%20Jan%2005.pdf 03.04.07.

[9] Directorate for Financial, Fiscal and Enterprise Affairs Competition Committee Merger Review in Emerging High Innovation Markets, op. cit. note 6.

3. Section 3 touches the legal basis for the application of the "*Innovation Market"* assessment in the Merger Control in the European Union,

4. Section 4 deals with the pharmaceutical industry, a *high-tech* based sector, and examines its suitability for the application of "*Innovation Market"* assessment,

5. Section 5 assesses the European Practice in the control of concentrations between pharmaceutical firms and how the European authorities have used the "*Innovation Market"* appraisal in three concrete Merger Cases. This practice will be compared and contrasted with the American point of view in the same Merger Cases,

6. Section 6 points out the main conclusions.

The implementation and correct application of *"Innovation Market"* assessment is not in vain, because an erroneous appraisal of this criterion would lead to a reduction in the R&D output, a reduction in innovation, and in the pharmaceutical case, this lessening would mean the privation for consumers of more effective and safer medicaments to combat important diseases. Thus, the role of *"Innovation Market"* in the consumer welfare is more than obvious.

THESIS STRUCTURE